

Alma Mater Studiorum - Università di Bologna

DOTTORATO DI RICERCA IN

European Doctorate in Law and Economics

Ciclo 29°

Settore concorsuale di afferenza: 13/A3

Settore scientifico-disciplinare: SECS-P/03

**An Economic Analysis of the Intellectual Property
Rights of Broadcasting Organisations**

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Esame finale anno 2019

An Economic Analysis of the Intellectual Property
Rights of Broadcasting Organisations

Een economische analyse van de intellectuele
eigendomsrechten van omroeporganisaties

Proefschrift ter verkrijging van de graad van doctor aan de
Erasmus Universiteit Rotterdam op gezag van
de rector magnificus
Prof.dr. R.C.M.E. Engels
en volgens besluit van het College voor Promoties

De openbare verdediging zal plaatsvinden op
donderdag 28 februari 2019 om 13.30 uur
door

Bryan Kareem Khan
geboren te Saint Joseph, Trinidad and Tobago

Promotiecommissie

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This thesis was written as part of the European
Doctorate in Law and Economics programme



An international collaboration between the Universities
of Bologna, Hamburg and Rotterdam.
As part of this programme, the thesis has been submitted
to the Universities of Bologna, Hamburg and Rotterdam
to obtain a doctoral degree.



ALMA MATER STUDIORUM
UNIVERSITÀ DI BOLOGNA



Universität Hamburg



ERASMUS UNIVERSITEIT ROTTERDAM

**AN ECONOMIC ANALYSIS
OF THE INTELLECTUAL PROPERTY RIGHTS
OF BROADCASTING ORGANISATIONS**

Bryan Khan

European Doctorate in Law and Economics

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PART I: INTRODUCTION AND RESEARCH BACKGROUND

CHAPTER 1: INTRODUCTION

[1]-1 PREFACE

This chapter provides an introduction to this manuscript. Section 1 is a preface, and sets out some basic administrative and editorial information. Section 2 is aimed at 'breaking the ice' on the topic by providing a casual background on the motivations behind this study, particularly in the context of how discussions on intellectual property are framed. Section 3 provides some broad operational definitions for key concepts discussed in this manuscript. Section 4 then sets out the main objectives and research questions of this project, and provides some notes that are useful for understanding this manuscript's content and structure. Section 5 then provides a literature review on the topic, leading into the short concluding comments set out in Section 6.

[1]-1.1 Administrative Background

This manuscript was written pursuant to the *European Doctorate in Law and Economics* Programme (EDLE).

The EDLE is a joint-programme co-hosted by the *Università di Bologna* (UNIBO, Bologna, IT), *Erasmus Universiteit Rotterdam* (EUR, Rotterdam, NL), and *Universität Hamburg* (UHH, Hamburg, DE).

Funding for this research project was provided by the German Academic Exchange Service (*Deutscher Akademischer Austauschdienst, DAAD*), and the European Union's Erasmus Mundus programme.

The primary promoter for this research project is Prof. Dr. Hans-Heinrich Trute of *Universität Hamburg*. The second promoter is Prof. Dr. Louis Visscher, and the co-promoter is Dr. Kees van Noortwijk, both of the *Erasmus School of Law*.

[1]-1.2 Acknowledgements

The author wishes to thank *everyone, everywhere, for everything*.

[1]-1.3 The Discipline of Law and Economics

This manuscript was prepared pursuant to the academic discipline of 'Law and Economics'. The essence of the field is the use of the tools of economic theory to analyse subject areas which are traditionally seen as legal in nature.

A consequence of this construction is that the analytical methodologies used are necessarily those that dominate economic thinking itself. This is to say that the discipline largely relies on the tools of neo-classical economics, and that the primary analytical concern is with economic efficiency.

While this approach is designed to provide an objective methodology for analysing the mechanisms of economic activity, economics (and legal analysis) are not value-free sciences. This is of course not to say that neoclassical economics is without value; its conclusions are indeed part of the building blocks of our understanding of social, economic, and legal institutions. However, it cannot – and should not – be the exclusive building blocks of such an understanding.

As such, to the extent that this manuscript attempts to fit within the framework of the discipline of law and economics, these discussions should be understood as an academic exercise within this specific research field. There are of course many other perspectives, which should be considered when applying research conclusions to policy prescriptions.

The above being said, the discipline of law and economics provides the general boundaries for the analysis in this manuscript. As such, the explicit goal is always welfare maximisation, and the lenses through which the topic is analysed are mainly the notions of transaction costs, public goods, and externalities.

There are of course other law and economics perspectives that can be used to analyse the topics in this research project. For example, the proposed legal instruments discussed in Chapter 2 (WIPO Treaty) and Chapter 9 (EU Regulation) can be analysed from a Public Choice Theory Perspective. The regional harmonization instruments discussed in Chapters 8 and 9 (EU Legal Framework) can also be analysed in terms of the economics of federalism. However, such analysis is not the intended scope of this research project.

[1]-2 SHAPING DISCOURSE THROUGH LANGUAGE

One of the major motivations for this research project was filling a perceived literature gap on the topic. Furthermore, it aims to bring nuance and detail to discussions on copyright law, which seem to lack such, particularly in terms of treatment of the intellectual property rights of broadcasting organisations. To understand this problem, it is useful to first take a look at the language on which these discussions are based.

To the confused reader - while the sections below may seem strange, rest assured that they do conclude with a salient point.

[1]-2.1 Protection of Cookies

“Try one of my cookies!” said Aunt Margaret.

“They are fresh out of the oven, and are so good, I copyrighted them!”

Obviously Aunt Margaret did not mean that she literally copyrighted the cookies; she just means to say that her cookies are so good and well known amongst the family that they deserve some sort of recognition, protection even - lest some other less culinary inclined party attendee take credit for them.

Firstly, the idea of 'copyrighting' something as an active decision is a misnomer. International copyright law explicitly provides that the enjoyment and exercise of copyright is not to be subject to any formality that would require any sort of active decision¹; rather, once the subject matter is copyrightable and meets the relevant qualification of originality, copyright arises automatically upon creation.

Secondly, the word 'copyrighted' in this context seems quite odd. Maybe Aunt Margaret should have used the word 'patented'. Perhaps she wishes to protect a special process or technology that she uses to make the cookies - some unique method of baking at different phases of temperature and pressure perhaps. Alternatively, she may have invented a special baking pan that optimizes the distribution of the degree to which the insides and outsides of the cookies are baked - leaving a nice crunchy outside but a chewy delicate inside - that is often a hit or miss for less experienced bakers. In these cases, one would need to analyse whether the invention or process meets the patent criteria of novelty, inventiveness, and utility. Most certainly, Aunt Margaret would also need a good patent agent to help her through the process, and some funds to cover the associated administrative costs of patent application. If it were that she did go through this application procedure, we would assume that she would have at least used the right terminology in her initial comments.

Another possibility is that she should have used the word 'trademarked'. Indeed, Aunt Margaret's cookies are so well known that her brand has value, and we all need to make sure that her cookies are properly identified. Without such branding (enabled by a trademark), not only might she not get credit, but someone else might pass off their lesser cookies for hers. Still, she would need to establish that her mark is indeed distinctive and does not conflict with any other existing mark, and she would also need a good trademark agent (and funding for the administrative costs). Furthermore, let's hope that the agent is experienced enough to know that the application should specifically be made in Class '300016' (biscuits/cookies) of the Nice regime² for classification of goods and services for the purposes of trademark filing.

So if 'patented' and 'trademarked' do not make much sense, then perhaps it is indeed the case that 'copyrighted' was the correct word. This would however involve a proposition that the cookies themselves are artistic works, and hence eligible for copyright protection - an argument with several layers of analytical complexity. Another possibility is that she is not talking about the actual cookies

¹ Article 5(2) of the Berne Convention on the Protection of Literary and Artistic Works provides that copyright protection cannot be subject to any formalities.

² The Nice regime is an international intellectual property agreement, harmonizing the system of classifying goods and services for the purposes of trademark law.

themselves, but the recipe used to make the cookies. However, the notion of protecting a recipe by copyright is a nuanced area. On one hand, a mere listing of ingredients is not copyright eligible.³ Conversely, the literary expansions and illustrations that often supplement ingredient listings, do meet the copyright eligibility criteria.

If a particular recipe really is ground breaking in that it is innovative and solves some known culinary problem, then maybe that recipe really is patentable. And so, the analysis circles back to patents. For completeness of discussion, it is noted here that in most cases, family recipes are protected by yet another different form of intellectual property – the trade secret.

The point of this example is that in common everyday communication, non-experts often erroneously use the terms ‘patent’, ‘trademark’, and ‘copyright’ somewhat interchangeably. While these forms of intellectual property rights all have very different public policy bases, economic functions, and legal mechanisms, one should not find fault with such casual linguistic errors. After all, the purpose of language is to communicate information, and the technical differences between different forms of intellectual property are irrelevant in this context. All that needs to be communicated is the cookies are somehow ‘owned’ by the creator, in an intangible sense that goes beyond the individual units of the physical baked goods; indeed, the words ‘patented’, ‘trademarked’, and ‘copyright’ all adequately succeed at communicating that sentiment.

While one might excuse such terminology misuse by casual commenters, there is an expectation of precision from policy-makers, legal practitioners, and academics – professions in which accuracy and nuance of communication is critical.

It might be assumed that as one digs deeper into the field, the language used in discussions on intellectual property matters becomes more precise. However, the issue of intellectual property rights nomenclature is a not-so-obvious problem in field of copyright law, even for those who claim to be experts in the field. The nature of this problem is captured in the literary device known as a ‘*metonym*’.

[1]-2.2 Shakespearian Metonyms

“Friends, Romans, countrymen, lend me your ears; I come to bury Caesar, not to praise him.” famously said the character Mark Antony in William Shakespeare’s Julius Caesar.

Obviously, Antony did not literally wish to borrow the physical ‘ears’ of those present at Caesar’s funeral. The statement was meant to be a request for the audience’s attention, and the reference to ‘ears’ was meant to represent the call for attention. That representation is a literary device known as a ‘*metonymy*’ - the

³ Generally, simple objective information (devoid of artistic character) is not copyright eligible. In the specific case of recipes, there is case law that explicitly suggests that lists of ingredients are not copyright eligible (e.g. see *Schleifer v. Berns, US District Court, Eastern District of NY 2017*)

substitution of a direct reference to something with a reference to some part or attribute associated with it (i.e. 'ears' are associated with 'attention').

A specific case of metonyms is the synecdoche – where part of something is used to reference the whole (or *vice versa*). For example, in American English parlance, to say that one just acquired a 'new set of wheels' would mean that one bought a new car (or bicycle). Part of the vehicle (the wheels) is used as a literary device to represent the entire car (or bicycle). Most certainly, to someone not familiar with this expression, hearing this statement without proper context can lead to a great misunderstanding; after all, wheels are quite useless without the rest of the car (or bicycle).

So what does this have to do with copyright law? The problem with discussions on copyright law is that the term 'copyright' itself is often used as a synecdoche for wider branches of the intellectual property system.

[1]-2.3 The Synecdoche of Copyright

Copyright is a form of intellectual property that confers certain rights onto the creators and authors of original literary and artistic works. There are of course many different types of creators (sculptors, music composers, poets, painters, architects, etc.), and many different types of works (sculptures, songs, poems, paintings, buildings, etc.). This vast array of creative activity is all captured under the umbrella of 'copyright'.

However, this is not where the problem lies. The problem lies in a separate form of intellectual property known as '*related rights*'. Related rights confer certain rights onto agents who are themselves not necessarily engaged in creating literary and artistic works, but whose activities are necessary for facilitating those works to be expressed and conveyed. These agents include performers – actors and musicians without whom a screenwriters' play or a composer's composition cannot be brought to life – and producers who make the arrangements for fixation (documentation and recording) of performed works.

Another group of related right beneficiaries are broadcasters – agents who themselves do not necessarily produce original works, but are an important mechanism to distribute works to the public. After all, the social value of the fruits of creative endeavour is at least partially related to extent to which those fruits are shared. The intellectual property rights of these broadcasting organisations are the central focus of this manuscript.

It is clear that copyright and related rights do have some sort of fundamental relationship, as the activities associated with related rights support the activities associated with copyright. Nevertheless, copyright and related rights are two distinct forms of intellectual property, with separate public policy goals and economic functions. Furthermore, the different types of related rights themselves are also very divergent in their theoretical bases and economic functions – a theme discussed in detail in Chapter 3 of this manuscript; it would appear that these are

merely grouped together under the umbrella of ‘related rights’ as a matter of convenience.

Hence, if one were to describe the intellectual property system as having three main branches – (i) Patent, (ii) Trademark, and (iii) Copyright, the last term becomes troublesome. The proper nomenclature should describe that third branch as ‘Copyright and Related Rights’. As such, since ‘Copyright’ is a part of the larger concept of ‘Copyright and Related Rights’, the term copyright is used as a synecdoche.

The ability to engage in meaningful discussion is made even more complicated by the fact that different jurisdictions take different approaches to protecting the rights of broadcasting organisations. While some grant an explicit related right, others protect broadcasts under copyright.⁴

A particular frustrating case can be found in the legislation of Canada. Section 21 of the Canadian Copyright Act provides that “...a broadcaster has a copyright in the communication signals that it broadcasts...”⁵ That Section then goes on to set out rights which would be otherwise understood as elements of broadcasters’ related rights. Furthermore, these rights are very different and separate from the rights of copyright owners set out in Section 3 of the legislation. The overall effect is that, Canadian law grants to broadcasters, certain special rights – which would in any other context be called related rights – but refers to it as copyright. There simply could be no better example of how confusing terminology can make meaningful discussion on this topic challenging.

The effect of the ‘copyright synecdoche’ is that the concept of related rights are often relegated to the status of a mere technicality in the structure of the overall intellectual property system. This relegation is not inconsequential. Unlike the case of light-heartedly describing the proprietary nature of cookie recipes, the language of copyright has real consequences in terms of policy debate, the formulation of legal rules, and the overall understanding of the theoretical nature of creative activities and the agents that support them.

To assume that the entire body of knowledge on the nature and theory of the subject matter of copyright equally applies to the subject matter of related rights can therefore lead to uninformed policy-making.

It is needless to say the academic literature on copyright law is extensive. There is a huge body of work analysing a plethora of sub-issues within the copyright system. However, the literature on related rights is certainly much less developed. In the case of the related rights of broadcasting organisations, the literature is particularly sparse. It would hence appear that there is very little cumulative knowledge concerning the nature, theory, and dynamics of the rights of broadcasting organisations. This manuscript aims at filling this literature gap.

⁴ WIPO SCCR/1/3, paragraphs 34-35

⁵ Canada Copyright Act R.S.C., 1985, c. C-42 / Loi sur le droit d’auteur, L.R.C. (1985), ch. C-42; Section 21 - Copyright in communication signals / Droit d’auteur sur le signal de communication

[1]-2.4 Technology and Literature Gaps

An obvious but perhaps incomplete explanation for this literature gap might be that in the timeline of the history of modern legal systems, broadcasting technology is relatively new. Extensive commercial radio services were introduced in the industrial world in the 1920s, and commercial television services did not emerge in a significant way until the 1930s. In contrast, modern copyright law finds its roots in the Statute of Anne, which was enacted in 1710 in Great Britain. It is therefore to be expected that analysis on relatively modern issues like ‘broadcasting copyright’ is much less developed relative to the long-standing history of the legal concept of ‘traditional copyright’.

A similar example of relatively ‘modern copyright issues’ might be found in the field of computer software. While there are certainly more recent technologies that are still uncertain territory for the intellectual property system (e.g. artificial intelligence or 3-D printing), software has at least been in use long enough to have an explicitly established position in the legal system.

The concept of computer software, very broadly speaking (and for the purposes of discussions on copyright law), emerged in the 1950s. However, there is most certainly a large body of literature analysing the issue of how computer software fits into the overall intellectual property system.

The comparison of the attention paid to broadcasting versus computer software may however be somewhat unfair, as software did indeed pose a very interesting question – *should it be protected under patents or copyright law?* The scope and perceived consequences of this question prompted extensive analysis on software and intellectual property, resulting in a wealth of literature on the topic. For completeness, the modern answer to this question is that computer programmes (whether source or object code) are protected under copyright law, akin to a literary works⁶; nevertheless the debate over the notion of software patentability continues.⁷

Aside from the policy dimensions of the copyright-patent debate, the literature on software copyright still goes quite deep. Part of this literature is a theoretical analysis into the very nature of programming code, how it relates to the concepts of creativity and innovation, and what that means for our collective understanding of intellectual property law. Indeed, there are entire books that consolidate various perspectives on this topic, and the result is a very developed theoretical understanding of computer software and its context in the intellectual property system.⁸

⁶ In international law, copyright eligibility for computer software is provided for by Article 10 of the World Trade Organisation TRIPs Agreement, and Article 4 of the WIPO Copyright Treaty.

⁷ For example, see the US Supreme Court Case ‘Alice Corp’ of 2014.

⁸ For example, for an overall assessment of intellectual property and computer software, see Bainbridge (1992).

As such, the example of computer software suggests that the literature gap on broadcasters' related rights is not a function of how recent broadcasting technology is, as the two fields are roughly equal in age. Rather, it suggests that broadcasters' related rights have largely been relegated to a footnote in academic discussions on intellectual property law.

This is not to say that the topic has been completely overlooked due to perceived unimportance. This might be the case if the issue otherwise found no attention in any other forum outside of academia. This however is not the case. As discussed in detail in Chapter 2, the area has been a major topic of debate in the international intellectual property community, and remains a major unsettled point of international copyright law.

There is therefore a very stark and surprising contrast between the levels of attention paid to this topic by academics and by international policymakers. It is in this context that this manuscript aims at contributing to the academic literature on broadcasters' related rights.

[1]-3 OPERATIONAL DEFINITIONS

Before moving on to substantive discussion on the topic of broadcasters' rights, it is useful to first establish some working definitions. Definitions of key concepts are necessary in order to properly contextualise the analysis in this manuscript, even if they are made in broad or even sometimes fluid terms.

