

A Technologically Neutral Solution for the Internet: Is It Wishful Thinking?

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It has become commonplace to say that any change in a copyright legislation that would be required in order to come to terms with the Internet should be drafted in a technologically neutral language. The call for this approach started to be made fairly early on as the copyright community was coming to grips with the issue. The reason for this concern sprang from a rather disquieting observation: no sooner would the rough sketch of a proposition be put forward than it would run the risk of being considered inappropriate because of more recent technological developments. Indeed, the pace of these developments is such that new complications come up just as a solution appears to be in sight. The phenomenon is very disconcerting for people who prefer the relative certainty of legal rules.

It is easy to understand the preoccupation with a solution that would last at least as long as it took to devise it. Yet, one may wonder if this goal is within our grasp. The development of copyright law has almost always been driven by technology; it is therefore no surprise that we should have to address the consequences of a technology that offers so much potential to the creation and dissemination of works. However, the process through which we are now going has already occurred in the past and it is responsible for today's copyright system, *i.e.*, it has given us the analytical framework with which to move forward. At this point in our collective reflections, it could prove to be instructive to pause and examine how copyright law has reacted in the past to the advent of new technologies. In particular, how technologically neutral has copyright law remained when the former new technologies were integrated into it? Some of these technologies provided new tools to create works (I), while others have played a greater role in the propagation of works (II). Of course, some have a dual nature and will be appraised under both angles. This exercise should help one put in perspective the contemporary call for a technologically neutral copyright law.

I. NEW TECHNOLOGIES FOR THE CREATION OF WORKS

Even though many activities that give rise to protected works continue to be done today in the same manner as hundreds of years ago, the progress of science has yielded new tools with which to give way to creativity. Forms of expression have been developed and acknowledged in one way or another by international copyright conventions and national statutes. Because the focus of this paper is on the Internet, the technologies that will be examined will be divided between those of the pre-digital world (A) and those that rely on the digital medium (B).

A. Pre-Digital Technologies

Over time, various technologies have appeared which have pushed further the limits of creation of artistic works as well as of works or objects that involve the use of sounds. In the first category, one can include photography and its derivative, cinematography. The second group of technology refers to sound recordings and thus raises even more controversial issues from a doctrinal standpoint.

Despite being the oldest art form that requires technological equipment, even today, photography is not always considered on an equal footing with other artistic endeavours. Perhaps the prime example of its uneasy position within copyright law is the special status it enjoys in the Berne Convention. Article 7(4) of the Convention provides that:

“It shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works [...]; however, this term shall last at least until the end of a period of twenty-five years from the making of such a work.”

Thus a particular rule on the term of protection is introduced, a rule which is not linked to a physical author's life. This negation of the author's role has an impact on the perception one may have of the originality of the work, indeed of the author's creativity in the making of such works. It is therefore no surprise to see national copyright laws that pointedly protect photographs for a lesser period of time and that cast the creator of photographs in a different light. In the Canadian *Copyright Act*, where the author of a photograph is the person, including the legal entity, who owns the negative at the time the photograph is made, this is effected through rules that nevertheless recognise that photographs are protected as

works,¹ whereas German law, for instance, provides for a shorter term of protection to “simple photographs” that are made by a “photographer” rather than an “author.”² The extreme position, of course, was that of the Nordic countries where all photographs were protected under a separate statute that was specifically designed for them.³

Cinematography was invented several decades after photography and has also given rise to many special rules. Again, the Berne Convention provides a fine example of the extent to which particular rules can be devised for a “new” type of work. These rules are, moreover, far more detailed than the one that applies to photographs. Not only is there a special term of protection for cinematographic works in Article 7(2) of the Convention, but the text sees to the status of cinematographic adaptations of works as well as of the cinematographic works themselves. Especially in the latter case, the non-committal statement on authorship⁴ has allowed for solutions that are as diverse as the work-for-hire rule in the US *Copyright Act*,⁵ the presumption of authorship status in the French Code of Intellectual Property,⁶ and the film copyright approach in the U.K. *Copyright, Designs and Patents Act 1988*.⁷ Moreover, special criteria of eligibility of protection and of determination of the country of origin apply to this category of works.⁸

The last technology to be examined in this group is that of the sound recording. Compared with photography and cinematography, its status is even more controversial: while copyright countries like the United Kingdom and the United States are willing to consider sound recordings as “works”, author’s rights countries are fundamentally opposed to this approach. The strength of their stance can be easily proven by the very existence of two international conventions that deal with the protection of these objects: the Rome Convention of 1961 and the Geneva Convention of 1971. This existence of a parallel status allows

¹ *Copyright Act*, R.S.C. 1985, c. C-42, s. 10.

