The Right of "Making Available" under the WIPO Copyright Treaty: Conformity or Confusion? A Comparative Analysis of Select Common Law Jurisdictions in Light of Recent US Case Law Developments

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The United States (US) has long maintained that the rights enumerated in §106 of the US Copyright Act sufficiently meet its obligations under Articles 6 & 8 of the 1996 WIPO Copyright Treaty (WCT.) Where Article 6 requires the "making available" of a copyrighted work and its tangible copies, however, §106(3) speaks merely of "distribution"; and where Article 8 mandates a right of "communication to the public", §106(4)-(6) refer to public performances and displays. As modern copyright law attempts to cope with digital technology that challenges its traditional classifications, copyright owners have begun to press for broader interpretations of the exclusive rights of reproduction, distribution and performance. In the US, this has resulted in litigation that has most recently seen a number of preliminary decisions on potential infringement liability for distribution simply through the "making available" of copies on computer shared folders and hard drives. Other common law countries that have amended their copyright laws to reflect (to varying extents) the language of WCT Articles 6 & 8 also face difficulties with defining the scope of the exclusive rights, particularly given the historical distinction between the common and civil law traditions as regards the exploitation of tangible and intangible material.

In this paper, I examine the US' claim of conformity with the WCT, in light of the recent US "Internet music distribution" cases. I consider whether the §106 exclusive rights, as interpreted by the courts in these and other earlier cases, are in effect broader or narrower than what WCT Articles 6 & 8 require; and compare them with the language and scope of similar copyright legislation in other common law countries such as the United Kingdom, Canada, Australia and Singapore. Relevant case law from other such countries, including the Hong Kong Court of Final Appeal's 2007 decision in the *Bit Torrent* case and the Canadian Federal Court of Appeal's 2008 *Ringtones* decision will also be examined. The analysis will show a variety of statutory language and possible interpretations, and a lack of uniformity and clarity, as to the meaning and scope of the concepts of "distribution", "making available" and "communication to the public". By highlighting these discrepancies and uncertainties, judges, legislators and policymakers can be alerted to the need to clarify these fundamental concepts and may consider – perhaps anew – their countries' adherence to and implementation of the WCT.