IS SPOTIFY THE NEW RADIO?
The scope of the right to remuneration for "secondary uses" in respect of audio streaming services[1]

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For many years, radio broadcasting has been an important source of supplementary income for performing artists. In Europe these revenues are commonly channelled through collecting societies charged with collecting and distributing the statutory right to equitable remuneration for so-called "secondary uses" of phonograms, such as broadcasting. At the international level this right is enshrined in Article 12 of the 1961 Rome Convention on neighbouring rights and Article 15(1) of the WIPO Performances and Phonograms Treaty (WPPT). In the EU the right to remuneration is harmonized in Article 8(2) of the Rental and Lending Directive.

In the early 1990s the emergence of on-demand music download services led to the introduction in the WPPT of a special right of making available for performers and phonogram producers. Since dissemination of phonograms by downloading on-demand was seen as a substitute to traditional record manufacturing and distribution, these new services were deemed "primary" rather than "secondary" uses. The new right of making available was therefore shaped as a full-fledged and transferable exclusive right rather than a 'mere' right of remuneration. Consequently, the statutory right of remuneration no longer applied. Instead, performers were expected to rely on their new exclusive right to secure revenue from these new services.

After the turn of the millennium most online music services gradually evolved from offering downloads on-demand, such as the now defunct Apple iTunes, to online *streaming* services such as Spotify. These services increasingly exhibit broadcast-like characteristics. For example, Spotify offers its listeners a wide variety of pre-programmed *playlists* that resemble traditional radio broadcasting services.

This raises the question of the legal status of playlists and similar broadcasting-like services offered by online streaming services. Can such services be deemed to 'make available' phonograms? Or should these services rather be treated on a par with traditional broadcasting services, and therefore fall within the legal mandate of the collecting societies that are charged with collecting the remuneration right?

The answer to this question is crucial to the income position of performers. In current practice, performing artists are entirely dependent for their streaming revenues on royalties contractually agreed with the record labels that have entered into licensing deals with the streaming services. Because the bargaining power of most artists is relatively weak, their exclusive rights of making available are routinely transferred to the labels, barring performers from directly negotiating licensing deals. As a consequence – paradoxically – the stronger right of making available has led to very modest revenue, as compared to the much more

[1] This contribution is dedicated to my colleague, co-author, co-editor, co-member of the European Copyright Society and good friend Thomas Dreier, one of Europe's pioneers in the field of 'digital copyright'. It is based on research for a legal opinion for SENA Performers.

substantial royalties collected on the basis of the right to remuneration for traditional 'airplay'.[2]

This contribution is structured as follows. First, we take a closer look at the broadcasting-like services that are the focus of our present analysis. In Section 2 we then examine the scope of the statutory right of equitable remuneration as codified in the Rome Convention and the Rental and Lending Directive. Thereafter, in Section 3, we interpret the right of making available laid down in the WPPT and the Copyright in the Information Society Directive. Here we also develop a list of general factors on the basis of which streaming services that should fall under the remuneration right can be distinguished from services that are covered by the right of making available. Finally, in Section 4 we apply our legal analysis to the hybrid services that are the focus of this contribution.

1. The rise of broadcasting-like services

Online streaming services are rapidly growing in number, variety and economic importance. At one end of the spectrum are online services that do not allow for any degree of interactivity (other than switching the service on or off by the consumer) and have all the characteristics of traditional radio broadcasting. This category includes, for example, web radio and the use of phonograms as background music for websites. Non-interactive online services also include all kinds of 'narrowcasting' services, where subscribers can listen to the streamed music in a prearranged order without being able to select specific songs. The provision of 'music on hold' by call centres also falls into this category. At the other end of the spectrum are services that operate entirely on-demand, letting the user choose from a catalogue of music recordings or other content for downloading or streaming. The classic example is the iTunes music download service in its original incarnation.