² *Act Dealing with Copyright and Related Rights* of September 9, 1965, s. 72.

³ For example, see the Swedish *Photography Act* 1960: 730, that has been repealed in 1994.

⁴ “Ownership of copyright in a cinematographic work shall be a matter for legislation in a country where protection is claimed.” Berne Convention, s. 14*bis* (2)(a).

⁵ *Copyright Act*, 17 U.S.C. § 101 (1988).

⁶ S. L. 113-7 C.I.P.

⁷ *Copyright, Designs and Patents Act 1988*, (U.K.) s. 9(2)(a).

⁸ Berne Convention, s. 4, 5(4)(c)(i), and 15(2).

for the creation of a distinctive body of rules governing all aspects of the protection. Yet, an examination of the laws of the copyright countries that do not embrace the neighbouring rights framework reveals that, there too, sound recordings are subject to rules that differ from those that are applicable to the traditional works protected by copyright in areas such as ownership, term of protection, and rights.

Despite its very cursory nature, this brief overview of the reaction of copyright to the introduction of new objects of protection shows that the response they provoked was the production of rules that are specifically tailored to accommodate the difficulties that they were perceived to generate. Moreover, it is particularly striking that the many special provisions have been maintained up to today, even though these technologies can no longer be considered revolutionary. Even in the case of photographs, for example, for which the WIPO Copyright Treaty of 1996 requires that the Member States no longer apply the special term of protection of Article 7(4) of the Berne Convention,⁹ countries are not prevented from having a separate neighbouring rights regime for photographs that are not original works. Indeed, the European directive on the term of protection, which reinforces that original photographs are protected for as long as the other works,¹⁰ has not led to the abrogation of the neighbouring rights protection for simple photographs in Germany, for example. Given the acceptance of a particular status for new objects of protection that spring out of technology, one is led to expect that digital technology will give rise to a very complex set of special rules.

B. Digital Technologies

The digital era started with computer programs. In turn, the programs have given birth to new kinds of works whose copyright status also raised problems. This is true, to a certain extent, with respect to computer assisted and computer generated works; and the situation has become particularly riddled with difficulties in the case of databases.

The ease with which computer programs have been integrated into copyright law is striking in comparison with the fate that the previous technologies have met. Despite their highly technical and industrial character, both the TRIPs Agreement and the WIPO Copyright Treaty merely solve the issue by stating that they are to be protected as literary

⁹ WIPO Copyright Treaty of 1996, s. 9.

¹⁰ EC, *Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights*, O.J. N° L290/9 (November 24, 1992) at 6.

works and that the rental right applies to them.¹¹ No variation on the rules that govern the ownership of the rights or the term of protection is introduced. Therefore, at the highest level of international copyright law, computer programs are almost a non-event. However, it would be inaccurate to portray their impact only in light of these two agreements. The European directive on the protection of computer programs does introduce several special considerations pertaining to ownership, rights and exceptions, and reverse engineering.¹² Consequently, national legislations have followed suit and incorporated some of these measures. The overall picture is thus fairly mixed: on the one hand, there is practically no special status—and that attitude is taken in the supposedly most trend-setting instruments—while, on the other hand, the usual preoccupation with devising particular rules still exists.

The tendency not to interfere with computer-related works is confirmed when one looks at computer-assisted works and computer-generated works. In the former case, no example comes forth in which computer-assisted works are singled out for special treatment. Indeed, no outcome has resulted from the numerous discussions on the status of one particular kind of computer-assisted work, the multimedia work. As for the even more troubling case of the computer-generated work, the only country to have addressed the issue is the United Kingdom, which recognises the existence of these works and provides, once more, special rules on authorship and on the term of protection.¹³ The general lack of interest in the consequences of the use of technology in the creation of works is perhaps due to a growing inurement to this phenomenon. It creates a rather paradoxical situation where the old technologies are still subject to a great variety of specific rules and the more recent ones, which represent challenges that are at least as daunting as the former ones, are left to welter in complacent uncertainty.