[1]-3.1 Defining 'Broadcasting'

A natural prelude to an analysis of intellectual property and broadcasting would be to define the term 'broadcasting'. However, a detailed discussion on the history and technological details of broadcasting is not necessary for the purposes of this manuscript.

Generally, 'broadcasting' refers to a single communication of some set of information to an open group of recipients across some geographical space. A telephone call would not constitute 'broadcasting' as it is a communication made to a single recipient, as opposed to a group of recipients. A letter sent by the State to every single household is also not a broadcast, as a separate (though identical) letter is sent to every household and it therefore not a single technical communication.

Also, a presentation at a conference or seminar (even if using visual or audio aids) would not constitute broadcasting, as the communication is 'face-to-face' rather over some relative geographical distance; furthermore, irrespective of distance, a private conference implies a finite audience and hence not an open group. The concept of the open group implies that any member of the public can access the communication, once the necessary technical requirements for reception are in place. This does not imply that the group of recipients is strictly unlimited and that

there is no excludability – it is just to say that any member of the public has the choice to become a recipient if they so desire; for example, cable television services might be limited to paying subscribers, but despite this excludability, the set of possible subscribers constitutes the entire public (within the technical range of service provision).

The nature of the information contained in a communication is also not directly relevant to whether it constitutes a ‘broadcast’ or not. However, in practical terms, broadcasting – at least in its historic and current forms – is limited to information perceptible by only two of the five traditional human senses, i.e. sight and hearing. Broadcasting is therefore understood as information comprised of sounds and images (or both), although future developments might possibly push up against the boundaries of such a definition (e.g. through olfactory technology which might introduce the concept of broadcasting smells). In the conventional sense, broadcasting should therefore be understood and including – but not limited to – radio and television services.

A major component of defining ‘broadcasting’ is the technology used to provide these services. Traditionally, radio and television services are provided through wireless transmissions on a defined electromagnetic frequency. This concept of traditional broadcasting is sometimes called ‘wireless’, ‘Hertzian’, ‘free-to-air’, or ‘terrestrial’ broadcasting. However, there are other technologies used for broadcasting which were developed relatively more recently, including communications made via wired networks (wired broadcasting or ‘cablecasting’), satellite networks (satellite broadcasting), and through the internet (‘webcasting’).

In the context of legal rules, ‘broadcasting’ may also take on different meanings in the context of different bodies of law. For example, broadcasting – as a technical act, particularly where electromagnetic frequencies are used – is subject to telecommunications law and regulatory policy.

The International Telecommunications Union (ITU) ⁹ defines a ‘broadcasting services as *“A radiocommunication service in which the transmissions are intended for direct reception by the general public. This service may include sound transmissions, television transmissions or other types of transmission”*. ¹⁰ Furthermore, it defines ‘radiocommunication’ as *“Telecommunication by means of radio waves”* ¹¹, and radio waves (or ‘hertzian waves’) as *“Electromagnetic waves of frequencies arbitrarily lower than 3 000 GHz, propagated in space without artificial guide”*¹². In the context of telecommunications law, broadcasting services

⁹ The International Telecommunications Union (ITU) is the specialised agency of the United Nations, which deals with issues relating to information and communications technology. The Radio Regulations (RR) as one of the main treaties administered by the ITU, and deals with the issue of allocation of electromagnetic spectrum resources.

¹⁰ ITU Radio Regulations, Article 1, Definition 1.38

¹¹ ITU Radio Regulations, Article 1, Definition 1.6

¹² ITU Radio Regulations, Article 1, Definition 1.5

can therefore be understood as a subset of telecommunications services that are based on the use of electromagnetic spectrum.

Another body of law which might apply to broadcasting is public law. This body of law would set out the regulations which apply to broadcasters in terms of the content which they broadcast. This would include policy areas such regulations on local content, advertising, and protection of minors. In this body of law, individual jurisdictions would set out relevant definitions for regulated services.

However, the definition of broadcasting relevant to this manuscript relates to intellectual property law. In this regard, the main feature of such a definition is the technology used for transmission. Generally, broadcasting is understood as referring specifically to wireless terrestrial broadcasting. Other forms of broadcast-like transmission are often referred to by technology specific names such as 'cablecasting' and 'webcasting', as previously mentioned.

Chapter 2 on the International Framework for Broadcasters' Rights discusses the definition of 'broadcasting' in international intellectual property treaties, and the coverage (or lack thereof) of different transmission technologies.

For the purposes of the analysis of broadcasters' rights in this manuscript, the term 'broadcaster' should hence be understood to refer to traditional broadcasting, with the subtext of an explicit intention to generalise the relevant discussions to other technologies.¹³ Where the analysis requires more explicit differentiation, the discussions will use more technology-specific language.

Furthermore, within this manuscript, the intention is to treat broadcasting services in general terms. While television services are often used for illustrative purposes, the analysis is meant to be equally applicable to other forms of broadcasting.

[1]-3.2 Definition of 'Broadcasting Organisation'

Since the provision of broadcasting services to the public falls under telecommunications and public law, service providers usually need public authorisation to provide services. Such authorisation should be understood as separate from the authorisation required to use a specifically allocated frequency.

Hence, the term 'broadcasting organisation' should be understood as being restricted to only those entities undertaking the activity of broadcasting where such activity is legitimately authorised under the regulatory framework of the relevant jurisdiction.

Furthermore, the technical act of broadcasting is often very complex, and might involve several different parties. For example, sometimes the infrastructure used for signal transmission might not be owned by the entity that compiles the

¹³ The concept of the synecdoche strikes again!

communication that is to be transmitted. In this example, the 'broadcasting organisation' can be understood to be (i) the party with 'editorial responsibility' for the communication, (ii) the party which undertakes the technical act of signal transmission, or (iii) both in conjunction. This question, while very important in terms of application of the law, is not relevant for the analyses in this manuscript. Therefore, it is sufficient to very generally define the 'broadcasting organisation' as the party responsible for undertaking the activity of providing a broadcasting service to the public.

[1]-3.3 Definition of 'Broadcaster's Rights'

The term 'broadcaster's rights' should be understood as being identical in meaning to 'the rights of broadcasting organisations'. Furthermore, it is important to understand that 'broadcaster's rights' are separate from – though easily confused with – the similar sounding term 'broadcasting rights'. 'Broadcasters' rights' are certain rights enjoyed by broadcasting organisations. In contrast, 'broadcasting rights' are certain rights enjoyed by copyright owners, particularly to control communication to the public of their protected works through broadcasting. To properly understand the analyses in this manuscript, it will be critical to continuously and actively acknowledge this difference.

Given the different bodies of applicable law, the concept of some 'rights' as enjoyed by broadcasting organisations can have different connotations in different context. For instance, in a telecommunications law context, the broadcasters' rights might be interpreted to mean the authorisation given to provide service to the public; it might also mean the right use a certain allocated frequency for the provision of such services.

In the context of public law, the concept of the rights of the broadcaster might be interpreted to refer to some exercise of the principles of freedom of speech, freedom of the press, or freedom to conduct business.

However, in the context of this manuscript, 'broadcasters' rights' should be explicitly interpreted in the context of intellectual property law. The term therefore refers to the rights granted to broadcasting organisations under intellectual property law, which relate to protection of a broadcast signal transmission. However, it is noted that the term may still more widely include other forms of protection which do not take the form of intellectual property (e.g. criminal liability for piracy of broadcast).

The specific scope and nature of these rights are discussed Chapter 2. However, for completeness, it should be stated that broadcaster's rights – like copyright – are generally bundles of different rights. The typical components of such a bundle are rights to control (i) fixation of a broadcast, (ii) retransmission of a broadcast, and (iii) communication to the public of a broadcast.

In this manuscript, the concept of 'broadcasters' rights' will be referred to as a general concept. Where necessary, specific rights – particularly the right of retransmission (which is the focus of Part IV) – will be referred to.

A final important note is that choice of intellectual property tool is not relevant to how the term broadcasters' rights is to be understood in the context of this manuscript. While some jurisdictions grant protection to broadcasting organisations through copyright, some grant protection through a related right. However, this designation generally has no material impact on the exact nature and scope of the rights granted, and should be seen as a peculiar technicality of individual jurisdictions' legal systems. Accordingly, the term 'the related rights of broadcasting organisations' is used in this manuscript as a generalised concept, even though in some cases, those rights might not be applied through a related rights system.¹⁴ For completeness, it should also be noted that the term 'neighbouring right' should be understood as identical to 'related right'.

[1]-3.3.1 Independence of Rights

A very important theme in this manuscript is the independence of copyright and the related rights of broadcasting organisations. The two are legally distinct concepts, and have different functions.

In practice, it is noted that a broadcasting organisation would often produce some of its own material, and hence also be a copyright holder. Hence, the two different rights often co-exist simultaneously (and are held by the same entity) in relation to the transmission of certain content. This however is not always the case, and the nature, function, and scope of these rights are different. Hence, the analysis stresses this 'dichotomy' of copyright and related rights.

To draw an analogy, it is no different from analysing the behaviour of a firm producing a good, where the good is protected by both a patent and a trademark. Both forms of intellectual property (i.e. the patent and the trademark) have different functions and scopes, although there may be overlap in the resulting effective protection from certain actions of competitors. In such a case, analysis of the firm in its capacity as a patent holder would not be affected from the fact that firm also enjoys trademark protection.

[1]-3.4 Definition of Specific Rights

Two specific elements of the broadcaster's 'bundle of rights' require some up front clarification. The first is the concept of 'fixation'. Because a broadcast is a transient communication, it exists only in the instance in which is transmitted. It therefore has no temporal permanence in a material sense. A broadcast may however be recorded in some way, resulting in some material permanence. This process of

¹⁴ Interestingly, this suggests a sort of reversal of the 'synecdoche' concept discussed in Section 2. The term 'related right' is used to include broadcasters right both when expressed through related rights, and copyright.

recording is known as ‘fixation’ in copyright and related rights law. The right to control fixation is one of the core elements of a broadcaster’s related rights.

The second element is the concept of retransmission. When a broadcast is first communicated to the public, it is said that a broadcast signal is transmitted. That signal may then be received by an entity other than the original broadcaster, and again transmitted. This process of receiving a transmission and engaging in a secondary transmission is called ‘retransmission’. A retransmission can be carried out through various technical means including by another broadcaster, a cable network, a satellite operator, or over the internet. In some contexts, (mostly in older legal writings), retransmission is called ‘re-diffusion’ or ‘re-broadcasting’; the terms should be understood as having the same meaning.

[1]-4 RESEARCH QUESTIONS AND OBJECTIVES

With the above general definitions set out, this section gives an overview of the general structure of this manuscript, its chapters, and their underlying research questions.

[1]-4.1 Overall Research Question

This dissertation manuscript is titled *‘An Economic Analysis of the Intellectual Property Rights of Broadcasting Organisations’*.

The overall goal of is to lay the theoretical foundations for an understanding of the nature, economic function, and legal mechanisms of the intellectual property rights of broadcasting organisations. The fundamental overarching research question in this regard is:

QQ: “What are the theoretical bases and economic mechanisms of the related rights of broadcasting organisations?”

[1]-4.2 Overview of Part I

Part I of this manuscript (*‘Introduction and Research Background’*) provides background information and the motivation for the research analysis in the rest of the manuscript. It consists of two chapters. Chapter 1 (the current chapter) provides general introductory information including the motivating factors for the research project. Chapter 2 provides an overview of the international framework for the protection of broadcaster’s rights.

It is important to note that the discussions in Chapter 2 relate to current policy debates, and therefore provide an understanding of the relevant issues as of July 2018. It is possible – and indeed quite likely – that at the time of reading this manuscript the status of the international debate of protection of broadcasting organisations has changed.

[1]-4.3 Overview of Part II

Part II is titled '*Broadcasting as Unique Subject Matter*', and contains two chapters. It provides the theoretical background to the topic – both in terms of legal and economic theory (as opposed to 'Law and Economic' theory) – and sets the context for the subject matter.

Chapter 3 is the first substantive analytical chapter, and is titled '*Broadcast Signals as IP Subject Matter*'. It analyses the theoretical foundations of intellectual property law, and how they apply to broadcasting signals. The underlying research question in this chapter is as follows:

Q1: "How do existing theories of intellectual property rights apply to the case of broadcast signals?"

The broad conclusion of this chapter is that broadcasters' rights have a very uneasy fit within the framework of the traditional theories of intellectual property.

Chapter 4 ('*The Economics of Broadcasting Markets*') moves on to provide an overview of the economic context of broadcasting markets. Its underlying research question is as follows:

Q2: "What are the key features of the markets in which the related rights of broadcasting organisations exist?"

The general conclusion is that broadcasters' rights are just one element of a very complex system of policy issues and legal rules that characterise broadcasting markets.

The analysis in Part II contributes to answering the overall research question as Chapter 3 concludes that understanding the theoretical bases of broadcasters' rights cannot be accomplished by deference to existing analyses of other branches of intellectual property. Chapter 4 build on this conclusion by noting the unique context of broadcasting markets, and hence why broadcasters' rights are indeed a specific case for the intellectual property system.

[1]-4.4 Overview of Part III

Part III is titled '*Modelling Broadcasters' Rights*'. This Part contains three chapters, two of which are mathematical in nature. The purpose of this is to analyse the specific issue of the scope and strength of broadcaster's rights, particularly in terms of its relationship to more general copyright.

This Part of the manuscript is the most explicit part in terms of its use of the methodology of Law and Economics.

Chapter 5 is titled '*Incentive-Access Model of Copyright*'. This chapter focuses on the issue of scope of protection. It analyses the key features of building an

economic model for the 'scope' of protection granted under copyright. The chapter then attempts to see how such a model can apply to the case of broadcasters' rights, further to the idea established in the previous chapter that broadcasters' rights really are a unique subject matter case in the intellectual property system. The underlying research question is therefore as follows:

Q3: "What is the optimal scope of rights for the related rights of broadcasting organisations?"

The broad conclusion of this chapter is that the scope of rights for broadcasting organisations should be less than that which is constructed for general copyright. While Chapter 5 takes a very abstract and theoretical view of the concept of 'scope of protection', Chapter 6 gives a practical discussion on the various policy dimensions that affect such scope. This chapter is titled '*Policy Levers for Breadth of Protection*', and analyses the various aspects of the concept of 'breadth of protection', and how such apply differently for general copyright and for broadcasters' rights. The underlying research question is therefore as follows:

Q4: "What are the practical policy dimensions that affect the scope of protection for the related rights of broadcasting organisations?"

The general conclusion is that the policy levers for broadcaster's rights are much more limited than that for patent protection and general copyright.

Chapter 7 is titled '*Enforcement in Broadcasting Markets*'. This chapter focuses on the specific issue of enforcement, specifically where both copyright and the rights of broadcasting organisations have interests in addressing infringements.

The basis of this analysis is that broadcasting markets are unique settings in terms of infringement and enforcement activities, given that two different sets of intellectual property are involved. This discussion builds on a notion of anti-commons effects, which was previously briefly discussed in Chapter 4. The underlying research question in this chapter is:

Q5: "What are the dynamics of intellectual property enforcement activities in broadcasting markets?"

The broad conclusion of this chapter is that there are various possible outcomes regarding enforcement of intellectual property rights in broadcasting markets, and these outcomes largely depend on the specifics of market and infringement characteristics.

The chapter also concludes with a suggestion that as an alternative to granting exclusive intellectual property rights to broadcasting organisations, such organisations can be allowed to undertake enforcement actions on behalf of the copyright owners with whom they hold licencing agreements.

This specific concluding proposition indirectly corresponds to the conclusion of Chapter 5; the notion of giving the broadcaster enforcement standing on behalf of

copyright holders results in constructing a scope of protection from the broadcaster that is less than that for the copyright holder.

Part III contributes to answering the overall research question by concluding that even though broadcasters' rights are a legally and theoretically independent concept from copyright, understanding the theoretical relationship between the two is necessary to understand the theoretical bases of broadcaster's rights. More specifically, in addressing the question of scope of protection, the process of designing optimal protection for broadcasting organisations requires some consideration of the scope of protection given to authors of copyright protected works.

[1]-4.5 Overview of Part IV

Part IV is titled '*Analysis of Retransmission Rights*'. Unlike all previous Parts, which focus on broadcasters' rights in general terms, this Part specifically focuses on retransmission rights. It consists of three chapters. However, unlike the preceding chapters which focus explicitly only on broadcasting organisations, these chapters analyse retransmission rights for copyright holders. This is significant because while the retransmission right is one aspect of a broadcaster's related rights, its exercise is inseparable from the corresponding retransmission right of the copyright holder.

Chapters 8 and 9 are inherently connected, and are separated only for editorial management. These chapters focus on the European Union legal framework for broadcasting and broadcast retransmissions. Chapter 8 is a positive analysis of the existing legal framework for broadcasting, and is titled '*The EU Legal Framework for Retransmission*'. It addresses the following research question:

Q6: "What are the key features of the current European Union legal framework for regulating retransmission activities?"

The general conclusion of Chapter 8 is that the European legal framework for retransmission is comprised of a complex network of multiple legal instruments. The key features of this system are the country-of-origin principle for cross-border broadcasts, and mandatory collective management for retransmission rights. However, it appears that this framework has some internal inconsistencies and gaps in logic.

Building on Chapter 8, Chapter 9 analyses goes into further detail analysing the new proposed EU legal instrument on retransmission, and is titled '*The EU Proposal on Online Transmissions*'. It addresses the following research question:

Q7: "Does the Proposed European Union Regulation on Online Transmissions succeed in adequately updating the legal framework for retransmissions?"

The general conclusion of Chapter 9 is that while the new Proposed Regulation supposedly aims at updating the legal framework and filling the gaps identified in Chapter 8, it appears to fall short of these objectives. It concludes with a general recommendation for a technology neutral policy approach to regulating retransmissions – an approach that the EU Proposal does not adopt.