Between these extremes are a range of services that exhibit features of broadcasting, but at the same time provide some degree of interactivity, personalization or retrievability. It is these services that are the focus of our attention. Examples of such hybrid services are the *playlists* offered by Spotify. While some playlists are fully or partially personalized based on the subscriber's usage profile (e.g., Spotify's "Daily Mix," "Discover Weekly," and "Radio"), many other playlists (e.g., "Peaceful Piano") are offered in non-personalized form to all subscribers in the same programming order. A more recent example of a Spotify service with obvious radio-like characteristics is 'Music + Talk', which combines the Spotify playlist feature with elements of talk radio.[3]

2. The notion of broadcasting in the Rome Convention and the Rental and Lending Directive

[2] See e.g. Ben Sisario, 'Musicians Say Streaming Doesn't Pay. Can the Industry Change?', NY Times, 7 May 2021, available at https://www.nytimes.com/2021/05/07/arts/music/streaming-music-payments.html.

[3] See https://newsroom.spotify.com/2020-10-14/spotify-launches-new-audio-experience-combining-music-and-talk-content/.

The statutory remuneration right has its origin in Article 12 of the Rome Convention (RC). Reflecting a compromise between the competing interests of performers, phonogram producers and broadcasters, this article provides for a right to remuneration with regard to the 'secondary use' of commercially published phonograms. Article 12 RC reads as follows:

> If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. […]

Article 12 RC does not mandate an exclusive right (right to prohibit), but provides for a right to equitable remuneration that is to be granted either to the performing artists or to the record producers, or to both. The right applies, first and foremost, to acts of "broadcasting". Article 3 (f) RC defines this as "the transmission by wireless means for public reception of sounds or of images and sounds". Thus, the concept of broadcasting under the Rome Convention does not extend to transmission by cable or other 'wire'. [4] The word 'directly' also excludes acts of rebroadcasting from the scope of the right to remuneration.[5] Moreover, a broadcast must be intended for reception by the public. According to the WIPO Guide to the Rome Convention, the words "for public reception" imply that "transmissions to a single person or a defined group (ships at sea, aircraft, a fleet of taxis) are not broadcasts for the purpose of the Convention."[6]

The remuneration right of art. 12 RC additionally applies to "any communication to the public", a concept that is not defined in the Rome Convention. Examples include the use of phonograms in discotheques and the playing of background music in shopping centres, restaurants, supermarkets, hotels, etc. It is uncertain whether making phonograms available via the Internet can also be understood as 'communication to the public'. Von Lewinski considers this to be a 'controversial' question, but nevertheless a defensible proposition, based on 'dynamic interpretation' of the relevant provisions.[7] However, the issue is of only limited importance, given the special status of the right of making available in the WPPT.

Rental and Lending Right Directive

Article 12 RC has strongly influenced Article 8 (2) of the Rental and Lending Right Directive (RLD) that harmonises the remuneration right for the EU Member States.[8] Note that the neighbouring rights in this Directive provide only for minimum harmonisation. Member States were (and are) therefore free to provide for more far-reaching protection.[9]

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[4] Von Lewinski , *International Copyright and Policy*, OUP 2008 [Von Lewinski], p. 200.
[5] F. Brison in: Dreier/Hugenholtz, *Concise European Copyright*, 2nd ed., Rome Convention, Art. 12 , note 2. Visser, *Naburige rechten*, Deventer: Tjeenk Willink 1999 [Visser], p. 74-75. See also F. Brison, *Het naburig recht van de uitvoerende kunstenaar* (dissertation), Brussels: Larcier 2001, p. 71-72.
[6] WIPO Guide to the Rome Convention (1981), para. 3.18.
[7] Von Lewinski, p. 214.
[8] Directive 92/100/EEC, as amended in Directive 2006/115/EC.
[9] Walter/Von Lewinski, p. 323.

Article 8(2) RLD, which was left unchanged by the 2006 "codification" of the Directive, reads as follows:

> Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them.

While the wording of Art. 8 (2) RLD is quite similar to Art. 12 RC, not being limited to "direct" uses its scope of protection is broader.[10] The right to remuneration therefore also applies to all kinds of 'indirect' uses, such as rebroadcasting and playing of broadcast music in a café or restaurant.[11] Like the corresponding provision in the Rome Convention, however, the right to remuneration remains limited to wireless (re)broadcasting.

