

2001

Transmissions of Music on the Internet

Daniel J. Gervais

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Daniel J. Gervais, *Transmissions of Music on the Internet*, 34 *Vanderbilt Law Review* 1363 (2021)
Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol34/iss5/3>

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Transmissions of Music on the Internet: An Analysis of the Copyright Laws of Canada, France, Germany, Japan, the United Kingdom, and the United States

Daniel J. Gervais*

ABSTRACT

This Article examines the status of copyright laws in several countries as they pertain to transmissions of music on the Internet. Because the exact legal ramifications of music transmissions over the Internet are currently unclear, the Author compares copyright laws of six major markets and examines the potential application of the copyright laws and other rights that may apply. The Article also discusses rules concerning which transborder transmissions are likely to be covered by a country's national laws, as well as specific rules applying to the liability of intermediaries. Next, the Article summarizes the comparative findings and discusses the relevant nuances that exist among the countries covered. Finally, the Article applies its findings to several real-life examples and details the practical impact of current and future copyright laws on the varying fact patterns.

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I. INTRODUCTION

With or without Napster, access to music on the Internet is unavoidable and is likely to become one of the main modes of commercialization of music.¹ In fact, copyright is at a crossroads; it must adapt to the increasing demand for legitimate online access to protected works, especially music, but also materials used for research and distance education, in particular scientific texts. Otherwise, peer-to-peer technology and other forms of online transmission and exchange may sound the death knell of copyright as we know it.² The answer will depend in large part on how fast the so-called "content industries" are able to provide business models in tune with the demands of the various user communities.³ Chances are, copyright will survive. The way in which it is used and administered, however, will need to change. The traditional exclusive rights that prohibit use of protected material seem almost impossible to apply in the Internet age. The exclusive right paradigm is gradually being replaced by a compensation paradigm and the focus is shifting from preventing unauthorized uses to getting paid for "authorized"—and unavoidable—uses.⁴ The copyright "concept" is still the best basis to claim financial compensation and organize markets along these lines, two essential tools for most creators, publishers, and producers.

It is highly probable that in a few years radio and television receivers will be permanently connected to the Internet and listeners will be able to pick individual songs from an almost endless catalogue, preselect songs, and program music for special occasions.⁵ The extent to which listeners will make temporary or permanent copies of the music on a computer or computer-like device is unclear. Will it make sense to have a permanent, stored copy of music? On a portable player, the answer is probably yes.⁶ Will computers with several gigabytes of memory be used to transfer existing collections of compact discs onto a single server? For the operators of broadcasting stations, this type of

1. See NATIONAL RESEARCH COUNCIL, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 76-87* (2000) [hereinafter *THE DIGITAL DILEMMA*].

2. See *id.*; see also Michael D. Crawford, *Modern Technology and the Death of Copyright*, at <http://www.goingware.com/comments/2000/feb/05top.html> (Feb. 5, 2000); see generally Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813 (2001).

3. *THE DIGITAL DILEMMA*, *supra* note 1, at 79.

4. See *id.* at 230. See also LESLEY ELLEN HARRIS, *DIGITAL PROPERTY 77* (1998).

5. *THE DIGITAL DILEMMA*, *supra* note 1, at 78.

6. See *Mini Disc Frequently Asked Questions*, at http://www.minidisc.org/minidisc_faq.html (Oct. 4, 2001). If music is not stored on a portable player, it would have to be streamed using technology such as WAP. See, e.g., the Nokia Music Player known as HDR-1 at <http://www.nokia.com/main.html> (Oct. 4, 2001).

storage clearly makes sense.⁷ Its use and value inside the home is less clear. In other words, the exact business models are still emerging and being formed by old and new players. What is clear, however, is that, sooner or later, the exact legal ramifications of music transmissions on the Internet will need to be clarified.

While some answers are emerging at the national level, it is necessary to understand the legal process in other countries and certainly of all major markets for at least two reasons. First, music transmissions across borders—and several transactions related thereto—may involve more than one set of national laws.⁸ Second, if and when international rules are negotiated to deal with this new phenomenon, a better understanding of the differences between national laws will undoubtedly help to bridge existing differences.

This Article will look at the copyright laws of six major markets, and the applicable “directives” of the European Union. For each country, the Article will examine the potential application of the primary copyright rights, in particular the right of reproduction and the right of communication to the public or public performance, but also other rights that may apply to musical works. The Article will also discuss rules concerning which transborder transmissions are likely to be governed by a country’s national laws and any specific rules applying to the liability of intermediaries. Finally, the Article will summarize the comparative findings and apply them to a series of real-life examples. The Article does not deal with the so-called neighboring rights or distinct rights in sound recordings as such.

7. See, e.g., Mark Plotkin, *The Times They Are a Changin': Internet? MP3? Digital? How Technology has Forced the Law to Deal with a New Era in Music Distribution*, 1 VAND. J. ENT. L. & PRAC. 46 (1999); June Chung, Note, *The Digital Performance Right in Sound Recordings Act and its Failure to Address the Issue of Digital Music's New Form of Distribution*, 39 ARIZ. L. REV. 1361 (1997); Frank Saxe, *Radio, Record Labels Chafe Over Streaming*, BILLBOARD, May 26, 2001 at 1; *View From the Top*, PC MAG., Sept. 4, 2001, at 175 (interview with Scott McNealy); Kevin Libin, *Are We Having Fun Yet?*, CANADIAN BUS., May 28, 2001, at 22.

8. Marc E. Mayer, *Do International Internet Sound Recording Infringements Implicate U.S. Copyright Law?*, 15 No. 5 CLW 11 (1998); Silvio Waisbord, *When the Cart of Media is Before the Horse of Identity*, in 25(4) COMMUNICATION RESEARCH 377-98 (1998).

II. ANALYSIS OF THE NATIONAL LEGAL FRAMEWORKS

A. Canada

Analysis of the legal situation in Canada focuses on a recent decision by the Canadian Copyright Board⁹ that answers several questions concerning Internet transmissions of music. In the absence of decisions by Canadian courts and in light of the fact that by and large the Board's decision seems consonant with Canadian copyright law principles, it constitutes a good indication of the current state of Canadian law on this subject. In this decision, the Board was called on to decide whether a music transmission on the Internet is a telecommunication subject to the tariffs and jurisdiction of Society of Composers, Authors and Publishers of Music of Canada (SOCAN),¹⁰ the single collective that manages performing rights in Canada. In other words, the Board had to decide whether SOCAN could collect a royalty for performances of music by telecommunication on the Internet. In addition, if the so-called "Tariff 22" applied, the Board had to determine who would be responsible for the payment of royalties. The Board's decision is only a "Phase I decision" on legal issues.¹¹ The Board has not issued the tariff itself, which will be Phase II of the process, and is unlikely to move forward until the appeal of the Board's decision before the Federal Court of Canada—by both parties—is settled or a final decision rendered.

1. The Right of Reproduction

In paragraph 1(a) of section 3 of the Canadian Copyright Act,¹² the copyright owner is granted a right of reproduction in any material form, which includes reproductions in digital form. A reproduction occurs, for example, when a phonogram is converted in a specific digital format to

9. Canadian Copyright Board, *Re Statement of Royalties to be Collected for the Performance or the Communication by Telecommunication of Musical or Dramatic—Musical Works*, 1 C.P.R. (4th) 417 (1999).

10. See SOCAN, *Do You Need a License?*, at http://www.socan.ca/en/music_users/web_licensing.asp (Dec. 2000) (explaining licensing requirements for web use of musical works); see also Pierre-Emmanuel Moysé, *Decision "Tariff 22" of the Canadian Copyright Board & Internet Law Related Issues*, at <http://www.robic.ca/publications/244-01.htm>; Gregory C. Ludlow & Mark Le Blanc, *Survey of Intellectual Property Part V—Copyright & Industrial Designs*, 31 OTTAWA L. REV. 93, 156 (1999/2000).

11. Moysé, *supra* note 10, at 2.

12. Canadian Copyright Act, R.S.C., ch. C-42 (1985), as amended, available at <http://lois.justice.gc.ca/en/C-42/33333.html>.

be transmittable via Internet.¹³ A second reproduction takes place when the work is copied onto a server.¹⁴ The user who requests the musical work from a website makes a third copy.¹⁵ The first two clearly need to be authorized. Does the third copy—made by the user—also need to be licensed? There is no clear answer to this question, and the Copyright Board did not answer it as such. In a separate decision, however, the Board approved a levy on blank media that covers digital media and does seem precisely to compensate for end-user copying.¹⁶ Interestingly, technology is being developed—such as SDMI—to prevent such copying.¹⁷ Clearly, however, the question whether a user can make or send additional copies is different from the questions surrounding the original transmission.

The copy legally downloaded by a user would probably be considered licensed, at least implicitly or on the basis of a mouse-click contract.¹⁸ Because there is no “fair use” under Canadian law, further use made by the user of the downloaded copy would either need to be licensed or be considered “fair dealing” under section 21 or 30 of the Copyright Act.¹⁹ The concept of “fair dealing” in Canadian law comprises a series of specific exceptions to the exclusive right of the author, including research, private study, criticism or review—provided the source author and other rightsholders are acknowledged—news reporting, as well as various exceptions concerning educational institutions, libraries, archives, and museums.²⁰

There is, however, a specific exception for private use of recorded music. Section 80(1) allows the reproduction for private use of a musical work embodied in a sound recording and performers’ performance. This exception does not apply if the reproduction is for the purpose of selling, renting, offering for sale or rental, distributing—whether or not for the purpose of trade—communicating to the public by telecommunication, or publicly performing the musical work.²¹ It is this kind of private copying

13. Eric S. Slater, *Broadcasting on the Internet: Legal Issues for Traditional and Internet-Only Broadcasters*, 6 MEDIA L. & POL’Y 25, 34, 41 (1997).

14. *Id.* at 34.

15. *Id.* at 35.

16. *Tariff of levies to be collected by CPCC in 2001 and 2002 for the sale of blank audio recording media in Canada*, Decision by the Copyright Board of Canada (Dec. 15, 2000), at <http://www.cb-cda.gc.ca/decisions/c22012001reasons-b.pdf> [hereinafter Dec. 15, 2000, Decision]; *Re Statement of Royalties*, *supra* note 9, at 417.

17. THE DIGITAL DILEMMA, *supra* note 1, at 83.

18. Dec. 15, 2000, Decision, *supra* note 16, at 6 (characterizing music downloaded by internet users for a fee as “legitimate”).

19. See JOHN S. MCKEOWN, CANADIAN LAW OF COPYRIGHT AND INDUSTRIAL DESIGNS 549 (3d ed. 2000); NORMAND TAMARO, THE 2001 COPYRIGHT ACT ANNOTATED 416 (2001).

20. MCKEOWN, *supra* note 19, at 549. See also TAMARO, *supra* note 19, at 416.

21. Copyright Act, R.S.C., ch. C-42, § 82 (1985), as amended, reprinted in TAMARO, *supra* note 19, at 675.

that is intended to be compensated by the levy recently decided by the Copyright Board, pursuant to section 82 of the Copyright Act.

2. The Right of Communication

In its decision, the Copyright Board first had to determine whether a transmission through the Internet is a communication. It concluded that transmitting musical works to someone via the Internet was in fact a communication of the information.²² According to the Board, the fact that the work is not transmitted in a sole component but in many elements or packets does not influence the concepts of communication and reproduction under copyright. This is only a consequence of the technology used. Even if the work is not contained in a single file, the Board concluded that a reproduction of the work occurs because the work can be reconstituted: "While some intermediaries may not be transmitting the entire work or a substantial part of a work, all of the packets required to communicate the work are transmitted from the server on which the work is located to the end user. Consequently, the work is communicated."²³

To be covered under the Canadian Copyright Act, the communication has to be done by telecommunication.²⁴ Section 2 of the Act describes telecommunication as any "transmission of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system."²⁵ The conclusion at which the Board arrives is that packets of information transmitted on the Internet meet that definition. Consequently, a musical work transmitted via Internet is a communication by telecommunication.²⁶

To be covered, a communication by telecommunication must also be public.²⁷ A communication is public "when it is made to individual members of the public at different times, whether chosen by them...or by

22. The Court reasoned as follows:

Opponents of Tariff 22 state that the process of compression and decompression means that something other than a musical work is transmitted. Yet, the result of these operations is that information is provided that allows a lay recipient to recognize the work. That, in itself, is sufficient. If such operations, or others such as modulation or encoding, could somehow change the nature of what is being communicated, then it would be impossible to communicate a musical work through a digital transmission. This would result in the rather absurd situation that commercial radio stations would no longer need to pay royalties to SOCAN as soon as they switched to digital technology.

Re Statement of Royalties, supra note 9, at 446 (citations omitted).

23. *Id.* at 447.

24. *Id.* at 423-24.

25. *Id.* at 443-44.

26. *Id.* at 443.

27. *Id.* at 444.

the person responsible for sending the work. . . .”²⁸ A communication is not private because it is received by subscribers in their private homes. Under previous Canadian court decisions, communications intended to be received by the general public in private homes were considered public.²⁹ Although the communication is intended for a particular public, it similarly remains public. A work is thus made available to the public when it is posted on a website and could be requested by a user.

The Board also decided that information is communicated whether or not the emission and the reception take place simultaneously: “Musical works are made available on the Internet openly and without concealment, with the knowledge and intent that they be conveyed to all who might access the Internet. Accordingly, a communication may be to the public when it is made to individual members of the public at different times.”³⁰

Indeed, timing is not relevant; nowhere in the Canadian law does one find a requirement that a communication be simultaneous.³¹ The Board also concluded that using compression techniques did not affect the copyright status of the telecommunication.³²

3. Canadian Transmissions

Once it had established that a transmission of music on the Internet was a public communication, the Board had to determine when and where the communication occurs. The communication of a musical work occurs when the latter is transmitted, not when it is made available to the public.³³ In other words, the musical work will be communicated to the public when it is requested.³⁴ A public communication happens each time a user accesses the work on a computer system. Even if just one

28. *Id.*

29. *Id.*

30. *Id.* Whether the rightsholder can retain control on the Internet, given the geographic scope and sheer number of users, is an open question. *C.f. Bishop v. Stevens*: “A composer who authorizes performances of his work for a period of time has not irrevocably given up control over how the work is presented to the public. He may choose at a future time to withdraw his authorization. . . . He may control the frequency of performance, and choose the audiences which are to hear his work. Other performers might copy his performances without authorization, *but the public nature of performance is such that this will likely come to his attention.*” *Bishop v. Stevens*, [1990] 2 S.C.R. 467, 479 (McLachlin, J.) (emphasis added). For a similar view of the “power” of the author’s exclusive right in the United States, see *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

31. For a requirement which applies to retransmissions, see *Canadian Copyright Act*, R.S.C., Ch. C-42, § 31(2) as amended, *available at* <http://lois.justice.gc.ca/en/C-42/3333.html> (exempting from liability acts of simultaneous retransmission of both local and distant signals, and requiring, in the case of distant signals, that applicable royalties be paid).