However, the tolerance level seems to have been reached with the advent of electronic databases. From a conceptual point of view, these databases are the modern day equivalent of anthologies and compilations. If they have become an issue, it is because the added electronic dimension has brought to the fore new preoccupations. Part of the concern, of course, comes from the use of the Internet as a mode of access to the databases;

¹¹ TRIPs Agreement, s. 10(1) and 11; WIPO Copyright Treaty, s. 4 and 7.

¹² EC, *Directive 91/250/ECC of 14 May 1991 on the legal protection of computer programs*, O.J. N° L122/42 (May 17, 1991).

¹³ *Copyright, Designs and Patents Act 1988*, s. 9(3) and 12(3).

but the very status of these creations within the ensembles of the protected works is also an important component of the general worriment.

The European directive on the protection of databases offers the best example of the coming to terms with the problems that databases create.¹⁴ The distinctive feature of this directive, of course, is the establishment of the *sui generis* right for non-original databases which reflects a concern that is similar to the one that exists for non-original photographs. Here again, one has recourse to a related-right mechanism in order to see to a more complete protection scheme because the limits of copyright protection have been pushed far enough. Accommodation can no longer be contemplated. Yet, even what remains within the copyright sphere is subject to some special rules: the directive spells out the position on ownership as well as on the rights and exceptions. Just like the directive on computer programs, for instance, it refers to the temporary or permanent reproduction of databases.¹⁵

The details of the European directive on databases have not found their way into international instruments. At the time the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty were negotiated in 1996, a treaty for the protection of databases was also on the agenda. Closely fashioned after the European directive, it did not come to fruition. The TRIPs Agreement does specify that databases are to be protected, but its statement is rather limited to that objective:

“Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.”¹⁶

The wording echoes that which is found in the NAFTA Agreement?¹⁷

¹⁴ EC, *Directive 96/9/EC of 11 March 1996 on the legal protection of databases*, O.J. N° L77/20 (March 27, 1996).

¹⁵ *Ibid.* at s. 5(a).

¹⁶ TRIPs Agreement, s. 10(2).

¹⁷ NAFTA Agreement, s. 1705(1)(b).

The relative lack of reaction to the onslaught of digital technology as a component of creativity is puzzling. Is the copyright community not as preoccupied with these issues today as it was with photography, cinematography and sound recordings in earlier times? The overwhelming quantity of learned texts on the subject would tend to indicate that this is far from the truth. How then should the current situation be interpreted? One can think of three possibilities.

The first interpretation is that a general consensus in favour of no special status is slowly being reached. One cannot say, of course, that no particular rule is developed since there are indeed some; but the quest for a special status has not attained the same fullness as before. Indeed, it could be the indication of a less interventionist attitude towards new technologies that is based on sentiment that copyright law already contains the necessary analytical framework to deal with them.

A variation on this interpretation could be that copyright law has matured into a consolidation phase. Instead of constantly developing vast arrays of new rules, copyright law incorporates the new technologies with as few changes as possible. This would be particularly true of the computer-assisted and computer-generated works, as well as of the databases to which general principles are merely extended. Yet, it is peculiar that this maturation process occurs in relation to the more recent technologies, at the sometime as one has to apprehend them, and that it bypasses the former technologies whose mechanisms have been tamed and understood for a much longer period of time.

Perhaps the simplest (and most cynical?) reason is that it has become too difficult to agree on a relatively complex set of specific rules when they must be approved by an ever-increasing number of people. More countries have a seat in the WIPO General Assembly now than before; the TRIPs Agreement is also meant to apply to a very large number of countries. In those circumstances, only the very basic principles can form part of an agreement. The existence of the European database directive indeed supports this interpretation: because they need suit a more restricted number of countries, the European Community authorities have a freer hand at elaborating specific regimes.¹⁸

¹⁸ The same reasoning cannot be transposed to the NAFTA Agreement which, even though it applies to only three countries, was developed in conjunction with the TRIPs Agreement.

Overall, the general trend is to continue to give new technologies some form of special acknowledgement in the international agreements when it appears inevitable in order to prevent misunderstandings, but to leave to national or even regional authorities greater freedom in working out the details. One wonders if the technologies that contribute to the dissemination of works, rather than to the creation of new works or objects to be protected, partake of the same tendency.

II. TECHNOLOGIES FOR THE DISSEMINATION OF WORKS

If it has given birth to new forms of creation, technology is perhaps even more present in modern everyday life through the means that provide access to the works. Here too, copyright law has reacted so that international, regional and national texts reflect this reality. The same distinction between pre-digital (A) and digital (B) technologies will be used here in order to assess how realistic it is to expect a technologically neutral approach to the use of works over the Internet.