The concept of communication to the public is not defined in the Directive and is to be interpreted in the light of the Rome Convention.[12] Cable retransmission is therefore probably not covered; however, Member States are free to extend the right to remuneration to such uses.[13] The notion of 'communication to the public' in Art. 8(2) RLD is to be distinguished from the identical term in Art. 3 of the Copyright in the Information Society Directive (InfoSoc Directive), and should be interpreted independently.[14] According to the CJEU, interpretation requires an "individual assessment" in which "several complementary criteria, which are not autonomous and are interdependent" must be taken into account.[15] For example, a hotel operator that makes television sets and CD players available to its guests is communicating to the public within the meaning of 8 (2) RLD and obliged to pay remuneration.[16]

The concepts of 'broadcasting' and 'communication to the public' in Art. 8(2) RLD are sufficiently broad to encompass a variety of Internet-based broadcasting-like services, such as webradio, webcasting and simulcasting, even though these forms of use did not exist when the Directive was first conceived.[17] This broad interpretation of the scope of Art. 8 (2) is supported by the 2005 Recommendation of the European Commission on the collective management of online music rights.[18]Article 1(f)(ii) of the Recommendation defines 'online rights' as including:

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[10] See M.M. Walter & S. Von Lewinski (eds.), *European Copyright Law*, OUP 2010 [Walter/Von Lewinski], p. 322.
[11] Walter/Von Lewinski, pp. 323-324.
[12] CJEU SCF (Marco Del Corso), para. 56.
[13] Walter/Von Lewinski, p. 320.
[14] CJEU SCF (Marco Del Corso), para. 74-76. See Krikke in *Concise European Copyright*, 2nd ed., Rental and Lending Right Directive, art. 8, note 3(b).
[15] CJEU PP Ireland, para. 29-30, quoting SCF.
[16] CJEU PP Ireland.
[17] Walter/Von Lewinski, pp. 320-321.
[18] Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC).

> the right of communication to the public of musical works, either in the form of a right to authorise or prohibit pursuant to Directive 2001/29/EC or in the form of a right to equitable remuneration pursuant to Directive 92/100/EEC, which includes webcasting, internet radio and simulcasting or near-on-demand services received either on a personal computer or on a mobile telephone.

3. 'Making available' in the WPPT and the Copyright in the Information Society Directive

The WIPO Performances and Phonograms Treaty (WPPT) was adopted in Geneva in 1996 with the aim to update and strengthen the minimum rights of the Rome Convention in the light of the emerging Internet. The treaty introduced an exclusive right of 'making available' of fixed performances, which was granted to performers and phonogram producers in Articles 10 and 14. Art. 10 WPPT reads as follows:

> Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

Article 14 WPPT grants an identical right of making available to producers of phonograms. Both articles are the result of proposals made by the European Commission during the negotiations that led to the treaty (and its sister treaty, the WIPO Copyright Treaty).

The introduction of an exclusive 'making available' right was considered desirable because the Internet enabled new forms of use that might compete with or even replace existing forms of content dissemination, such as the distribution of CDs.[19] With a view to the future, the right of making available is expressed in technology-neutral terms. In other words, it does not matter what technical means are used to make phonograms available; 'making available' can therefore also be done by way streaming[20] or 'push technology'.[21]

Article 10 WPPT is based on the WIPO Basic Proposal, which determined availability on the basis of two factors: interactivity and 'on-demand access'.[22] Ricketson/Ginsburg note that:

> Nothing in the Records of the Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions (WIPO, 1996), indicates that the language 'from a place and at a time individually chosen by them' received special attention, apart from general endorsement of its adaptability to digital communications. [23]

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[19] For a comprehensive history of the WPPT, see Reinbothe & Von Lewinski, *The WIPO Treaties on Copyright*, [2nd] ed., Oxford: OUP 2015 [Reinbothe/Von Lewinski], p. 342 ff.
[20] Reinbothe/Von Lewinski, p. 350; see in particular note 449.
[21] Reinbothe/Von Lewinski, p. 351.
[22] Ricketson & Ginsburg, *International copyright and neighbouring rights, The Berne Convention and Beyond, Oxford*, [2nd] ed., 2006 [Ricketson/Ginsburg], p. 1265.
[23] Ricketson v. Ginsburg, p. 748, nt. 144.

