JICLT
Journal of International Commercial Law and Technology
Vol.9, No.1 (2014)

Communicational Approach to Copyright

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Abstract: It may be questioned whether traditional concepts of individualistic droit d' auteur copyright theory apply to digital communication networks such as Internet. Due to mass of information it may be especially questioned whether it is rational to apply the concept of reproduction in an environment where no-one, not to mention individual authors, may rigorously evaluate where and when a copy of a certain piece of content is being produced. Consequently this article suggests an alternative approach to evaluate economic rights of authors in digital network environments. In doing so it theoretically compares economic rights of authors to basic research results from the field of communication studies. This approach is chosen as copyright is often connected to communication. The article offers an alternative, which should not narrow rights of authors but would provide more meaningful way to perceive copyright in digital networks.

1. Introduction

It has been argued that a change from industrial society to information society elevates communication to the core of society.[1] An especial feature created by the change to the information society is a possibility for everyone to easily be a content producer and a user i.e. a *prosumer*.[2] Consequently everyone in theory are able to communicate with each other regardless of time and place. This inevitably leads to situation when masses of information are constantly being copied and made available to public especially on the Internet.[3]

However, provided the information exceeds the required threshold for protection and no limitation to copyright applies, individualistic *droit d' auteur* copyright theory postulates that permission should always be asked when information created by others is being copied or made available to the public. Considering constantly evolving and expansible content mass on the Internet it is obvious that that applying individualistic copyright theory to information society becomes challenging as it simply becomes problematic for anyone to rigorously evaluate or supervise when and where certain pieces of content are being used.

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[1] Ideologically one has often referred to Marshall *McLuhan's* concept of the "Global village" where physical distance does not constitute real hindrance to the real-time communicative activities of people. See e.g. Marshall *McLuhan*, Ihmisen uudet ulottuvuudet, Werner Söderström Osakeyhtiö, Porvoo, 1968. A translation from Marshall McLuhan's Understanding Media: The Extensions of Man (First Ed. McGraw Hill, New York, 1964. See also Antti *Hautamäki* (eds.), Suomi teollisen ja tietoyhteiskunnan murroksessa, Tietoyhteiskunnan sosiaaliset ja yhteiskunnalliset vaikutukset, A publication of SITRA (154), Helsinki 1996, available at: http://www.sitra.fi/julkaisut/tietoyhteiskunta/sitra154.pdf. SITRA is a trust under the Finnish parliament and its purpose is defined in a law called Suomen itsenäisyyden juhlarahastosta (717/1990).

[2] Regarding more specific definitions for prosumers see e.g. Alvin *Toffler*, The Third Wave, Pan Books Ltd 1981, p. 275 – 295, David *Ticoll*, Alex *Lowy* and Ravi *Kalakota*, Joined at the Bit: The Emergence of the e-Business Community, published in Don *Tapscott*, Alex *Lowly* and David *Ticoll*, Blueprint to the Digital Economy, McGraw-Hill 1998, p. 24 and Kari *Lietsala*-Esa *Sirkkunen*, Social Media, Introduction to the Tools and Processes of Participatory Economy. Tampere 2008, p. 18 (available at, http://tampub.uta.fi/tup/978-951-44-7320-3.pdf), Frank *Webster*, Theories of the Information Society, third edition, Routledge 2006, p. 17 – 19 and Seppo *Sisättö*, Internet taskussa, Mobiiliin sähköiseen yhteiskuntaan, Inforviestintä Oy, Tampere 2004, p. 15 ja ff. Regarding legal literature see e.g. Tuomas *Mylly*, Tekijänoikeuden ideologiat ja myytit, Lakimies 2/2004, p. 241 -242.

[3] In general about the use of Internet in workplaces see e.g. Manuel *Castells*, The Rise of Network Society, The Information Age: Economy, Society and Culture, Volume I, Second Edition, Blackwell Publishers 2000 (hereafter Castells), p. 375 and 390.

Consequently, following a suggestion of Ole-Andreas *Rognstad*[4], this article attempts to provide an alternative approach to perceive economical rights of authors in the information society. As an attempt to do so the article compares copyright and its right of reproduction and right to make content available to public to research results from the field of communication studies. This is because copyright is often connected to different forms of communication and since communication has been elevated to the core of the information society.