32. *Re Statement of Royalties*, *supra* note 9, at 447.

33. *Id.*

34. *Id.* at 449.

communication occurs, it is still a communication to the public.³⁵ Finally, the communication occurs at the time the work is transmitted—whether it is played at the point of reception or not.³⁶ The communication is authorized when the work is made available on a website, and consequently that act must be authorized or licensed.³⁷

The law requires that the communication take place “in Canada” to be covered by the exclusive right contained in the Canadian Copyright Act.³⁸ It seems that a communication occurs “in Canada” when it comes from a server located in Canada. In 1994, the Canadian Supreme Court decided in the CAB 1994³⁹ case that a communication occurs where the transmission originated. Thus, the authorization for the public communication is essential only when the work is posted on a Canadian server. The result is the same whether the content is on the original site or on a mirror site. That being said, in the Tariff 22 decision the Board explicitly left open the following question whether “an entity that provides content outside Canada with the intention to communicate it specifically to recipients in Canada is communicating in Canada?”⁴⁰ In other words, it would not be the location of the server that would determine jurisdiction, but rather the intent of the provider. If this position were confirmed, the Board would thus find itself trying to assert jurisdiction over a site located in the United States but whose primary market was Canada. This poses a number of interesting conflict of laws and enforcement questions. Because the Board would seem ready to give Canadian collectives the right to clear all transmissions from Canada, however, would that apply to a server located in Canada whose primary market was the United States? Naturally, independently of the answer under Canadian law, U.S. law might then apply, as in the recent “iCraveTV” example.⁴¹

35. *Id.* at 449-50 (“As was stated earlier, a communication is to the public if its intended target is a public. The degree to which the person wishing to communicate the work succeeds in doing so is irrelevant.”).

36. *Id.* at 450 (“Third, the communication occurs at the time the work is transmitted whether or not it is played or viewed upon receipt, is stored for use at a later date or is never used at all.”).

37. *Id.* at 455. See also Federal Partners in Technology Transfer, *Presentation at the Current Practices and Issues in Managing & Exploiting Intellectual Property* (Oct. 5, 2001), at <http://nrc.ca/corporate/english/index.html>; Amy-Lynne Williams of the law firm of Deeth Williams Wall, *Information Technology Law in Canada*, WORLD LEGAL FORUM (Dec. 1, 1999), at <http://www.worldlegalforum.co.uk/canada/articles/19991201921.html>; GLEN BLOOM AND DIANE CORNISH, MUSIC ON THE INTERNET – LIABILITY UNDER SOCAN’S TARIFF 22 DETERMINED (1999).

38. See *Re Statement of Royalties*, *supra* note 9, at 420.

39. *Id.* at 459 (stating the rule in CAB 1994 case).

40. *Id.* at 460.

41. *Twentieth Century Fox v. iCraveTV*, 2000 U.S. Dist. LEXIS 11670 (W.D. Pa. 2000); William Crane, *The World-Wide Jurisdiction: An Analysis of Over-Inclusive Internet Jurisdictional Law and An Attempt by Congress to Fix It*, 11 DEPAUL-LCA J. ART & ENT. L. & POLY 267, 287-88 (2001).

The situation may change when Canada implements the 1996 World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).⁴² An expanded right of communication to the public—also referred to as the “making available” right—is contained in these two new instruments.⁴³ The European Union seems to have interpreted this right in such a way that a protected work or object is made available in every country from which it can be accessed.⁴⁴ The practical implications of this interpretation are discussed in Part III below.

As far as the risk of servers located in so-called copyright havens is concerned, part of the solution resides in establishing a proper notice and take down procedure, as in the U.S. Digital Millennium Copyright Act.⁴⁵ In light of the Board’s comments on foreign servers commercially aimed at Canadian users, however, a modified Bogsch theory might apply. According to this “theory” enunciated by the former Director-General of the WIPO, Dr. Arpad Bogsch, in the context of satellite transmissions,⁴⁶ the emission theory should apply provided the laws of the countries of emission and reception are similar or comparable. If the country of emission has no acceptable copyright legislation, then the laws of the country of reception will apply to the transmission. This Article will return to this question in Part III below.

4. Liability Issues

The Copyright Board also had to establish who is the communicator. It is obvious that the person who makes the work available is responsible for the communication. A person who just provides means of

42. See A Framework for Copyright Reform, paper published by the Canadian government on June 25, 2001, available at <http://strategis.ic.gc.ca/ssg/rp01101e.html>.

43. Neither of which is in force at this time owing to an insufficient number of ratifications. Entry into force, however, is likely at the end of 2001 or early in 2002. The right to make available is contained in Article 8 of the WCT and Articles 10 and 14 of the WPPT. Article 8 WCT reads (in part) as follows:

[A]uthors 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.

WIPO Copyright Treaty, Dec. 20, 1996, art. 8, reprinted in Goldstein, *infra* note 58, at 423.

44. See *infra* Part III of this Article.

45. 17 U.S.C. § 1201-05 (2001).

46. This view was expressed orally during meetings of committees of experts meeting under the auspices of WIPO. See Mario Fabiani, *Broadcast Transmissions Via Satellite or Cable and Copyright*, in WORLD INTELLECTUAL PROP. ORG., WORLDWIDE FORUM ON THE IMPACT OF EMERGING TECHNOLOGIES ON THE LAW OF INTELLECTUAL PROPERTY 160 (1988).

telecommunication does not communicate it to the public.⁴⁷ According to the Board:

Content providers do not provide tools for the use to occur; they provide the work. They dictate content. . . . They determine whether the site will contain musical works. They select those works, protected or unprotected. They know and expect that the materials they post will serve to effect a use which is protected if the work is not in the public domain, something which it is incumbent upon them to verify: their contractual arrangements with the person whose services they retain to ensure transmission of the work clearly contemplate that the sole use of the posted content is to be the production of audible and visual messages on the recipient's hardware. In fact, once posted, the music, assuming it is protected, cannot be used without infringing copyright.⁴⁸

One may question whether there may be cases in which using music posted on the Web would not violate copyright, for example, if a legitimate exception applied.⁴⁹ The Board seems to be correct, however, in concluding that content providers have the lion's share of the responsibility—when compared with service or access providers.

The Board decision has now been appealed directly to the Federal Court of Appeal and a decision is expected towards the end of 2001. It may then be appealed to the Supreme Court.⁵⁰ In the meantime, another tariff has been filed for approval by the "mechanical rights" societies, arguing that a mechanical reproduction takes place in any Internet transmission of a sound recording, because, at the very least, a copy of the work is made in the digital transmission itself.

B. France

As for other EU countries covered, this Article directs the reader's attention to Part III on the European copyright and e-commerce directives, which, when fully implemented, will impact the law and practice of EU Member States.

1. The Right of Reproduction

Under French law, the right of reproduction is involved in most, if not all, Internet transmissions of protected works.⁵¹ The reproduction right is contained in Article L.122-3 of the French Intellectual Property Code.⁵² A single reproduction is sufficient to constitute a reproduction

47. Canadian Copyright Act, R.S.C., Ch. C-42, § 2.4(1)b (1985).

48. *Re Statement of Royalties*, *supra* note 9, at 457.

49. See Canadian Copyright Act, R.S.C. C-42, § 32.2 (1985).

50. Supreme Court Act, R.S.C., ch. S-26, § 40(1) (1993) (Can.).

51. See, e.g., *Sardou case*, *infra* note 53.

52. Article L.122-3 of the French *Intellectual Property Code*, available at clea.wipo.int:

requiring an authorization. For example, in the *Sardou* case⁵³ the *Tribunal de Grande Instance* (High Court) of Paris affirmed that the posting of a work on a server—to communicate it through the Internet—was such a reproduction. The Tribunal also stated that the digitization of a work was a reproduction that had to be authorized by the copyright owner.⁵⁴ Thus, posting a musical work on a commercial server is a reproduction requiring an authorization. In the same vein, a reproduction occurs when the service provider copies the work onto a hard disk or other digital storage medium. In the *Brel* case, the Court found that students had infringed the reproduction right in reproducing musical works on their web pages.⁵⁵

The storage of a protected work in a computer memory is also considered a reproduction. When the recipients of transmissions from a website download a file on their computers, they reproduce the work. Is that reproduction made for “private use?” Or does it benefit from an exemption? The exception relating to copies for private use is contained in Article L.122-5-2 of the Intellectual Property Code.⁵⁶ A copy made by the recipient of a commercial web transmission of music in most cases cannot claim the benefit of the exemption for private use, owing to the commercial nature of the transaction. Indeed, copying the work on a hard disk or CD-ROM is similar—in some respects—to buying a CD in a store. This analysis by the Court of the potential impact on the market for the music—a criterion not found in the French Code—is strikingly similar to the fourth fair use criteria in U.S. law.⁵⁷ In the *Sardou* case, the Court thus concluded that the storage by a user of a work on his personal computer connected to Internet was a reproduction requiring an authorization.⁵⁸

Reproduction shall consist in the physical fixation of a work by any process permitting it to be communicated to the public in an indirect way. It may be carried out, in particular, by printing, drawing, engraving, photography, casting and all processes of the graphical and plastic arts, mechanical, cinematographic or magnetic recording. In the case of works of architecture, reproduction shall also consist in the repeated execution of a plan or of a standard project.

53. See *ART Music France and Warner Chappel France v. École Nationale Supérieure des Télécommunications et al.*, T.G.I. Paris, Aug. 14, 1996, D. Jur. 490 [hereinafter *Sardou* case].

54. *Id.*

55. See *Brel* case, *infra* note 62.

56. Copies or reproductions reserved strictly for the private use of the copier and not intended for collective use, with the exception of copies of works of art to be used for purposes identical with those for which the original work was created and copies of software other than backup copies made in accordance with paragraph II of Article L. 122-6-1, *French Intellectual Property Code*.

57. See 17 U.S.C. § 107(4); see also Part II.F of this paper dealing with U.S. law.

58. See *Sardou* case, *supra* note 53.

2. The Right of Representation

An Internet transmission in France is also linked to the right of "representation." This notion is defined at the Article L.122-2 of the French Intellectual Property Code.⁵⁹ A representation is a communication of a work to the public by any means and communication by Internet is included in the concept of "telediffusion," which in turn is a representation of a diffusion by any means.⁶⁰ To be protected under the law, this communication must be public—beyond the family circle and social acquaintances.⁶¹

Users who access a protected work on the Internet at the moment and the place they choose are part of the public. Hence, when people post works on a website, they communicate to the public. In the *Brel* case,⁶² a French court confirmed this view. Two students who had posted musical works on their personal web pages were sued for infringement to both the right of reproduction and the right of representation. Concerning the representation right specifically, the Court concluded that, although the musical works were posted on a "personal" web page, the students had infringed the copyright owner's exclusive right because, by posting information on the Internet, they intended to make it available to the public.⁶³

Making music available on the Internet thus requires a specific license for the representation of the musical works. Section L.122-7 of the Code provides that when a total license is given concerning the representation right or the reproduction right, the extension of this license is limited to the technology intended in the contract. Currently, licenses are granted by collecting societies.⁶⁴ This seems to be imposed by law when the author has assigned over his rights to a collective.⁶⁵

59. PAUL GOLDSTEIN, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* 267 (2001).

60. Defined as follows in the French Code: "Performance shall consist in the communication of the work to the public by any process whatsoever, particularly: (. . .) Telediffusion: Telediffusion shall mean distribution by any telecommunication process of sounds, images, documents, data and messages of any kind. Transmission of a work towards a satellite shall be assimilated to a performance." Art. L.122-2 of the Code.

61. See Art. L.122-5(i) of the Code.

62. *Éditions musicales Pouchenel, Warner Chappel France, MCA Caravelle v. École Centrale de Paris (ECP), Jean-Philippe R., Guillaume V., and École Nationale Supérieure des Télécommunications (ENST), Ulrich F., François-Xavier B., T.G.I. Paris*, Aug. 14, 1996, JCP, Éd. G II 22 7 27 (1996) [hereinafter *Brel* case].

63. See *id.*

64. See Title II, Book III of the French Code.

65. The publication of a work implies assignment of the right of reprographic reproduction to a society governed by Title II of Book III of the Code and approved to such end by the Minister responsible for Culture. Art. L.122-10.

3. French Transmissions

French courts have not indicated how they would apply private international law rules to online music transmissions. The principle, however, is that the law of the country in which the protection is claimed will apply.⁶⁶ It is not necessarily the *lex fori*, but rather the *lex loci delicti*. Courts will likely assert jurisdiction not only over transmissions from France, but also transmissions into France that are alleged to cause damage.⁶⁷ Courts recently applied French law to online auctions, but were careful to issue an order limited to the territory of France.⁶⁸

4. Liability Issues

Having determined that an Internet transmission seems to involve both a reproduction and a representation, it is necessary to define who is responsible for the—restricted—acts involving those rights. French courts have provided some clues about the liability of the various actors involved. It seems that the service provider could be liable for copyright infringement if it does not take some reasonable action to prevent restricted acts. Case law is not uniform on this point and could change as a result of the implementation of the European Union Copyright Directive.⁶⁹

Under French law, the “director” of the publication of an audiovisual communication may have an obligation of “monitoring and diligence.” Although a website is considered an audiovisual work, according to the *Infonie* case of September 28, 1999, the service provider would not be liable as a “director of publication.”⁷⁰ The court concluded that “the director of an audiovisual communication service is the one who can monitor before the publication and who has the control on the

66. GOLDSTEIN, *supra* note 59, at 65.

67. See A. AND H. J. LUCAS, *TRAITE DE LA PROPRIETE LITTERAIRE ET ARTISTIQUE* §§ 986-91 (2d ed. 2000).

68. See *France Bans Internet Nazi Auctions*, BBC NEWS, at http://news.bbc.co.uk/1/hi/english/world/europe/newsid_760000/760782.stm (May 23, 2000) (summarizing the court's interim decision); see also Michelle Dennehy, *French Court: Yahoo Must Block Access*, AUCTION WATCH, at <http://www.auctionwatch.com/awdaily/dailynews/november00/2-112000.html> (Nov. 20, 2000) (summarizing the decision on the merits); Kristi Essick, *Yahoo Told to Block Nazi Goods From French*, THE INDUSTRY STANDARD (Oct. 5, 2001), available at <http://www.thestandard.com/article/0,1902,20320,00.html>.