According to Reinbothe/Von Lewinski, the words “from a place and at a time individually chosen by them” in Article 10/14 WPPT do not encompass pre-programmed services that are offered at specific times where listeners have no influence on the time at which they can access the performance. [24] But according to the same authors, the right of making available does cover catch-up services by broadcasters:

> Although his or her choice in this case does not relate to an individual performance, the fact that the broadcasting station does not allow him or her to make a more precise choice does not hinder the application of the right of making available; also in this case, the decisive element is that a particular performance (as part of a whole 'package' of several hours) has been chosen by an individual consumer to be made available for access by him or her, as opposed to a programme that is broadcast to the public irrespective of his or her demand. [25]

Reinbothe/Von Lewinski also speculate about other forms of use, in which the user may choose the genre of music or exclude songs, so-called ‘unicasting’ – apparently in contrast to broadcasting:

> One will have to look closely at every single model; the degree of individual choice of time and place of access a particular performance or package of performances will be, in fact, different. Where the individual choice prevails and the user can determine what performances or set of performances are made available to him or her, while they are not transmitted in the same way to another person at the same time, such a scenario is covered by the right of making available. [26]

Art. 15 (1) WPPT provides for a right to equitable remuneration for secondary use of phonograms that goes beyond Art. 12 RC in several respects:

> Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.

By way of derogation from the Rome regime, the remuneration right is granted both to performers and phonogram producers. Furthermore, the right extends to 'direct or indirect use' of phonograms.

The remuneration right first and foremost concerns the use of phonograms 'for broadcasting'. In line with the Rome Convention's definition this term is defined in Article 2(f) WPPT as "the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof". As in the Rome regime, 'broadcasting' therefore remains limited to wireless transmission. [27]

Likewise, the right to remuneration of Article 15 (1) WPPT extends to 'any communication to the public' of phonograms. Art. 2(g) WPPT defines this as:

[24] Reinbothe/Von Lewinski, p. 350-351.
[25] Reinbothe/Von Lewinski, p. 351.
[26] Reinbothe/Von Lewinski, p. 351.
[27] Ricketson/Ginsburg, p. 1244.

> the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of Article 15, "communication to the public" includes making the sounds or representations of sounds fixed in a phonogram audible to the public.

This makes ‘communication to the public' within the meaning of Article 15 WPPT a twofold concept. Firstly, it covers any *transmission* of phonograms "otherwise than by broadcasting", which clearly includes wired transmissions. The second part of the definition extends the notion to the use of radios, jukeboxes, etc. in public places. [28]

In their treatise on the WPPT, Reinbothe/Von Lewinski offer various examples of direct and indirect uses:[29]

- "Direct use for broadcasting" includes the broadcasting of phonograms by radio or television broadcast over the air.
- "Direct use for communication to the public": e.g. use in discos, bars, restaurants, shops, etc.
- "Direct use for communication to the public" includes cable radio, internet radio, etc.
- "Indirect use for broadcasting" covers retransmission over the air.
- "Indirect use for communication to the public" includes playing music from radio, television or computers in public places, such as bars, restaurants, etc.

Nevertheless, Article 15 WPPT is unlikely to cover the 'making available' of phonograms. Although the wording of Article 15 and the definition of 'communication to the public' do not rule out an extension to forms of 'making available', the structure of the WPPT precludes such a broad interpretation. Indeed, Articles 10 and 14 WPPT explicitly provide for an exclusive right with regard to making available phonograms. This right would become largely meaningless if making available were to fall within the ambit of the remuneration right as well.[30]

During the drafting of the WPPT, the borderline between forms of 'making available' (that fall under the scope of the exclusive right) and broadcasting-like services (that are covered by Article 15) was extensively discussed. The debate turned on the status of so-called 'multi-channel services', in which large quantities of music recordings would be offered in an ever-changing order through a multitude of parallel channels. The United States delegation aspired to place such "near-to-interactive" services under the exclusive right of making available, but found insufficient support among the other states.[31] Eventually, this disagreement led to the adoption of an Agreed Statement in connection with Art. 15 WPPT:

> It is understood that Article 15 does not represent a complete resolution of the level of rights of broadcasting and communication to the public that should be enjoyed by performers and phonogram producers in the digital age. Delegations were unable to achieve consensus on differing proposals for aspects of exclusivity to be provided in certain circumstances or for

[28] Reinbothe/Von Lewinski, pp. 267 and 281-282.
[29] Reinbothe/Von Lewinski, p. 399-400.
[30] Ricketson/Ginsburg, p. 1246; Reinbothe/Von Lewinski, p. 400.
[31] See Reinbothe/Von Lewinski, pp. 345, 392. See also M. Ficsor, *The Law of Copyright and the Internet*, OUP (2002), pp. 638-640.

> rights to be provided without the possibility of reservations, and have therefore left the issue to future resolution.

Information Society Directive

The WPPT was ratified by the European Union and its Member States on 14 December 2009, and entered into force for the EU on 14 March 2010.[32] Much earlier, important parts of the treaty were already incorporated in the 2001 Copyright in the Information Society Directive. In line with Articles 10 and 14 WPPT, Article 3 (2) InfoSoc Directive instructs the Member States to provide for an exclusive 'making available' right for (inter alia) performers and phonogram producers. This right is defined as

> the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

In the explanatory memorandum to the original proposal[33], the European Commission discussed at length the importance and significance of the new 'making available' right. The European Commission noted that the first 'on-demand' services were launched in 1995 and 1996. Also, the first experimental 'online music shops' ('digital jukeboxes') were spotted in Europe. The Commission expected such services to penetrate the market during the 2000-2005 interval.[34]

The Commission characterised 'on-demand' services

> by the fact that a work or other subject matter stored in digital format is made permanently available to third parties interactively, i.e. in such a way that users may order from a database the music or film they want; this is then relayed to their computer as digital signals over the Internet or other high-speed networks, for display or for downloading, depending on the applicable licence. [35]

In the explanatory memorandum the Commission also addressed the distinction from broadcasting:

> The element of individual choice hints at the interactive on-demand nature of access. The protection offered by the provision thus does not comprise broadcasting, including new forms of it, such as pay-TV or pay-per-view, as the requirement of "individual choice" does not cover works offered in the framework of a pre-defined programme. Similarly, it does not cover so-called near-video-on-demand, where the offer of a non-interactive programme is broadcast several times in parallel at short intervals. Furthermore, the provision does not cover mere private communication, which is clarified by using the term "public". [36]

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[32] https://www.wipo.int/treaties/en/notifications/wppt/treaty_wppt_78.html.
[33] Explanatory Memorandum on the Proposal for a Directive on Copyright in the Information Society, European Commission, COM(97) 628 final, Brussels, 10 December 1997 [Explanatory Memorandum on the InfoSoc Directive].
[34] Explanatory Memorandum on the InfoSoc Directive, p. 5-6.
[35] Explanatory Memorandum on the InfoSoc Directive, p. 5.
[36] Explanatory Memorandum on the InfoSoc Directive, p. 26.

So-called 'near-on-demand' services should therefore remain outside the scope of the making available right:

> The making available right set out in Article 3(2), covers, as does paragraph I with respect to authors, the making available of such subject matter by wire or wireless means. It is limited to situations where the subject matter is made available from a place, and at a time individually chosen, i.e. interactive and "on-demand". Likewise, it does not cover on the one hand private communications nor any forms of broadcasting, including "near-on-demand" services. As explained in the Commission's Copyright Communication of November 1996 conclusions to the Green Paper consultation, the need for an exclusive right for certain forms of broadcasting to the benefit of neighbouring rightholders has not as yet been ascertained. [37]

Recital 24 of the Directive as finally adopted implicitly confirms that the right of making available does not extend to near-on-demand services:

> The right to make available to the public subject-matter referred to in Article 3(2) should be understood as covering all acts of making available such subject-matter to members of the public not present at the place where the act of making available originates, and as not covering any other acts.

