The Making Available Right: A Framework for Analysis

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The WIPO “Internet Treaties” (1996)

- WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT)

- WCT Article 8:

  [1] An “act” of making available

  [2] To “the public”
Copyright’s TWO Key Functions

1. Incentivise Authorship
2. Encourage Dissemination of Knowledge

- Rivalries between disseminators, under ©’s “communications policy”

Neglects dissemination

1. Focus on the copyright owner’s perspective
2. Ignores “creative destruction” of dissemination markets
Broad approach including mental factors

The “Act”

Fault (EU)

Volition (US)

Svensson (linking)

Sanoma (link to infringing source)

Filmspeler; The Pirate Bay (2017)

Goldman v Breitbart News (SDNY 2018)

Cf Perfect 10 v Amazon (9th Cir US) / Cooper (Aus)

1. Overlooks “act” as limit on primary infringement

2. Fault considerations overtake the analysis
Missing perspectives…

- Role of disseminators
- Judicial interpretation

© Consumers

- Autonomy interest
- Active, not passive

Technological Innovation

The Interpretive Matrix

Four interrelated principles

- Principle 1 – Dissemination rivalries
- Principle 2 – Technological innovation
- Principle 3 – Copyright consumers’ autonomy
- Principle 4 – Authorship incentives
Thank you

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