69. See *infra* Part III; see also *A.C.I. and A.C.V. v. Christophe M., M. Christophe S., Société Infonie, T.G.I. Puteaux*, Sept. 28, 1999; *L. Lacoste v. Multimania France SPPI, Esterel, T.G.I. Nanterre, 1re*, Dec. 8, 1999, D.S. Jur. Somm. 274; *inf. C.A. Versailles*, June 8, 2000, D.S. Jur. I.R. 270.

70. See *id.*

content.”⁷¹ Usually, the service provider—in that capacity—has no control on the content posted on its server. The court thus exempted the provider from any liability and concluded that it was the person who provided the content who was responsible for the infringement.⁷²

In a decision rendered in December 1999 involving a similar set of facts, another court found a service provider liable. French top model Lynda Lacoste sued the creators of a website as well as the service provider for breach of her right to image—considered a personality right under French law.⁷³ The website contained several pictures of Lacoste without her authorization. Even though she had given her authorization for the publication of these pictures, she had not granted the right to use them on the Internet. The court first distinguished between the role of service provider, administrator of the server—webmaster—, and access provider.⁷⁴ The latter had no liability; his role was to transfer bytes, without control over the content. The former, on the other hand, had a larger role to play with the content posted on its server; it provided permanent storage for the information and made it available to anyone. The court also noted that the “service provider had the possibility to access and check the content” posted on its server.⁷⁵ Accordingly, the Court found that service providers have a general obligation of “diligence,” which forces them to take measures to prevent prejudice to third parties and control the legality of the content traded over their network.⁷⁶ This is similar to the *Yahoo!* case involving auctions of Nazi paraphernalia in France.⁷⁷ The “obligation of diligence” does not, however, require that service providers monitor all content posted on their servers. They must take “reasonable measures”—based on reasonable industry practice—to block sites when the illicit nature of the content is apparent. In the case at hand, the service provider was found liable of breach of Ms. Lacoste’s right to her image.⁷⁸ The Versailles Court of Appeal reversed the decision of the trial court, but without rejecting these findings concluded that the terms of the ISP contract

71. Le directeur d’un service de communication audiovisuelle est celui qui peut exercer son contrôle avant la publication, celui qui a la maîtrise du contenu du service. The decision is available at <http://www.afa-france.com/html/action/jugement.htm>.

72. Société Infonie, *supra* note 69.

73. Lacoste v. Multimania Production, T.G.I., Nanterre, Dec. 8, 1999. On June 8, 2000, the Court of Appeal of Versailles overturned the decision in part, stating that the obligation of the ISP was one of “means” not “result” under civil law principles. The ISP must be “vigilant” but it not obligated to monitor all the content hosted on its servers. The decision (in French) is available at <http://www.juriscom.net/txt/jurisfr/img/caversailles20000608.htm>. See also Arrêt Lacoste c/Multimania, ou le sens de l’équilibre entre le rôle de l’hébergeur et celui du juge, available at <http://www.afa-France.com/html/action/220600.htm>.

74. *Id.*

75. *Id.*

76. *Id.*

77. Dennehy, *supra* note 68.

78. Lacoste, *supra* note 73.

exonerated it from liability. The Appellate Court also noted that imposing on ISPs an obligation to monitor might encroach upon freedom of speech.⁷⁹

In light of the apparent conflict between these cases, an amendment to French law was recently tabled.⁸⁰ It is referred to as the Bloche amendment, after the member of Parliament who introduced it.⁸¹ According to the text of the amendment, service providers would be liable if they also provided the content; they would also have to act quickly to prevent access to litigious content when ordered to do so by a judicial authority.⁸² Finally, their liability could be involved if they do not take diligent measures after receiving a notice from a rightsholder concerning litigious content.⁸³ That said, only a judicial authority could decide whether the content is illicit. The French National Assembly adopted this amendment on June 28, 2000.⁸⁴

C. Germany

As for other EU countries covered, this Article directs the reader's attention to Part III on the European copyright and e-commerce directives, which, when fully implemented, will impact the law and practice of EU Member States. There are some difficulties in determining the right applicable to Internet transmissions in Germany. In the absence of clear case law, the Article tries to foresee how the existing laws would be interpreted.

1. The Right of Reproduction

The definition of the right of reproduction is contained in section 16 of the German Copyright Act.⁸⁵ A reproduction occurs when a copy of

79. *See id.*

80. The amendment was tabled on May 18, 1999. *See* <http://www.patrickbloche.org/national/internet/responsabilites.html#16>. Mr. Bloche has his own website and an English-language summary of the report on which he based his amendment is available at <http://www.patrickbloche.org/national/internet/internet-plA.html>.

81. Prime Minister Lionel Jospin, Address at the University of Communication in Hourtin, available at <http://62.160.66.10/actual/evenements/cybercrim/jospin2.gb.html> (Aug. 26, 1999).

82. *See* Art. 43-8 of Title II of Law No. 86-1067 on September 30, 1986 concerning the freedom of communication, as amended on June 28, 2000.

83. *Id.* *See* <http://www.patrickbloche.org/national/internet/responsabilites.html> for a full text of the debate in the French National Assembly and results of the vote which adopted the amendment.

84. *Id.* The official text of the new law is available on the website of the National Assembly at <http://www.assemblee-nat.fr/ta/ta0553.asp>.

85. The 1965 "Urheberrechtsgesetz," (Copyright Act) § 16(1) (BGB1. I.S. 1273). *See also* Adolf Dietz, *Germany*, in *INTERNATIONAL COPYRIGHT LAW AND PRACTICE*, GER-99-100 (Melville Nimmer & Paul Geller eds., 1991).

the work is made by any means.⁸⁶ The storage of a work in a computer memory—on a server—is a reproduction that requires an authorization unless a specific exemption applies.

Are end-users also making reproductions requiring authorizations when they listen to musical works without keeping copies of the work in their computer memory? This is an open question. If the copy is temporary and made for technical reasons, it could be viewed as an ephemeral reproduction. If, on the other hand, listening to music in streaming mode is associated with broadcasting, it does not involve a reproduction requiring an authorization because, under German law, broadcasting seems to preclude the application of the reproduction right.⁸⁷

In fact, the “reproduction right” is a translation of the German *Vervielfältigungsrecht*.⁸⁸ This notion seems to imply the making of physical copies. In fact, a better translation might be the “right to reproduce in material form.” When the music is listened to as it is being transmitted, is a physical copy made? No copy of the complete musical work occurs while it is listened to in streaming mode. The musical work is never complete in the computer memory of the user; sounds are just transmitted without ever being stored on the hard disk. The law also states that a single copy is sufficient to apply the exclusive right of the author.⁸⁹ Even if a single digital copy is posted on a server, it infringes the reproduction right—unless properly authorized.⁹⁰

2. The Right of Exploitation

Once the work is digitally reproduced and posted on a web page or other server, the right of “exploitation” of the work comes into play. This right includes both the right to exploit the work in a material form and the right to communicate it to the public in a non-material form.⁹¹ It is contained in section 15 of the Act⁹² and includes broadcasting.⁹³ The broadcasting right is defined in section 20. The term “broadcasting” is probably not the best translation. Indeed, the term “transmission” would be better because “broadcasting” is usually limited to wireless transmission, whereas the definition in the law includes both wireless and wire transmissions.

The copyright owner is also granted a right of communication by a visual or sound recording means. This occurs, for example, when the

86. See *Ureheberrechtgesetz*, § 16.
87. Dietz, *supra* note 85, at GER-99.
88. *Id.*
89. *Ureheberrechtgesetz*, § 16.
90. *Id.*
91. Dietz, *supra* note 85, at GER-99.
92. *Ureheberrechtgesetz*, § 15(1).
93. Dietz, *supra* note 85, at GER-103-04.

musical work is streamed without a complete copy being made in the computer memory.⁹⁴ Section 21 must be read in conjunction with paragraph 3 of section 19, which states that this right is composed of the right to communicate to the public a work on a screen, through a speaker or by any other technical means. The expression "other technical means" is broad enough to encompass certain communications via the Internet.⁹⁵

Copyright owners are granted a "transmission right" and can authorize or prohibit the transmission of their work via the Internet—in the same way they could with broadcasting or cable transmissions. To be protected under the law, this transmission must be public.⁹⁶ "A communication is deemed public if it is intended for a number of persons, unless such persons form a clearly defined group and are interconnected personally by mutual relations or by a relationship to the organizer of the communication."⁹⁷ Putting a musical work on a web page to reach the public via an Internet transmission is thus a public transmission.

3. The Right of Distribution

The question here is whether the German distribution right applies to Internet transmissions of music. When music is streamed over the Internet, the distribution right probably does not apply because this right seems to apply to the distribution of physical copies. For the same reason, when a user downloads music on his computer memory, the distribution right will not apply because it is not a material copy that is offered to the public and then sent. Rather, it is coming into being only after transmission and therefore regarded as a new copy—which has not been distributed.⁹⁸ During the transmission of a musical work, no physical copy is made and, therefore, the distribution right would not seem to apply.

4. German Transmissions

A communication to the public generally will be considered to have occurred in Germany when the server, which emits the signal of transmission, is located in Germany.⁹⁹ As a member of the European Union, it is the law of the country of emission that applies—to satellite transmissions. Applying those rules to the Internet, a communication to

94. Urheberrechtsgesetz, § 21.

95. *Id.* at § 19(3).

96. GOLDSTEIN, *supra* note 59, at 202.

97. Dietz, *supra* note 85, at GER-103-04.

98. Urheberrechtsgesetz, § 17.

99. See Lothar Determann, *The New German Internet Law*, 22 HASTINGS INT'L & COMP. L. REV. 113, 159 (1998).

the public would take place in Germany when the server that emits the transmission is located in Germany.¹⁰⁰

5. Liability Issues

In 1997, the German government enacted what it termed a "multimedia law," officially entitled *Federal Act Establishing the General Conditions for Information and Communication Services*.¹⁰¹ This law contains seven sections relating to communications. Article 1 deals with "teleservices;" Article 2 with the protection of data within the framework of teleservices; Article 3 with digital signatures; Article 4 with criminal measures; Article 5 with the regulation of acts contrary to public policy; Article 6 with the distribution of publications that present a danger for young readers; and finally Article 7, which contains amendments required to implement the European database directive.¹⁰² The main impact of this legislation for Internet transmissions is related to the liability of service providers.

While it is clear that the content provider is liable for posting unauthorized material, liability is doubtful in the case of service providers. The 1997 law concerning the liability of the service providers on the Internet distinguishes among content providers, access providers, service providers, and users.¹⁰³ The content provider is the person who posts information on the Internet to make it available to users. The service provider provides the server and the software to publish the information. The access provider provides users with access to the Internet through online connection and accounts.

The responsibility thus follows from the role played in the transmission. Section 5 of Article 1 of the law spells out quite clearly the extent of the service providers' potential liability:

Responsibility 1) Providers shall be responsible in accordance with general laws for their own content, which they make available for use.

2) Providers shall not be responsible for any third party content which they make available for use unless they have knowledge of such content and are technically able and can reasonably be expected to block the use of such content.

3) Providers shall not be responsible for any third party content to which they only provide access. The automatic and temporary storage of third party content due to user request shall be considered as providing access.

4) The obligations in accordance with general laws to block the use of illegal content shall remain unaffected if the provider obtains knowledge

100. *Id.*

101. Informations - und Kommunikationsdienste-Gesetz (IuKDG) [Federal Act Establishing the General Conditions for Information and Communication Services], v. 1.7.1997 (BGBl.IS.1870), available at www.iid.de/rahmen/iukdgbet.html [hereinafter Law].

102. *Id.*

103. *Id.*

of such content while complying with telecommunications secrecy under §85 of the Telecommunication Act (Telekommunikationsgesetz) and if blocking is technically feasible and can reasonably be expected.¹⁰⁴

It should be noted that access providers might be liable if they know that illegal content is being transmitted. An access provider, a service provider, and a user can become content providers by installing hyperlinks on a web page. They would then be liable under paragraph 1 of section 5 of the Multimedia Law and be considered secondary content providers.¹⁰⁵

D. Japan

The rights potentially involved in the transmission of music over the Internet in Japan are the reproduction right, the transmission right, the right of public performance, and the right of making phonograms available. A distribution right also applies, but only to cinematographic—audiovisual—works.¹⁰⁶ Amendments to those rights—relating specifically to Internet transmissions—came into force in 1997 to comply with the two WIPO Treaties of December 1996.¹⁰⁷ These rights are discussed in greater detail in the following sections.

1. The Right of Reproduction

The reproduction right granted to the copyright owner is contained in Article 21. Producers of phonograms and “wire diffusion organizations” also have a reproduction right.¹⁰⁸ Limitations to this right include reproductions for private use—Article 30.¹⁰⁹ The exception for reproduction for private use may apply to Internet transmissions of

104. *Id.* art. 1, § 5.

105. Determann, *supra* note 99, at 153-54.

106. Japanese Copyright Act, Law No. 48 of May 6, 1970, art. 26.

107. World Intellectual Property Organization Copyright Treaty, *available at* www.wipo.int/treaties/ip/copyright/index.html (Dec. 20, 1996); World Intellectual Property Organization Performances and Phonograms Treaty, *available at* www.wipo.int/treaties/ip/performances/index.html (Dec. 20, 1996).