A. Pre-Digital Technologies

Some of the technologies that produced new objects to protect, like photography, cinematography, and sound recordings, also provided at the same time new means to bring existing works to the public. The purpose of some other technologies, however, has strictly been the dissemination of works: broadcasting, cable and satellite communication, tape and video recorder. In their case, the production of a new object of protection, broadcast signals, has not had the impact that the former technologies have had on the evolution of copyright law as a whole. Before these technologies are examined, however, it could prove worthwhile to look at a form of communicating works that still relies on very old technology, but that has attracted much attention: translation.

It may seem anachronistic to include translation in a discussion on technological means to disseminate works. Yet, in times and in places where the more recent technologies do not exist or are scarce, the availability of works through translations is a concern as legitimate as the one to have access to broadcasts. Even though translations can be regarded as mere applications of the right of reproduction, they have been the object of specific provisions since the beginnings of the Berne Convention¹⁹ right up to the *Paris Act* with the Appendix in favour of developing countries. National legislations continue to make specific

¹⁹ Berne Convention, s. 8, 11(2)*ter* (2).

references to translations of works.²⁰ The translation of computer programs is often specified.²¹ If such an accepted way of communicating works to new audiences can still be singled out for special treatment, it is no wonder that more sophisticated technologies can be the target of elaborate legal structures.

Photography has not given rise to particular conceptual difficulties as a means of reproduction (indeed, it is often perceived only as a mode of reproduction rather than as a form of creation), but cinematography has. Article 14 of the Berne Convention deals with the cinematographic adaptation of works, as well as with all the rights that are associated with the said adaptation. This article has found its way in national legislations such as the Canadian provision in section 3(1)(d) and (e) of the *Copyright Act* and sections 19(2)(b) and 19(3) of the UK *Copyright, Designs and Patents Act 1988*. The adaptation into the cinematography form and the performance of the cinematographic adaptation are thus specifically mentioned.

Sound recordings—or, to use an earlier terminology, records, perforated rolls or other contrivances by means of which sounds may be mechanically reproduced—have also offered another reproduction medium whose use was distinguished. Today's wording in the Berne Convention seems rather innocuous: "Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention."²² This statement represents only one dimension of the reproduction of works by sound recordings, of which there are still specific national equivalents.²³ However, one should not forget the special status that is at the same time granted to mechanical reproduction rights in Article 13 of the Convention. These rights are, in reality, a compulsory licence scheme for the reproduction of musical works in sound recordings. The mechanism still exists in, for example, U.S., Australian and Swiss copyright statutes.²⁴

²⁰ Canadian *Copyright Act*, *supra* note 1 at s. 3(1)(a); U.K. *Copyright Designs and Patents Act 1988*, s. 21(3)(a)(i).

²¹ Canadian *Copyright Act*, *supra* note 1 at s. 30.6(a); EC, Directive, *supra* note 12 at s. 4(a).

²² Berne Convention, s. 9(3).

²³ Canadian *Copyright Act*, *supra* note 1 at s. 3(1)(d); U.K. *Copyright, Designs and Patents Act 1988*, s. 19(2)(b) and 19(3).

²⁴ *Copyright Act of 1976*, 17 U.S.C. § 115; Australian *Copyright Act 1968*, s. 54; Swiss *Copyright Act*, s. 23.

In order to avoid repetitions, it is more convenient to deal with broadcasting, cable, and satellite transmissions as a group, even though this approach could itself be interpreted as a step towards a technologically neutral approach to electronic media. Yet, it is rather less bold than the one whereby one would recognise that these means are modern day equivalents of the right of public performance. From a conceptual point of view, though, it is indeed permissible to consider that these modes of communication constitute an extension of the right of public performance, albeit they require sophisticated equipment. Again, however, they have been the target of many specific provisions at the international, the regional, and the national levels.