However, before going into details some technical specifications shall be made. The article focuses especially on examining applicability of copyright in information networks, which for simplicity are also referred to as Internet or digital environment.[5] Regarding more specific examples concerning legislation, references to Finnish Copyright Act shall be made. This is because it is not possible to go through all national legislations. However, as Finland has adopted all the relevant international conventions regarding copyright and the evaluation is being conducted on a more general level, the given examples are commonly applicable.

2. Applying Copyright to the Internet

2.1. Copyright as a Property Right

In contemporary legal thinking legal relationships have been perceived *as relationships between persons*.[6] This means that norms should be addressed only to persons, not to objects. This distinction should be kept in mind as e.g. in the history of copyright references have also been made to "intangible/immaterial" works as objects of rights. However, already decades ago such references to "immaterial/intangible" objects were discarded as inaccurate from legal thinking.[7] Keeping this starting point in mind it might be asked how copyright, which is often considered as a property right, could be perceived in the information society.[8]

2.2. Regarding Factual and Legal possibilities to Administer Use of Copyrighted Content

As it comes to property rights, an exclusive right protected by the government to freely administer one's property may be regarded as the primary right. This primary right may be further divided into factual and legal administration of rights. *Factual administration* means a right to actually determine about the use of an object whereas *legal administration* refers to right to sell, donate, and pawn (etc.) an object. Thus the legal administration does not refer to possibilities to actually use the object, but determining about rights related to it. This separation is done in order to make a distinction between actually using an object from assigning property rights related to the object.[9]

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[4] Ole-Andreas *Rognstad* has suggested that it might be reasonable to resign from operating with concepts such as reproduction and making content available to the public. See Ole-Andreas Rognstad, Opphavsrettens innhold i en multimedieverden – om tradisjonelle opphavsrettsbegrepers møte med digital teknologi. Nordisk Immateriellt Rättskydd 6/2009, p. 540–543.

[5] About Internet see e.g. Wikipedia: http://en.wikipedia.org/wiki/Internet.

[6] See e.g. Wesley Newcomb *Hohfeld*, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, Yeale Law Journal (23 Yale L.J. 16), November, 1013 (hereafter, Hohfeld). See also Simo *Zitting*, Omistajanvaihdoksesta, silmällä pitäen erityisesti lain huudatuksen vaikutuksia, Suomalaisen lakimiesyhdistyksen julkaisuja, A-sarja, N:o 43, Vammala 1951 (hereafter Zitting), p. 47. Regarding copyright see e.g. Markku *Helin*, Immateriaalioikeuksien kohteesta, Suomalaisen lakimiesyhdistyksen aikakauskirja, 1978 (hereafter Helin), p. 650, Mogens *Koktvedgaard* and Marianne *Levin*, Lärobok i immaterialrätt, Upphovsrätt, Patenträtt, Mönsterrätt, Känneteckensrätt – i Sverige, EU och internationellt, åttonde upplagan, Norstedts Juridik AB 2004 (hereafter Koktvedgaard – Levin), p. 38 and Pirkko-Liisa *Haarmann*, Tekijänoikeus ja lähioikeudet, Jyväskylä 2005 (hereafter Haarmann), p. 49.

[7] See e.g. *Helin* (passim) and *Koktvedgaard – Levin*, 36 – 38.

[8] About copyright as a property right see e.g. T. M. *Kivimäki*, Tekijänoikeus. Helsinki 1948 (hereafter Kivimäki) p. 43 – 44 where he refers to John Locke's ideas of property. See also Rainer *Oesch*, Tekijänoikeudet ja perusoikeusnäkökulma, Lakimies 3/2005 (passim) and e.g. Statement of the Constitutional Law Committee 7/2005.

[9] *Zitting*, p.7 and Wesley Newcomb *Hohfeld*, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, Yeale Law Journal (23 Yale L.J. 16), November, 1013, under headline: Legal Conceptions Contrasted with Non-legal Conceptions.