108. Japanese Copyright Act, arts. 96, 100.

109. *Id.* art. 30. *See also id.* art. 31 (applying exceptions to reproductions in libraries); *id.* art. 35 (applying exceptions to reproductions in school textbooks, reproductions in schools and other educational institutions); *id.* art. 36 (applying exceptions to reproductions in examination questions); *id.* art. 37 (applying exceptions to reproductions in Braille); *id.* art. 39 (applying exceptions to reproductions of articles on current topics); *id.* art. 42 (applying exceptions to reproductions for judicial proceedings); *id.* art. 47 (applying exceptions to reproductions required for an exhibition of artistic works); *id.* art. 47*bis* (applying exceptions to reproductions by the owner of a copy of a program work).

music. Article 30(1) states that reproduction for personal use is permitted.¹¹⁰

While it is obvious that the reproduction right is involved in the storage of a protected work on a commercial server from which users download music, it is not clear whether the recipients also make a reproduction requiring authorizations. Do they reproduce for “private use?” The answer seems to be contained in Article 30(2): if the recipient downloads music from a Web server, he must pay compensation to the copyright owner as the author of the work—and the producer. It has not been determined with absolute certainty which Internet-based downloads—such as those using kiosk technology—would fit into the definition of “automatic reproducing machine.” In any case, there are only two possibilities: (1) if the type of use is covered by the exception to the private use exception, then no authorization is required, only the payment of compensation—presumably, this compensation would be part of the fee charged to the end-user either on the medium itself or as part of the transaction—; or (2) the end-user copy is private use.¹¹¹ The former is a more appropriate answer than the latter, from both policy and business standpoints: music downloads—especially if a permanent copy is retained by the end-user—may replace certain sales of carriers.¹¹²

2. The Right of Public Performance

Is music in streaming mode included in the definition of a “performance” under Japanese law? Performance is described as the acting on stage, dance, musical playing, singing, delivering, declaiming, or performing in other ways of a work and includes similar acts not involving the performance of a work that are of the nature of “public entertainment.”¹¹³ At first blush, a musical work that a user listens to directly from his computer—without necessarily storing the music on his hard disk or other digital medium—seems to be a performance, because “performing in other ways” could apply to this type of use of music on the Internet. At the end of Article 2, however, the right of public performance seems to be inapplicable to transmissions of musical works on the Internet:

In this Law, ‘performance and recitation’ include the performance or recitation of a work by means of sound or visual recordings, not falling within the term ‘public transmission’ or ‘presentation’ and the communication by means of telecommunication installations of

110. Terou Doi, *Japan, in INTERNATIONAL COPYRIGHT LAW*, *supra* note 85, at JAP-54.

111. *See id.* at JAP-54-56.

112. *See infra* note 195 and accompanying text.

113. Doi, *supra* note 110, at JAP-54.

performances or recitations of works, *not falling within the term public transmission.*¹¹⁴

The concept of performance is thus set aside because the transmission of music on the Internet—simultaneous or not—is included in a definition of public transmission in Article 2(1)(*viibis*) of the Act.

3. The Right of Transmission

The amended Japanese Copyright Act changed the traditional definition of “transmission.” Before the 1997 amendments, Article 23 read, “the author shall exclusively have the right to broadcast or transmit by cable his work.”¹¹⁵ In 1997, the Diet replaced the right to broadcast a work or transmit it by cable with a “right of public transmission.”¹¹⁶ The expression “public transmission” now includes wire and wireless transmission, but also “automatic public transmissions,” which are defined as transmissions made automatically upon request of the receiver.¹¹⁷ Indeed, the definition of “public transmission” refers to “wire, telecommunication intended for direct reception by the public.”¹¹⁸ A transmission using the Internet is a telecommunication intended for direct reception by the public. Music listened to in streaming mode by the recipient seems to be covered by this definition. When the music is not listened to while it is being communicated, this is considered an “interactive transmission.” This kind of transmission occurs when a user downloads a file from a website for later listening. This transmission, as indicated by law, is also a public transmission.¹¹⁹

In addition to granting copyright owners a right to publicly transmit their work, Article 23 enables them to make that work available to the public. Consequently, the exclusive right of the copyright owner is broader; it includes the right to authorize any public transmission such as broadcast, cable, or interactive transmissions.

4. The Right to “Make the Work Available” to the Public

A work is “made available to the public” when it can be transmitted on the Internet. Therefore, the work does not need to be downloaded by

114. Japanese Copyright Act, art. 2 (emphasis added).

115. *Id.* art. 23.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* art. 2 (noting that “[i]nteractive transmission’ means the public transmission made automatically in response to a request from the public, excluding the public transmission falling within the term ‘broadcasting’ or ‘wire-diffusion’”). *See also id.* art. 23(1).

an actual user to be public, which eliminates the arguments that to be public a transmission has to be simultaneous.¹²⁰

5. Japanese Transmissions

Japanese copyright law applies to public transmissions that “take place” in Japan. A public transmission is said to occur in Japan basically when the server is situated in Japan—or when the transmission is made by a Japanese organization.¹²¹ The transmission takes place when a user requests the file containing the music. In other words, the law of the place of transmission applies.¹²²

6. Liability Issues

Any person who, without consent, converts information in a form compatible with a digital public transmission and provides means to perform this transmission seems to be liable for infringement. If a provider is not involved in making the work available and only administers the server, it probably cannot be found liable. It seems excessive to ask providers to control every exchange of information occurring on their servers. That being said, to avoid being considered negligent under Japanese law, providers have to maintain some reasonable means to prevent or deter copyright infringement.

E. *United Kingdom*

As for other EU countries covered, this Article directs the reader’s attention to Part III on the European copyright and e-commerce directives, which, when fully implemented, will impact the law and practice of EU Member States.

A 1997 U.K. court decision concluded that Internet transmissions were in some respects similar to cable transmissions. Thus, rules applicable to the latter would also apply to communication by electronic means:

In my view the pursuers’ contention that the service provided by them involves the sending of information is *prima facie* well founded. Although in a sense the information, it seems, passively awaits access being had to it by callers, that does not, at least *prima facie*, preclude the notion that the information, on such access being taken, is conveyed to and received by the caller. If that is so, the process may arguably be said to involve the sending of that information. . . . While the facility to comment or make suggestions via the Internet exists, this does not appear to me to be an essential element in the service, the primary function of which is to

120. *See id.* art. 4(1).

121. Doi, *supra* note 110, at JAP-77.

122. Japanese Copyright Act, art. 9.

distribute news and other items. In any event, it is arguable that this facility is a severable part of the pursuers' cable programme service.¹²³

Several rights are involved in the transmission of a copyright work via the Internet occurring in the United Kingdom. Those rights include the reproduction right, the right of communication to the public, and the right of public performance.

1. The Right of Reproduction

The right of reproduction is directly involved in an Internet transmission. When a person converts a musical work to make it transmittable on the Internet and copies this musical work on a digital storage medium, at least two reproductions of the work occur—albeit ephemerally in certain cases.¹²⁴ Section 17 of the U.K. Act states that the storage of a work in any medium by electronic means is a reproduction.¹²⁵ The reproduction—transient or not—in computer memory is covered by the exclusive right of the copyright owner unless a specific exemption applies.¹²⁶

Is an authorization necessary for the reproduction made by the recipient—end-user—on a hard disk or other storage medium? Is it a copy for private use—fair dealing? Because this reproduction takes the form of a distribution, the reproduction arguably needs to be licensed, but the Author found no confirmation of this in U.K. case law. From the viewpoint of the normal commercial exploitation of and access to the work—one of the three-steps of Article 9(2) of the Berne Convention¹²⁷—there is little difference between downloading the musical work on a computer memory and purchasing a record in a store.¹²⁸ There is, however, a distinct possibility that the end-user copy would be considered fair dealing.¹²⁹

2. The Right of Public Performance

If the musical work is listened to at the same moment as the recipient is reproducing it in his computer memory, a performance of the

123. *Shetland Times v. Wills*, [1997] F.S.R. 604, 608 (Scot. OH).

124. Copyright, Designs, and Patents Act, 1988, c. 48, § 17(6) (U.K.).

125. *Id.* § 17(2).

126. William R. Cornish, *United Kingdom*, in *INTERNATIONAL COPYRIGHT LAW AND PRACTICE*, *supra* note 85, at UK-89-90.

127. Berne Convention for the Protection of Literary and Artistic Works, available at www.wipo.int/treaties/ip/berne/index.html.

128. The main difference is probably that in a store, music is bundled in an "album." "The new technology may be promoting a 'new' business model, in which the content is easily unbundled and as a consequence marketed and sold in smaller chunks." NRC Report, *supra* note 1, at 94.

129. Cornish, *supra* note 126, at UK-103.

work takes place.¹³⁰ An authorization must therefore be obtained. A performance includes the delivery of the work by speeches, lectures, visual or acoustic presentation, and presentation by cable distribution, broadcasting, or sound recording.¹³¹ By analogy, it appears that listening to music in streaming mode is a performance under U.K. law.¹³²

To be covered under the exclusive right of the copyright owner in the musical work, the performance must be public. Here, courts have stated that the distinction made between public and private audiences was a purely factual question.¹³³ The test to apply to determine if a communication is public is: "whether the persons coming together to form the audience are bound together by a domestic or private tie, or by an aspect of their public life."¹³⁴ The relationship of the public to the owner of copyright must also be taken into account. On the basis of these criteria, a Web-based performance would be public.

3. U.K. Transmissions

When does a transmission—and possible infringement—occur in the U.K.? Using the above analogy with broadcasting—the person responsible for the broadcasting act is the one who sends the information, thus the theory of emission applies—it seems that under U.K. law, as it stands, a communication via the Internet occurs when the information is sent to the recipient and therefore where the server is located.¹³⁵

4. Liability Issues

Is the service provider liable for unauthorized music transmissions? This is only partly answered by section 16(2) of the U.K. Act.¹³⁶ This is a difficult question to answer because of the complexity of the role that each participant plays in the transmission. Would the service provider be liable for the reproduction of a work when he cannot know whether works are licensed and when he is not able to control transmissions occurring on his server? A provider who simply provides services without controlling the content being made on a server should not be held liable for an infringing reproduction, and the European Copyright

130. *Id.* at UK-98.

131. *Id.*

132. Copyright, Designs, and Patents Act, § 19(1).

133. *Jennings v. Stephens*, 1 All E.R. 409, 411 (1936).

134. 1 Kevin Garnett et al., *COPINGER AND SKONE JAMES ON COPYRIGHT* § 7-126 (14th ed. 1998).

135. *Id.* § 7-134.

136. Copyright, Designs, and Patents Act, § 16(2).

Directive, which is subsequently addressed, confirms this.¹³⁷ That may already be the law in the United Kingdom: Copinger and Skone James come to this conclusion by making an analogy with photocopiers made available in libraries and works sent by fax machines.¹³⁸

On the other hand, the liability of the provider could be involved if operating the equivalent of a cable service—with some degree of control over the content made available. In the *Shetland Times* case, the court held that the operator of a website that had sent content at the request of a subscriber had infringed copyright.¹³⁹ In other words, if a provider has—and one could perhaps add, should have had—control over the content, a finding of liability is possible. This will change once the EU Copyright Directive is fully implemented.¹⁴⁰

It is also worth noting that the service provider may be held liable for authorizing an exclusive act done without the consent of the copyright owner. "Authorisation means the grant or purported grant, which may be express or implied, of the right to do the act complained of, whether the intention is that the grantee should do the act on his own account, or only on account of the grantor."¹⁴¹ A person will be deemed to authorize an act when he asks someone else to do it and gives the permission to do it or grants someone else the right to do it.¹⁴² A person, however, will not be held liable for infringement by simply providing the means to do the infringing act, even where the provider knows that the means will be used in an unlawful way.¹⁴³ Finally, the fact that the infringing act occurs outside of the United Kingdom is not relevant if the authorization is given in this jurisdiction.¹⁴⁴

137. See *infra* Part III.

138. Garnett et al., *supra* note 134, § 7-20.

Thus in the simple example of a photocopier provided by a library, a member of the public who uses the photocopier to make a copy is clearly the person who copies the work, not the librarian. In the technically more complex case of the sending of a fax, where the sender causes a copy to be made automatically by the receiver's remote fax machine, it is suggested that the sender is the person who is responsible for copying the work which is sent, not the person in control of the receiving fax machine.

Id.

139. *Shetland Times v. Wills*, [1997] F.S.R. 604, 609 (Scot. OH).

140. See *infra* Part III.

141. Garnett et al., *supra* note 134, § 7-151.

142. *Id.*

143. See *Amstrad Consumer Electronics, plc v. British Phonographic Industry, Ltd.* [1986] F.S.R. 159 (UKHL); see also *CBS Songs Ltd. v. Amstrad Consumer Electronics, plc*, [1988] 2 ALL ER 484 (UKHL).

144. See *ABKCO Music & Records, Inc. v. Music Collection International Ltd.*, [1995] R.P.C. 657.

F. *United States*

1. Important Concepts of U.S. Copyright Law

It may be useful, especially for non-U.S. readers, to recall some fundamental concepts of U.S. copyright law that distinguish it from the copyright laws of other countries.

First, one must distinguish between the concepts of “musical work,” “sound recording,” and “phonorecord.” As in the Berne Convention and the copyright laws of most countries, the underlying musical works embodied in sound recordings are protected as such.¹⁴⁵ The sound recording itself—which contains a performance of a particular musical work—is also given copyright protection as a separate work.¹⁴⁶ This obviates the need for a neighboring right. The third related concept, the phonorecord, refers to the object—or copy—such as a compact disk.¹⁴⁷ The text of the relevant definitions is contained in 17 U.S.C. § 101. It is very important to understand the definitions not only of the categories of works to which such exclusive rights apply, but also the nature of the rights themselves and the exceptions thereto.

The first relevant definition is the word “perform,” which is defined in section 101 as “to recite, render, play, dance or act [a work,] either directly or by means of any device or process. . . .”¹⁴⁸ The exclusive right only applies to public performances. The Copyright Act¹⁴⁹ also defines the expression “to perform or display a work publicly” as follows:

(i) to perform or display [a work] at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (ii) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.¹⁵⁰

It is also relevant to look at the definition of “transmission,” as specifically applied to the musical field. The Act defines the expression “to transmit a performance or display” as communicating it by any device or process whereby images or sounds are received beyond the place from which they are sent.¹⁵¹

Finally, as indicated above, it is necessary to look at the fundamental exceptions to the exclusive rights of copyright owners.

145. 17 U.S.C. § 101 (1994).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. 17 U.S.C. § 101 (1994).

There are two types of exceptions, the impact of which is quite different. First, under section 107 certain uses of copyrighted works are considered "fair use" and do not require the authorization of the copyright holder.¹⁵²

To qualify as fair use, a particular use must be examined according to four criteria. These criteria are:

- (1) The purpose and character of the use, including whether such use is of a commercial nature and is for nonprofit educational purposes;
- (2) The nature of the copyrighted work;
- (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) The effect of the use upon the potential market for or value of the copyrighted work.¹⁵³

The Act lists as purposes that may be considered fair use criticism, comment, news reporting, teaching, scholarship, and research.

A second class of exceptions are cases where a compulsory license is imposed and a mechanism set to determine the price to be paid for a particular use covered by such licenses.¹⁵⁴ Such licenses apply to musical works, not sound recordings. There are two relevant compulsory licenses to consider: the compulsory license affecting the mechanical reproduction of musical works and the compulsory license concerning the digital transmission of music.¹⁵⁵ A mechanical reproduction license is required to reproduce music in a form that requires a mechanical device to listen to the music. The mechanical license rates in the United States as of January 1, 2000 are \$7.55 per song or \$1.45 per minute, whichever amount is larger.¹⁵⁶

The second relevant compulsory license applies to the digital delivery of phonorecords.¹⁵⁷ The Library of Congress Copyright Office issued regulations concerning this compulsory license on January 29, 1999.¹⁵⁸ This decision was based on the 1995 Digital Performance Right in Sound Recordings Act.¹⁵⁹ This Act defined "digital phonorecord delivery" as each individual delivery of a phonorecord by digital transmission of a sound recording that results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording.¹⁶⁰ While an agreement was

152. 17 U.S.C. § 107.