Even though the general provision on the right of public performance in the Berne Convention includes “such public performance by any means or process” and “any communication to the public of the performance of [...] works”,²⁵ extensive specifications are provided in Article 11*bis* of the Convention. Distinctions are made between broadcasting, communication by wire or by rebroadcasting, and communication by loudspeakers. Article 11*bis* also forms the basis for two special regimes that are associated with the exercise of these rights: a compulsory licence scheme and the ephemeral recording exception.²⁶

Naturally these international norms have found their way into regional instruments and national laws. An entire European directive is devoted to the problem of cable and satellite transmissions,²⁷ while the only intellectual property provisions of the Canada-United States Free Trade Agreement of 1987 pertain to the cable retransmission of works.²⁸ These regional requirements have of course spawned even more detailed national texts. The extent of their specificity will however vary. The Canadian *Copyright Act* now boasts of a “right to communicate by telecommunication” that was indeed designed to cover indiscriminately broadcasting, cable, and satellite activities; but it still sets out a compulsory licence for the retransmission of works by cable.²⁹ Extensive provisions on the collective management of this licence round off the

²⁵ Berne Convention, s. 11(1).

²⁶ Berne Convention, s. 11*bis* (2) and (3).

²⁷ *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 retransmission*, O.J. No L248/15 (October 6, 1993).

²⁸ Canada-United States Free Trade Agreement, s. 2005-2006.

²⁹ *Copyright Act*, *supra* note 1 at s. 2, 3(1)(f), and 31.

licence scheme.³⁰ The United Kingdom also has a provision on the cable retransmission of works,³¹ but in addition, the entire structure of the rights throughout the statute, in this context, rests on a distinction between broadcasting and the inclusion in a cable programme which makes for fairly convoluted drafting. By comparison, the French *Code of Intellectual Property* offers a more synthetic approach: the rights to communicate through these various media are assimilated to the notion of performance and the specifics of cable and satellite are quite limited.³²

Mass reproduction media are the last group to be examined here. They have given birth to such phenomena as reprography as well as private audio and video copying. Contrary to the other technologies that have been identified so far, however, none of the existing international agreements covers them. The European authorities are still considering their options for the harmonisation of national laws in this respect. Indeed, over thirty-five countries in the world have introduced laws that establish so-called private copying levies.³³ This mechanism, which is often mistaken for a tax, is unusual in copyright law for it pertains to a levy on the equipment that is used to make the private copies rather than a royalty that is based as much as possible on the actual use that is made of the works. Another distinguishing feature of this scheme is that the absence of a specific provision on this issue in the Berne Convention increases the likelihood that the national schemes not be included within the workings of the rule on national treatment mere reciprocity is quite common.³⁴

Concern over mass reproduction media is sometimes manifested through other techniques. With respect to reprography, for instance, national laws may provide an exception, with or without compensation, for such activities when they occur in educational institutions.³⁵ Another copyright institution can also be considered as founded in the preoccupation to curtail mass reproductions: the rental right. While one

³⁰ *Ibid.* at s.71-76.

³¹ *Copyright, Designs and Patents Act 1988*, s. 73.

³² Sections L. 122-2 and L. 132-20 J.P.C.

³³ A list appears in J.A.L. Sterling, *World Copyright Law* (London: Sweet & Maxwell, 1999) at 991, para. 79.50.

³⁴ To wit, the recent Canadian provisions on the private copying on blank audio recording media that, moreover, are not included within the statutory notion of copyright, but are yet in the *Copyright Act: Copyright Act, supra* note 1 at s. 79-88 (Part VIII of the statute).

³⁵ See, for example, Part V B of the *Australian Copyright Act 1968*, as well as the recent Canadian amendments: *Copyright Act, supra* note 1 at s. 30.1-30.4.

cannot deny that it is aimed at redressing the balance between actual enjoyment of works and the remuneration of authors, one must also recognize that the rental of works is often the first step towards private copying. One can observe too that, at the international level, an understanding of the rental right has been reached over works that are embodied in tangible media that are particularly prone to private copying, *i.e.* computer programs, sound recordings, and videograms.³⁶ Indeed the link between the rental right and private copying is underscored by the condition to which its exercise is subject with respect to cinematographic works. Countries are expected from introducing a rental right for this category of works:

“[...] unless [the commercial] rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred [...] on authors and their successors in title.”³⁷

Although the relationship between the rental right and private copying may not appear as blatant in the context of other works, the European Community has extended the rental right to all categories of works, as well as to performers and makers of sound recordings, and has moreover introduced a public lending right.³⁸

It is obviously difficult to devise a single solution that constitutes the answer to mass reproduction media. Nevertheless, the various methods that are used demonstrate, once again, that technological developments lead to specific measures in copyright laws. As the challenges that these developments raise involve means that facilitate a use of the works that is difficult to monitor because it is private and multifarious, it takes more time to develop statutory responses and the measures that are elaborated seem to lack the focus of former times. All in all, they produce a certain bewildering effect that makes one wonder to what extent the situation is under control, a perception that is heightened by the awareness of the prevalence of the technology. Is this phenomenon repeated with digital technologies?