> *Hohfeld* has explained the separation in the following way: "The term, "transfer", is a good example. If X says that he has transferred his watch to Y, he may conceivably mean, quite literally, that he has physically handed over the watch to Y; or, more likely, that he has "transferred" his *legal interest*, without any delivery of possession, -the latter, of course, being relatively figurative use of the term."[10]

Also in relation to copyright, a right holder is to some extent factually able to administer the use of his/her content. *A factual possibility* to administer the use exists regarding unpublished content provided the right holder has pieces of the content him/herself and regarding live-performances, if the right holder him/her self is the performer. Thus, in practice factual possibilities to administer the use of copyrighted content are rather narrow.

> The problem related to right holder's possibilities to factually administer the use of his/her content may be illustrated with the following theoretical example. For example, how could a right holder "silence" a person who performs his/her protected song in a public place (sings it in a restaurant or merely whistles it on the street) without the right holder's permission? The question becomes even more problematic, if there are several singers. It simply would be impossible for an individual author to factually "silence" them both at the same time (as they may not even be at the same location), even if s/he had a legal right to do so.[11]

In other words, after the work has been posted openly available on the Internet an individual loses his/her factual possibility to administer the use of his/her works. However, despite the loss of factual possibilities to administer the use, it may be argued that a right holder retains a legal right to administer the use.

Regarding the *legal right* it is understood in this article that copyright – as a right directed to persons – would necessitate that individual authors and interested users should conclude individual transactions with each other in order to produce copies and make content available to the public (instead of obligating the right holder to somehow "factually" control who, where and when uses his/her content). As individual control over use of content is factually impossible and permissions from right holders are *de facto* obtained against compensation, copyright seems to form a certain type of business model embedded to law: content production should be funded by asking permission from right holder against compensation in certain points defined in law. Today those points are when copies are being produced and when content is being made available to the public. However, as next shall be demonstrated, it is questionable whether legal rights, especially the right of reproduction, suitably fits to digital environment.

2.3. When is Content Protected?

Use of economic rights is connected to protected expressions and consequently concept of an expression shall be briefly be evaluated. Idea/expression dichotomy is a traditional way to evaluate when a certain expression is protected by copyright. Regarding the dichotomy a common norm, as e.g. stated in the article 9, subsection 2 of the TRIPS Agreement is, that "*Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.*"[12]

As it comes to the protected expressions, paragraph 1 of the Finnish Copyright Act (and similarly e.g. article 2 of the Berne Convention) provides that expressions protected by copyright are, among others, literary and artistic works, oral presentations, musical and dramatic works, cinematographic works, photographic works, works of visual arts, architecture, artistic handicrafts and industrial art. In addition so-called neighbouring rights protect e.g. performing artists, phonogram producers, photographs, visual recordings, radio- and television broadcasts, databases and newspaper bulletins. Therefore, although information and ideas fall outside the scope of copyright and neighbouring right protection, it may be

[10] See *Hohfeld*, under headline: Legal Conceptions Contrasted with Non-legal Conceptions.
[11] See also Olli *Vilanka*, Rough Justice or Zero Tolerance? – Reassessing the Nature of Copyright in Light of Collective Licensing (Part I), published in in "In Search of New IP Regimes", a publication of IPR University Center 2010, chapter 3.1.
[12] See also Article 1 subsection 2 of the Software Copyright Directive (Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs).

seen that copyright covers wide range of different phenomena as e.g. merely a speech or an improvised song as oral presentations may obtain copyright protection.[13]

However, in order for an expression to obtain copyright protection it should exceed a certain threshold.[14] Although no specific thresholds for protection may be set, case law provides guidelines for defining one. For example, in *Infopaq*-case, given 16 July 2009, the European Court of Justice held that: "An act occurring during a data capture process, which consists of storing an extract of a protected work comprising 11 words and printing out that extract, is such as to come within the concept of reproduction in part within the meaning of Article 2 of [Infosoc-] Directive ..."[15] In other words, according to the European Court of Justice, mere output of *eleven words* may be deemed to exceed required level to be protected by copyright and hence requiring permission from relevant right holders for each individual copy. Following the *Infopaq*-case the High Court Chancery Division regarded in 2011 that headlines and/or extracts of newspaper articles may exceed required level for copyright protection.[16] Similarly in a case of the Finnish Copyright Council (2010:2) it was deemed that a sentence of *eight words* obtained copyright protection.[17] In fact, the same case may be interpreted so that the Copyright Council regards possible that in exceptional circumstances even *one word* might exceed threshold for copyright protection.[18]

Therefore, as there is no theory of art or science stipulating norms when the threshold for protection is exceeded and ethical or moral evaluations are irrelevant when conducting the evaluation, one can see that almost any expression may in theory qualify as a protected content.[19] Consequently as expressions are constantly being formed on different platforms on the Internet during communication processes, it may be asked if it is rational to apply traditional concepts of copyright when content is been used on the Internet.[20] In this respect applicability of right of reproduction shall be evaluated first.