153. *Id.*; see also *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

154. 17 U.S.C. § 115.

155. *Id.*

156. 37 C.F.R. § 255.3 (1998).

157. 17 U.S.C. § 115(c)(3)(A).

158. Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 64 Fed. Reg. 6221 (Feb. 9, 1999); Public Performance of Sound Recordings: Definition of a Service, 65 Fed. Reg. 14227 (Mar. 16, 2000).

159. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. 104-39, 109 Stat. 336 (1996).

160. *Id.*

reached among the Recording Industry Association of America (RIAA), the National Music Publishers Association (NMPA), and the Harry Fox Agency (HFA), various comments were filed, including by the U.S. performing rights societies, which led to certain clarifications of the agreement. This in turn led to the issuance of the rate payable under the compulsory license for digital phonorecord deliveries. For digital phonorecord deliveries made on or after January 1, 1998, the rate payable for such deliveries is identical to the rate of the mechanical reproduction license already mentioned, except for deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission.¹⁶¹ No decision was reached on the rate that may be payable in the case of reproductions or distributions that are incidental to the transmission process. It is worth noting that this compulsory license does not apply to webcasting.¹⁶²

2. The Right of Reproduction

With respect to the right of reproduction—as with the right of public performance—there are situations in which it is not possible to give a definite answer. While it is certain that a reproduction takes place both in the case of digital deliveries and streaming,¹⁶³ the question remains whether these reproductions are in fact subject to the exclusive rights of the rightsholder in the underlying musical work—if any. In case such exclusive rights do apply, would the statutory license rates apply?

When a sound recording is downloaded, a copy is made on the recipient's computer or an optical storage device chosen by the recipient. Clearly, a copy also was present on the server from which the download took place—or on a server to which such server had access, in the case of, for example, portals. In the case of streaming, there similarly needs to be a copy of the work on the server or origin of the transmission and then a copy of the work—albeit not necessarily the entire work at any one time—is made on the recipient's computer. In the case of “pure” streaming, no permanent copy is made on the recipient's computer or other device. In addition to the above, transient and other copies are necessarily made on various technical devices used for Internet transmissions. These may include cache—proxy servers—mirror sites and servers or RAM. The interesting difference between traditional mechanical reproductions and digital delivery is that the copy is not in fact made by the licensee but by the “inducer.” At first blush, this would thus seem to be conduct covered more under the Audio Home Recording Act than by the exclusive reproduction right in musical work. From this perspective, both in the case of streaming and digital deliveries, the only

161. *Id.*

162. 17 U.S.C. § 115(d).

163. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

copy that would have to be licensed would be the one residing on the server of origin. Naturally, this position would be strongly opposed by the music publishers who have started collecting for the digital download of music in the United States, on the basis of the statutory rate already mentioned. The Ninth Circuit also indicated very clearly that “space shifting” fair use only applies when there is no simultaneous distribution of copyrighted material—fair use only applies when the material is already legally in the user’s hands.¹⁶⁴

While the decision was made to apply the existing mechanical reproduction rate to digital deliveries, the existing rate structure does not take into account the many business models that digital technology makes possible. For instance, there could be a single download of a file with the right to listen to it a specific number of times, which would amount to a single copy made on the recipient’s computer and thus potentially need to be licensed only once. The same user could license the right to stream the same song five times, never making a permanent copy. The practical result in the eyes of the user is exactly the same, with the possible difference that the user needs to be connected to the Internet to be able to use streaming audio. An agreement was signed on October 29, 2001 between the RIAA and the HFA that determines how the tariff for mechanical reproduction applies to this new environment.¹⁶⁵ The agreement covers both “on-demand stream” and music downloads.¹⁶⁶

In interpreting the scope of the mechanical reproduction right, section 112 of the Copyright Act dealing with ephemeral recordings should also be taken into account. For instance, if an organization is licensed to publicly perform a work, then it is not a violation of section 106—exclusive rights—to make more than one copy or phonorecord of a particular transmission program embodying the performance or display if the copy or phonorecord in question is used solely by the transmitting organization.¹⁶⁷ Section 112(a) also contains a statutory license that allows a transmitting organization entitled to transmit to the public a

164. John W. Belknap, Recent Developments, *Copyright Law and Napster*, 5 J. SMALL & EMERGING BUS. L. 183, 188 (2001).

Despite Napster’s claims, the Ninth Circuit held that Napster users’ space-shifting was not the same as Sony time-shifting because, unlike time-shifters in Sony who made videotape copies for personal use, Napster’s space-shifting users automatically released any MP3 files copied onto their computers for potential download by millions of Napster users.

Id. See also Sara Beth A. Reyburn, *Fair Use, Digital Technology, and Music on the Internet*, 61 U. PITT. L. REV. 991 (2000).

165. See Agreement, at nmpa.org/pr/finalRIAAAgreement.pdf.

166. See *id.* ¶ 1.1. In the FAQ about the agreement released on November 7, 2001, HFA states that “[t]he Agreement recognizes that on-demand streaming and limited downloads offered by online subscription services require mechanical licenses and payment of mechanical royalties.” See Agreement FAQ, at http://nmpa.org/pr/RIAA_Agreement.FAQ.pdf.

167. 17 U.S.C. § 114(a) (1994).

performance of a sound recording to make no more than one phonorecord of the sound recording, provided that: (a) the phonorecord—copy—is retained and used solely by the transmitting organization that made it; (b) the phonorecord is used solely for the transmitting organization's own transmissions originating in the United States under a statutory license; (c) the phonorecord is destroyed within six months of the date the sound recording was first transmitted—unless preserved exclusively for purposes of archival preservation; and (d) phonorecords of the sound recording in question have been distributed to the public under the authority of the copyright owner and the phonorecord made under this license is made from a phonorecord lawfully made and acquired.¹⁶⁸ Procedures are underway before the United States Copyright Office to determine the appropriate rate. The rate to be agreed, however, was to be valid only until December 31, 2000 and new negotiations must therefore continue to determine the appropriate rate as of 2001.¹⁶⁹

3. The Right of Public Performance

The two main rights that apply to the underlying musical work are the right of mechanical reproduction and the right of public performance.

Clearly, when a work is broadcast on the Internet using, for example, streaming audio technology, a public performance occurs. The definition of "to perform" is not limited to specific technological measures. Quite to the contrary, it is much more difficult to say whether a pure download of music, in which the user makes a permanent copy on a hard disk or optical storage device, also involves a public performance. If one looks at the 1996 WCT¹⁷⁰ and the fact that the Digital Millennium Copyright Act purported to implement that Treaty, one would be tempted to conclude that a public performance takes place in almost all those cases because that right seems to be the right corresponding to the new right of communication to the public contained in the Treaty. This WCT right clearly covers online transmissions of music and other protected works. Article 8 of the WCT grants a right concerning "the making available to the public of their works in a way that the members of the public may access these works from a place and at a time individually chosen by them."¹⁷¹ WIPO, in an explanatory note about the Treaty, stated that, "the quoted expression (Article 8) covers in particular on-demand, interactive communication through the Internet."¹⁷² That being said, while the WIPO Treaty may serve as a guide to interpret the extent of

168. 17 U.S.C. § 112(a).

169. 17 U.S.C. § 114(f)(1)(A).

170. WIPO Copyright Treaty, *supra* note 43.

171. *Id.* art. 8.

172. WPPT 1996, at <http://www.wipo.int/eng/general/copyright.wppt.htm>. This language was also used in a Swedish government document available at <http://www.jmk.su.se/global96/global97/level2/projects/cop/files/intcop.htm#wipo>.

the public performance right in the United States, there are valid arguments to support the view that certain online transmissions of music do not constitute a public performance of the underlying musical work. Before going into the details of this position, it may be worth noting that to weaken the public performance rights in musical work may have the domino effect of weakening the new right in sound recordings contained in section 106(6) of the Copyright Act, which grants an exclusive right in the case of sound recordings to perform the copyrighted work publicly by means of a digital audio transmission. Does this definition of transmission confirm that such a transmission is in fact a public performance under the Copyright Act and that this would then extend to the underlying musical work?¹⁷³

Clearly, there are solid arguments that can be used to show that a digital transmission during which the user does not listen to the music but merely copies file onto a hard disk or optical storage device does not constitute a public performance. First, if in the case of a sound recording the law was specifically amended to refer to performance by transmission—also because the Act does not refer to transmission with respect to performances of musical works, but rather to the notion of “public performance”—one might infer that such transmissions are not in fact public performances of music but only of the sound recording. This would not mesh with the traditional interpretation of rights in sound recordings, particularly in countries with a neighboring right tradition, according to which rights in sound recordings cannot be higher than the rights in the underlying musical work. The definition of “to perform” refers to rendering the work and, in the case of an audiovisual work, making the sounds audible. When a computer file is transferred from one computer to another, is the musical work in fact “rendered?” Clearly, it is not made audible at that point. The problem is quite different from that of video time-shifting because the video transmission or broadcast is in fact received. A copy is made for later viewing, but what was received at the time of the recording would have been fully perceptible by the user at the time of the transmission.

In response to this argument, one could argue that the only real difference between a broadcast or transmission that is perceptible by the user at the time of the broadcast or transmission and the online delivery of sound recording is the fact that it will be perceptible later once the

173. See generally 17 U.S.C. § 114 (1994). Under § 114, however, the performance of a sound recording by means of a retransmission is not an infringement of § 106 under certain conditions. *Id.* In addition, under §§ 114(d)(1) and 114(j), this exclusive right does not apply to non-subscription broadcast transmissions, retransmission of a non-subscription broadcast transmission—under certain conditions—and certain other transmissions. *Id.* Finally, a statutory license applies to many of the transmissions that do come under the exclusive right provided for in § 106(6). *Id.* The analysis of this new right granted the record producers is beyond the scope of this Article.

user activates the appropriate device, if not at the time of the transmission. It is thus the functional equivalent of time-shifting.

Another seemingly potent argument in favor of the conclusion that a digital delivery of music is in fact a public performance lies in the definition of "to perform a work publicly." This definition specifically refers to transmissions.¹⁷⁴ That said, this is a definition of a "public" performance and not of a performance itself. Moreover, what has to be transmitted is a performance of a musical work and one may question whether a sound recording is indeed a performance of a musical work. A sound recording is defined as a fixation of sounds and not as a rendering of sounds.¹⁷⁵

In considering the arguments for and against the application of the public performance right in the context of a digital phonorecord delivery, one can also refer to the historical and revision notes on Title 17.¹⁷⁶ The House Report states that "any individual is performing whenever he or she plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set."¹⁷⁷ This would seem to indicate that the performance must be audible at that point, which in the Author's opinion is conveyed by the use of "turning on." That said, in its discussion of the definition of "to perform," the Report goes on to state that:

A performance may be accomplished either directly or by means of any device or process, including all kinds of equipment for reproducing or amplifying sounds or visual images, any sort of transmitting apparatus, any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented.¹⁷⁸

This definition would arguably cover digital delivery, which may be said to constitute or use a "transmitting apparatus" or an "electronic retrieval system." Congress apparently had in mind a fairly broad definition.

Perhaps the strongest argument in favor of the application of the public performance right resides in the text of section 115(c)(3) which states that

A compulsory license under this section includes the right of the compulsory licensee to distribute or authorize the distribution of a phonorecord of a nondramatic musical work by means of a digital transmission which constitutes a digital phonorecord delivery, regardless

174. 17 U.S.C. § 101.

[T]o transmit or otherwise communicate a performance or display of the work to . . . the public by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Id.

175. *Id.*

176. COPYRIGHT LAW REVISION, H.R. REP. NO. 94-1476.

177. *Id.*

178. *Id.*

of whether the digital transmission is also a public performance of the sound recording under Section 106(6) of this title or of any nondramatic musical work embodied therein under Section 106(4) of this title.¹⁷⁹

From this text, one may draw two conclusions: (1) that digital phonorecord deliveries are a subset of digital transmissions; and (2) that such phonorecord deliveries constitute a distribution of a phonorecord, which may have a direct impact on the application of the right of importation—addressed later. Because section 106(6) reads “to perform the copyrighted work publicly by means of a digital audio transmission,” one may argue that all digital audio transmissions—which include digital phonorecord deliveries under section 115—are in fact public performances. One could also refer to section 114(d)(2) dealing with “the performance of a sound recording publicly by means of a subscription digital audio transmission. . . .”¹⁸⁰

This view is further supported by section 112(e)(10), which reads in part as follows:

Nothing in the subsection annuls, limits, impairs or otherwise affects in any way the existence or value of any of the exclusive rights of the copyright owners in a sound recording, except as otherwise provided in this subsection, or in a musical work, including the exclusive rights to reproduce and distribute sound recording or musical work, including by means of a digital phonorecord delivery, under Sections 106(1), 106(3) and 115, and the right to perform publicly a sound recording or musical work, including by means of a digital audio transmission, under Sections 106(4) and 106(6).¹⁸¹

This section, added by the Digital Millennium Copyright Act, would lead one to the conclusion that all digital audio transmissions may be public performances and that digital phonorecord deliveries, which, as already mentioned, constitute a form of digital audio transmission, involve also the reproduction and distribution right. Finally, it is relevant to note that the U.S. Copyright Office decided in December 2000 that “an AM/FM broadcast signal over a digital communications network, such as the Internet, are subject to a sound recording copyright owner’s exclusive right to perform his or her work publicly by means of digital audio transmissions. Broadcasters who choose to transmit their radio signals over a digital communications network such as the Internet may do so under a compulsory license.”¹⁸²

As can be seen from the above, there are valid arguments to justify both the conclusion that a digital phonorecord delivery—without streaming—is and is not a public performance of the underlying musical

179. 17 U.S.C. § 115(c)(3) (1994).

180. 17 U.S.C. § 114(d)(2).

181. 17 U.S.C. § 112(e)(9).