Commenting on this provision, Walter/Von Lewinski opine that two factors determine the distinction between making available and broadcasting: (1) the fact that the audience is not reached *simultaneously*, and (2) the absence of a *program*.

> Thus it is made clear that the public need not necessarily be addressed at the same time and that the making available does not presuppose the provision of a designed programme. As is the case with the distribution right, the public is addressed successively, the access to the material made available being carried out individually (interactively).[38] […]

> The decisive criterion for the distinguishing of making available from broadcasting is that the user in the case of making available may access a specific work or other subject matter whenever he decides and from whatever place, whereas in the case of broadcasting the access to a specific work can only be carried out simultaneously with its transmission. The assumption of broadcasting, therefore, presupposes the presentation of more or less continuous programme." [39]

In his commentary on the InfoSoc Directive, Bechtold places particular emphasis on "individual control":

Relevant factors

From the preceding discussion we conclude that various interrelated factors play a role in determining the distinction between acts of broadcasting or (other) communication to the

[37] Explanatory Memorandum on the InfoSoc Directive, p. 26.
[38] Walter/Von Lewinski, p. 983.
[39] Walter/Von Lewinski, p. 984.

public, which are subject to the right to remuneration, and acts of making available to the public, that are covered by the exclusive right.

1) Programme: is there a searchable catalogue of phonograms on offer or is the sequence of recordings arranged according to a predetermined schedule programme)?
2) Accessibility: does the consumer have direct access to every phonogram in the database?
3) Choice of time: is the consumer able to access the desired phonogram directly at any time?
4) Location: is the consumer able to access the service at a location of his or her choice?

Re 1) The first criterion is known from broadcasting law, and is used there to distinguish broadcasting services from other 'media services'.[40] In this context, a distinction is often made between 'linear' and 'non-linear' services.

Ad 2) The second criterion is reminiscent of the definition of 'database' in the Database Directive.[41] If the elements contained in a database are not separately retrievable by its users, there is no 'database'. For the same reason, there is no 'making available' of a phonogram if the phonogram is not directly and individually accessible.

Re 3) The third criterion is related to the second one. This test is met if the consumer can determine the time at which he or her can listen to the phonogram. Criteria (2) and (3) are often jointly referred to as 'interactivity'.

Re 4) The fourth criterion is the least problematic in practice. Virtually all music services offered over the Internet can be enjoyed through a variety of mobile devices, and are therefore accessible from any place the user chooses.

Although this catalogue of criteria can be useful in interpreting the right of making available in a specific case, it will not solve all hard cases immediately. For instance, a playlist created by Spotify may not meet the first criterion, but assuming that the playlist is transparent for the consumer and the songs in the playlist can be chosen individually by the consumer, it might still meet the other criteria. Such borderline cases are discussed in the concluding section of this contribution.

4. Analysis and conclusions

As we have seen, the right to remuneration for ‘secondary uses’ is to interpreted in the light of two treaties and two Directives. This does not make it easy to arrive at an unequivocal interpretation. Moreover, the relevant provisions were drawn up at the end of the last century,

[40] See Art. 1 (1) (e) of the Audiovisual Media Services Directive: "television broadcasting" or "television broadcast" (i.e. a linear audiovisual media service) [is] “an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule”.

[41] See Article 1(2) Database Directive: “‘database’ shall mean a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.”

when the Internet was still in its infancy and most of the services that are the focus of this contribution were science fiction. The Contracting States to the WPPT were well aware of their limited foresight. In the Agreed Statement to Art. 15 WPPT, the contracting parties declared that they could not agree on the exact scope of the right to remuneration in view of future technological developments. The Treaty therefore left ample room for a dynamic interpretation.

An additional complicating factor in the interpretation is that several core concepts are not sharply delineated. As appears from the foregoing analysis, the concepts of 'broadcasting' and 'communication to the public' that determine the scope of the remuneration right cover a wide range of services far beyond broadcasting in the traditional sense. The presence of a programme seems to be a key feature: the phonograms are offered to the listeners in a fixed sequence.