2.4. Right of Reproduction and Internet

Article 2 of the Infosoc-Directive provides an author an exclusive right of "*direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part.*"[21] Traditionally the right has been understood as a wide right and it has been examined in very detail whether an act of

[13] However, it should be mentioned that *droit s' auteur* copyright theory postulates that only humans may initially be copyright holders. Companies may only have derivative rights whereas possible outputs of animals and machines are not protected at all.

[14] About the threshold in general see: Tuomas *Mylly*, Intellectual Property and European Economic Constitutional Law, The Trouble with Private Informational Power. Vaajakoski 2009 (hereafter Mylly), p. 342 ff and p. 363 ff and *Haarmann*, p. 256 ff.

[15] See Case C-%/08, *Infopaq International A/S v Danske Dagblades Forening*, Judgement of the Court (Fourth Chamber) of 16 July 2009. The court left it for the national courts to decide "if the elements thus reproduced are the expression of the intellectual creation of their author."

[16] *The Newspaper Licensing Agency Ltd & Ors v Meltwater Holding BV & Ors* [2011] EWCA Civ 890 (27 July 2011, available at: http://www.bailii.org/ew/cases/EWCA/Civ/2011/890.html.

[17] Copyright Council gives opinions regarding copyright, which do not bind courts. According to its www-pages: "The Finnish Government appoints the Copyright Council for three years at a time to assist the Ministry of Education and Culture in copyright matters and to issue opinions on the application of the Copyright Act. The Council is composed of representatives of the major right holders and users of protected works. The chair, vice-chair and at least one member are impartial." Available in English at: http://www.minedu.fi/OPM/Tekijaenoikeus/tekijaenoikeusneuvosto/?lang=en. See *Copyright Council case 2010:2*.

[18] Similarly in legal literature e.g. Pirkko-Liisa *Haarmann* has argued that a slogan or e.g. name of a book may exceptionally obtain copyright protection. *Haarmann*, p.70.

[19] It should be mentioned that the low threshold applies also to neighbouring rights. The threshold for obtaining neighbouring right protection is often actually minimal, as it may be sufficient to merely fulfil a certain act stated in a particular paragraph as e.g. to broadcast a TV-signal, produce a phonogram or take a photograph.

[20] It could also be mentioned that for the mentioned reasons it is difficult – especially for a layman prosumer – to exactly know whether certain use belongs under a certain exemption or limitation. For example, paragraphs 22 and 25, subsection 1 of the FCA enact about literal and pictorial citations. However, as merely eleven or eight words long text may constitute a protectable content, it becomes difficult if not even impossible to always know if such text has been cited properly.

[21] See Article 2 of the Infosoc-Directive. See also Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971, as amended on September 28, 1979, article 9, which states that: "Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, *in any manner or form*" (emphasis added). A corresponding wide and strict formulation can be found from the paragraph 2, subsection 2 of the FCA.

reproduction has taken place. This indicates that copyright doctrine has traditionally followed a strict literal (i.e. grammatical) reading of the law.[22] This means that relevant copies necessitating permission are in theory formed constantly when content is being added to the Internet. However, due to the masses of information on the Internet it is obvious that one cannot necessitate permission for each copy that is being produced.