182. Rulemaking to Determine Whether a Transmission of an AM or FM Radio Signal made over a Digital Communications Network by an FCC-licensed Broadcaster is Exempt from the Digital Performance Right, 37 C.F.R. § 201(b)(2) (2000).

work. The performing rights societies have clearly expressed their view that any transmission of music, whether by streaming or delivery of a file containing a sound recording, is a public performance,¹⁸³ a stand that seems fairly convincing. The point does need to be firmly established, however, either by a U.S. court or perhaps by industry practice. If indeed a digital delivery—without streaming—is considered a public performance of the underlying musical work, this would be the first instance in which a public performance takes place and the user is not capable of perceiving the work as it is being transmitted.¹⁸⁴ On the other hand, if a court found that such deliveries do not constitute a public performance of the musical work and the rights of reproduction and distribution did not allow rightsholders to exercise a full exclusive right to limit the online availability of copyrighted works, the United States would arguably be in violation of its obligations under the WCT.¹⁸⁵

Unfortunately, the decision of the Ninth Circuit in *A&M Records, Inc. v. Napster, Inc.*¹⁸⁶ did not clarify the point because the Court only found that “at least” the right of reproduction and the right of distribution were infringed.¹⁸⁷

4. U.S. Transmissions

It is difficult to determine with absolute precision how U.S. law would apply to a digital transmission of music to or from a foreign country. In the case of a transmission from the United States, there is little doubt that such transmission, to the extent that it constitutes a public performance, needs to be cleared at the point of origin of the transmission. This has been the practice in the United States for broadcast, cable, and satellite transmissions.¹⁸⁸ Particularly in the case

183. See AL KOHN & BOB KOHN, *KOHN ON MUSIC LICENSING* 343 (Aspen 2d ed. 1996 & Supp. 2000).

184. This would not, for example, be considered “time-shifting” as in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 449-50 (1984), because a time-shifting scenario, the user would be able to watch or listen to the transmitted work at the time of the transmission. In fact, in the definition of “publicly” perform or display contained in 17 U.S.C. § 101, the public must be “capable of receiving” the performance. 17 U.S.C. § 101. Is the performance received if no one can watch or listen?

185. Because no right would be provided to implement the making available right contained in Article 8 WCT. WIPO Copyright Treaty, *supra* note 43.

186. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

187. *Id.* at 1014.

188. Although for infringement purposes, it seems that both the place of emission and the place of reception might be relevant. See *National Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10 (2nd Cir. 2000); see also Jennifer M. Driscoll, *It's a Small World After All: Conflict of Laws and Copyright Infringement on the Information Superhighway*, 20 U. PA. J. INT'L ECON. L. 939, 978-79 (1999); Andreas P. Reindl, *Choosing Law in Cyberspace: Copyright Conflicts on Global Networks*, 19 MICH. J. INT'L L. 799, 821-24 (1998).

of transmissions licensed under a statutory license, however, the rights granted to the transmitting organization are often limited to the United States, as the example of section 114(e) just mentioned demonstrates. In other words, the transmitting organization may not in fact be licensed to transmit to users in foreign countries. Under certain circumstances, the organization may need to acquire the necessary rights in the countries of reception, where the rights may not be the same as in the country of origin. Copyright is still viewed and managed, even in large multinational groups, as a territorial right and the collecting societies administering both the reproduction and the public performance rights have yet to establish a one-stop-shop for worldwide rights clearance.¹⁸⁹

If mechanical reproduction rights societies license copies made by users in their territory, the licenses would be paid by the transmitting organization, not the person actually making the copy. Some might argue that the Copyright Act and international conventions¹⁹⁰ do not grant an exclusive reproduction right as such but rather a right to "authorize" the reproduction. In this case, however, the copyright owner in the musical work would be authorizing someone else to authorize the reproduction because the copyright owner would be authorizing the transmitting organization to authorize a user to make a copy. This is one step removed from the concept of a right to authorize. To make matters worse, in a number of jurisdictions, including the United States, the end-user copy may be considered fair use—under certain circumstances.¹⁹¹ If the reproduction made in the course of a phonorecord delivery takes place on the recipient's computer—or other device—the mechanical reproduction right should be cleared only once for each transmission. Of course, the original copy on the transmitting organization's server also needs to be licensed. It would indeed seem preferable, as suggested in the Canadian Copyright Board's decision on its so-called Tariff 22 decision,¹⁹² to license the transmission only once. Assuming that both the mechanical reproduction and the public performance rights apply—which may or may not be the case as discussed above—then it should be licensed only once for each right, independently of whether the transmission takes place between a transmitting organization and a recipient in one or two different countries and independently of the fact that the transmission may have

189. See Andre Lucas, *Copyright Law and Technical Protection Devices*, 21 COLUM.-VLA J.L. & ARTS 225, 229 (1997); Jane Schurtz-Taylor, *The Internet Experience and Authors Rights: An Overview of Some of the Present and Future Problems in the Digital Information Society*, 24 INT'L J. LEGAL INFO. 113, 133 (1996).

190. Berne Convention for the Protection of Literary and Artistic Works, July 26, 1971, art. 9(1), available at <http://www.wipo.int/treaties/IP/berne/index.html>.

191. Either as a time-shifting copy under the Sony doctrine discussed *supra* note 184 or under the Audio Home Recording Act. The application of time-shifting defense—under the fair use doctrine—was dealt a severe blow in the Napster case. See *supra* note 163, at 1019.

192. See *supra* note 9.

been routed through computers in various countries. This would seem to be the only practical solution.

In the case of a transmission entering the United States, the question arises whether the U.S. importation right applies.¹⁹³ Section 602 of the Copyright Act grants the owner of copyright in the United States the exclusive right to authorize the importation of phonorecords into the country.

The problem in applying the right of importation is that it applies to phonorecords, which are defined as material objects. In the case of a digital phonorecord delivery, no digital object in fact crosses the border, but a material object is created on the recipient's computer or other device, which also means that the right of distribution applies.¹⁹⁴

Yet, the fact that the Act refers to digital phonorecord delivery seems to imply that a phonorecord may in fact be delivered this way and, consequently, could be considered to have been imported because it had to enter the United States in one form or another. Again, if the transmission originates in a foreign country, the copy is not made by the transmitting organization but rather by the recipient who, in the United States, could perhaps rely on the exemption for "home recordings." That would, however, defeat the purpose of the Act because digital phonorecord deliveries in fact replace some sales of material phonorecords—compact discs.¹⁹⁵ Interestingly, in a few cases of licensed digital phonorecord deliveries of which the Author is aware, the transaction proceeds not as a sale but as a licensing transaction whereby the end-user actually receives a license to use the material downloaded under certain conditions.¹⁹⁶ If indeed the industry considers that the transmission is in fact a licensing transaction rather than a sale, then it may be more difficult to argue that there is in fact importation and

193. 17 U.S.C. § 602 (1994).

194. 17 U.S.C. § 106(3). See also *Storm Impact, Inc. v. Software of the Month Club*, 13 F. Supp. 2d 782 (N.D. Ill. 1998).

195. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1016 (9th Cir. 2001). The court also stated that computers are not "digital audio recording devices" under the *Audio Home Recording Act* and that Napster users were not fair users. *Id.* at 1015. First, because Napster users merely duplicated copyrighted works for use in another medium, their downloading and copying of music files did not transform the copyrighted works. *Id.* Second, because Napster users copied and downloaded files to obtain songs they would otherwise have to pay for, the use was commercial in nature. Therefore the first fair use factor favored the plaintiffs. *Id.* The court found that "even if Napster's service actually increased sales of some CD's due to increases exposure—a debatable point—market harm could still result." John W. Belknap, Recent Developments, *Copyright Law and Napster*, 5 J. SMALL & EMERGING BUS. L. 183, 187 (2001). See also George H. Pike, *A Busy Year Ahead for Congress*, INFO. TODAY 16 (May 5, 2001).

196. A good example may be found in the case of *Adobe Systems, Inc. v. One Stop Micro, Inc.*, 84 F. Supp. 2d 1086 (N.D. Cal. 2000), in which the court held that the fact that the defendant had obtained software in violation of an educational license and restrictions on sale to the educational community did not make the acquisition by defendant a purchase and, consequently, the defendant's claims that Adobe's rights were exhausted under the first-sale doctrine failed.

distribution of a phonorecord into the United States. Conversely, if the application of the right of importation is sought, then the first sale doctrine may be applicable. As such, this would not pose a significant problem if the recipient were to give, for example, a CD-RW to a friend. In practice, however, the risk is obviously that a copy would be given to a third party without destroying or deleting the original—downloaded—copy. A licensing transaction—perhaps accompanied by appropriate technical measures—thus seems a logical way to proceed but may impact the way a court would decide to apply or not the right of importation to these transactions.

Applying the right of mechanical reproduction to copies made not by the transmitting organization but rather by the recipient may seem a stretch of the imagination. The problem in the United States does not occur in all countries, however. Yet, it is certainly possible to argue that the recording by the end-user of the phonorecord on his or her computer or other device does not constitute fair use. Contrary to incidental copying such as videotaping for purposes of time shifting, digital phonorecord delivery may constitute a primary distribution channel for the audio industry. In light of the fourth fair use criteria, namely the impact on the market or value of the sound recordings in question,¹⁹⁷ one could argue that the recipient does need to be licensed for this type of download. Because it would be impracticable to require that the user obtain a license directly from either a performing rights society or a mechanical rights society or a music publisher or any combination thereof, it is certainly possible to conclude that the transmitting organization should obtain this license on behalf of all those recipients and pass the license on as the download occurs and is licensed to the recipient. The practical solution would be that the transmitting organization would require the appropriate license from the rightsholder in the musical works, whether on its own behalf or on behalf of the end-user recipients.

In light of the above, it is possible to conclude that digital phonorecord deliveries constitute a distribution. Section 112(e)(10) seems to say so. In addition, in the famous cases *Playboy Enterprises, Inc. v. Frena*¹⁹⁸ and *A&M Records v. Napster, Inc.*,¹⁹⁹ the unauthorized downloading of a copyrighted photo was held to infringe the plaintiff's exclusive right of distribution. In this case, this right would be exhausted by the first sale, and the owner of a lawful copy could dispose

197. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). See also Debra A. Sitzberger, *Copyright Law—Who Gets the Picture?*, 57 WASH. L. REV. 599 (1982); Sarah H. McWane, Comment, *Hollywood vs. Silicon Valley: DeCSS Down, Napster to Go?*, 9 COMMLAW CONSPECTUS 87 (2001); Stacey L. Dogan, *Is Napster a VCR? The Implications of Sony for Napster and other Internet Technologies*, 52 HASTINGS L.J. 939 (2001).

198. *Playboy Enter., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

199. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

of it under section 109(a) of the Copyright Act. As mentioned previously, this poses the problem of further reproductions by the recipient as noted by the Working Group on Intellectual Property Rights of the White House Information Infrastructure Task Force.²⁰⁰

Yet, this concern about the first sale doctrine is not necessarily a major problem. Section 109(a) states that notwithstanding the exclusive right of distribution—section 106(3)—the owner of a particular copy or phonorecord lawfully made is entitled to sell or otherwise dispose of the possession of that copy or phonorecord. Making a copy of that copy is not the same as disposing of the possession of the copy but rather making an additional copy. The correct interpretation would thus be that while the recipient could lawfully give a downloaded copy—for example, stored on a CD-RW—to a third party under section 109(a), the regime governing the making of a copy of that copy for whatever purpose is governed by section 106(1) regarding the right of reproduction. Naturally, the fair use exception may apply but then the fair use criteria should govern and not the principles of the first sale doctrine.

5. Liability Issues

As for other countries under review, the question of who is liable for copyright infringement in Internet transmissions of music will be addressed briefly under U.S. law. The normal rule that applies is obviously that the person who infringes one of the applicable rights, in particular the right of reproduction and the right of public performance, will be held liable if such acts were done without proper authorization and unless a specific exemption, such as fair use, applies.²⁰¹ The particular case of service providers requires an additional explanation.

The adoption of the Digital Millennium Copyright Act (DMCA) included a Title II dealing specifically with the liability of service providers in the online environment.²⁰² The liability of service providers was limited for acting as a “mere conduit,” for system caching, for storing infringing material at direction of a user—hosting—and for linking or referring users to infringing material.²⁰³ This limitation applies against the service providers but not against the users, subscribers, or account holders.²⁰⁴ To qualify as a service provider under the DMCA, the company seeking to benefit from the exemption from liability must offer transmission, routing, or provision of connections for digital online communications between or among points specified by a user, of a

200. 94th Congress, *Report on Intellectual Property and the National Information Infrastructure*, at www.uspto.gov/web/offices/com/doc/ipnii/ipnii.

201. See Eric J. Schwartz, *United States*, in *INTERNATIONAL COPYRIGHT LAW & PRACTICE*, USA-125-162 (Melville Nimmer & Paul Geller eds., 1991).

202. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

203. See 17 U.S.C. § 512(a) (1994).

204. 17 U.S.C. § 512(a)-(b).

material of the user's choosing, and without modification to the content of the material sent or received.²⁰⁵ The exemption also applies to organizations that provide online services or network access.²⁰⁶

In exchange for the limitation of liability, service providers must put in place a "notice and take down" procedure that includes the designation of an agent and a procedure through which rightsholders can notify such agent—the statute contains the details of the notification content.²⁰⁷ Under the Act, the person who allegedly made infringing material available may counter notify. Basically, the Act specifies how and within which delay the service provider must remove the infringing material and under which conditions.

Without going into all the details of the DMCA, it can be said that service providers that have no control over the content that goes through their network or is posted on their servers and who are acting at arm's length and in good faith are exempt from liability provided they comply with the notice and take down procedure requirements.²⁰⁸

The Act also limits the liability of non-profit educational institutions for the infringing acts of faculty members or students, which could otherwise be imputed to these institutions.²⁰⁹ The exemption applies with respect to faculty members and graduate students and, interestingly, in exchange for this limitation, educational institutions must provide informational materials that accurately describe and promote compliance with U.S. copyright laws.²¹⁰

In practice, the application of the DMCA seems relatively straightforward. After having determined the identity of the service provider concerned—using databases such as WHOIS—one browses the database of the Copyright Office to locate the contact information that service providers must make available. In practice, notifications are normally sent to a mailbox specified by the service provider.²¹¹ It seems that service providers are generally responding to the notices within twenty-four hours and that they are also providing copyright owners with an acknowledgment of receipt and a confirmation that the infringing material has been taken down. There are a number of cases in which a long lag-time has been observed between the notice and the take down, which can cause significant commercial damage.²¹² In other cases, the manner in which the service provider has taken down the material was considered inappropriate, such as a simple freeze of the

205. 17 U.S.C. § 512(d).

206. 17 U.S.C. § 512(c), (e).

207. Batur Oktay & Greg Wrenn, *A Look Back at the Notice-Takedown Provisions of the U.S. Digital Millennium Copyright Act One Year After Enactment*, WIPO Doc. OSP/LIA/2 (Dec. 1, 1999), available at www.wipo.int.