Like Chapter 2, it is important to note that Chapter 9 addresses a current event. The analysis of the content in this chapter is based on an understanding of the relevant developments as of *July 2018*. It is very likely that at the point in time that the reader peruses this work, the relevant facts would have substantially changed. For example, a new legal instrument may or may not have been adopted by the European Union, which may or may not bear any resemblance at all to the Proposal analysed in this chapter. However, the analysis is still relevant as a case study and a basis for articulating certain theoretical arguments, which should in principle retain some relevance irrespective of subsequent developments.

Chapter 10 is titled *‘Theories of Retransmission Rights’*. This chapter builds on the case study in Chapters 8 and 9 and attempts to construct a basic understanding of the theoretical foundations of retransmission rights. It analyses the foundations for both copyright authors’ and broadcasters’ retransmission rights, and how they relate to each other. The underlying research questions of this chapter is therefore as follows:

Q8: “What are the theoretical bases and economic mechanisms of retransmission rights?”

The general conclusion of this chapter is that the retransmission rights of the copyright holder and of the broadcaster are strongly linked. As the right of the broadcaster comes into existence, a constraint on the rights of copyright holders simultaneously emerges. This constraint takes the form of a limitation to exclusive copyright, and its purpose is to offset the high transaction costs that characterise the retransmission market. Furthermore, the way in which this constraint is constructed depends on policy choice, but is dictated by a general trade-off between freedom of contract and legal certainty. These policies can also be explained as having a theoretical resemblance to the concepts of default contractual rules, copyright exhaustion, and the conversion of property rules into liability rules.

In addition to these limitations to copyright and policy choices, the concept of retransmission itself also involves various technical and doctrinal legal challenges, which are only likely to increase with increased technological innovation.

Part IV contributes to answering the overall research question by building some theoretical understanding of the retransmission rights of broadcasters, and how these relate to the retransmission rights of copyright-holders.

[1]-4.6 Overview of Part V

Part V of this manuscript is the concluding part. It contains a short concluding chapter that summarises the main research findings of this manuscript, most of which have been articulated in the discussions above. It also provides some general comments on how these conclusions can be used to inform the international policy debates described in Chapter 2.

The final parts consist of a bibliography for the entire manuscript, and Annexes to the various chapters.

[1]-4.7 Notes on Structure

The general arrangement of the chapters in this manuscript follows a certain organisational logic. The general idea is to begin with a very wide discussion that tends to get narrower in scope with each chapter.

[1]-4.7.1 Progression of Analytical Scope

The content of Part I is mainly introductory, where Chapter 1 contains editorial information, and Chapter 2 provides practical policy context on the topic. The main analysis begins in Part 2.

In Part II, the discussions in Chapter 3 and 4 are intentionally very wide. While the focus is on broadcasters' rights, the frame of discussion in Chapter 3 is a broad analysis of the overall intellectual property system, and the theories on which that system is based. Similarly, Chapter 4 gives a very broad discussion of the overall landscape of the broadcasting sector, in which broadcasters' rights are just one element.

Part III then focuses in on the question of scope of protection. While the frame of discussion in Chapter 5 is therefore narrower than that of Part 2, it looks at the question of scope – the fundamental character of the nature and structure of a given right – in very abstract and hence broad terms. Chapter 6 then brings some specificity and tactility to the broad concept of 'scope' discussed in Chapter 5. Chapter 7 then focuses away from the notion of the nature of structure of rights, and focuses on the issue of enforcement of said rights. This is hence a further narrowing of scope.

Chapters 8 and 9 then go even narrower by focussing on one specific jurisdiction (the European Union), and the entire Part IV focuses one specific aspect of broadcasters' rights – the retransmission right. However, in order to undertake this analysis, the scope is also widened in that Part IV focuses much attention on the retransmission aspect of copyright (as opposed to strictly focussing on broadcasters' related rights). Nevertheless, this is still structurally consistent with Part II, which frames the analysis of broadcasters' rights as relative to general copyright.

In a break from the trend of progressively narrowing scope, Chapter 10 then becomes more general as it sets out a general theoretical discussion on retransmission rights. This structure is necessary as Chapter 10 necessarily builds on the content in Chapters 8 and 9.

The reason the retransmission right is given such dedicated attention in this manuscript (as opposed to fixation rights for example) is because it a very analytically interesting area. In terms of policy, retransmission is the individual right for which there are the most complex legal rules (as discussed in Part IV). Furthermore, in economic terms, since retransmission involves another second party besides users (i.e. the retransmitting broadcaster), retransmission rules have a different economic context. Broadcaster's rights generally exist to solve a public good market failure (as discussed in Chapter 4). However, where a signal is retransmitted, new market issues come into play – high transaction costs and information asymmetries due to legal uncertainty (discussed in Chapter 8). Regulation of retransmission rights is therefore a task in balancing the trade-offs between different issues. The result is that retransmission is an extremely interesting area for academic analysis, and Law and Economic analysis in particular.

[1]-4.7.2 Separability of Chapters

Generally speaking, this manuscript is designed to be read as a single cohesive work. However, it is drafted such that each individual chapter can be read as a separate piece (with the exception of Chapter 9, which only makes sense if read after Chapter 8). As such, individual chapters often contain some basic content repeated from previous chapters, mostly in the form of prompts to the reader to 'recall' certain core principles that would have been previously established.

Such repetition has generally been kept to a minimum, and used only where fundamentally necessary to set the stage for the analysis that follows.

[1]-4.7.3 Methodology and Chapter Contents

While this manuscript was prepared in the context of Law and Economics, certain chapters deviate from this and present mainly historic and legal information in order to provide a complete overview of the topic.

This specifically refers to Chapters 2, 8, and 9, which give detailed information on the international legal framework and the European Union respectively.

In Part I, Chapter 1 is merely introductory, while Chapter 2 gives historical background on the international legal framework. Chapter 2 is therefore mostly descriptive.

While Chapters 3 and 4 do not follow a Law and Economic methodology *per se*, they do frame the entire analysis by discussing the topic from a legal and economic perspective respectively. As noted above, Part III (Chapters 5, 6, and 7) of this

manuscript is the main part in terms of applying the methodology of Law and Economics.

Chapter 8 focuses on the European Union, and like Chapter 2, gives a detailed account of legal rules. Chapter 9, does contain an analytical contribution, but as it builds on Chapter 8, is also mostly legal. The purpose of these chapters is to provide the basis for Chapter 10 which does contain Law and Economic analysis.

Furthermore, given that the legal descriptive chapters in this manuscript focus on the given state of current legal frameworks, they might lend themselves to analysis from a Public Choice Theory perspective. However, such analysis is expressly outside of the scope of this research project; the overall goal of this project is to develop a theoretical perspective on broadcasters' rights, and not to account for the current legal state.

Consequently, **readers exclusively interested in Law and Economics would wish to skip Chapters 2, 8 and 9.**

[1]-4.7.4 Applicable Body of Law

The analysis in this manuscript is intentionally jurisdictionally non-specific. With the exception of Part IV, which explicitly focuses on the European Union, the majority of this manuscript discusses issues in a manner that can be theoretically applied to any jurisdiction. However, there are of course several points at which individual pieces of legislation or case law from specific countries are used as references; such references are generally for mere illustrative purposes, and are not meant to narrow the focus onto any specific jurisdiction.

As such, references to legal principles and rules in this manuscript are intentionally based on the international intellectual property law, as defined by various multilateral treaties.

For the sake of clarity, international law in this sense explicitly refers to the body of international treaties administered by the *World Intellectual Property Organisation* (WIPO). Most commonly, references are made to the *Berne Convention (...for the Protection of Literary and Artistic Works, 1886)*, and the *Rome Convention (International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961)*.

In addition to the treaties administered by WIPO, in the context of this manuscript, 'international intellectual property law' also includes the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPs Agreement), to which all *World Trade Organization* (WTO) Member States are bound.

Chapter 2 contains a detailed discussion of all the relevant provisions of international law as they relate to broadcasters' rights. This chapter can therefore be used as reference material in this regard.

However, parts of this manuscript (mainly Chapter 10) also rely on various international legal provisions on copyright (and related rights besides broadcasters' rights). These provisions are summarized in *Annex 4*.

[1]-5 LITERATURE REVIEW

Academic readers are likely to peruse this manuscript and have a frank (and very valid) criticism – the apparent deficiency of citations and references to academic sources. Indeed, part of the motivation for this study is the apparent lack of academic literature on the specific niche topic of broadcasters' rights. However, this research does attempt to make good use of existing documents on this topic, such as industry reports, government policy papers, and documents from WIPO.

The general sentiment however is that broadcasters' rights is an extreme niche subject area. For example one can have a look at Cornish et al (2013)¹⁵, which is used as the go-to reference text for intellectual property law courses in many Commonwealth law schools. This text dedicates nothing more than a few paragraphs, simply mentioning the fact that broadcasters' related rights exist.

In the field of law and economics, discussions on intellectual property law almost always begin with Posner and Landes (2009)¹⁶, the seminal text on the economics of intellectual property rights. However, this text does not make any explicit reference to broadcasters' rights, besides in broad discussions about (i) copyright over facts in the context of sports broadcasts, and (ii) the principle of fair use and time-shifting in the famous *Betamax* case.¹⁷

The topic therefore does not even appear in general reference texts. Accordingly, the section below aims at providing an overview of the existing literature that is specifically dedicated to broadcasting organisations and intellectual property. Generally speaking, the literature can be categorised into six streams.

[1]-5.1 General Literature on Broadcasting and Copyright

The first stream consists of general literature on the issue of intellectual property in the broadcasting sector. Literature in this stream is not necessarily focused on broadcasters' related rights, but more generally on intellectual property in the broadcasting markets.

¹⁵ Cornish, W., Llewelyn, D., & Aplin, T. (2013). *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 8th, London, Sweet & Maxwell. Proof of the massive popularity of this text lies in the fact that the 2013 Edition is the eighth edition since the book was first published in 1980.

¹⁶ Landes, W. M., & Posner, R. A. (2009). *The economic structure of intellectual property law*. Harvard University Press.

¹⁷ Posner and Landes (2009) at pgs. 106 and 118 respectively.

A good example of this is stream is Vaish (2008) – *Intellectual Property Rights and Broadcasting Rights*.¹⁸ This stream of literature does not provide any major analysis of broadcasters’ rights as a specific form of intellectual property, but more general discusses licencing audiovisual works for communication to the public via broadcasting. It therefore focuses on ‘broadcasting rights’ as opposed to ‘broadcasters’ rights’. To the extent that broadcasters’ rights are discussed, discussions are generally superficial.

While this stream strongly dominates literature searches, it is of little relevance to the specific scope of this research project.

[1]-5.2 General Literature on Related Rights

The second stream of literature is the body of works that focus generally on related rights (also known as ‘neighbouring rights’). The works in this stream collectively discuss various related rights, usually the rights of performers, producers, and broadcasting organisations; an example would be Jehoram (1991).¹⁹

This is normally in the context of discussing the main international treaties on related rights – the Rome Convention, and the WIPO Performances and Phonograms Treaty.²⁰ An example of such literature is Davies (2012).²¹

As a general note, works that discuss related rights as a class of intellectual property tend to focus on performers’ rights. Since this stream places little focus on the specifics of broadcasting, this body of literature is of very little relevance to building a theoretical understanding of broadcasters’ rights. However, in terms of understanding the theoretical foundations of related rights, this literature is discussed in Chapter 3.

[1]-5.3 WIPO Specific Literature

By far the largest stream of literature on the topic of broadcasters’ rights is that associated with discussions at the *World Intellectual Property Organisation* (WIPO) regarding the possibility of a new international agreement on the issue. This body of literature can further be broken down into two subsets – articles and commentaries on the Proposed WIPO Treaty, and documents published by WIPO itself.

¹⁸ Vaish, A. (2008). *IPR and Broadcasting Rights*. Shree Publishers and Distributors, New Delhi

¹⁹ Cohan Jehoram, H. (1991) – *The Nature of Neighboring Rights of Performing Artists, Phonogram Producers and Broadcasting Organizations*, 15 Colum.-VLA J.L. & Arts 75

²⁰ These treaties are discussed in detail in Chapter 2.

²¹ Davies, G. (2012) - *The 50th Anniversary of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations: Reflections of the Background and Importance of the Convention*, 2 Queen Mary Journal of Intellectual Property 206

While there is a lot of material in this stream, it is not from peer-reviewed academic sources. The works in this stream mainly consist of policy briefs and technical documents. The documents from WIPO are the main basis for the analysis in Chapter 2.

In terms of WIPO publications, one set of documents appears quite useful – a series of studies on the *'Socioeconomic Dimension of Unauthorized Use of Signals'*. Part I of the Study analyses market and technological trends²², with the general conclusion that service availability and new technological platforms have greater penetration in developed markets. Part II analyses the causes and effects of signal piracy²³, and generally identifies various technical mechanisms for unauthorised access to signals, and notes that such access reduces incentives for investment. Part III analyses the effects of the Proposed WIPO Broadcasting Treaty²⁴, and reads more like an explanatory document of the Treaty's proposals rather than a firm economic analysis. In terms of the intended scope of this research project, none of the documents provide any real theoretical background on the nature of broadcasters' rights.

In terms of non-WIPO publications, there are several policy briefs and commentaries published by various stakeholder groups, civil society organisations, and think tanks. However, these publications all focus explicitly on the WIPO Treaty, its progress and its issues, rather than on broadcasters' rights as a theoretical concept.

For example, Akester (2006)²⁵ and CDT (2011)²⁶ both discuss the possible negative effects of the proposed treaty on freedom of expression, while Rumphorst (2006)²⁷ critically explains some of the key features of the treaty. South Centre (2007)²⁸, analyses the treaty and opines that it fails to legitimately balance the interests of all stakeholders from a development perspective.

There are several other policy briefs and commentaries by various authors and institutions, which all generally follow the same theme – scepticism on the proposed WIPO Broadcasting Treaty. One would also note that the majority of these works were published between 2006-2008, when the WIPO Treaty achieved

²² WIPO SCCR/19/12 - *Study on the Socioeconomic Dimension of the Unauthorized Use of Signals - Part I: Current Market and Technology Trends in the Broadcasting Sector*

²³ WIPO SCCR/20/2 REV - *Study on the Socioeconomic Dimension of the Unauthorized Use of Signals - Part II: Unauthorized Access to Broadcast Content - Cause and Effects: A Global Overview*

²⁴ WIPO SCCR/21/2 - *Study on the Socioeconomic Dimension of the Unauthorized Use of Signals - Part III: Study on the Social and Economic Effects of the Proposed Treaty on the Protection of Broadcasting Organizations*

²⁵ Akester, P. (2006) - *The Draft WIPO Broadcasting Treaty and its Impact on Freedom of Expression*, UNESCO Copyright Bulletin April – June 2006

²⁶ CDT (2011) – *WIPO Considering Broadcasting Protection Treaty That Could Undermine Online Free Expression* – Center for Democracy and Technology, December 2011

²⁷ Rumphorst, W. (2006) - *The broadcasters' neighbouring right: impossible to understand?*, UNESCO Copyright Bulletin July – September 2006

²⁸ South Centre (2007) - *The Proposed WIPO Treaty on the Protection of Broadcasting and Cablecasting Organizations*, South Centre Policy Brief, June 2007 No, 8

peak stakeholder interest (the observation that the Treaty achieved peak momentum in this time is established in Chapter 2).

In terms of academic research, Rafiei (2015)²⁹ – a PhD thesis manuscript in law – provides a detailed historical account of the WIPO Treaty. However, it does not critically assess the basis of broadcasters’ rights and does little to establish a firm understanding of the subject matter from a theoretical perspective.

[1]-5.4 Jurisdiction Specific Literature

The fourth stream of literature is comprised of articles that relate to broadcasters’ rights in specific jurisdictions. This can of course relate to the Proposed WIPO Treaty and resulting issues in specific jurisdictions. For example, CRS (2008) is a US Congressional Research Report that discusses the WIPO Treaty as it relates to the USA.³⁰

In a similar vein, some analyses focus on jurisdiction-specific legislative proposals (often triggered by the WIPO Treaty debates), such as Kumar and Paul (2007) who discuss broadcast rights reform in India.³¹

Some of this literature however focuses on jurisdiction-specific legal frameworks. Notably, there is a sub-set of literature such as Rumphorst (1994)³² and Hugenholtz (2012)³³ that analyses issues in the European legal framework – specifically the ‘Satellite-Cable Directive’. This analysis is explored in detail in Chapter 8.

Another major sub-set of jurisdiction-specific literature is the literature on the US system of ‘Retransmission Consent’. Examples of this literature include Chae (1998)³⁴, Clements and Abramowitz (2006)³⁵, and Burton (2012)³⁶. Although there is indeed a very large body of literature on this topic, it has restricted relevance to this research project. This is partially because the US legal framework

²⁹ Rafiei, G. (2015), *The Possibility of granting new legal protection and IP rights to broadcasting organizations against the unauthorized exploitation of their broadcasts*, Doctoral Thesis, Université de Neuchâtel, Faculty of Law, 2015

³⁰ CRS (2008) – *WIPO Treaty on the Protection of Broadcasting Organizations*, Congressional Research Service, Library of Congress RS22585

³¹ Kumar and Paul (2007) – *Rights of Broadcasting Organisations: Do We Need Legal Reform?*, Indian Law Institute, New Delhi

³² Rumphorst, W. (1994) – *Satellite and Cable*, *Managing Intellectual Property*, April 1994 ; 3, 38

³³ Hugenholtz, P. (2012) - *SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive*, Amsterdam Law School Research Paper No. 2012-42, University of Amsterdam, Institute for InformationLaw (IViR)

³⁴ Chae, S. (1998) - *A bargaining model of retransmission consent and must-carry rule*, *Information Economics and Policy* 10 (1998) 369-387

³⁵ Clements, M. and Abramowitz, A. (2006) - *Retransmission Consent, Network Ownership, and the Programming Decisions of Cable Operators*, *Journal of Media Economics*, 19:4, 221-240

³⁶ Burton, M. (2012) - *Reforming Retransmission Consent*, *Federal Communications Law Journal*; May 2012; 64, 3

is a case that is hard to generalise due to its complexity and extreme specificity. In this system, protection of broadcasts is afforded under the regime for telecommunications regulation by the Federal Communications Commission (FCC), rather than through the intellectual property system. Indeed, as will be noted in Chapter 2, explicit broadcasters' rights do not even exist in the USA. Furthermore, the US market is unique in that it is subdivided into various local markets, with a major role for national networks that act as brokers and intermediaries between local broadcasters, advertisers, and content owners. As these studies are concerned with the very specific structure of that system, and the dynamics of how regulatory policy is made in the US communications sector, this literature does not provide much guidance in terms of developing a theoretical understanding of broadcasters' rights. Nevertheless, key elements of this system are noted in Chapter 10.