³⁶ TRIPs Agreement, s. 11 and 14 (4); WIPO Copyright Treaty, s. 7.

³⁷ TRIPs Agreement, s. 11. See also WIPO Copyright Treaty, s. 7 (2)(ii).

³⁸ EC, *Directive 92/100/EEC of 19 November 1999 on rental right and lending right and on certain rights related to copyright in the field of intellectual property*, O.J. N^o L346/61 (November 27, 1992).

B. Digital Technologies

Given the time frame over which means to disseminate works have developed, one may wonder if it is not too early to assess the impact of the digital media as a distinct category. After all, what is happening now can, in future years, merely be considered as the growing pains of a system that has not yet reached its maturity. It can already be seen, however, that digital technology has put a strain on both the tangible and the (almost) intangible means of making the works available to the public.

The impressive quality of digital copies makes this mode of reproduction a source of great anxiety for copyright owners. It is one of the numerous paradoxes of technology that the work whose status in the family of protected works was so ardently sought after, the computer program, should form the basis of a reproduction system that can bring about its very demise. Consensus over the idea that reproductions can be made in an electronic format was not difficult to reach. It is even one of the bare minimal rules over which states agreed at the time of the diplomatic conference for the WIPO Copyright Treaty in 1996:

“It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.”³⁹

The generality of such an agreement does not prevent the development of particular regimes. This is indeed what has happened when the United States Congress adopted the *Audio Home Recording Act of 1992*⁴⁰ which creates a private copying remuneration scheme when digital equipment is used. Not only is a context, in which the act of copying occurs, specially targeted, *i.e.*, private copying, but the situation is narrowed to a distinct technology.

The most controversial debate, however, centres round the digital transmission of works over the Internet. Before the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty of 1996 there had already been, in the United States, the *Digital Performance Right in Sound Recordings Act of 1995*.⁴¹ Again, just like the earlier statute on

³⁹ Agreed Statements Concerning the WIPO Copyright Treaty, Document CRNR/DC/96, s. 1.4.

⁴⁰ *Audio Home Recording Act of 1992*, Pub. L. N° 102-563, 106 Stat. 4248 (28 October 1992).

⁴¹ *Digital Performance Right in Sound Recordings Act of 1995*, Pub. L. N° 104-39, 109 Stat. 336 (November 1, 1995).

private copying, only the use of digital technology is aimed at the statute in relation to a right, which is here the performance right in sound recordings, that does not exist for analog technology. In both instances too, one can also observe that the US Congress intervened in the field of music. The development of the WIPO treaties, though, is meant to go beyond one category of works and elaborate a solution that is applicable to all works. The several articles in each of the WIPO treaties that pertain to the diffusion of works over the Internet generally continue the trend that has been identified throughout this paper, *i.e.* they set up additional measures that are dictated by a technology.

The article that refers to the right itself is, perhaps, of a slightly different nature than the others. Sections 8 of the WIPO Copyright Treaty is indeed drafted in such a way as to describe the nature of the act of communicating over the Internet:

*“[...] authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”*⁴²

However, the title of the article in which this description is made is “Right of Communication to the Public” and the beginning of the provision states that it is to apply “without prejudice to the provisions of Sections 11 (1) (ii), 11*bis* (1) (i) and (ii), 11*ter* (1) (ii), 14 (1) (ii) and 14*bis* (1) of the Berne Convention.” There appears to be a willingness to formulate a right of communication to the public that encompasses all the many contemporary forms of “performance.” Full harmonisation was out of bounds, though, because the WIPO Copyright Treaty is a special agreement, not a revision of the Berne Convention. It is the same kind of relationship between the WIPO Performances and Phonograms Treaty and the Rome Convention that explains the autonomy of the “right of making available to the public” from the broadcasting right in that Treaty; an apparent distinction between the right of making available to the public

⁴² The WIPO Copyright Treaty, s. 8. See also WIPO Performances and Phonograms Treaty, s. 10 and 14.

and the right of communication to the public in that Treaty is, however, more difficult to explain.⁴³

The other articles that have been conceived in light of transmissions over the Internet introduce new components into copyright law. They refer to obligations concerning technological measures and concerning rights management information.⁴⁴ These provisions are intended to give more bite to the various methods that are being developed to ensure the efficiency of copyright management over the Internet. They are not of the same nature as the rights that copyright owners exercise nor are they exceptions, or even rules on ownership or on the term of protection. While they are certainly meant to work in conjunction with copyright rights, they are not of a traditional copyright nature.