> According to a study of IDC the amount of bits added to digital environment only in 2008 was 3,892,179,868,480,350,000,000 bits and in 2010 the amount was five times as many, and increasing.[23] In comparison, the amount of printouts taken from the Internet (i.e. not copies taken by photocopying) by teachers in comprehensive schools and secondary schools in 2008 in Finland was approximately 5.000.000, which roughly corresponds to 60,000,000,000 bits.[24] Thus although heaps of content are being printed in educational institutions, the amount of information in the digital environment is significantly larger.[25] Used information is in various different and often protected forms of content as e.g. in text, sound, image, photographs, software and often mixed together as in forms of adaptations or audiovisual productions.[26]

In this respect article 5(1) of the Infosoc Directive (and correspondingly and paragraph 11(a) of the Finnish Copyright Act) intends to alleviate the situation. Article 5(1) of the Infosoc directive posits a mandatory exemption exempting "transient or incidental" copies, which are an "integral and essential part of a technological process and whose sole purpose is to enable [...] a transmission in a network between third parties by an intermediary, or [...] a lawful use of a work or other subject-matter [...], and which have no independent economic significance". Aim of the exemption is to enable normal communication processes in digital environment without risk of infringing copyright as otherwise use of Internet as it is

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[22] For example, according to the Commissions Explanatory memorandum for the proposal for the Infosoc-Directive (2001/29/EC) already a transmission of a video from a database in Germany to a home computer in Portugal may require at least 100 acts of storage (copying). Regarding theories for interpreting law see e.g. Aarnio *Aulis*, Mitä lainoppi on? Helsinki 1978, p. 101 and ff and similarly Raimo *Siltala*, Johdatus oikeusteoriaan, Helsingin yliopiston oikeustieteellisen tiedekunnan julkaisut, Helsinki 2001, p. 110 and ff.

[23] See John *Gantz* and David *Reinsel*, A Digital Universe Decade – Are You Ready?, 2010, available at: http://www.emc.com/collateral/demos/microsites/idc-digital-universe/iview.htm and John *Gantz* and David *Reinsel*, IDC – Multimedia White Paper, As the Economy Contradicts, the Digital Universe Expands, May 2009. Available at: http://www.scribd.com/doc/15748837/IDC-Multimedia-White-Paper-As-the-Economy-Contracts-the-Digital-Universe-Expands.

[24] See Peruskoulujen ja lukioiden valokopiointitutkimus 30.9.2008, Jan-Otto *Malmberg*. A Study conducted by the Ministry of Education and Kopiosto, p. 8 and 17. The estimation related to the amount of bits is based on an assumption that one A4 sized paper in writing contains roughly 1500 bits of information. However, the estimation is rough as the amounts of bits per document varies based on what content is being used (e.g. text or pictures) and on how the information is stored. The estimation was given by Markku *Wallgren*, Novell Finland, technical expert, e-mail interview on 30th of March 2011. See also homepage of Kopiosto, available at (in Finnish), http://www.kopiosto.fi/kopiosto/teosten_kayttoluvat/valokopiointi/fi_FI/valokopiointi/.

[25] For example 35 hours of video was being uploaded every minute to YouTube in 2010. See YouTube's blog, available at http://youtube-global.blogspot.com/2010/11/great-scott-over-35-hours-of-video.html. See also Michael *Wesch* in "an Anthropological introduction to YouTube" (hereafter Wesch), available at http://www.youtube.com/watch?v=TPAO-lZ4_hU. About the increase of information in social media general see e.g. Gary *Hayes's* Social Media counter http://www.personalizemedia.com/garys-social-media-count/. About the increase of information in the in more general see e.g. EMCs World Wide Information Growth Ticker, available at: http://www.emc.com/leadership/programs/digital-universe.htm.

[26] See John *Ganz* and David *Reinsel*, IDC IVIEV, Extracting Value from Chaos, June 2011 where they also argue that: "While 75% of the information in the digital universe is generated by individuals, enterprises have some liability for 80% of information in the digital universe at some point in its digital life." According to *Wesch* 88 % of the content uploaded to YouTube is created by individuals as contrast to industry. See *Wesch*, available at http://www.youtube.com/watch?v=TPAO-lZ4_hU.

being used today would not be possible. Although it is mainly directed to intermediaries[27], it also applies to copies in general on the Internet as it exempts copies completely from copyright.[28]

However, article 5(1) of the Infosoc Directive does not specifically state when use is exempted and when permission is needed leaving room for interpretation. Furthermore, regarding the constantly evolving information mass, it is difficult to see how anyone could rigorously evaluate in practice when a license for a certain specific piece of copied information would be needed. Consequently in the end the exemption enacted in article 5(1) of the Infosoc Directive seems more as a declaration stating "not all copies are relevant".