[1]-5.5 Issue Specific Literature

The fifth stream of literature concerns the matter of broadcasting and issues that are specific to certain types of content. For example, this would include literature that analyses issues of freedom of speech and freedom of the press in terms of broadcasting activities. In that context, the term 'broadcasters' rights' has a very different connotation, and does not relate to the concept of intellectual property at all, as noted in the sub-section above on 'Defining Broadcasters' Rights'.

A more relevant sub-set of this literature is the set of articles that relate specifically to the issue of sports. Policy discussions on intellectual property and broadcasting almost always bring up the topic of sports broadcasting, as this is a multi-billion-dollar global industry. However, the issue often operates on different levels, as there are sports events that have international relevance, while there are those with only local or national relevance (in terms of audience demand). Nevertheless, there is a large body of literature on sports broadcasting, its economic significance, and its associated legal issues. Examples of literature in this stream include Garrett and Hochberg (1983)³⁷, Cave and Crandall (2001)³⁸, and Gratton and Solberg (2007)³⁹.

For completeness, it is also noted that news broadcasts are also a specific area with its own literature. However, while this area is very useful to understanding the dynamics and economic functions of broadcasters' rights, this stream of literature is generally focussed on practical legal and regulatory issues, rather than constructing a theoretical framework. Furthermore, in terms of intellectual property protection and broadcasting, sports and news should be seen as a special

³⁷ Garrett, R. and Hochberg, P. (1984) - Sports Broadcasting and the Law, Indiana Law Journal, Vol. 59, No. 2

³⁸ Cave, M. and Crandall, R. (2001) - *Sports Rights and the Broadcast Industry*, The Economic Journal, 111: 4-26

³⁹ Gratton, C. and Solberg, H. (2007) - *The Economics of Sports Broadcasting*, Routledge, ISBN 0-203-00385-3

case. These broadcasts are not explicitly addressed in detail in this manuscript, although their nature as a special case is discussed in Chapter 4.

[1]-5.6 Literature Explicitly on Broadcasters' Rights

The final stream of literature is the one most relevant to this research project – material explicitly on theoretical perspectives on broadcasters' rights. In this regard, there are only two works that are relevant and useful to review. The first is the only relevant published book that explicitly focuses on the rights of broadcasting organisations – Ogawa (2006)⁴⁰. The second is one of the only truly useful academic papers that explores the theoretical basic of broadcasters' rights – Balganesch (2007)⁴¹.

[1]-5.6.1 Protection of Broadcasters' Rights

Perhaps the only substantial monograph explicitly dedicated to the issue of broadcasters' rights is the 2006 book by Megumi Ogawa titled '*Protection of Broadcasters' Right*'.

This main thrust of this book is that it attempts to trace the rationale for broadcaster's rights. Its general theme is that there are two distinct approaches to broadcasters' rights – a 'creator-oriented' rationale and a 'social-oriented' rationale. The creator-oriented rationale is understood as based on natural rights theory, characteristic of civil law traditions, and leads to protection of broadcasting organisations' interests through copyright. The social-oriented rationale is understood as based on a consideration of wider social welfare, is characteristic of common law traditions, and leads to protection through related rights. Ogawa then undertakes two case studies – Australia and Japan, which represent legal systems that follow a common law and civil law tradition respectively. The author's general conclusion is that regardless of the initial rationale for broadcasters' rights, the evolutions of the law, particularly as a response to digital technology, has moved towards a more creator-oriented rationale.

On the international level, updating the legal framework of the Rome Convention, as envisioned by a new WIPO Treaty, cannot be explained as merely adapting the existing provisions of the Rome Convention to the digital context. However, due to the Rome Convention's apparent social-oriented rationale, comprehensive protection was not given in the first place, and technological progress has done nothing more than add to the list of problems by creating new varieties of broadcasting outside of the scope of the Rome Convention. Hence, the social-oriented rationale is insufficient to explain the proposals for the new Treaty, and the rationale for broadcasters rights has therefore been shifting to a more creator-

⁴⁰ Ogawa, M. (2006). *Protection of Broadcasters' Rights*. M. Nijhoff.

⁴¹ Balganesch, S. (2007). The Social Costs of Property Rights in Broadcast (and Cable) Signals. *Berkeley Technology Law Journal*, 22(4), 1303-1387.

oriented one.⁴² A conclusion of the book is therefore that the common understanding for the rationale for broadcasters' rights in common law and civil law systems is therefore inaccurate.⁴³

This text is useful as a historical background on the development of international rules on broadcaster's rights, particularly in terms of the development of the Rome Convention; for this reason, Chapter 2 of this manuscript does not attempt to reproduce such an account.

However, the text's contribution is limited to only a purely positive (as opposed to normative) analysis. Firstly, its ascription of 'social-oriented' and 'creator-oriented' rationales stem from textual analysis of the various reports on which the analysed legal instruments were based. It is indeed sometimes the case that the explicitly stated justifications for legal rules do not fully reflect the circumstances within which they are adopted. However, explanations for the adoption of legal rules on the rights of broadcasting organisations, from a public choice theory perspective, is neither the focus of Ogawa, nor this manuscript.

Furthermore, the concepts of the social-oriented rational and the creator-oriented rational generally parallel the incentive and natural rights theories of intellectual property. However, no attempt is made by Ogawa to evaluate the appropriateness of these theories, as a foundation for broadcasters' rights (as is done in Chapter 3 of this manuscript).

Additionally, the necessarily positive analysis means that the entire discussion in the book assumes some implied necessity for broadcasters' rights in the first place. Any normative evaluation of the existence of these rights, their theoretical foundations, or their scope, is not undertaken.

[1]-5.6.2 *The Social Costs of Property Rights in Signals*

At more than 80 pages, Balganes's 2007 article titled '*The Social Costs of Property Rights in Broadcast (and Cable) Signals*' is a very lengthy article. Like most of the writing on this topic, including Ogawa (2006), this article seems inspired by the debates over the WIPO Broadcasting Treaty. The vast majority of the article is dedicated to analysing the US system for broadcast regulation. However unlike other works on the US retransmission consent regime, this article uses a more theoretical analytical lens.

It begins – as most works on the topic do – by discussing the origin of broadcasters' rights in the Rome Convention and discussing the debates over the WIPO Broadcasting Treaty. It then goes on to two interesting perspectives which are relevant for this research project. The first is the notion that property rights in broadcast signals can be seen as a mechanism to reduce transaction costs associated with contacting into certain rights. This perspective is discussed in Chapter 7 of this manuscript.

⁴² Ogawa (2006), pg. 176

⁴³ Ogawa (2006), pg. 177

The second interesting perspective is an analysis of the ‘investment protection and piracy prevention rationale’ for broadcast signal protection. Balganesch’s position is that in the context of piracy, a distinction should be made between losses of existing revenue streams, and losses of potential revenue stream. While only the former should really be considered when evaluating property rights as a justification to prevent piracy, debates on the topic have tended to claim both categories of losses. Balganesch claims that to the extent that broadcasters’ arguments for property rights do have any merit, they derive from the principle of ‘unjust enrichment’.

The article then goes on to give a historic overview of the US television industry, and the various regulatory mechanisms for exclusionary rights. Balganesch describes the US system as being one of ‘attenuated exclusionary rights’, rather than one of exclusive property rights. The article then provides arguments that moving from such a system to one of ‘open-ended property rights’ would result in various negative social consequences, particularly in terms of harming users, hampering innovation, and limiting the development of new markets. The general conclusion is that the regime proposed by the WIPO Treaty does not have readily identifiable gains and is likely to have significant costs.

Balganesch proposes that to address the issue of online retransmission, the current system administered by the FCC can be adapted in and implemented in a phased approach. The First phase would involve remunerating copyright holders through compulsory licencing for retransmitted content. The second phase would involve a similar compulsory authorisation rule to remunerate the broadcasters whose signals are retransmitted online.

These recommendations are similar to recommendations made in Chapter 9 of this manuscript in terms of adopting a technologically neutral approach to retransmission. However, Balganesch’s proposals are even stronger (i.e. a greater limitation on rightsholders) for two reasons. Firstly, Chapter 9’s recommendations are based on the existing European legal framework (discussed in Chapter 8). In the EU framework, mandatory collective management is used for copyright administration instead of the compulsory licences used in the US; as noted in Chapter 10, the compulsory licence is a stronger (more restrictive) policy tool than mandatory collective management. Secondly, Balganesch’s proposal also places a compulsory licence mechanism on broadcast transmissions themselves; the broadcaster therefore does not have any capacity to prohibit retransmission of their signal under this model.

The purpose of the phased approach of Balganesch’s proposal is that the rights of all parties are balanced, while creating a mechanism for the online broadcasting market to grow (under limited liability, just as the cable market in the US was able to), before being subject to additional liability for broadcast signal compensation. The idea is that once the market is sufficiently mature, the additional compensation for broadcasters will incentivise online broadcasters to broadcast their own schedules and content rather than merely retransmitting the offline signals of traditional broadcasters.

[1]-5.7 Overall Assessment of Literature

Based on the above description of the literature on broadcasting and intellectual property, it is clear that there is a general deficiency of academic literature on the topic. Furthermore, the literature that does exist is largely motivated by international policy debates; the general trend is that this literature expresses scepticism about the proposed WIPO Broadcasting Treaty, which will be analysed in the next chapter. There is very little existing material on which one can build some sort of theoretical understanding of broadcaster's related rights, as a unique form of intellectual property. Various elements of the literature are however useful when analysing specific elements of the overall environment in which broadcasters' rights exist.

In the context of the discipline of Law and Economics, the only element of the literature that seems particularly insightful is Balganesch (2007). Indeed, this is the only paper that seems to explicitly discuss the issue with reference to concepts such as transaction costs and property rules. It can therefore be said with some certainty, that there exists a literature gap in terms of the economics of broadcasters' related rights. This manuscript aims to fill that gap.

[1]-6 CONCLUDING COMMENTS

This chapter aimed at giving general introductory content for this manuscript. Furthermore, it aimed at stressing that the topic of broadcasters' rights deserves analytical attention because of the divergence between the attention given to the topic in academia and that given in international policy debates.

The literature review in this chapter underscored that there is a need to develop academic literature on the topic. The next chapter of this manuscript aims at establishing that the topic has indeed attracted a lot of attention at the international level.

CHAPTER 2: THE INTERNATIONAL LEGAL FRAMEWORK

This chapter is mostly legal-descriptive, which **readers exclusively interested in Law and Economics analysis may wish to bypass.**

[2]-1 INTRODUCTION

A major motivating factor for this research project is how much attention the topic of broadcasters' rights attracts at the international level. As the debate on the rights of broadcasting organisations is a major component of international copyright law, a dissertation on the topic would therefore be very much incomplete without dedicating at least some part of the manuscript to outlining these events and issues.

This chapter therefore aims at providing an overview of the international legal instruments dealing with the rights of broadcasting organisations. In this regard, the focus is explicitly on international instruments – mainly those administered by the World Intellectual Property Organisation (WIPO) – a specialised United Nations agency, and main international forum for intellectual property policy. In particular, the focus will be on the debates regarding a new proposed WIPO Treaty on Protection of Broadcasting Organisations.

This chapter has two purposes. Firstly, it will establish an account of the relevant international legal provisions on broadcasters' rights, which provides the basis for the analysis in subsequent chapters. Secondly, it provides the grounds for the claim that the issue of broadcasters' is indeed a major international policy issue.

[2]-2 THE ROME CONVENTION

The natural starting point for any discussion on the intellectual property rights of broadcasting organisations is the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* ('Rome Convention') of 1961.

The Rome Convention can perhaps be seen as the second major international treaty in the field of Copyright and Related Rights; the first is of course the *Berne Convention for the Protection of Literary and Artistic Works* (Berne Convention), originally adopted in 1886.⁴⁴

For the purposes of the analysis in this manuscript, this is the international legal instrument that first coordinated the concept of related rights. The Convention provides for three categories of rights and beneficiaries: (i) the rights of

⁴⁴ For completeness, it is however noted that between the dates of the Berne and Rome Conventions, the Universal Copyright Convention (UCC) was developed and adopted in 1952. The UCC was largely framed as an alternative to the Berne Convention, and has generally lost its significance, except as a note in the history of international intellectual property law.

performers, (ii) the rights of phonogram producers, and (iii) the rights of broadcasting organisations.

Article 1 sets out that the rights provided for in no way affect copyright. This is an important feature, as it underscores the idea of the ‘dichotomy of copyrights and related rights’, mentioned in Chapter 1. Article 2 then sets out the principle of National Treatment (a standard feature of modern multilateral treaties).

Article 3(f) defines ‘broadcasting’ as “*the transmission by wireless means for public reception of sounds or of images and sounds*”. There are few things worth noting about this definition. Firstly, it is limited to ‘wireless’ broadcasting, and hence is centred on traditional terrestrial transmission technology.⁴⁵ Secondly, it is limited to signals intended for ‘public reception’, so that it excludes closed network point-to-point communications. Lastly, the reference to ‘sounds’ or ‘images and sounds’⁴⁶ explicitly includes both radio and television services; for completeness it is noted that the question of copyright protection is irrelevant to the notion of ‘sounds or images and sounds’.

Article 3(g) then defines ‘rebroadcasting’ as the “*simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation.*” The Convention therefore limits the scope of rebroadcasting (retransmission) to simultaneous retransmission. However, this does not mean that non-simultaneous retransmissions are excluded, as in order to undertake a deferred retransmission, the broadcast would first have to be fixed (recorded), which is covered under a separate element of the broadcasters’ rights.⁴⁷ Article 6 then defines the basis on which to determine the point of attachment for a broadcasting organisation, for the purpose of national treatment.

For the purposes of this manuscript, the most important Article of the Convention is Article 13, which sets out the minimum rights for broadcasting organisations, and states as follows:

Broadcasting organisations shall enjoy the right to authorize or prohibit:

(a) the rebroadcasting of their broadcasts;

(b) the fixation of their broadcasts;

(c) the reproduction:

(i) of fixations, made without their consent, of their broadcasts;

(ii) of fixations, made in accordance with the provisions of Article 15, of their broadcasts, if the reproduction is made for purposes different from those referred to in those provisions;

⁴⁵ Accounts suggest that some proposals for the Rome Convention did indeed also extend to wired broadcasting. However, this was possibly excluded due to the fact that too strong protection might reduce the number of participants who wish to adopt the treaty. (Ogawa, 2007, pg 42).

⁴⁶ ‘Images and sounds’ has come to be understood as including ‘images only’ (e.g. silent films).

⁴⁷ This is confirmed by WIPO (1981) comment 3.19.

(d) the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee; it shall be a matter for the domestic law of the State where protection of this right is claimed to determine the conditions under which it may be exercised.

Article 14 then stipulates that the minimum duration of protection is twenty years from the initial broadcast.

Of importance to note, Article 15 provides for certain possible limitations and exceptions. Article 15(1) lists possible exemptions as private use, reporting on current events, ephemeral fixation⁴⁸, and use for teaching and scientific research. These permitted uses bear broad resemblance to the limitations and exception for copyright set out in Articles 10, 10bis, and 11bis of the Berne Convention. However, Article 15(2) provides more broadly for limitations and exemptions to related rights that are in line with the same limitations, and exemptions provided for copyright. Furthermore, it should be noted that Article 16(1)(b) allows for a reservation in applying Article 13(d) (on public communications of television broadcasts).

Therefore, under the Rome Convention, the rights of the broadcasting organisation can be described as a ‘bundle of rights’ (in the same sense that copyright is a bundle of rights), with the following constituent elements: (i) a wireless retransmission right, (ii) a fixation right⁴⁹, (iii) a reproduction right, and (iv) a possible (but limited) public communication right. These rights last for twenty years, and are generally subject to the same limitations as copyright.

As a final point – which is important for historical context on the issue – the Rome Convention currently has 93 Contracting Parties.⁵⁰ In discussions on intellectual property treaties, there is a perception that the Rome Convention does not have very widespread acceptance.⁵¹ For contrast, the Berne Convention has 176 Contracting Parties.⁵²

⁴⁸ In the process of broadcast transmission, a transient temporary reproduction of the content being broadcast is often made for technical purposes. This is the concept of ‘ephemeral fixation’. Without an exception to copyright and related rights for such activities, broadcasting organizations would need to obtain permission from rightsholders for reproduction, even though such reproduction is only a mere technicality and pursuant only to the ultimate act of communication to the public.

⁴⁹ While it is agreed that fixation applies to the embodiment of only a part of a broadcast, there is no similarly agreed position as to whether a single photograph falls within the scope of a protected fixation requiring authorization (WIPO SCCR/8/INF/1, paragraph 27).

⁵⁰ WIPO-Administered Treaties Online Portal – Rome Convention (www.wipo.int/treaties/en/ip/rome/)

⁵¹ Interestingly, all OECD Members with the exception of New Zealand and the United States of America are Contracting Parties to the Rome Convention. This suggests that the Convention has greater acceptance in the industrialised world than in the developing world.

⁵² WIPO-Administered Treaties Online Portal – Berne Convention (www.wipo.int/treaties/en/ip/berne/)

[2]-3 OTHER INTERNATIONAL INSTRUMENTS

With respect to the rights of broadcasting organisations, there are two international legal instruments that are relevant – the Brussels Satellite Convention, and the TRIPs Agreement.