However, the analysis also shows that the concept of 'making available', where the right to remuneration does not apply, goes beyond the mere making available of phonograms for download. The decisive factors here are the accessibility of the offered content and the time independence of the service. If the recipient can decide which phonograms he or she wishes to listen to at which moment in time, the service is deemed 'interactive'.

These concepts overlap where online services exhibit features of both categories, as is the case with hybrid music services that are pre-programmed but where phonograms are also individually accessible on demand. This can lead to opposite conclusions depending on the starting point of the analysis. For example, an analysis based on the concept of 'broadcasting', in which the program criterion is decisive, will easily lead to the conclusion that all pre-programmed streaming services are subject to the remuneration right. Conversely, an analysis based on ‘making available’ might lead to the conclusion that all kinds of programmed (broadcasting-like) online services are covered by the exclusive right, because the phonograms offered in the form of playlists remain individually accessible just the same.

Clearly, the dynamic technical developments in this field make drawing a sharp line almost impossible. This was the conclusion of the Institute for Information Law in a report submitted to the European Commission in 2006:

> With digital distribution technology still developing, it is difficult to conceive of a precise definition of 'on demand' distribution, i.e. delivery at a time and place individually chosen by the user (i.e. through pull rather than push technology). Precisely what level of interactivity it implies is not quite clear. In practice, dissemination on line is done through models along a sliding scale of interactivity. [42]

Depreeuw concurs with this nuanced view in her 2014 dissertation:

> Some services cannot be readily classified as either broadcasting, making available or some other unspecified form of communication to the public. In theory, it is clear that the interactive nature of a service entails that it should be seen as a making available to the public, but ambiguous cases remain. [...] Moreover, many online service providers (such as music streaming platforms) offer services with mixed features: the end-user can pick songs and

[42] IViR, Recasting Study (2006), p. 59.

make a playlist (on demand) but she can also listen to "featured radio channels", readily made playlists or "recommendations" based on her music profile. [43]

All this makes the interpretation and application of the relevant provisions rather complex. A correct interpretation of the right to remuneration requires (to paraphrase the Court of Justice) an "individualised assessment". Nevertheless, some general guidelines can be formulated based on the above.

In the first place, it is clear that the remuneration right in any event extends to a spectrum of broadcasting-like digital services, such as digital airwave broadcasting (DAB), digital cable radio, webcasting and simulcasting. The narrowcasting services referred to in Section 1 are also covered by the remuneration right, as are other 'near-on-demand' services. In all cases, these are pre-programmed services offered at specific times, whereby the recipients of the service have no influence on the choice of phonograms or on the time at which they are listened to or downloaded. Therefore, the offering of these services is to be considered '[any] communication to the public' within the meaning of Article 8(2) of the Rental and Lending Directive, subject to the right of remuneration.

Whether the services in question are offered over the air or by 'wire' makes little difference to the scope of application of the remuneration right - despite the extensive discussions on the subject. With the rapid advance of 'mobile Internet', this distinction has become highly artificial.

The right to remuneration also covers the use of streaming services in public places, such as the playing of Spotify repertoire in bars and restaurants, even if these are personalized playlists. Following the case law of the Court of Justice, this applies equally to the provision of smart TVs or tablets in hotels on which Spotify or other music streaming services are preinstalled.

Secondly, it is clear that services that consist solely in making individual phonograms available for downloading or streaming at the individual request of consumers constitute forms of 'making available to the public' and therefore fall outside the right to remuneration. This applies, for example, to the core streaming and download services offered by Apple Music and Spotify.

This leaves us the key question of how to deal with playlists and other hybrid services that have characteristics of both. How to determine whether such services are covered by the remuneration right or the right of 'making available'?

The history of the Rome Convention shows that the right of remuneration is motivated by at two different policy objectives: on the one hand, to guarantee a fair return for performers and phonogram producers for the use of their performances and phonograms by broadcasters and, on the other hand, to ensure that (radio) broadcasters would not be unduly hindered in the fulfilment of their broadcasting mission. [44]

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[43] Sari Depreeuw, *The Variable Scope of The Exclusive Economic Rights in Copyright*, Kluwer Law International 2014, pp. 443-444.