Finally, even if all the communicated information on the Internet was constantly recorded, it would most likely be impossible for anyone to go through the constantly evolving information mass in order to track down particular copies and their producers. In fact, it is questionable whether individual authors can in any circumstances be aware of all the possibly relevant copies that are being formed on certain platforms on the Internet during communication processes. Whether the right to make content available to the public applies more conveniently on the Internet shall be evaluated next.

2.5. Right to Make Content Available to the Public and Internet

An author's right to make the content available to the public has been enacted e.g. in article 3 of the Infosoc directive (and article 2 of the Finnish Copyright Act). It is often divided into subgroups, which e.g. in Finland are communicating, performing, distributing and displaying content to the public.[29] They shall be used as an example in this article.

Communicating content to the public refers especially to situations when both the sender and the receiver are using a technological device as happens e.g. when content is being communicated on the Internet. It is irrelevant whether any content is actually downloaded, but a possibility to access content suffices for the liability.[30] *Performing* takes place if audience is present at the occasion (regardless of the technology used for presenting the performance). *Distributing* takes place when copies of works are being made available to the public and *displaying* refers to situations when appearance of a work is being displayed to viewers (copy of the displayed work must be present in the occasions).

Thus, regarding the right to make content available to the public, it seems that the situation is clearer in comparison to the right of reproduction: always when a person communicates content on the Internet or otherwise posts content available to the public s/he needs permission from an adequate right holder. It is irrelevant whether any content is actually being communicated, but a possibility to obtain content suffices for the liability.

Therefore, it seems that possible challenges regarding applicability of copyright on the Internet are related to the concept of reproduction. As copyright is often connected to acts of communication, the next chapters evaluate whether results from communicational research could provide more meaningful answers for perceiving the concept of reproduction on the Internet.

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[27] Intermediaries are third parties who offer intermediation services between those who transmit (in terms of copyright copy and communicate) content. In more detail see e.g. Gerald *Spindler*, Giovanni Maria *Riccio* and Aurélie *Van Der Perre* (under the direction of the professor *Montero*): Study on the Liability of Internet Intermediaries (Markt 2006/09/E, Service Contract ETD 2006/IME2/69). Thibault Verbies, ULYS, p.7, available at: http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf.

[28] See also P. Bernt *Hugenholtz* (with the assistance of Kamiel *Koelman*), DIPPER, Digital Intellectual Property Practice Economic Report, Institute for Information Law (IViR) (hereafter Hugenholtz), p. 23.

[29] See e.g. Government Bill 28/2004, p. 77.

[30] See also *Hugenholtz*, p. 27: "The relevant act of exploitation commences, and is completed, by providing public access to the protected work. Whether or not, in a given situation, copies of the work are actually downloaded, received or otherwise consumed, is quite irrelevant."

3. Comparing Basics of Communicational Research to Right of Reproduction

3.1. In General

A close connection between copyright and communication may be seen already from the writings of Immanuel *Kant*. He wrote that ”A book is a writing (it does not matter, here, whether it is written in hand or set in type, whether it has few or many pages), which represents a discourse that someone delivers to the public by visible linguistic signs. One who *speaks* to the public in his own name is called the *author* (*autor*). One who, through a writing, discourses publicly in another's (the author's) name is a *publisher*. When a publisher does this with author's permission, he is the legitimate publisher; but if he does it without the author's permission, he is an illegitimate publisher, that is an *unauthorized publisher*.”[31]

In more recent literature the connection may be read e.g. from WIPO's Intellectual Property Handbook. It states that copyright is virtually concerned with “all forms and methods of public communication, not only printed publications but also such matters as sound and television broadcasting, films for public exhibition in cinemas, etc. and even computerized systems for the storage and retrieval of information.”[32]

In general all subgroups under the right to make content available also seem to resemble some type of communication. One usage form is even named as “right of communication”.[33] However, as it comes to the right of reproduction, the situation is not as clear requiring more detailed examination. For this reason it shall be compared in more detail to basics of communicational research as presented by Osmo A. *Wiio* and C. E. *Shannon*.[34]