[2]-3.1 Brussels Satellite Convention

The *Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite* (Brussels Satellite Convention) was established in 1974.

The need for such an instrument appears to have been driven by the fact that the Rome Convention seemed inadequate at the time; the Rome Convention neither covered satellite transmissions (which were not an issue when it was negotiated in 1961), nor did it have widespread acceptance⁵³.

The core of the Brussels Convention is Article 2(1), which states that *“Each Contracting State undertakes to take adequate measures to prevent the distribution on or from its territory of any programme-carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended...”*

Furthermore, Article 2(3) states that these protective measures *“...shall not apply to the distribution of derived signals taken from signals which have already been distributed by a distributor for whom the emitted signals were intended.”* Additionally, Article 3 states that the Convention *“...shall not apply where the signals emitted by or on behalf of the originating organization are intended for reception from the satellite by the general public.”*

The cumulative effect of Article 2(1) and the limitations of Articles 2(3) and 3 creates a very specific scope for protection. To understand this scope, it is useful to first make some technical definitions. For the purpose of this discussion, a satellite can provide either a ‘fixed-satellite service’ (FSS)⁵⁴, or a ‘direct-to-home broadcasting service’ (DBS)⁵⁵. FSS is where a satellite serves as an intermediate relay between two fixed terrestrial stations, such as where a broadcaster uplinks

⁵³ A review of the Contracting Parties to the Rome Convention shows that as of the end of 1974 (the year in which the Brussels Convention was accepted), the Rome Convention had only 14 Contracting Parties, even though 26 states were signatories.

⁵⁴ Article 1.21 of the International Telecommunications Union (ITU) Radio Regulations defines ‘fixed-satellite service’ as *“a radiocommunication service between earth stations at given positions, when one or more satellites are used; the given position may be a specified fixed point or any fixed point within specified areas; in some cases this service includes satellite-to-satellite links, which may also be operated in the inter-satellite service; the fixed-satellite service may also include feeder links for other space radiocommunication services”*

⁵⁵ Under the ITU’s Radio Regulations, the technical regulatory name for such services is ‘broadcasting-satellite service’. Article 1.39 of the Regulations defines this as *“A radiocommunication service in which signals transmitted or retransmitted by space stations are intended for direct reception by the general public. That article further notes, “In the broadcasting-satellite service, the term ‘direct reception’ shall encompass both individual reception and community reception.”*

a signal to a satellite in order for that signal to be relayed to another fixed service provider (distributor) in distant location, who then (re)transmits the signal of the uplinking broadcaster. DBS services however are where a satellite broadcasts directly to the final consumer audience, and are explicitly excluded by Article 3 of the Convention.

While the Convention is designed to cover FSS services, it only covers the aspect of the communication chain concerning the satellite as an intermediary relay. Once the signal is received by the indented distributor, the Convention does not cover the further distribution of the signal. In the terminology of the Convention, protection is accorded to 'emitted signal' and not the 'derived signal'. Protection is therefore focussed on the uplink and downlink segments of the communication chain, rather than the redistribution segment. *Annex 1* provides an illustrative summary on of these various distribution scenarios.

The scope of the Convention as described above gives the Brussels Convention a very technical flavour that the Rome Convention does not have. However, comparing the two legal instruments gives rise to one very obvious and significant difference – unlike the Rome Convention, the Brussels Convention does not stipulate the nature of the protection to be granted.

While protection can be granted through private property rights, it can also take the form of provisions relating to telecommunications regulation (or even some other body of law); the point is that the form of protection is in the discretion of the implementing state. Therefore, unlike the Rome Convention which is explicitly an intellectual property agreement, the Brussels Convention is actually an instrument of public international law.

Interestingly there are accounts that an early draft of the convention did provide a private right (similar to copyright or related rights) for broadcasting organisations. However, this concept was opposed by authors (copyright owners) and performers, and thus the final proposal took a very different form.⁵⁶ If this claim is indeed true, this provides a precedent for the perception of other rightsholders that intellectual property rights for broadcasters might encroach on their interests.

This model of a discretionary mechanism of protection seems consistent with the fact that the scope of the signals under the Brussels Convention are not limited to those which are intended for public reception. Under the Rome Convention, the definition of broadcasting explicitly excludes closed network or point-to-point communication (as transmissions must be intended for public reception). In contrast, the programme-carrying signals under the Brussels Convention do not need to be intended for public reception, and hence covers a wider range of possible transmissions. Therefore, the Brussels Convention can be seen as having some relevance to broader telecommunications law, and can be used as a basis for prevention of unauthorised interception of more general radiocommunication services.

⁵⁶ Ogawa (2007), pg. 48

As a final note, the Brussels Convention falls quite short of creating an international framework for protecting broadcast transmissions, as it has even less wide acceptance than the Rome Convention. The Brussels Convention has 37 Contracting Parties⁵⁷, compared to 93 for the Rome Convention.⁵⁸

[2]-3.2 TRIPs Agreement

Perhaps the most significant international legal instrument on intellectual property is the World Trade Organisation (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement)⁵⁹.

The relevant provision of the TRIPs Agreement that addresses the rights of broadcasting organisations is Article 14(3), which states as follows:

“Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971).”

Ostensible comparison of TRIPs Article 14(3) and Rome Convention Article 15 suggest that the two are very similar in scope. They both provide for a fixation right, a reproduction of fixations right, a wireless retransmission right, and a limited public communication right. Furthermore, like the Rome Convention, TRIPs Article 14(5) stipulates a minimum length of twenty years for such protection.

One difference however is that the public communication is stronger under TRIPs. While both instruments limit this right to television broadcasts, TRIPs does not limit the right only to communications in ‘places accessible to the public against payment of an entrance fee’ (as is the case under Rome Article 13(d)). Furthermore, this right is mandatory under TRIPs, unlike the Rome Convention where a reservation to its application is possible.

Aside from this superficial similarity in scope, TRIPs Article 14(3) is very interesting for its second sentence which states that “*Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in*

⁵⁷ WIPO-Administered Treaties Online Portal – Brussels Convention (www.wipo.int/treaties/en/ip/brussels/)

⁵⁸ An interesting observation is that the United States is a Contracting Party to the Brussels Convention, but not to the Rome Convention.

⁵⁹ The Agreement on the Trade-Related Aspects of Intellectual Property Rights is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization

the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention.”

This suggests that Member States have a choice between granting specific rights to broadcasting organizations, or covering the relevant acts under the provisions of the Berne Convention. However, irrespective of this choice, WTO Member States are in any case bound by TRIPs Article 6, which requires compliance with Articles 1 through 21 of the Berne Convention – the substantive legal provisions on copyright – with the notable exclusion of Berne Article 6bis (which provides for certain ‘moral rights’ independent of ‘economic rights’). Compliance with TRIPs would hence imply compliance with the Berne Convention, and that the copyright holders of literary and artistic works contained in broadcasts have the protection required by the second sentence of TRIPs Article 14(3).⁶⁰

In terms of this second sentence of TRIPs Article 14(3), the curious use of the phrase “*provide ...the possibility of preventing...*” warrants some attention. Insight into the significance of this phrasing can be gained by returning to the Rome Convention.

Articles 10 and 13 of the Rome Convention provide property rights to phonogram producers and broadcasting organisations respectively. Property rights arise because of the fact that those articles take the structure of “*(beneficiary) shall enjoy the right to authorize or prohibit (certain act(s))*”. Article 7 on performer’s rights however takes a different structure, and reads “*The protection provided for performers by this Convention shall include the possibility of preventing...*”. The WIPO Guide to the Rome Convention gives comments on the significance of this language, and explains that:

“The reason for the wording in this paragraph is to leave complete freedom of choice as to the means used to implement the Convention, and to choose those which member countries think most appropriate and best. They may be based on any one or more of a number of legal theories: law of employment, of personality, of unfair competition or unjust enrichment, etc. - and of course, if they wish, an exclusive right. The important thing is that those means achieve the purpose of this Article, namely that the performer has the possibility of preventing the acts enumerated.”⁶¹

Returning to the protection of broadcasts under TRIPs Article 14(3), it would appear a choice of legal approach (akin to that for implementing Rome Convention Article 7) does not exist. The choice is only between (i) an exclusive right for broadcasters, and (ii) deference to the Berne Convention, which in itself provides

⁶⁰ Commenting on the second sentence of TRIPs Article 14(3), WIPO (1996) gives a possible explanation for the significance of the language used. It states: “*The purpose and meaning of this provision is obviously not a mere repetition of that clear obligation. It rather seems to refer to the well-known differences between the national laws in respect of the actual coverage of the concept of works, and seems to state that only those Members may deny specific rights to broadcasting organizations in the copyright laws of which the concept of works is sufficiently broad to grant efficient protection to broadcasting organizations in respect of their broadcast programs*” – WIPO (1996), paragraph 67

⁶¹ WIPO (1981), comment 7.4

for only one possible solution – an exclusive right for authors of literary and artistic works – which is already mandatory under TRIPs Article 6.

Given the construction and language of Article 14(3), it is clear that the TRIPs Agreement really does not go beyond the Berne Convention, and actually falls short of the Rome Convention in terms of a mandate for rights of broadcasting organisations. In fact, the Article even seems to create a false sense of policy-flexibility on this issue.

Despite the fact that it does not necessarily provide for broadcasters' rights, the TRIPs Agreement remains the most wide-reaching international legal instrument in this area, having 164 contracting parties⁶². Additionally, it should be noted for completeness that one major contribution of the TRIPs Agreement is its very comprehensive framework for intellectual property enforcement – something not contained in any other treaty.⁶³

[2]-4 MODERNISING COPYRIGHT LAW

The last amendments to the Berne Convention were made in 1979, and the Rome Convention has not been amended since being first adopted in 1961. Obviously, the landscape of culture and technology has dramatically changed since then, resulting in a need to update international laws on copyright and related rights for the modern digital environment.

For completeness, it can be noted that WIPO published a set of principles in 1984 for the application of copyright and related rights law to cable distribution.⁶⁴ However, these were just principles for interpreting existing law and not a new legal instrument in itself. Their publication is however important as it exemplifies how, even at that time, technological changes in broadcasting were posing serious challenges to intellectual property law.

[2]-4.1 WIPO Internet Treaties

As a result of the rapid technological changes brought about by digital technology, two new international legal agreements were adopted in 1996 – (i) the WIPO Copyright Treaty ('WCT'), and (ii) the WIPO Performances and Phonograms Treaty ('WPPT'). The WCT and WPPT are seen as updating the Berne and Rome conventions respectively, to account for new challenges brought on by the internet era.

⁶² There are currently 164 Member States of the WTO, and all Member States are automatically contracting parties to the TRIPs Agreement (www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)

⁶³ TRIPs Agreement Part III (Articles 41-64).

⁶⁴ WIPO (1984) - *Annotated Principles of Protection of Authors, Performers, Producers of Phonograms and Broadcasting Organizations in Connection with Distribution of Programs by Cable*.

In terms of related rights, while the Rome Convention covered three areas – performers, phonogram producers, and broadcasters – the WPPT covers only performers and phonogram producers. The WIPO Internet Treaties therefore do not address the issue of the rights of broadcasting organisations.

One relevant contribution of the WPPT is however its updating of the definition of ‘broadcasting’ in the context of copyright and related rights law. Under Article 3(f) of the Rome Convention, ‘broadcasting’ is defined as “*transmission by wireless means for public reception of sounds or of images and sounds*”. The WPPT however, in Article 2(f) states that:

“broadcasting’ means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also ‘broadcasting’; transmission of encrypted signals is ‘broadcasting’ where the means for decrypting are provided to the public by the broadcasting organization or with its consent;

This definition can be seen as combining the definitions in the Rome Convention and the Brussels Convention.⁶⁵ The updating of this definition is significant for two reasons. Firstly, it clarifies explicitly that satellite broadcasting is included in the definition of wireless broadcasting. While the Rome Convention’s definition does not explicitly exclude satellite transmission (as such can be considered as ‘wireless’), greater legal certainty results from the WPPT’s explicit inclusion of satellite transmissions.⁶⁶ Secondly, it explicitly notes that a broadcast transmission can be encrypted. However, it should be noted the WPPT definition is still limited to wireless transmissions, and hence excludes broadcasts originating on cable networks (‘cablecasting’).⁶⁷

Aside from the new definition of broadcasting, the other relevant contribution of the Internet Treaties is the introduction of legal provisions on ‘Technological Protection Measures’. These provisions are discussed briefly in a later section, and in more detail in Chapter 4.

[2]-4.2 SCCR Agendas

In 1998, WIPO set up four ‘standing committees’ to coordinate and streamline the organisation’s activities in key areas of intellectual property.⁶⁸ One of these committees was the *Standing Committee on Copyright and Related Rights* (SCCR).⁶⁹

⁶⁵ WIPO SCCR/8/INF/1, paragraph 5

⁶⁶ WIPO SCCR 7/8, paragraph 28

⁶⁷ For completeness, it is noted that in the domestic legislation of some jurisdictions, cablecasters are offered protection analogous to that of traditional broadcasters (WIPO SCCR/8/INF/1, paragraph 11)

⁶⁸ WIPO WO/GA/23/1, paragraphs 1 and 2.

⁶⁹ It should be noted that the SCCR was formed after the adoption of the WIPO Internet Treaties.

The SCCR is therefore the main forum for international discussions on technical copyright policy issues. The SCCR has the mandate to make recommendations to be considered by the WIPO General Assemblies, and also to convene a Diplomatic Conference on new proposed international instruments when appropriate. The Committee holds regular sessions to consider various matters, as well as *ad hoc* special session on specific individual matters, and preparatory meetings for diplomatic conferences.

In order to ascertain the main priorities of international copyright policymakers, one can therefore look to the SCCR and its agenda. Review of the meeting agendas of all sessions of the SCCR shows that the Committee has been focused on a limited number of key issues since its inception. *Annex 2* summarises the issues considered at these sessions.

The main issues have been: (i) the protection of broadcasting organisations, (ii) the rights of audiovisual performers, and (iii) limitations and exceptions to copyright. Tracking the Committee's agenda shows that discussions on limitations and exceptions in general evolved into discussions on limitations and exceptions in three specific areas: (i) for 'visually-impaired persons and persons with print disabilities', (ii) for 'libraries and archives', and (iii) for 'educational and research institutions and for persons with other disabilities'.

Other issues have been discussed such as (i) database protection, (ii) recordation systems, and (iii) artist resale right, which did not attract significant attention to be further pursued.

The work of the SCCR has resulted in two new international legal instruments to date. The first is the *Beijing Treaty on Audiovisual Performances*, which was concluded at a diplomatic conference in 2012, after an earlier diplomatic conference in 2000 failed to produce an agreement. The second is the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled* which was concluded at a diplomatic conference in 2013.

The main drive for initiating talks on a new treaty for broadcasting organisations came from broadcasting associations themselves, and their claim that the Rome Convention was no longer sufficient given technological progress.⁷⁰ There is even an assertion that the discussions were a result of bargaining between broadcasting associations and WIPO itself; in exchange for collaboration on the WCT and WPPT, WIPO promised broadcasters that it would initiate discussions on protection of broadcasting.⁷¹

In contrast with the areas of audiovisual performances and visually-impaired persons, progress on an instrument for the protection of broadcasting organisations has been notoriously negative. Several different drafts of possible

⁷⁰ Generally, see Ogawa (2006), Chapter 5

⁷¹ Ogawa (2006), pg. 2

legal instrument have been circulated by the Committee over the years, but discussions seem to be extremely protracted.

At one point, completion of an instrument seemed close, and the SCCR planned to convene a Diplomatic Conference on the Protection of Broadcasting Organisations in July 2007 in Geneva.⁷² However, the eventual June 2007 preparatory meeting⁷³ for such a Conference was cancelled, due to the inability of reaching ‘an agreement on the objectives, specific scope and object of protection’.⁷⁴ Consequently, no diplomatic conference was even convened.⁷⁵

Pursuant to that particular development, it is useful to define these specific areas of supposed disagreement. In terms of objectives, the SCCR advocates that:

“The main objective of the new treaty is to provide a stable legal framework for the activities of broadcasting organizations. Its focus is on the ‘anti-piracy’ function, and against signal-theft, but it provides also protection against competitors and against unfair exploitation, and against free-riding. The rationale of the legal protection is twofold: the investment required for providing program content to the public; and the easiness of exploitation by others of the result of this investment in the new technological environment.”⁷⁶

In terms of the treaty’s scope, this refers to the actual level and nature of protection granted to the relevant beneficiaries. It is noted that ‘scope’ in this context does not refer to ‘scope’ as normally used in discussions on international treaties, where it refers to the field of application.⁷⁷ In terms of the issue of ‘object of protection’, this refers to the exact activities which are covered and are to be protected (and the relevant beneficiaries) – which is what the term ‘scope’ in normal treaty parlance might actually refer to.

Nevertheless, after the failed drive toward a 2007 diplomatic conference the topic of broadcasting remained on the SCCR agenda. In fact, broadcasting is the only topic that appears on practically every single SCCR Meeting Agenda (and various special sessions), since the First Session in November 1998⁷⁸, to the Thirty-sixth Session in May 2018⁷⁹. Along with the relatively newer issues of limitations and exceptions for (i) libraries and archives, and (ii) teaching and research, the issue of broadcasting organisations remains on the current agenda of the SCCR.

It can therefore be said that not only has the issue of broadcasters’ rights attracted significant attention in the forum for international copyright law discussions, but that issue has notoriously resulted in an impasse.

⁷² WIPO WO/GA/33/4

⁷³ WIPO SCCR/PM/1

⁷⁴ WIPO WO/GA/34/8

⁷⁵ WIPO SCCR/S2/WWW[79838]

⁷⁶ WIPO SCCR/17/INF/1, paragraph 41

⁷⁷ WIPO SCCR/17/INF/1, paragraph 42

⁷⁸ WIPO SCCR/1/1

⁷⁹ WIPO SCCR/36/1

[2]-5 WIPO TREATY: CORE ISSUES

The difference in views regarding a new WIPO broadcasting Treaty can be generalised to the overall approach taken; in this regard there have two competing overarching concepts – (i) a signal-based approach, and (ii) a rights-based approach.