The responses to the WIPO treaties have been varied. The European Community has introduced a proposal for a directive which elaborates only a little further on the texts of the treaties, especially on the articles dealing with technological measures and with rights management information.⁴⁵ In the United States, the *Digital Millennium Copyright Act* offers one of the most complex and unreadable pieces of copyright legislation to have ever been adopted because it delves into details to an unprecedented degree.⁴⁶ Other countries are still wondering what to do. The urgency of the situation is not the same in all places. In Canada, for example, the existence of a “right to communicate to the public by telecommunication”, coupled with a definition of “telecommunication” that clearly encompasses the digital transmission of works over any network,⁴⁷ means that the principle of copyright liability for Internet transmission is guaranteed. What remains to be done is the implementation of the clearly new obligations, *i.e.*, new from a Canadian perspective, that are mandated by the WIPO treaties.

⁴³ Sections 10 and 148 of that Treaty do not indicate that the right of making available to the public is to be understood as part of the right to communicate to the public, contrary to section 8 of the WIPO Copyright Treaty.

⁴⁴ WIPO Copyright Treaty, s. 11 and 12; WIPO Performances and Phonograms Treaty, s. 18 and 19.

⁴⁵ Modified Proposal of the European Parliament and of the Council on the harmonization of certain aspects of copyright and related rights in the Information Society.

⁴⁶ *Digital Millennium Copyright Act*, Pub. L. N° 105-304, 112 Stat. 2860 (1998).

⁴⁷ *Copyright Act*, s. 2 and 3 (1)(f).

These new obligations can only translate into further specific national provisions. Can they be technologically neutral? It appears impossible. The only latitude that countries have lies in the extent to which they can go into details, since the principle of specific legislative intervention when there is a new technology appears to be established. One may then wonder at the call for a technologically neutral copyright law. Two recent events help to explain it. One is the *Digital Millennium Copyright Act* itself: it cannot be good policy to enact a statute that is so complicated to understand. The second explanation may reside in a recent US decision that involves the *Audio Home Recording Act of 1992*. In that case, the Recording Industry Association of America was trying to rely on that statute to control the manufacture and distribution of the Rio portable music player which allows a user to download MP3 audio files from a computer in order to listen to them as if he were using a *walkman*. Because of its very specific language, the downloading of the MP3 files could not come within the purview of the statute.⁴⁸ The case is a blatant example of the speed at which a technology oriented legislation can become obsolete. Only a technologically neutral text can prevent such pitfalls and it seems reasonable to fear that a statute like the *Digital Millennium Copyright Act* will not achieve this.

CONCLUSION

The preoccupation with technologically neutral legislation started before the Rio-MP3 case, as if people had the prescience of such events. However, it is impossible to have a fool-proof statute since the future cannot be predicted with accuracy. What may today be considered technologically neutral may at a later date be viewed as technologically specific. It is useful, though, to be aware of the consequences of technologically specific measures at a time when the pace of technological development is accelerating. The cry for technologically neutral texts thus offers something reassuring: the powers that be know that they must move with caution.

Yet, there may be something different lurking behind the term “technologically neutral”: a yearning for a more synthetic drafting style. In that light, the technologically neutral “lobby” could have a greater task to accomplish in the copyright countries than in the author’s rights countries. This is not to say that these countries have perfected the art of technologically neutral drafting, but they do seem to favour more general

⁴⁸ *Recording Industry Association of America v. Diamond Multimedia Systems Inc.*, Court of Appeals, 9th Circuit, June 15, 1999 (see: <http://laws.findlaw.com>).

principles over arcane technicalities. The work that is being done in Australia to simplify the *Copyright Act 1968*, which can also be described as a fairly convoluted piece of legislation, is a concrete step towards a technologically neutral copyright law. Let us hope that this movement will spread to other parts of the world and that it will be integrated into the inevitable adaptations to copyright law that new technologies have always required. Given the convergence of copyright legislations that the Internet calls for, though, the overall results will probably lie somewhere in the middle between the two approaches.