3.2. Right of Reproduction as an Act of Communication

According to *Wiio* all conceivable means for communication may be divided into two main categories: either matter is being modified into a certain form in order to be delivered to a recipient or energy is being modified in order to be transmitted to a recipient. The systems may converge as happens e.g. when a fax is sent. Respectively communication systems have also been divided to quantity and instant communicating. *Quantity communicating* takes place when a communication process takes time and leaves a mark. For example, transferring an object to another place is an act of quantity communicating. On the other hand in *instant communicating* message is being communicated quickly and disappears unless it is being separately recorded.[35] *Shannon's* mathematical theory of communication may be used to depict a communication system for instant communicating.[36]

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[31] Immanuel *Kant*, The Metaphysis of Morals, Introduction, translation, and notes by Mary *Gregor*, Cambridge University Press, 1991, p. 106 (emphasis original).

[32] WIPO Intellectual Property Handbook: Policy, Law and Use, chapter 2.162, http://www.wipo.int/about-ip/en/iprm/pdf/ch2.pdf. According *Fiske* all cultures would die without communication. John *Fiske*, Merkkien Kieli, Johdatus viestinnän tutkimiseen, Gummerus Kirjapaino Oy, Jyväskylä 1993 (Oiriginal: Introduction to Communication Studies), p. 13 – 14. About the connection of culture and new systesm of communication in general see also e.g. Castells, p. 405.

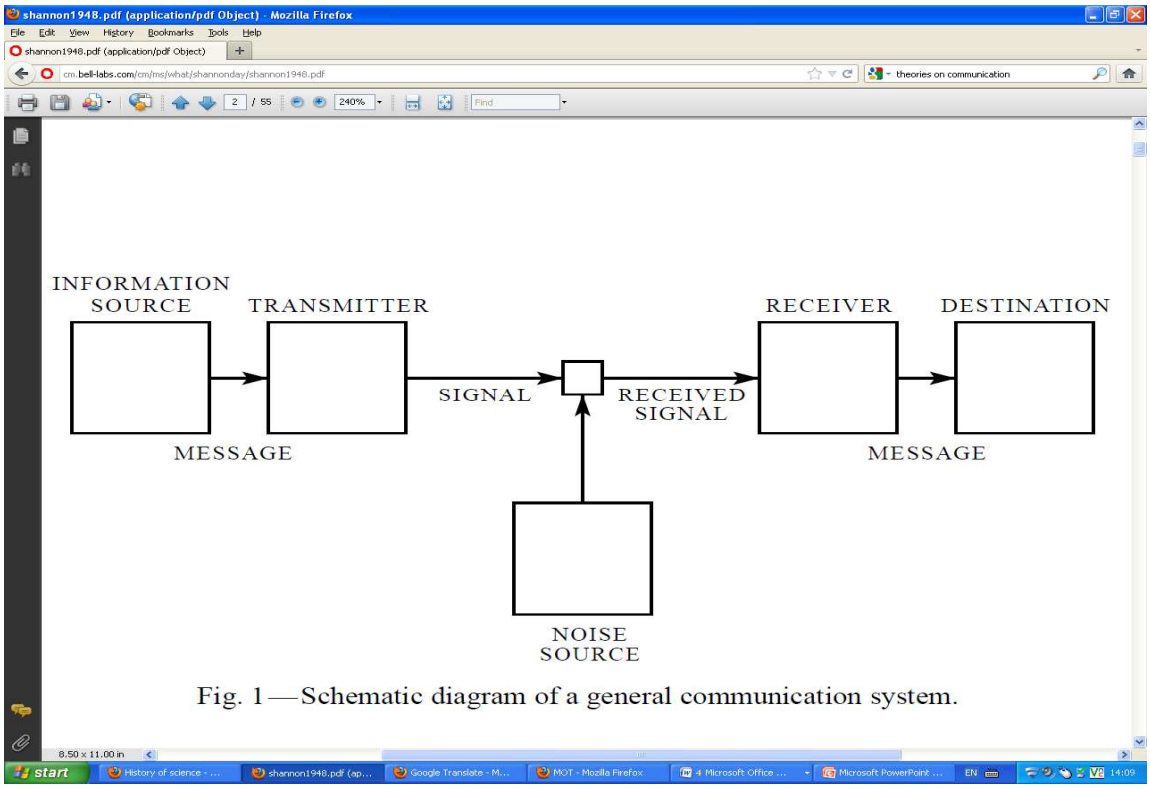
[33] See also Article 8 of the WIPO Copyright Treaty (as adopted in Geneva on December 20 1996), which is titled as “Right of Communication to the Public”.