[44] WIPO Guide to the Rome Convention (1981), para. 12.18-22.

In light of this dual rationale it seems reasonable to apply the remuneration right to services that are economically comparable to traditional broadcasting. Moreover, we might also take into account that the pecuniary interests of the performers are better served by a statutory remuneration right than by an exclusive right that usually is passed on to the phonogram producers. In other words, a narrow interpretation of the remuneration right would be inconsistent with the intention of the Convention to ensure equitable remuneration for performers.

The genesis of the WPPT and the InfoSoc Directive shows that the main reason for introducing the right of making available was the expectation was that the provision of phonograms by way of on-demand services would eventually replace the manufacture and physical distribution of phonorecords. This expectation has indeed materialized; the CD market has collapsed and streaming services have become the primary means of exploitation of phonograms. [45] This economic rationale justifies that the exclusive right of 'making available' extends to online services that fulfil a function for consumers that is similar to that of a self-purchased CD collection. Based on this rationale, it is reasonable that the exclusive right applies to online services offering a catalogue of readily available phonograms, such as the core services of Apple Music and Spotify. [46]

On the other hand, it is much less obvious to extend the exclusive right to services that perform, to a large extent, a different economic function and that do not (significantly) serve as substitutes for the physical distribution of phonograms. This might be the case for streaming services which, although technically offering content 'on-demand', do not invite interactive behaviour by consumers, and are functionally much closer to broadcasting services. Whether and to what extent such substitution occurs is something to be determined by empirical economic research.

This economic approach finds support in the argument that a purely technical-formal interpretation of the right of 'making available' could easily lead to an uneven playing field and market distortion. From a perspective of fair competition, it is hard to see why traditional broadcasting services are subjected to the remuneration right, while functionally equivalent online services are not.

The above can be illustrated by the various services offered by Spotify. While, as mentioned, Spotify's basic service is clearly covered by the right of making available, this may not be the case for a number of additional Spotify services. For example, many of the playlists offered by Spotify generally (i.e. to all subscribers) are quite similar to traditional broadcasting services. Spotify offers a large variety of playlists, divided into genre categories, that are intended for passive listening; in practice, the phonograms on the playlists will rarely be individually accessed by the subscribers. This is true not only for playlists intended for situations where interactivity is practically impossible or undesirable (such as those for the categories 'Workout', 'Sleep' and 'Dinner'), but also for many other categories.

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[45] See https://techcrunch.com/2018/01/04/on-demand-streaming-now-accounts-for-the-majority-of-audio-consumption-says-nielsen/.

[46] By the way, many streaming services do not allow the downloading of phonograms at all. See https://en.wikipedia.org/wiki/Comparison_of_on-demand_music_streaming_services.

While standard playlists are functionally and economically comparable to genre-specific radio channels, the similarity is even more striking with Spotify's 'Radio' services. Unlike playlists that contain a finite number of phonograms, 'Radio' services are endless. Whereas substitution with the physical distribution of phonograms is unlikely, these radio-like services directly compete with traditional radio broadcasting.

Other playlists are more difficult to qualify. The playlists generated by Spotify for each individual subscriber on the basis of their usage profile ('Your Daily Mix') are based on the the subscriber's personal preferences, as these are known from the songs and albums they have listened to in the past. At the same time they fulfil a 'radio function' in that they do not invite interaction and often continue indefinitely.

The advertisement-based free streaming service offered by Spotify ('Spotify Free') also exhibits hybrid features. Although this service offers some degree of interactivity, users are restricted in their freedom to access or skip individual songs. In addition, users are forced to listen to advertisements. In economic terms, Spotify Free is somewhere between a purely interactive streaming service and a radio broadcasting service. Even the basic paid service of Spotify ('Spotify Premium') shows some broadcasting characteristics, in that (depending on the user setting) albums once listened to automatically turn into 'radio'.

These examples illustrate that online music streaming services such as Spotify cannot simply be qualified unequivocally as forms of 'making available'. Platforms like these in fact offer a broad spectrum of music services, some of which closely resemble broadcasting. It is entirely plausible that at least some of these services fall under the statutory right to remuneration rather than the right of making available.