208. *Id.*

209. *Id.*

210. 17 U.S.C. § 512(e)(1)(C).

211. Oktay & Wrenn, *supra* note 207, at 7-8.

212. *Id.*

infringing page or pages in such a way that the pages could be viewed but not accessed.²¹³ But by and large the most important problem reported by rightsholders has been the heavy administrative and practical burden of policing the Web to find potentially infringing material, locating the service provider concerned and its agent, and proceeding with detailed notification required under the DMCA.²¹⁴

III. EUROPEAN DIRECTIVES

There are two "directives" in the European Union that will have a direct impact on the conclusions reached in the study of the law of its Member States, including France, Germany, and the United Kingdom. Once finally adopted, all EU Member States will have a set timeframe within which to conform their national legislation to the directives.

A. *The Directive on Copyright in the Information Society*

The main purpose of the *Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society* is to implement the two 1996 WIPO Treaties.²¹⁵ As regards the right of communication to the public, the preamble to the directive states:

The Directive should harmonize further the authors' right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.²¹⁶

The preamble later states:

The legal uncertainty regarding the nature and level of protection of acts of on-demand transmission of copyright works and subject matter protected by related rights over networks should be overcome by providing for harmonized protection at community level. It should be made clear that all rightsholders recognized by this Directive have an exclusive right to make available to the public copyright works or any other subject matter by way of interactive on-demand transmissions. Such interactive on-demand transmissions are characterized by the fact that members of the public may access them from a place and at a time individually chosen by them.²¹⁷

213. *Id.*

214. *Id.*

215. Directive 2001/29/EC of the European Parliament and of the Council Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L167) 10.

216. *Id.* pmb. ¶ 23.

217. *Id.* pmb. ¶ 25.

The Copyright Directive gives copyright owners an exclusive right to authorize or prohibit any communication to the public of their works, including the making available to the public in such a way that members of the public may access the works from a place and at a time individually chosen by them.²¹⁸ A similar right is granted to performers in respect of fixations of their performances; phonogram producers for their phonograms; film producers for the original and copies of their films; and finally broadcasting organizations for fixations of their broadcasts.²¹⁹ It seems that the right of making available as described here covers all forms of transmissions of music online.

With respect to the right of reproduction, a right is granted to all copyrighted works and a similar right granted to performers, phonogram producers, film producers, and broadcasting organizations in respect of the objects already mentioned above with respect to the right of communication to the public.²²⁰

The directive seems to imply that the right of distribution, which it also recognizes, only applies to material objects. Paragraph 18 of the Preamble states: "Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article. . ."²²¹ and further, "the question of exhaustion does not arise in the case of services and on-line services in particular."²²² In other words, the first sale doctrine—here referred to as "exhaustion of rights"—would not apply, which would seem to indicate that the distribution right does not apply to online delivery of music.

B. *The E-Commerce Directive and Applicable Law*

Interestingly, the directive on copyright does not address the question of transmissions between Member States or from third countries. The Commission preferred to leave this question to the *Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market*.²²³ In this respect, this directive contains a number of interesting features: (1) it does not aim to establish specific rules of private international law relating to conflicts of law or jurisdiction;²²⁴ (2) "Information Society services"—including online music delivery—should be supervised at the source of the activity in order to ensure an effective protection of public interest objectives, and to effectively guarantee

218. *Id.* art. 3(1).

219. *Id.* art. 3(2).

220. *Id.* art. 2.

221. *Id.* pmb. ¶ 28.

222. *Id.* pmb. ¶ 29.

223. Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in particular electronic commerce, in the Internal Market, 2000 O.J. (L 178) 1-16.

224. *Id.* pmb. ¶ 7.

freedom to provide the services in legal certainty for suppliers and recipients of services, such Information Society services should only be subject to the law of the Member State in which the service provider is established; and (3) the rules determining where a service provider is established are determined according to the case law of the European Court of Justice.²²⁵ Usually, this is the place where the provider of the Information Society service is the Member State where the provider has its center of activities.²²⁶ The eCommerce Directive does not apply to service providers established in a third country, but the directive should be consistent with applicable international rules and without prejudice to the on-going discussions referred to as the Global Business Dialogue launched on February 4, 1998.²²⁷

Based on the above, it seems that the European Union wished to remain consistent with the position taken early on in the Directive on Cable and Satellite Transmissions, in which it decided to apply the law of the country of emission²²⁸ or the law of the server—in most cases—as in the Canadian Tariff 22 case.²²⁹ In the Cable & Satellite Directive, the European Union had dealt with transmissions from foreign countries in the following way; if the broadcaster was located in a third country that had a lower level of protection, but the uplink to the satellite was in a Community Member State, then that Member State would be considered the point of origin of the transmission.²³⁰ If the uplink and the broadcaster were located in a third country, but “a broadcasting organization established in a Member State had commissioned the act of communication to the public by satellite,” then the act was deemed to have occurred in that Member State.²³¹ If similar principles were applied to Internet transmissions and the server of origin of the transmission was located in a country where copyright protection is insufficient, but the transmission used a mirror or cache site located in a Member State, then that could be considered the point or origin of the transmission—and where a license would be sought.²³² If all servers—except perhaps for the server managed by the ISP—were located outside EU Member States, but the service was offered by or on behalf of a company located in a Member State, then that could be considered the point of origin of the transmission.²³³

225. *Id.* art. 22.

226. *Id.* pmb. ¶ 8.

227. *Id.* pmb. ¶ 7.

228. Council Directive 93/83/EEC of 27 September 1993 on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Transmission, art. 2(b), 1993 O.J. (L 248) 15-21.

229. *See supra* note 9.

230. Cable and Satellite Directive, *supra* note 228, art. 1(2)(d).

231. *Id.* art. 1(2)(b).

232. *See* Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 538-39 (2000).

233. *See id.*

That will not be the case. Intellectual property, including copyright, was carved out of the eCommerce Directive.²³⁴ What is the impact of this exclusion? Much will depend on the implementation of the directive by the fifteen member States of the Union, and the twenty-seven other European countries that have to adapt their legislation accordingly due to their accession negotiations or other bilateral arrangements with the European Union. It may be said, however, that because the country of emission rule was specifically said not to apply to copyright, then the reception theory applies. This would mean that a protected work or object is made available in every country where it is downloaded—probably assuming, as in the French *Yahoo!* case,²³⁵ that the provider is able to filter out or at least categorize users based on their country of origin. In theory, if a restricted act takes place in each country of reception, a license for that country must be obtained. Because those rights tend to be administered exclusively by copyright collectives—“societies”—especially in the music field, a license would have to be obtained from the society operating in each and every territory of reception. And, because Internet sites are available worldwide, interested users may be in more than two hundred countries.²³⁶ This could rapidly become an administrative nightmare. The provider would theoretically have to report every use in the country of the server—where a reproduction and, arguably, a communication take place—and in every country where a user downloaded or listened to a work—where, arguably, a communication, a reproduction, and a distribution occurred. Adding another layer of difficulty, because some legal systems may pick the emission theory—as seems to be the direction in Canada and the United States—and others the reception theory—as seems to be the case in Europe—users would have to base their reporting on the—possibly changing over time—legal system of each and every territory. Putting in place a one-stop shop bringing together all collectives under a single umbrella would make life easier, but may raise competition law—antitrust—concerns.

There is no easy answer but clearly a legislative intervention—either to clarify the situation or lift antitrust barriers—or a new international set of rules may be desirable to avoid drowning copyright law in a pool of impracticable requirements. Perhaps the new WTO round of global trade talks, which may start as early as December 2001, could include this topic in its revision of the TRIPS Agreement, which

234. eCommerce Directive, *supra* note 223, art. 22(2).

235. See *supra* note 77.

236. As of December 2000, there were music collectives in more than one hundred countries, according to the International Confederation of Societies of Authors and Composers (CISAC), at <http://www.cisac.org> (visited Oct. 4, 2001).

will in any event include an attempt to incorporate the rules of the WCT and WPPT into TRIPS.²³⁷

IV. PUTTING IT ALL TOGETHER: ANALYSIS AND SCENARIOS

A. *Comparative Analysis*

Before looking at individual scenarios, it may be useful to summarize the main similarities and differences among the six legal systems under review, even though it may not be possible to convey all appropriate nuances. The reader should turn to the appropriate section of the Article for a more detailed analysis and reference materials.

1. The Right of Reproduction

A reproduction on the server from which users—"the public"—can download music must be licensed in all six countries under review. In both Canadian²³⁸ and U.K.²³⁹ law, the format conversion—to upload the work on the server—is also a reproduction requiring an authorization. The same may be true under other national laws but the Author found no confirmation.

The question whether the copy made by the end-user needs to be licensed is more difficult to answer with certainty. Canadian law contains a specific "fair dealing" exception for private use of recorded use, but its application to downloaded music is not clear.²⁴⁰ In France, courts have considered that the fact that the user ends up with a "CD-like product" means that the copy is not "private."²⁴¹ In Germany, the end-user who listens to the music in streaming mode does not make a copy that needs to be licensed. The situation is unclear when a permanent copy of the work is made.²⁴² In Japan, the end-user copy is authorized by law, but compensation—probably in the form of a private copying levy—must be paid.²⁴³ In the United Kingdom, again it is unclear whether the end-user copy is fair dealing. If not, it would need to be licensed.²⁴⁴ In the United States, the end-user copy may be considered fair use, although the rationale of the Audio Home Recording

237. Declarations Made by Senior Representatives of the European Union and the United States at the Fordham Eighth Annual Conference on International Intellectual Property Law & Policy, New York (Apr. 27, 2000).

238. See *supra* note 13 and accompanying text.

239. See *supra* note 124 and accompanying text.

240. See *supra* notes 18-21 and accompanying text.

241. See *supra* notes 51-57 and accompanying text.

242. See *supra* notes 86-90 and accompanying text.

243. See *supra* notes 110-12 and accompanying text.

244. See *supra* notes 127-29 and accompanying text.

Act does not seem to apply directly to primary digital phonorecord deliveries.²⁴⁵ Finally, even when the first end-user copy is authorized, any further use thereof would be governed by the reproduction right of the country in which reproduction takes place and any exception thereto, including fair use, fair dealing, and the civil law right of "private copying."²⁴⁶

The EU Directive on Copyright in the Information Society²⁴⁷ contains a reproduction right that would seem to apply to both servers and end-users, although there are limited exceptions in favor of users.

2. Right of Public Performance/Communication/Transmission

The application of this exclusive right to the use of music in streaming mode makes little doubt when the user does not select the songs; this is comparable to broadcasting. Beyond that point, however, the conclusions that can be drawn under each national law differ. In Canada, posting a copyrighted work on a server—at least on a publicly-accessible one—is a restricted act, even though the actual communication—to the public—takes place only at the time of the user request.²⁴⁸ The Canadian Copyright Board has specifically rejected arguments to the effect that no work was being transmitted based on the transformation—for example, encoding—of the "work" during the transmission.²⁴⁹ In France, the right of "representation," which may be considered a functional equivalent of the right of communication to the public for our purposes, similarly applies to the posting of a work on a website.²⁵⁰ In Germany, the traditional right of "exploitation" already contains a right concerning transmissions of works, which probably applies to Internet transmissions. In Japan, the right of public performance does not apply, but a right of transmission exists and applies to both streaming and downloads, with slightly different legal bases.²⁵¹ Under U.K. law, a public performance occurs if the user listens in streaming mode. It is unclear whether the same can be said of pure downloads.²⁵² In the United States, listening to music in streaming mode is probably a public performance. There are solid arguments both for and against the conclusion that a pure music download is also a public performance.²⁵³

245. See *supra* notes 161-64 and accompanying text.

246. See *supra* notes 57 and 197 and accompanying text.

247. See *supra* Part III.

248. See *supra* notes 22-32 and accompanying text.

249. See *supra* notes 22-32 and accompanying text.

250. See *supra* notes 59-65 and accompanying text.

251. See *supra* notes 115-19 and accompanying text.

252. See *supra* notes 130-32 and accompanying text.

253. See *supra* notes 170-87 and accompanying text.

The EU Directive contains a new right of communication to the public that includes a right to make available on the Internet—and other interactive networks.²⁵⁴

3. Liability Issues

The laws of Germany, Japan, and the United States already contain specific provisions concerning the liability of service providers. Similar provisions are about to enter into force in the European Union.²⁵⁵ These laws greatly limit the potential liability of service providers as intermediaries, but impose different restrictions and conditions. In Germany, under a 1997 law, a service provider may be liable if it is “aware” of the use of its network for infringing purposes.²⁵⁶ In Japan, the service provider in most cases will not be liable, but it has a duty to take “reasonable means” to deter the use of its servers for infringing purposes.²⁵⁷ In the United States, the DMCA²⁵⁸ limits the liability of service providers who act as mere conduits provided that: (1) a notice and take down procedure is put in place; and (2) the provider has no control over the content. A similar solution is provided for in the EU Directive on Copyright in the Information Society.²⁵⁹ In other countries under review, general legal principles apply. In Canada, the provider of the network as such is not liable when he has no control over the content.²⁶⁰ By contrast, in France, service providers have a general obligation of “diligence” because they can check the content posted on their servers.²⁶¹ A good example is the injunction issued against Yahoo! concerning the use of its servers for auctions of Nazi objects.²⁶² In the United Kingdom, the rules that apply to cable operators would seem to govern. Liability is only imposed if there is some degree of control over the content.²⁶³

4. Applicable Law

The rules in this area vary greatly and their commercial significance is enormous. Each country would like to control both servers located in its territory and users in its territory accessing material posted on foreign servers. Copyright collectives similarly want to be able to license transmissions from servers in their territory and

254. See *supra* Part III.

255. See *supra* Part III.

256. See *supra* notes 101-05 and accompanying text.

257. See *supra* Part II.D.6.

258. See *supra* note 202.

259. See *supra* notes 215-22.

260. See *supra* notes 47-50 and accompanying text.

261. See *supra* notes 74-83 and accompanying text.

262. See *supra* note 77 and accompanying text.

263. See *supra* notes 139-40 and accompanying text.

users—including end-users—in their territory.²⁶⁴ The latter may be even truer of collectives based in countries in which there are probably more users than servers.