[34] It is evident that the comparison must be conducted on a rather general level as communicational research is completely different field of research than legal sciences.

[35] Osmo A. *Wiio*, Johdatus viestintään, 6.-8. painos, WSOY Kirjapainoyksikkö, Porvoo 1998 (hereafter Wiio), p.13. One could also translate the communication systems to slow and rapid messaging. (Quantity and instant messaging are translated from Finnish words “kesto- ja pikaviestintä”).

[36] See e.g. C. E. *Shannon*, A Mathematical Theory of Communication, a reprint with corrections from The Bell System Technical Journal, Vol. 27, pp. 379 – 423, 623 – 656, July, October, 1948 (hereafter Shannon), p. 2. Available at: http://cm.bell-labs.com/cm/ms/what/shannonday/shannon1948.pdf.

Picture 2. *Shannon's* Schematic diagram of a general communication system



When comparing the result of *Shannon's* research to the concept of reproduction one sees that always when content is successfully being communicated to another platform it is by definition also being copied. This may also be directly seen e.g. from terminology used by Shannon as he states that:"The fundamental problem of communication is that of *reproducing* at one point either exactly or approximately a message selected at another point."[37] Correspondingly e.g. Committee Report 1953:5 states that an act of reproduction takes place when a work is being *transmitted* to a device that may be used for its reproduction.[38] Common to both approaches is that communicating content always necessitates possessing a copy from where the communication process begins.

Consequently, as the right to make content available to the public already as such depicts acts of communication, it seems that one may understand all the economic rights provided by copyright as rights to communicate content. All of the economic rights of right holders seem also to belong under the category of instant communicating, except distributing copies, which is a form of quantity communicating.

4. Concluding Remarks

Therefore, it is suggested in this article that the economical rights of right holders to copy and make content available could be perceived as rights to communicate content in different ways. It is difficult to see that considering copyright simply as a right to communicate content would limit exclusive rights of right holders as one cannot communicate without having a copy of the content. Instead it would provide clearer way to comprehend essence of economic rights of authors especially on the Internet. In practice it would enable us to disregard random copies that are being produced during communication process on the Internet and allows us to focus on the person who is the communicator.

[37] *Shannon*, p. 1 (emphasis added).
[38] Committee Report 1953:5 ehdotus laiksi tekijänoikeudesta kirjallisiin ja taiteellisiin teoksiin, p. 47. Thus according to the Committee Report 1953:5 an act of reproduction takes place if a work is being transmitted to a platform where it may be repeated (i.e. copied/transmitted again).

It should also be noted that the suggested approach explains why it is difficult to extend copyright liability to Internet intermediaries such as operators, search engines or other similar services. The problem related to their liability is that they are not the communicators of content, but instead merely providers of services and/or platforms of their own i.e. use their own – occasionally even copyright protected – property.[39] Thus the approach here suggests that, if so desired, extending liability to intermediaries is a political problem i.e. would necessitate enacting new legislation.[40]

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[39] For example, several search engines use the ©-sign although it is not necessary for copyright protection. In fact, also homepage and software of the notorious file sharing service The Pirate Bay easily exceeds required level for copyright protection. Despite the controversy some intermediaries (such as The Pirate Bay) have been held liable for copyright infringement leading to a paradox related to possibilities of Intermediaries to use their own property.

[40] In this respect it could also be mentioned that regarding possible liability of Intermediaries references are often being made to the so called directive on the Electronic Commerce (Directive 2000/31/EC of the European Parliament and of the Council, of 8 June, on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market). The problem of the approach is that the directive does not specifically amend or extend economic rights of authors. Another thing is that it provides exemptions from liability for intermediaries. Regarding possible liability also references to penal codes have been made (e.g. to such concepts as aiding and complicity), but they neither explicitly extend rights of authors.