[2]-5.1 Signal-based Vs. Rights-Based Approach

The fundamental difference between these two approaches is that a signal-based approach seeks to limit protection to what is necessary to address the core objective of the proposed treaty – signal piracy. In contrast, a right-based approach applies a broader scope of protection, and includes rights that go beyond mere signal protection, and include some protection for the content contained in broadcast transmissions.

This is not to say that a signals-based approach does not involve granting rights, but that the ‘bundle of rights’ foreseen is much more limited. It should therefore be stressed that the signal versus rights-based debate and the question as to whether protection is granted through rights or some other legal mechanism are conceptually different issues.⁸⁰

At the core of the difference in approaches is the sub-set of rights sometimes referred to as ‘post-fixation rights’. While a signal-based approach might include provisions on unauthorised fixation (recording) of a broadcast transmission, a rights-based approach would also contain provisions on the unauthorized use (e.g. reproduction and subsequent distribution) of such a fixation.

It is important to recall that a broadcast transmission is a transient set of information; in the case of traditional terrestrial broadcasting, it is an electromagnetic pulse at a given frequency that ceases to exist once the transmission is complete.

Fixations of such a transmission however, would be fixations of the content contained in that transmission, and hence the fixation would continue to exist long after the signal from which it was derived ceases to be. Therefore, provisions regarding use of fixations amount to going beyond the scope of protecting signals, and enter into the scope of protecting content – a role traditionally reserved for the ‘primary’ copyright system.

[2]-5.2 Objects and Beneficiaries of Protection

In addition to the question of overall approach and scope of rights, there are different views of who the beneficiaries of protection should be. This is a major

⁸⁰ WIPO SCCR/17/INF/1, paragraph 40

issue in a changing technological environment in which new innovative services – which are sometimes hard to fit into traditional definitions – rapidly emerge.

However, discussions on the proposed treaty recognise three possible categories of potential beneficiaries. The first category is obviously traditional wireless broadcasters – as defined in the Rome Convention and the WPPT. The second category would be ‘cablecasters’ – organisations whose activities are analogous to traditional broadcasters, but whose transmissions originate on wired networks as opposed to traditional terrestrial or satellite transmission.

The third category is ‘webcasters’ – organisations whose transmissions are delivered over the internet. The concept of webcasting can be further sub-categorised into two separate components. Webcasting can take place when a traditional broadcaster (or cablecaster) also simultaneously transmits the broadcast content online; such simultaneous online transmission is referred to as simulcasting.

Webcasting can also take place where the online transmission is not associated with any ‘primary’ offline broadcast, i.e. the transmission originates on, and is communicated via solely the internet. This is the type of activity is more generally referred to by the term ‘webcasting’⁸¹.

In terms of beneficiaries and scope of protection, there is also one more critical concept – the concept of the ‘pre-broadcast signal’.

The technical act of broadcasting is often complicated and involves communicating information across large geographical distances. Therefore, signal transmission activities can take place even before a broadcast transmission is communicated to the general public. Consider the example of a sports broadcast or live news coverage. Cameras and microphones collect images and sounds at a remote location (the relevant event being covered), but before the coverage can be broadcast to the public, the information must be sent to the central location of the broadcasting organisation. Often, this is done via an ‘outside broadcasting’ station, which transmits the raw footage to the broadcasting studios, where it might then be edited in real time, or subject to some other technical modification in order to be subsequently transmitted to the general public. The signal sent between the ‘outside station’ and the central station is an internal communication within the broadcasting organisation, and is known as a ‘pre-broadcasting signal’. Another example might be a broadcasting organisation sending content to its various local affiliates, for subsequent public transmission.

As this signal is not meant for reception by the general public, it does not constitute ‘broadcasting’ within the context of copyright and related rights law. Nevertheless, the pre-broadcast signal might be subject to piracy by a party seeking unauthorised access to the content being communicated. Hence, one of the issues for debate regarding a legal instrument on broadcasters’ rights, is whether protection should be afforded to pre-broadcasting signals. For

⁸¹ Yet another synecdoche.

completeness, it is noted that protection of pre-broadcast signals is covered by the Brussels Satellite Convention, specifically when a satellite is used as the intermediary link for communication of such a signal.

The table below summarises the various possible objects of protection and possible restricted acts that might be covered under a new legal instrument on the protection of broadcasting organisations.⁸²

<u>Object of Protection:</u>	<u>Specific Rights/Restricted Acts:</u>
<ol style="list-style-type: none"> 1. 'Traditional' transmission over the air for direct reception by the general public 2. Cable originated transmissions of program-carrying signals 3. Pre-broadcast signals 4. Simultaneous real-time streaming of 1 and/or 2 5. Internet originated real-time streaming 	<ol style="list-style-type: none"> 1. Fixation 2. Reproduction of fixations 3. Distribution of fixations 4. Decryption of encrypted broadcasts 5. Rebroadcasting 6. Cable retransmission 7. Retransmission over the Internet 8. Making available of fixed broadcasts 9. Rental of fixations 10. Communication to the public (in places accessible to the public)

Table 2.1: Summary of Objects of Protection and Restricted Acts

In terms of substantive policy, the issue of treatment of webcasting remains one of the main contentions. However, in order to make progress, the SCCR resolved in 2006 that work should focus on protection of traditional broadcasting and cablecasting.⁸³ Any possibility of protection of webcasting would therefore be deferred to future discussions. This compromise was not meant to dismiss the issue of webcasting, but rather to narrow the proposed treaty's scope in order to facilitate progress on negotiations.

Nevertheless, the main concerns brought by civil society organisations however remain. These are that a treaty might represent a new intellectual property right over broadcast content, which would likely harm consumers, lock up public domain content, and stifle technological innovation.⁸⁴

[2]-6 REVIEW OF CURRENT WORKING DRAFT

The following section provides an overview of the key articles of the current working document on which the proposed WIPO Broadcasting Treaty is intended

⁸² Based on WIPO SCCR/8/INF/1, Annex

⁸³ WIPO SCCR/17/INF/1, paragraph 3

⁸⁴ WIPO SCCR/17/INF/1, paragraph 21

to be based (SCCR/27/2 REV).⁸⁵ This working document is understood to incorporate the current agreed positions of WIPO Member States and the SCCR, and gives various alternative drafts of key provisions on matters where there is not yet agreement.⁸⁶

The purpose of this section is to take stock of the current contested policy issues in order to see how the analysis in this manuscript can provide possible insights.

[2]-6.1 Relationship to General Public Policy

The first interesting observation is that the Working Document sets out three general articles on the context of the Proposed Treaty's intended objectives.

Article 2 explicitly states that the Treaty is not meant to limit a Contracting Party's freedom to promote access to knowledge, pursue national scientific and educational objectives, or take actions for public interest including technological development. Article 3 makes a similar pronouncement on the freedom of Contracting Parties to protect and promote cultural diversity. Article 4 then provides for national measures on competition regulation, specifically in terms of '*practices, which unreasonably restrain trade or adversely affect the international transfer and dissemination of technology*'.

While it is quite normal for international treaties to contain language referencing broader related public policy areas, such an approach is quite atypical for an intellectual property rights treaty. Firstly, such references are usually made in a treaty's preamble or recitals; dedicating a substantive article gives the issue much more significance. Hence, having more than one article on the Proposed Treaty's relationship with other broader related policy areas is of major consequence. In fact, no existing WIPO-administered treaty contains such provisions.

Furthermore, these articles set out provisions in the form of '*Nothing in this Treaty shall prevent/limit the freedom of a Contracting Party to...*'. This hence means that where the provisions of the Proposed Treaty come into potential conflict with some other set of legal rules or public policies, the Treaty positions itself as subordinate.

The effect of these articles is therefore that it gives the Proposed Treaty a somewhat 'defensive' tone that is uncharacteristic of a treaty on intellectual property law. It would appear that the Proposed Treaty attempts to be very sensitive to its main criticisms, particularly as it relates to technological innovation, access to information, and cultural diversity.

⁸⁵ WIPO SCCR/27/2 REV – *Working Document for a Treaty on the Protection of Broadcasting Organisations* – Standing Committee on Copyright and Related Rights, Secretariat, March 25th 2014

⁸⁶ It is however noted there are more recent documents, such as the *Consolidated Text on Definitions, Object of Protection, Rights to be Granted and Other Issues* (WIPO SCCR/35/12). However such documents are meant to consolidate the main areas that have been informally agreed on, and hence is not the ideal basis for analysing the underlying debates.

[2]-6.2 Qualification for Protection

In addition to the above discussion, and aside from the core debate on scope of rights and beneficiaries, the Working Document contains several interesting provisions.

Two such provisions are on details that are already implied (or generally understood) within the existing legal framework for broadcaster's rights. Firstly, Article 6 (Alternative A)(2) clarifies that the provisions of the Treaty *'shall not provide any protection in respect of mere retransmissions by any means'*. This is to mean that while a transmission is protected by broadcasters' rights, a retransmission of the same is not. Secondly, Article 15 clarifies that *'The enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality.'* Both of these Articles are interesting to note, as they are principles that are implied by the existing legal framework, but were never previously explicitly stated within the legal instruments.

[2]-6.3 Proposed Rights

In terms of the actual rights set out in the Proposed Treaty, these are contained in Article 9. The working Document contains two alternatives for Article 9. *Alternative A* provides for (i) a retransmission right, (ii) a public performance right, and (iii) a pre-broadcast signal use right.

In contrast, *Alternative B* provides for (i) a fixation right, (ii) a reproduction of fixations right, (iii) a retransmission right, (iv) a public communication right, (v) a 'making available' right for fixations, (vi) a transmission of fixations right, and (vii) a sale and transfer right for fixations.

These alternatives are very different in scope in several ways. It is clear that *Alternative A* is founded on a signal-based approach, while *Alternative B* is founded on a rights-based approach.

Both alternatives are similar in the retransmission right – they both provide for a technology-neutral retransmission right (i.e. a right that covers retransmission over any platform or medium). *Alternative B* obviously also covers many more rights, and is wider in scope of protection. However, *Alternative B* does not provide for a pre-broadcasting right, while *Alternative A* does. This suggests that *Alternative B* is not just opting for more rights, but there is truly a conceptual difference between the signal-based and rights-based approaches.

Another observation is that the public performance and public communication rights in the two alternatives are very different. While *Alternative A* is specific and covers a *'performance of their broadcast signal in places accessible to the public, for commercial advantage or using very large screens'*, *Alternative B* is much broader in scope and covers *'the communication to the public of their broadcasts'*. Both of these proposals give more rights than Article 13(d) of the Rome Convention, which is limited to *'the communication to the public of their television broadcasts if*

such communication is made in places accessible to the public against payment of an entrance fee'.

First of all, even the relatively narrower *Alternative A*, applies to all forms of broadcasting (i.e. both radio and television), while the corresponding Rome Convention provision was limited to television. Furthermore, it is not limited to situations where there is an entrance fee, but rather where there is the broader concept of 'commercial advantage', which can obviously be indirect in nature (e.g. a bar showing a sports game on a large television to attract customers who do not pay an entry fee, but who then stay and buy drinks).

[2]-6.4 Post-Fixation Rights

Turning to the issue of post-fixation rights, the construction of *Alternative B* is interesting. In addition to a fixation right, it proposes certain rights that loosely correspond to similar rights under copyright.

The reproduction of fixations right (ii) corresponds to the reproduction right of Berne Convention Article 6. Additionally, the sale and transfer right (vii) corresponds to the sale and transfer rights of WCT Article 6.

The making available of fixations right (v) corresponds to making available right of WCT Article 8 (this is the right which is relevant for 'on-demand' type services). However, it should be noted that the WTC Article 8 is much broader – covering any communication to the public, including both broadcasting and the making available at a time and place determined by a user.

It is therefore very interesting to note that in this regard, this aspect of the proposed post-fixation rights is more limited than the corresponding rights under copyright. The concept of 'broadcasting' a fixation of a broadcast would come under the concept of retransmission (or rather deferred retransmission), and is hence not directly relevant. However, broadcasting and 'making available to the public at a user-defined time and place' are not the only possible forms of communication to the public. Other communications would not be covered under Article 9 *Alternative B*, although they would be covered under WCT Article 8. It can be surmised therefore, that once a fixation of some broadcast content is authorised, a subsequent public communication or performance of that content might be permissible, once it does not involve a reproduction, on-demand-type service, retransmission, or sale.

In terms of the proposed 'transmission of fixations' right (vi) it might be initially inferred that corresponds to the public communication and public performance rights of Berne Convention Article 11 or WCT Article 8. However, the intention of this right is almost certainly to serve as a right regarding deferred retransmission, to compliment the 'standard' right of retransmission, which is normally defined as a simultaneous activity.

Regarding these post-fixation rights, a very interesting aspect of *Alternative B* is how the exclusivity of these rights is to be construed.

The standard language of both the Berne Convention and the WCT is that the copyright holder has the “*exclusive right of authorising*” a certain activity. In the case of the Rome Convention, the language of Article 13 is that “*Broadcasting organisations shall enjoy the right to authorize or prohibit...*”. TRIPs Article 14(3) however, uses the language “*Broadcasting organizations shall have the right to prohibit...*”.

Both Alternatives to Article 9 of the Proposed Treaty use the language “*Broadcasting organizations shall enjoy the exclusive right to authorize...*”. *Alternative B* however, contains a provision 9(3) which allows for Contracting Parties to establish protection using a ‘right to prohibit’ rather than a ‘right to authorise’, for the specific rights described above as post-fixation rights.

In theoretical terms, the ‘right to prohibit’ is necessarily a weaker right than the ‘right to authorise’.⁸⁷ Therefore, presenting post-fixation rights as ‘rights to prohibit’ is therefore some conceptual middle ground between a full rights-based approach and a signal-based approach. This would explain why this option is presented as a sort of reservation to the proposed provisions on post-fixation rights.

[2]-6.5 Limitations and Exceptions

Like all WIPO-administered treaties on copyright and related rights, the Proposed Treaty contains provisions on limitations and exceptions. These provisions are contained in Article 10.

In international instruments on copyright law, the standard approach is to use the ‘three-step-test’. The three-step-test originates from Article 9(2) of the Berne Convention, which allows for exceptions to exclusive reproduction rights “*in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.*” The essence of the tree-step-test is reproduced in TRIPs Article 13, and WCT Article 10.

It is however noted that the Berne Convention also contains provisions on specific limitations and exceptions, as set out in Article 10 (quotation), Article 10bis (use for reporting of current events), and Article 14bis(2)(b) (limits to contributors of cinematographic works).

In the field of related rights, there is often a different type of provision – one that stipulates that the same limitations and exceptions that apply to copyright may apply to related rights (the concept of ‘equivalency’).

⁸⁷ An analysis of why this is necessarily so is presented in Chapter 6.

Rome Convention Article 15 uses a combination of two approaches. While Article 15(1) enumerates a list of explicitly permitted exceptions (private use, reporting of current event, ephemeral fixation, and teaching and research), Article 15(2) provides for equivalency with copyright. The WPPT also used two approaches - Article 16(1), and provides for limitations and exceptions based on equivalency to copyright, while Article 16(2) limits those limitations and exemptions to the criteria of the three-step-test.

The way in which limitations and exemptions for broadcasters' related rights would be set out in a new instrument therefore depends on whether the Draft Treaty takes the approach of the Rome Convention or that of the WPPT.

Article 10 of the Proposed Treaty has three different alternatives. *Alternative A* uses a combination of an enumerated list and the equivalency principle. The permitted uses in this list are the same as those in Article 15(1) of the Rome Convention - private use, reporting current events, teaching and research, and ephemeral fixations). *Alternative B* also sets out a combined approach, but uses the equivalency principle as well as the three-step-test.

Alternative C is the most interesting, and uses the equivalency principle, an enumerated list, and the three-step-test. This proposal therefore takes the strongest stance on limitations and exceptions. Furthermore, the permitted uses in the enumerated list go beyond the uses already contained in the Rome Convention. It includes exceptions for (i) use to promote access by visually-impaired persons, and (ii) use by libraries and archives. It is noted that these are two of the areas that have attracted attention on the SCCR agenda (in addition to exceptions for teaching and research, which is already included in the Rome Convention). This proposed version of the article also contains language which explicitly clarifies that the uses on the enumerated list are assumed to comply with the requirements of the three-step-test.

Most interestingly, the list also contains a final broad exception for "*any use of any kind in any manner or form of any part of a broadcast where the program, or any part of it, which is the subject of the transmission is not protected by copyright or any related right thereto*". This proposed limitation is very significant as it strikes to the heart of one of the major criticisms of the Proposed Treaty – that it would result in enclosing the existing public domain by apply a new right to content that is currently outside of copyright protection.

These competing approaches to the drafting of the limitation and exceptions provision of the new treaty is significant for the reason that it shows the intensity of the debate on broadcasters' rights. It shows that in the eyes of some stakeholders, the current approach of the Internet Treaties is insufficient to ensure that legal certainty regarding the limits to the scope of certain rights.

The area of limitations and exceptions is expectedly a major issue for civil society stakeholders. They contend for both mandatory and permission exceptions, along with the non-prohibition of compulsory licences, stressing that the exceptions for broadcasting rights should not be less enabling for users than those that apply to

copyright.⁸⁸ Furthermore, civil society stakeholders stress that broadcaster post-fixation rights should not even apply for works that are in the public domain or are openly licenced.⁸⁹

[2]-6.6 Technological Protection Measures

One of the most significant contributions of the Internet Treaties was the introduction of new provisions on Technological Protection Measures (TPMs) and Rights Management Information (RMI).