The emerging legal picture is as follows. In Canada, servers located in that country must be licensed independently of the user's location because the communication—restricted act—occurs at the server's location. The Copyright Board may, however, assert jurisdiction over foreign servers whose primary market is Canada.²⁶⁵ In France, the law of the country "for which" protection is claimed applies. This could apply to both servers, as several court cases have already shown, and end-users.²⁶⁶ In Germany, consistent with rules dealing with satellite transmissions, the law of the server governs, at least until the EU Directive is fully implemented.²⁶⁷ In Japan and the United Kingdom, it also seems that the location of the server is the determining factor.²⁶⁸ U.S. law clearly applies to servers located in the country, which poses interesting problems in terms of the extraterritorial application of statutory licensing rates.²⁶⁹ As they started to do in the iCraveTV case,²⁷⁰ U.S. rightsholders will no doubt want U.S. courts to assert jurisdiction over U.S. end-users and foreign servers that make content available to U.S. users.

In the Directive on Copyright in the Information Society and the Directive on eCommerce,²⁷¹ the European Union decided not to apply the principle of the country of emission of the transmission that applies to satellite transmissions and to apply to law of the country of reception. The practical implementation of this principle in the fifteen EU Member States—and the twenty-seven other European countries that are obligated to adapt their laws accordingly under Accession Agreements—has not yet begun.

B. *The Scenarios*

Scenario A1: American Records has its economic residence in Los Angeles and operates a website from a U.S. server offering sound recordings to the public over the Internet to listen to or download—together with other features, such as biographies and tour dates—where appropriate against credit card payment. Access to the site is not restricted in any way.

264. See *infra* Part V.

265. See *supra* notes 38-46 and accompanying text.

266. See *supra* notes 66-68 and accompanying text.

267. See *supra* notes 99-100 and accompanying text.

268. See *supra* notes 121-22, 135 and accompanying text.

269. See *supra* notes 193-94 and accompanying text.

270. See *supra* note 41 and accompanying text.

271. See *supra* note 223.

In this scenario, U.S. law clearly applies. Foreign laws may apply in reception countries, as explained in Part IV.A.4. If the consumer makes a permanent copy, the U.S. reproduction right applies. While there is a doubt as to whether the consumer or American Records should clear the reproduction, in practical terms a license should be obtained by American Records either from the music publisher or from the Harry Fox Agency. If the consumer does not listen during the download, there is a doubt as to the application of the public performance right. A court, however, would probably find that the digital phonorecord delivery, constituting a digital audio transmission, is both a form of distribution and a public performance in light of the amendments of 1995 and of the DMCA to the U.S. Copyright Act.²⁷² The performing rights could be cleared either directly with the U.S. rightsholders or with the performing rights societies. In the case of foreign rightsholders, it may not be possible to obtain those rights directly and recourse to a collecting society might be more practical. If video is included, an authorization is required from the rightsholder in the audiovisual work.

If lyrics and notations are added, while the rightsholder remains the same, the need to secure the display right—usually from the publisher—arises.

The business model chosen by American Records does not change the nature of the rights that need to be cleared. It, however, may change the basis for payment. On a pay-per-listen basis, the current tariff structure for the mechanical reproduction right would seem to apply each time a copy is made. If technology was used that allowed the user to listen to the music a certain number of times without making additional copies, it is questionable whether additional royalties would have to be paid. On the performing rights side, both the ASCAP Experimental License Agreement for Computer On-Line Services and BMI website Music Performance Agreement calculate the fee on the basis of the gross revenues generated by the website.²⁷³ The fact that the content is only accessible on input of a password would not change the legal nature of the transaction.

The fact that the service is interactive or quasi-interactive does not change the nature of the legal relationship itself as regards the underlying musical work. It may change the applicable tariff. There are, however, significant differences regarding the law applicable to the sound recordings themselves. The producer's rights will vary depending on the type of service. This is beyond the scope of this Article.

272. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2887 (Title IV amending § 108, § 112, § 114, chapter 7 and chapter 8, Title 17 U.S.C.) (1998).

273. Broadcast Music Inc. (BMI) also offers a website music performance agreement for corporate websites where the fee is based on either the number of page impressions—defined as a transfer request for a single web page—or music impressions—defined as a music page multiplied by the number of music file titles on that page. See <http://www.bmi.com/licensing/forms/corping01.pdf>, § 2(b).

In the case of non-interactive services, the question arises whether the cable compulsory license contained in the U.S. Copyright Act applies to Internet retransmissions. Given that compulsory licenses are an exception to exclusive rights and that the compulsory license refers specifically to cable²⁷⁴—the expression “cable system” is defined in section 111(f) as a facility that receives the signals transmitted or programs broadcast by one or more television broadcast stations and makes secondary transmission by wires, cables, microwave, or other communication channels to subscribing members—the compulsory license would not seem to apply to Internet transmissions. While one could interpret “cable” as including Internet transmissions—because Internet typically uses either television cable or telephone wires—this expression was truly intended to refer to traditional cable. The House Report on Title 17, for example, reads: “A typical system consists of a central antenna which receives and amplifies television signals and a network of cables through which the signals are transmitted to the receiving sets of individual subscribers.”²⁷⁵ Thus, the cable retransmission statutory license does not apply to Internet-based retransmissions. The broadcast compulsory license applies, however.²⁷⁶

In the United States, performing rights societies as well as the Harry Fox Agency have acquired the necessary rights to license use of music on the Internet—for the repertory that they administer. Where use is made by a U.S. server and destined to U.S. consumers, these licenses are available. Due to the consent decrees that govern the operations of ASCAP and BMI, it is possible to obtain those rights directly from the rightsholders, at least for those rightsholders that are willing to grant those rights directly. Collective management of rights in the United States is not mandatory. In fact, the Copyright Act is almost silent on this point compared to certain European legislations, in particular the German Law, which contain an entire statute on collective rights management.

The question whether existing mandates given by authors to publishers and by authors’ publishers to societies cover on-line use is interesting. Based on the recent decision by the U.S. Supreme Court in *New York Times Co. v. Tasini*,²⁷⁷ it seems that electronic rights may need to be acquired by publishers separately and distinctly from paper rights—although it could obviously be in the same contract— unless the contract was clearly intended to cover all forms of exploitation in any medium now known or later developed. While more recent agreements were revised to include newer versions of the right, the performing rights rightsholder agreements for older works only authorized ASCAP

274. 17 U.S.C. § 111(c) (1994).

275. H.R. Rep. No. 94-1476 (1976) reprinted in 1976 U.S.C.A.N. 663.

276. See *supra* note 179.

277. *New York Times Co. v. Tasini*, 121 S. Ct. 2381 (2001).

and BMI to license the traditional “public performance right.”²⁷⁸ Yet, it is the same right that today applies to some or all uses of music on-line and this probably gives ASCAP and BMI the necessary authority to license on-line uses. As regards author or publisher agreements, a number of form agreements contain the words “and any and all other rights that a composer now has or to which he may be entitled that he hereafter could or might secure with respect to this composition,” that would arguably include newer forms of exploitation, particularly in light of the fact that it is fairly traditional rights that apply to on-line music—the right of public performance, the right of reproduction, and possibly the right of distribution.²⁷⁹

Because no new rights—in musical works—have been created in U.S. law, but rather existing rights were extended or interpreted so as to apply to new forms of use of music on-line, existing agreements would by and large cover these new uses. This being said, it is certain that in light of the U.S. Supreme Court decision in the *Tasini* case, a transfer of copyright to a publisher may be interpreted restrictively if there were any doubt that on-line rights were in fact covered.

Scenario A2: Yankee Records operates a mirror site from a server located in Paris.

The answer to this scenario would be the same as for Scenario A1 but for two additional comments. First, the reproduction taking place in France would be governed by French Law and as such would require an authorization from the local rightsholder. In addition, if French users were targeted, then based on the principles of the Berne Convention and of the French Law, SACEM/SDRM, the French collective, would assert the right to license transactions taking place with French consumers. It is likely that a French court would come to the conclusion that use in France did in fact occur and that such use had to be licensed.

The fact that the European Union seems to be favoring the reception theory²⁸⁰ would mean that EU—including French—receptions would also need to be licensed.

Scenario B1: Osaka Records, with its economic residence in Kyoto, operates a similar website from a server in Japan.

These transmissions should be licensed in Japan. According to Japanese law, use occurs in Japan because: (1) a licensable reproduction takes place there; and (2) that is where the transmission—protected by a new exclusive right—takes place as well. Collectives or rightsholders in the country of reception might nonetheless argue that a licensable reproduction occurs in the country of reception—if different—and in some countries they have a point. That would be impractical.

278. See R. Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 MIAMI L. REV. 237, 245 (2001).

279. See Susan H. Bodine et al., *Counseling Clients in the Entertainment Industry 2001*, 648 PLI/PAT 9, 79.

280. See *supra* Part III.

Furthermore, it is better to find an arrangement that allows users of authors' rights—whether content or service providers—to license Internet transmissions only once. This is much easier in countries with a single collective for both main rights. In Japan, the Author was not able to determine whether the Japanese collective JASRAC currently licenses music websites. It seems that they would need to acquire the new right of transmission established in 1997. It is similarly unclear whether foreign collectives acquire this right and can license it to JASRAC in respect of their repertory.

Scenario B2: Osaka Records operates a mirror site from a server based in the United States.

It was concluded that U.S. transmissions would be licensed in the United States and U.S. collectives have indicated their intention to do so; if the transmission's recipient was located in a third country, there may be a need to license the reproduction in that country. Yet, because it is eminently impractical to ask end-users to license mechanical reproductions—but not to pay the levy on blank media where it exists, as in Canada—the reproduction right should be cleared in the country of origin.

The question is therefore whether the mirror site is the server for purposes of an Internet transmission. The answer is yes. First of all, a copy on a mirror site has a sufficient degree of permanence. It needs to be authorized. It is not a mere ancillary technical reproduction occurring as a result of the transmission. Second, users usually are asked to choose the site nearer to them and would thus know they are using the mirror site. If this view is correct, server location and "mirror-siting" might become a tool in reducing the copyright price of commercial music transmissions.²⁸¹

Scenario C1: Marble Arch Records, with its economic residence in London, operates a similar site from a server in London.

Again, the two main rights are involved and need to be licensed. Because the server is located in London, U.K. law dictates that transmissions occur in the United Kingdom. As already mentioned, there is still an argument in the country of reception—if different—that a separate reproduction occurs there, which also needs to be licensed.

Scenario C2: Piccadilly Records operates a mirror site from a server based in Japan.

Japanese law would apply and consider these transmissions Japanese. If residence of the entity, however, not the location of the server, should be the determining factor, that conclusion would change; the server location argument is stronger in light of traditional copyright law, but no decision has been rendered to confirm such a view.

281. See P. Bernt Hugenholtz, *Caching and Copyright: The Right of Temporary Copying*, 22 E.I.P.R. 482 (2000), available at <http://www.ivr.nl/publications/hugenholtz/opinion-EIPR.htm>.

As mentioned above, a practical agreement with all or some of the collectives involved should aim to have all transmissions licensed only once, leaving up to collectives to split and redistribute revenues. Currently, technological barriers may prevent this from happening efficiently.

Scenario D1: Hexagon Records, with its economic residence in Paris, operates a similar site from a French server.

The rights of reproduction and representation apply; SACEM/SDRM apparently assert the right to license both. As already mentioned, there is still an argument in the country of reception—if different—that a separate reproduction occurs there, which also needs to be licensed.

Scenario D2: Hexagon Records operates a mirror site from a server based in Pirateland—or another copyright haven.

Based on response to Scenario B2, the logical answer would be that this transaction should be licensed only in Pirateland. This of course is the weak point of any answer based on the country of the server—which is the practice for satellite transmissions. In implementing the principle that transmissions ought to be licensed in the country of the server, a revised version of the so-called Bogsch theory should apply. According to this proposal, a transmission would only be considered to have been licensed in the country of reception if duly licensed in the country of emission—server—which implies that the law—and practice—of the country of emission is in line with accepted international standards—such as the TRIPS Agreement and the Berne Convention.²⁸² It would be possible to implement the European directives on copyright and e-commerce in this way.²⁸³

Scenario E: Any of the above operate websites that are accessible only to customers in specified territories; and where the server hosting on such website may be located either: (1) in the country of economic residence of the producer; or (2) in the country of the final consumer; or (3) in a third country.

Making websites accessible only in certain countries certainly would allay the concerns of rightsholders who still insist on splitting the world into sales territories. Arrangements with subpublishers and distributors are at stake. If the website is only accessible in the country where the transmission is licensed, this removes any argument that the end-user copy needs to be licensed in a different country—presumably by a different collective. This restricted access scenario will no doubt be appealing, at least for a while, because it mirrors existing distribution patterns. The iCraveTV²⁸⁴ case was a clear example of this, with the

282. See *supra* note 222; see also *Commission Welcomes Adoption of the Directive on Copyright in the Information Society by the council*, available at http://europa.eu.int/comm/internal_market/en/intprop/news/copyright.htm.

283. *Id.*

284. See *supra* note 41.

added insult—for non-Canadian rightsholders—of having a questionable compulsory license rate forced upon non-Canadian rightsholders.

V. CONCLUSION

The analysis has shown that copyright has the potential to adapt to music transmissions on the Internet in the six major markets under review. The solutions chosen vary considerably, however. The reproduction of musical works on a web server for commercial dissemination is a restricted act—an act requiring an authorization. In most countries, the communication of that work to the public is also a restricted act, albeit the legal basis used varies. While under U.S. law it is arguably a public performance, especially when users listen to the music as it is being downloaded, in other cases—Canada—a more general right of communication to the public is involved. Japan is the only country to have created a separate right of “transmission,” and even there more traditional copyright rights may apply. On a more political level, one should bear in mind the fact that music rights are traditionally managed by copyright collectives and in countries in which the rights of reproduction and communication to the public or public performance are managed by different organizations—as is the case in Canada and the United States—each organization will try to maximize the scope of the rights it administers.

What is clear, however, is that to implement the 1998 WCT, as the United States did in the DMCA, the act of making the music available on the Internet must be covered by at least one exclusive right. In the scenarios in Part IV.B, the findings were applied to transnational situations, as these are likely to give rise to the more complex and most interesting legal challenges.

In the wake of the *Napster* case,²⁸⁵ music transmissions on the Internet seem unstoppable. The train is on the tracks. Rightsholders may have the theoretical option of stopping every website in every country or trying to impose release schedules country-by-country, but this use of their exclusive rights may prove futile in the end. It may make more sense to consider that the Internet is the best embodiment of the change of the traditional exclusive right paradigm to a compensation paradigm, in which rightsholders organize the market—to a certain extent—with a view to ensuring proper financial returns. In other words, if the only option of users is to infringe or not access music at all, many of them will find a way to access the content they want. If, on the other hand, content is accessible but in an organized, properly channelled way, the “need” to infringe greatly diminishes and copyright survives.

285. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).