TPMs are technical measures that rightsholders use to restrict what activities can be undertaken by a user. Broadly speaking, there are two types of TPMs – access controls and copyright controls. Access controls limit the ability of users to access a work, for example through password protection or encryption of data. Copyright control limit the ability of a use to undertake copyright restricted actions; an example would be a file that has restrictions on the number of times copies of it can be made.

RMI is a form of metadata (data about data), and included information about a work such as the author, other contributing rightsholders, and the terms and conditions for use of a work. RMI and TPMs are related, as the RMI data can sometimes be the basis on which TPMs are made operational.

Both Internet Treaties introduce the concept of TPMs into international copyright and related rights law. WCT Article 11 and WPPT Article 18 both contain almost identical language, and require Contracting Parties to provide “*adequate legal protection and effective legal remedies against the circumvention of effective technological measures*”.

Regarding RMI, WCT Article 12 and WPPT Article 19 also have almost similar language. These articles provide for remedies against unauthorised removal of RMI, or distribution of protected subject matter with RMI removed.

The Working Document for the Proposed Treaty contains four different formulations for proposed Articles 12 and 13 on TPMs and RMI, all of which require Contracting Parties to “*provide adequate and effective legal protection*” against stipulated unauthorised acts.

Article 12 *Alternative A1* stipulates the unauthorised acts of (i) decryption of encrypted signals or circumvention of TPMs similar to encryption, (ii) manufacturing, selling, or importing devices for decryption, and (iii) removal of RMI. *Alternative A2* stipulates only the unauthorised acts of (i) decryption (without any reference to other TPMs), and (ii) removal of RMI.

⁸⁸ Joint NGO letter on the proposed WIPO treaty on broadcasting (May 28th 2018); Item 2

⁸⁹ Joint NGO letter on the proposed WIPO treaty on broadcasting (May 28th 2018); Item 3

Alternative B1 takes a form almost identical to that of the WCT and WPPT, with a proposed Article 12 on a general anti-circumvention provision, and a proposed Article 13 on RMI, both of which mirror the language used in the Internet Treaties. *Alternative B2* is different only in that it considers a sub-article explicitly on unauthorized decryption.

Aside from general drafting structure, there appear to be two main ideas for debate. The first is whether a general provision on TPMs is sufficient, or whether it is necessary to explicitly have a provision on encryption. While encryption might generally be understood as a type of TPM, the desire to have a specific provision reflects that the signal protection objectives of the Treaty are quite well established and specific.

The second contested issue is the inclusion of a provision on manufacturing, sale, or import of devices used for unauthorized signal decryption. Such provisions are not features of the international legal framework for copyright and related rights, and are neither included in the WIPO Internet Treaties, nor the TRIPs Agreement. They can therefore be seen as particularly 'strong' provisions that greatly extend the scope of intellectual property law. However, these provisions are features of the copyright laws of many developed jurisdictions, including the United States⁹⁰ and the European Union⁹¹.

[2]-6.7 Term of Protection

The current status quo regarding the term of broadcasters' rights is twenty years. This is stipulated in both Rome Convention Article 14 and TRIPs Article 14(5). However, some jurisdictions provide for longer terms of protection, notably the European Union, which provides for a term of fifty years.⁹²

The Proposed Treaty has three alternatives in terms of protection term, which is addressed in Article 11. *Alternative A* provides for a term of either twenty years or fifty years. *Alternative B* provides for a flexible term determined by individual Contracting Parties, subject to the condition that the terms is not "*in conflict with the normal exploitation of the broadcast signal and shall not unreasonably prejudice the legitimate rights of the broadcasting organizations nor the rights holders*". It should be noted that this language reflects the same wording of two of the criteria of the three-step-test.

Alternative C is that there is no such provision on term of protection at all. Such a stipulation (or rather lack thereof) would be in line with a very strict interpretation of the signal-based approach.

Recall that under signal-based approach, protection should be limited to the signal only, and not the content contained with a signal transmission. Since a signal

⁹⁰ US DMCA (Digital Millennium Copyright Act); 17 U.S. Code §1201

⁹¹ Article 6 of Directive 2001/29/EC ('Information Society Directive')

⁹² Article 3(4) of EU Directive 2006/116/EC ('Term Directive')

transmission is transient by definition, it is not possible (or at least not necessary) to stipulate a term of protection beyond the instantaneous protection that applies during the transmission itself. Hence, defining a term of protection necessarily implies a rights-based approach as a time-bound term of protection can logically only apply to fixations whose existence persist beyond the signal from which they were derived. A joint letter sent by various NGOs to the SCCR had very strong words to say about the palpable contradictions between a signal-based approach and a long term of protection, stating that:

“A 50 year term of protection makes a mockery of the notion that this is a signal based treaty or is only concerned with signal piracy, as it effectively extends the protection beyond the term of copyright, and is a recipe for disaster as regards orphan works (just as individual countries are in the process of trying to solve the orphan works problem). To protect against signal piracy, a short term of 24 hours would make more sense than 5 decades from the date of every broadcast.”⁹³

For completeness, a not-insignificant point of debate is the matter of the calculation of the term of protection. Specifically, the possibility for protection to be extended – even perpetually – if the content of a broadcast is broadcast again before the term of the initial broadcast expires, hence triggering a new term.⁹⁴

[2]-7 REGIONAL AGREEMENTS

Notwithstanding the intended focus on international legal instruments in this sub-chapter, it is noted for completeness that there are some regional agreements in place that have provisions relevant to broadcasters’ rights. While these will not be discussed in detail, there are three agreements that are worthy of at least noting.

[2]-7.1 NAFTA

The first is the *North American Free Trade Agreement* (NAFTA) of 1994. Article 1707 of NAFTA (Protection of Encrypted Program Carrying Satellite Signals) makes provisions on devices and systems that might be used to decode encrypted broadcasting signals. The Agreement provides for criminal offences for the manufacture, importation, sale or lease of such devices, as well as civil offences for receiving or distributing signals that have been decrypted on an unauthorised basis. It is noted that this provision draws similarities to one of the proposed provisions on TPMs in the Proposed WIPO Treaty Working Document.

[2]-7.2 Cartagena Agreement

The second agreement to note is the Cartagena Agreement – the basis of the Andean Community of South American States. More specifically, broadcasters’

⁹³ Joint NGO letter on the proposed WIPO treaty on broadcasting (May 28th 2018); Item 1

⁹⁴ WIPO SCCR/17/INF/1, paragraph 31

rights are provided for by The Andean Community's '*Decision 351 establishing the Common Regime on Copyright and Neighboring Rights*', of 1993.⁹⁵ Article 39 of this decision provides for exclusive broadcasters' rights regarding retransmission (by any means, not just wireless), fixation of broadcasts, and reproduction of fixations. Article 40 build on these rights by clarifying that they also apply to pre-broadcast signals ('program-carrying signals intended for a broadcasting or telecommunication satellite'). Finally, Article 41 stipulates a minimum protection term of fifty years for the rights set out in Article 39.

[2]-7.3 European Television Agreement

The last agreement to note is the *European Agreement on the Protection of Television Broadcasts*, of 1960. Article 1 of this Agreement sets out certain exclusive rights of broadcasting organisations, including (a) a re-broadcasting right (retransmission right), (b) a diffusion by wire right (cable retransmission right), (c) a communication to the public right, (d) a fixation right (including of photographs) and a reproduction of fixations right, and (e) a deferred re-broadcasting or wire diffusion right (deferred retransmission right).

Interestingly, the deferred retransmission right of Article 1(e) of the European Agreement does not apply when the broadcasting organisation has authorised the sale of the fixations or reproductions to the public. Therefore, it can be said that once fixations (or reproductions of fixations) are authorised, there is an implied indivisible right to communicate those fixations – i.e. permission to sell the fixations automatically implies permission to re-broadcast the content on a deferred basis.

The European Agreement is wider in scope than the Rome Convention in a few notable ways. First of all, it recognised wired diffusion, which the Rome Convention does not. This recognition can be seen as a possible response to the perception that even at the time of its negotiation, the Rome Convention was not sufficient to address current technologies.⁹⁶ Secondly, it explicitly states that a photograph constitutes a fixation of a broadcast. Thirdly, the communication to the public right is not limited to situations where there is an entry fee. However, the Agreement does converge back to the scope of the Rome Convention, in that Article 3 allows for reservations to the rights of fixation of photographs, and public communication where such is not to a paying audience.

The rights in the European Agreement are subject to a minimum term of twenty years (Article 2). Furthermore, Article 5 clarifies that the provisions of the agreement apply only to television broadcasting and not radio (hence making it in this way narrower in scope than the Rome Convention).

⁹⁵ Decision No. 351 (*Decisión N° 351 que establece el Régimen Común sobre Derecho de Autor y Derechos Conexos*) was issued by the Commission of the Andean Community (also called the 'Commission of Cartagena') on December 17, 1993, and published in the Official Gazette of the Cartagena Agreement No. 145 of December 21, 1993, in Lima, Peru.

⁹⁶ Ogawa (2007), pg. 60

For completeness, it is noted that the European Agreement is no longer relevant as it has been superseded by more modern legal instruments of the European Union. Most notably, the Rental Directive⁹⁷ sets out the modern provisions for broadcasters' rights in the EU. This Directive, along with other relevant instruments specific to the European legal framework are analysed in detail in Chapter 8 of this manuscript.

[2]-8 CONCLUDING COMMENTS

This chapter aimed at giving an overview of the international legal framework for the intellectual property rights of broadcasting organisations.

The main existing international instrument for broadcasters' rights is the Rome Convention. However, this convention has not been updated since its initial adoption in 1961, and there is much concern amongst the international community that protection for broadcasters needs to be updated, much in the same way that the WIPO Internet Treaties updated the framework copyright and other forms of related rights.

This desire to update the international framework has attracted much of the attention of the WIPO Standing Committee on Copyright and Related Rights since its inception. However, while the Committee has been able to find solutions to other key policy issues, a new international instrument on the protection of broadcasting organisations has not yet been concluded. Furthermore, possible progress on such a new treaty on broadcasting is greatly hindered by the fact that there are still core differences in opinion on key policy issues.

The Rome Convention therefore remains the main international reference point for broadcasters' rights. However, that Convention remains as having a relatively low number of Contracting Parties. Furthermore, the main international agreement on intellectual property – the TRIPs Agreement – does little to provide a coherent framework for broadcasters' rights.

The status quo is therefore that there is little explicit harmonisation on the international level for broadcasters' rights. This is however not to say that individual jurisdictions do not protect broadcaster's rights, or that where they do, there is necessarily extensive divergence in the approach taken. It just means that there is not much coordination of the issue through a single international instrument, and that individual jurisdictions use different approaches.

Aside from the extreme circumstance of not offering any protection at all to broadcasting through the intellectual property law system, there are generally three different approaches taken by individual jurisdictions. The first is to offer an explicit related right to broadcasting organisations, which is the general focus of the analysis in this manuscript. The second is to protect broadcasts as a category

⁹⁷ EU Directive 2006/115/EC ('Rental Directive')

of works under the copyright system, as is done in the United Kingdom and some other jurisdictions.⁹⁸

The third approach is where broadcasts are not explicitly included as a category of works, but are protected through a more general interpretation of ‘works’ eligible for copyright protection. A notable example of such protection is the United States, where copyright is interpreted – and clarified in case law – to cover broadcasts once a simultaneous fixation of the broadcast transmission is made.⁹⁹ Furthermore, various regulatory principles of the Federal Communications Commission (FCC) provide for some limited protection for broadcasters, though not in the form of an exclusive property right. Therefore, although the United States technically does not provide for a related right for broadcasting organisations, despite being the world’s leading exporter of audiovisual services¹⁰⁰, and historically the leader in pushing to liberalise that sector¹⁰¹.

Furthermore the case of the US is made even more peculiar given that it was very active in the negotiations that led up to the Rome Convention, but ultimately chose not to become a contracting party.¹⁰² Additionally – and almost counter-intuitively – the US appears to be one of the major proponents of the WIPO Broadcasting Treaty.¹⁰³

Taking a broad look at the international framework, the overall impression is that although broadcasters’ rights might appear on the surface to be a simple niche area of intellectual property law, its context – at least in terms of international law – is complex. This complexity will likely remain, even if a new WIPO-administered Treaty on Broadcasting Organisations is adopted.

Whether such an instrument will actually be adopted in the near future remains to be seen. Nevertheless, even if a new treaty is eventually adopted, the fact remains that work on theoretical understanding of broadcasters’ rights is sparse.

While the analysis in this manuscript does not explicitly aim at answering the key policy questions concerning a proposed treaty, it will use Law and Economic analysis to provide a systematic theoretical context for the debates. The analysis in this manuscript will therefore hopefully remain relevant, no matter the outcomes at WIPO in this area.

⁹⁸ WIPO SCCR/1/3, paragraph 35

⁹⁹ WIPO SCCR/1/3, paragraph 36

¹⁰⁰ World Trade Organisation (WTO) Document S/C/W/310 – Audiovisual Services, Background Note by Secretariat, Council for Trade in Services, January 2010

¹⁰¹ See Pauwels and Loisen (2003) for a history of the development of international trade in audiovisual services, specifically in the context of liberalisation under the WTO General Agreement on Trade in Services (GATS)

¹⁰² Balganes (2007), pgs. 1311-1312

¹⁰³ Balganes (2007), pg. 1306

PART II: BROADCASTING AS UNIQUE SUBJECT MATTER

CHAPTER 3: BROADCAST SIGNALS AS IP SUBJECT MATTER

This chapter is the first substantial research chapter in this manuscript, and one of two chapters in Part II. It aims at analysing the concept of broadcasting signals as unique subject matter in the intellectual property system. While this chapter does not employ a Law and Economics methodology *per se*, it justifies why the topic of broadcasters' rights is best understood through a Law and Economics perspective, and it is important for setting the context of the subject matter analysis in the rest of the manuscript.

[3]-1 INTRODUCTION

In order to address the overall research question of the theoretical bases of broadcasters' rights, a good starting point is to explore how the general theories of intellectual property apply to this subject matter. As such, the research question addressed by this chapter is *"How do existing theories of intellectual property rights apply to the case of broadcast signals?"*

This will set a context for the analysis of broadcasting signals as unique subject matter for intellectual property (IP) protection. Firstly, the chapter recalls various traditional theories of intellectual property law and analyses how they relate the unique subject matter at hand. Secondly, a brief analysis of the generally understood taxonomy of intellectual property rights (IPRs) is presented, in order to contextualise the position that this form of IP holds and its relationship with other forms of IP. The relationship between these two objectives is that the chapter looks at how IP theory applies to the field of related rights itself, of which broadcasters' rights are of course one sub-component.

In the wider context of this manuscript, the purpose of this chapter is to demonstrate that the most viable theoretical perspective on broadcasters' rights is welfare theory – the branch of IP theory that naturally lends to Law and Economic analysis. In fact, this chapter argues that other non-utilitarian perspectives do not even apply well to such subject matter, and are hence of limited use in answering the overarching research question.

Additionally, by discussing the taxonomy of the intellectual property system, this chapter will argue that broadcasters' rights are a very unique subject matter for IP protection. As such, addressing the overall research question means that broadcasters' rights themselves need to be analysed specifically, rather than adopting broader perspectives on various branches of the IP system. In particular, not only is a general view of theories of copyright and related rights not viable, but this chapter will argue that the very concept of 'related rights' has little coherence as a branch of the system itself. Consequently, analysis of other forms of related rights, while instructive, do not provide sufficient insight into the rights of broadcasting organisations.

[3]-2 JUSTIFICATION FOR BROADCASTERS' RIGHTS

Before delving into discussions on the various theories of intellectual property rights, it is useful to first note the claimed basis of these rights in various international legal instruments. However, it is surprisingly difficult to find an explicit justification for broadcasters' rights in such instruments.

While an explicit justification is surprisingly absent from the Rome Convention in its final form, a justification for broadcasters' rights can be found in the Explanatory Statement accompanying the 1957 Draft Agreement on Protection of Certain Rights Called Neighbouring on Copyrights ('Monaco Draft'), which was a precursor and an input into the Rome Convention.¹⁰⁴ This statement was that the agreement was to '*encourage creative activity and the dissemination of artistic works in the public interest*'.¹⁰⁵

Furthermore, key clues can be observed in various statements documents from the WIPO Standing Committee on Copyright and Related Rights (SCCR). One such statement is that "*Broadcasting organizations have been granted protection for the result of their investment, their entrepreneurial efforts and their contribution to the diffusion of culture and their public information service. Broadcasting organizations are entities that take the financial and editorial responsibility for the selection and arrangement of, and investment in, the transmitted content.*"¹⁰⁶

In terms of the recent proposed WIPO Broadcasting Treaty (discussed in Chapter 2), the SCCR advocates that: "*The main objective of the new treaty is to provide a stable legal framework for the activities of broadcasting organizations. Its focus is on the 'anti-piracy' function, and against signal-theft, but it provides also protection against competitors and against unfair exploitation, and against free-riding. The rationale of the legal protection is twofold: the investment required for providing program content to the public; and the easiness of exploitation by others of the result of this investment in the new technological environment.*"¹⁰⁷

Therefore, based on these statements, the main justification for broadcasters' rights appear to be to protect against signal piracy, encourage investment, and reward broadcasters' for their role in distributing creative and artistic works. With this claim established, attention can now be placed on the topic of theories of intellectual property.

¹⁰⁴ There were three overlapping origins of the Rome Convention. One was a proposal from the ILO in 1956, one was a proposal from the Berne Union (of the Berne Convention) and UNESCO in 1957 (the Monaco Draft), and the third was a proposal from the ILO, UNESCO and the Berne Union in 1960 (the Hague Draft).

¹⁰⁵ Ogawa (2007); pg. 36.

¹⁰⁶ WIPO SCCR/8/INF/1; Para. 58, and also WIPO SCCR/7/8; Para. 5.

¹⁰⁷ WIPO SCCR/17/INF/1, paragraph 41.

[3]-3 THEORIES OF INTELLECTUAL PROPERTY

There is a very rich tradition of academic accounts of intellectual property from various perspectives, each with its own philosophical roots and policy implications. The following section summarises the main theories of IP, and attempts to relate these theories to the subject matter of broadcasting signals, and related rights more generally. Generally, theories of intellectual property can be placed within two groups: Utilitarian Theories and Non-Utilitarian Theories.¹⁰⁸

While the summary below also focuses mainly on normative perspectives it is acknowledged that there is also a stream of literature on the historical evolution of intellectual property law and other positive perspectives. For example, Olsen (1989) builds on the traditions of public choice theory, and suggests that legislators may deviate from 'good copyright policy' due to political influences of overrepresented interest groups. Furthermore, Merges (1995) tracks the evolution of intellectual property law, and notes a 'shifting baseline' from a presumption of open competition and an absence of property rights, towards a presumption of protection, due to political economy concerns of legislators.

As an editorial note, the discussions that follow focus on the three main (traditional) branches of intellectual property law: copyright, patents, and trademarks. It fully acknowledged that various other forms of intellectual property exist (e.g. trade secrets, publicity rights, sui generis rights, etc.). However, the theoretical underpinnings of these forms of Intellectual Property general parallel those relating to the main branches.

[3]-3.1 Utilitarian Theories

Utilitarian theories of intellectual property are primarily concerned with social welfare issues, and hence provide the underlying stream of thought for the economic analysis of intellectual property law. Generally, utilitarian theories attempt to balance the conflicting goals of incentivising the production of creative works, inventions, and innovations with the market power granted via virtue of property rights. Indeed, this the branch of theory most directly consistent with the discipline of Law and Economics.

A welfare economics framework for analysis of Intellectual Property Rights can be traced to Pigou (1924), who articulated an appropriability problem facing inventors. Arrow (1962) was further instrumental in formalising the notion that information can generally be reproduced at zero marginal cost, hence leading to a public good problem. Building on the foundations laid by Coase (1960) on property rights and market failures, Demsetz (1970) propositioned that strong property rights are necessary for intellectual creations, where efficient resource allocation can then be facilitated through Coasean bargaining processes.

¹⁰⁸ For a detailed discussion on the various theories of intellectual property, see Menell (2000), on which this section is largely based.

Building on utilitarian and welfare frameworks, much economic analysis has been conducted on the optimal structure of intellectual property law. In the field of patent law, Nordhaus (1969) provides a seminal model of patent protection in which it was demonstrated that an optimal length of protection could balance incentives for investment in innovative activities with the deadweight loss resulting from market power. Gilbert and Shapiro (1990) expand on the Nordhaus approach by allowing for variation in not only patent length, but also patent breadth (scope of protection).

There has subsequently been a rich body of research following from this tradition, evolving into its own research niche of 'innovation economics'. Common themes in this niche are institutional studies (for example analysis stemming from Schumpeter's (1942) concept of 'creative destruction'), the implications of patent races (stemming from Barzel's (1968) work on innovation rivalry), the implications of cumulative innovation (stemming from Scotchmer's (1991) work on spillover effects in innovation markets), the implications of network externalities (for example stemming from Katz and Shapiro (1985) on innovation and product standards), and alternative mechanisms to property rights (example Wright (1983) on prizes and research contracts as alternatives to patent rights).

While the vein of literature known as innovation economics discussed above mainly deals with modes of economic production whose outputs are utilitarian in nature (i.e. inventions and innovations that are subject to patent protection), the same philosophical and theoretical foundations apply to production of goods which are creative in nature (i.e. literary and artistic works that are the subject of copyright protection). This is evident as Arrow's notion of information as a public good also equally applies to information in the form of creative outputs, leading to the need for a utilitarian and welfare-based framework to analyse the structure of inventive systems in such markets.

Despite the intuitive appeal of a utilitarian framework, welfare-based analysis has always had an uneasy relationship with copyright law. Hurt and Schuchman (1966) discussed the uncertainty of the welfare effects of copyright protection. Breyer (1970) also famously shines a light of scepticism on copyright protection, noting that while copyright may be justified on economic reasoning of encouraging production of works, existing evidence suggests that the effect of exclusive rights is marginal at best.

Johnson (1985) as well as Novos and Waldman (1984) develop the tradition of formal economic modelling of copyright issues, and demonstrate that limitations on copying lead to increases in social welfare. Subsequently, Landes and Posner (1989) can be considered as the seminal work in economic analysis of copyright law.

While the notions of a public good problem and incentivisation through property rights are common threads in both theories of patent law and copyright law, application of a utilitarian framework to trademark law takes quite a different form. The principal economic problem at play in the sphere of trademark law is one of information asymmetry. Economides (1988) sets out the discussion on the

economic mechanism of trademarks, and notes how marks facilitate the efficiency of consumers' choices, especially in cases of experience or infrequently used goods. Furthermore, Landes and Posner (1987) suggest that trademarks enhance social welfare through the key economic function of reducing consumer search costs.

[3]-3.2 Non-Utilitarian Theories

Non-utilitarian theories are particularly significant for literary and artistic works, which are generally the subject matter of copyright protection. In particular, non-utilitarian philosophical perspectives have had a particularly pronounced influence on the evolution of intellectual property systems in continental Europe.¹⁰⁹ Generally, non-utilitarian theories find their basis in the foundations of general property rights laid by classical philosophy. More generally, Becker (1993) discussed the various moral grounds on which people deserve to claim ownership over intellectual property, as compared to rights in tangible property.

Perhaps the most dominant non-utilitarian theory is that of Locke's labour-centric notion of natural rights. For Locke, the central theme is that ownership of one's labour gives rise to a natural entitlement to property rights over outputs that are a product of such labour.¹¹⁰ While a large body of literature has developed which applies Lockean natural rights theory to intellectual property generally, the literature is certainly not in consensus about this basis. For example, while Denicola (1981) and Ginsburg (1990) argue for expansionary interpretations of copyright law pursuant to a Lockean tradition, Hettinger (1989) and Nozick (1984) are critical of such liberal interpretations.

Aside from Lockean natural rights theory, the other major strain of non-utilitarian theory is a perspective of personhood, as grounded in the philosophies of Kant and Hegel. In the case of Hegel, property rights are central to one's personality and expressions of personhood. In Kant's account, the notion of individual autonomy is the central justification for property rights. Radin (1982) gives a seminal account for the role personhood in modern legal discourse generally.

According to Menell (2000), in the case of personhood theories, the justification of property rights appears to be more convincing in circumstances where an object or idea is closely intertwined with an individual's personal identity.¹¹¹ This concept is well summarised by Hughes (1988) in the following statement: *"The more a creative process is subject to external constraints, the less apparent personality is in the creation. At some point, these constraints on a particular form*

¹⁰⁹ *"This difference in philosophical perspective is reflected in part in the ways in which intellectual property systems are designated. Whereas protection for literary and artistic expression in the United States comes within the 'copyright' law - the title of which emphasizes limits on the public's right to make copies - the analogous bodies of law in Europe are labelled 'author's rights': droit d'auteur in France, Urheberrecht in Germany and derecho de autor in Spain."* – Menell (2000), pg156.

¹¹⁰ For an account of the role of Lockean natural rights theory in the evolution of copyright law, see Hughes (1988).

¹¹¹ For a general critique of this theory, see Simmons (1992).

of intellectual property may be too great to permit meaningful expressions of personality. We may determine that the personality justification should apply only to some genres of intellectual property or that the personality generally present in a particular genre warrants only limited protection."

In terms of the evolution of intellectual property law, it is interesting to note the extent of influence of non-utilitarian theories. While the US copyright system appears to be almost solely built on a Lockean labour perspective¹¹², Continental European law, with its rich tradition of a strong focus on moral rights, generally traces its philosophical foundations to personhood theories¹¹³.

While the term 'natural rights' is typically associated with Lockean perspectives, for the purposes of the analysis at hand, personhood theories can also be grouped into a broader classification of 'natural rights theories'. This can be done as the types of rights pursuant to both theoretical branches are 'natural' in the sense that their existence is intrinsic and connected to the very nature of the human condition, i.e. outside of any externally imposed legal system.

It is further useful to note that there also exists a perspective which sharply contrasts these natural rights based frameworks, based on the foundations of the deconstructionist school of thought in literary criticism. This perspective rejects the classic romantic concepts of the 'author' (or the 'inventor') as an artificial social construction that may lead to unwarranted and unconstructive associations between creative works and their authors.¹¹⁴

Aside from the above-discussed perspectives on property rights based on classical philosophical foundations, there are several other themes in perspectives on intellectual property rights which can be loosely described as non-utilitarian in nature. For example, there is certainly a growing trend of 'libertarian' perspectives, which criticise the dominant philosophical perspectives on intellectual property.¹¹⁵ More recently, authors such as Barlow (1994) discuss how intellectual property rights undermine free expression and participation in cultural and political affairs, particularly in the modern digital age.

These libertarian perspectives are very much related to strains of literature which set out a sort of 'democratic theory' perspective. For example, Kaplan (1967) notes that intellectual property has a strong historical basis in notions of political patronage, which are no longer applicable in the modern era¹¹⁶. Goldstein (1970) discusses how various doctrines within copyright law are unified with constitutional notions of freedom of speech and freedom of the press. Further to this tradition, there is certainly a growing body of literature that is critical of

¹¹² See Hughes (1988)

¹¹³ See Netanel (1993)

¹¹⁴ For an overview and critique of this deconstructionist view, see Lemley (1997).

¹¹⁵ For example, see Palmer (1989)

¹¹⁶ Copyright law in the UK traces its origins to policies used by the Crown to regulate the press via granting special royal grants of privileges. For a discussion on the history of copyright in the UK, and the role of the copying privileges, see Rose (2009).

expansionary trends in intellectual property, and the implications for democratic participation and free expression.¹¹⁷ Similarly, Netanel (1996) stresses the importance of copyright policies in facilitating free speech in the modern era of digital communication networks.

[3]-4 TAXONOMY OF INTELLECTUAL PROPERTY RIGHTS

Before proceeding to discuss the extent to which these various theories are applicable to broadcasters' rights as unique subject matter for intellectual property protection, it is first useful to present a broad discussion of the overall landscape of the intellectual property system in terms of the different forms of rights and types of subject matter covered.

While the above overview of the various theoretical perspectives on IP is only rudimentary, it illustrates there is no single unified theory or philosophy on which the intellectual property system in its entirety is based. Rather, the applicable theoretical and philosophical perspective largely depends on the type of subject matter under consideration.

This following section will briefly set out a broad taxonomy for the IP system, in order to build a sense of how different theories map onto different subject matter areas.

[3]-4.1 General Taxonomy of IPRs

Standard accounts of intellectual property in non-academic settings tend to define two distinct branches of the intellectual property system: (i) Copyright and Related Rights, and (ii) Industrial Property¹¹⁸. As is evident from its name, the former branch deals with two sub-branches (copyright and related rights), while the latter deals with patents, trademarks, and other forms of property normally associated with commercial endeavours. This distinction is largely based on a notion that the subject matter of copyright are outputs pursuant to artistic and creative activities, while the subject matter of industrial property deals with outputs pursuant to commercial activities. Indeed, it would therefore be implied that at least superficially, copyright is founded in non-utilitarian theoretical perspectives, at least to a greater extent than industrial property, which may be strictly founded in utilitarian perspectives.¹¹⁹

The above distinction is not particularly useful in an academic context, and in particular, the very notion of industrial property itself is not particularly

¹¹⁷ For example, see Coombe (1991)

¹¹⁸ For example, see WIPO (2008) paras 1.4 – 1.9.

¹¹⁹ Support for the notion that copyright and industrial property evolved out of separate streams of intellectual thought and policy issues is found in the fact that industrial property issues were first addressed at the international level in the Paris Convention (1883), which considered trademark as well as patent issues. However, copyright issues were independently considered in a separate instrument – the Berne Convention (1886).

constructive. From an economic viewpoint, the starting point for analysing property rights is an identification of the market failures that may prevail in the absence of such rights. As alluded to in the previous section, the non-rivalrous and non-excludable nature of information leads to potential underproduction of information goods due to free-rider problems. Furthermore, information may be associated with various positive externalities, which again suggests a state of underproduction in the absence of market intervention. As such, solving a public good market failure is the basis for justifying the existence of patents and copyrights as specific forms of property rights. Trademarks on the other hand are justified on a completely different form of market failure - information asymmetries and the resulting search costs.

This distinction is certainly based on a purely utilitarian perspective, but at least provides for a less arbitrary framework than that provided for under the notion of 'industrial property'. There appears to be a general consensus that the patent system has evolved almost purely on a utilitarian based philosophy.¹²⁰ Furthermore, the dominant view is that the trademark system is also founded on utilitarian perspectives.¹²¹

The result is that non-utilitarian philosophical perspectives on intellectual property tend to be generally limited to the copyright system. This is indeed intuitive on the same grounds that the copyright/industrial property distinction is made, i.e. that the former are inherently the result of artistic and creative endeavours, while the latter are generally commercially oriented.

As discussed in Chapter 1, the copyright system is often used as a synecdoche for the broader classification of 'copyright and related rights'. In order to present a basis for theoretical discussion of broadcasters' rights (which is the focus of this research project), the following section discusses the distinction between 'primary copyright' and related rights.

The above discussion on the general taxonomy is presented in order to bring context to the main discussion of broadcasters' rights. Firstly, it suggests that it is useful to examine such rights (and related rights in general) in the broader context of the copyright branch of the intellectual property system. Secondly, it establishes that although the patent system is a distinct branch, the copyright and patent systems are based on similar theoretical foundations, and hence insights from patent law may be useful for technical analysis of particular copyright issues.¹²² Thirdly, it establishes that insights from the third major branch of intellectual property - trademark law - may be of little relevance.

¹²⁰ See Menell (2000). However, in contrast with this view, Oddin (1996) provides an interesting perspective on the application of natural rights theories to patent law.

¹²¹ For discussions on the applicability of natural rights theory to trademark law, see Hughes (1988) and Port (1994).

¹²² This is the partial basis for Chapters 5 and 6, which will aim to see how models of patent protection (as well as copyright protection) can be adapted to the subject matter of broadcasters' rights.

[3]-4.2 Dichotomy of Copyright and Related Rights

As noted in Chapter 1, an important theme running through the entirety of this manuscript is that there exists a strict dichotomy between copyright and related rights. In reality, many broadcasting organisations both licence works from third party media producers, and also produce their own content in-house. However in the latter case, this activity is carried out in the capacity as content producers themselves - in the scope of the discussion at hand, broadcasting shall hence solely refer to the act of content distribution.¹²³ It is therefore important to understand that the two form sufficiently independent domains of property rights.

For example, the existing policy framework for related rights provides that the existence of any related right does not undermine any existing copyright in the underlying work being performed, produced or broadcasted.¹²⁴ Furthermore, the existence of a related right does not necessarily have to be predicated on any assumption that the underlying work being performed, produced, or broadcast was subject to copyright protection in the first instance.¹²⁵

[3]-5 RELATED RIGHTS AS A CONCEPT

This section focuses on the concept of Related Rights as a specific branch of the intellectual property system. The purpose of this discussion is to arrive at the conclusion that broadcasters' rights are indeed a unique form of IP which must be analysed specifically, and that even though it is considered a form of 'related right', that very concept has little theoretical coherence.

[3]-5.1 Domain of Copyright and Related Rights

Interesting insights can be gained from a preliminary review of the historical evolution of related rights (in the wider context of the historical evolution of copyright).¹²⁶ Generally, copyright law evolved in the framework of a somewhat

¹²³ Even quasi-authoritative sources seem to conflate the concepts of copyright and related rights in relation to broadcasting organisations. For example, WIPO (2008) refers to the need to protect the rights of broadcasters in relation to 'their own programs' (paras 8.51 and 8.71).

¹²⁴ Article 1 of the Rome Convention ('Safeguard of Copyright Proper') states as follows: "*Protection granted under this Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Convention may be interpreted as prejudicing such protection.*"

¹²⁵ For example, the Rome Convention states that "*performers' means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works*". However, further to the definitions set out in the Berne Convention, the term 'works' includes literary and artistic productions that may or may not be protected by copyright. As such, a performer's related right does not depend on any pre-existing copyright in the underlying work being performed. This notion has very important implications, as it extends protection to performers of works that are already in the public domain (such as traditional cultural expression and folklore).

¹²⁶ The historical background of related rights in the international intellectual property system was discussed in Chapter 2.

'subject-matter-neutral' paradigm – i.e. copyright protection was meant to be conferred upon various subject matter with fall within the general category of 'literary and artistic works'. Although international treaties (and in most cases national legislation) sometimes set out enumerated lists of copyright eligible subject matter, such listings are designed to be generally illustrative and non-exclusive.¹²⁷ However, changes in technology and cultural institutions over the years have led to an accumulation of case law and statutory amendments in many jurisdictions, to expand the domain of copyright eligible subject matter.¹²⁸

In some instances, case law has also contributed to policy frameworks that aim to resolve conflicts or overlaps between different forms of intellectual property; as noted in Chapter 1, the debate over the appropriate mode of protection for software is a primary example in this regard.¹²⁹ Furthermore, case law and policy frameworks have also lead to particular developments in relation to gaps and tensions over specific subject matter relative to overall copyright system; the emergence of *sui generis* database rights is a primary example of such gaps.¹³⁰

Notwithstanding the peculiarities of a few special cases, it can be said that the international copyright system largely evolved in a somewhat subject-matter-neutral paradigm, where the specifics of implementation of copyright policies in relation to specific economic sectors or subject matters have been left up to individual national legislatures.

In contrast, the evolution of related rights seems to have been much more significantly concerned with individual sectoral and subject-matter-specific policy issues. This is certainly reflected in the fact that there exist three fundamentally discreet forms of related rights under the general rubric of related rights: (i) the rights of performers, (ii) the rights of producers, and (iii) the rights of broadcasting organisations.¹³¹

It is interesting to note that these three classes of related rights are generally sector specific, unlike the case of copyright, which applies to a vast range of possible literary and artistic works. There are therefore conceivable circumstances in which market agents, who serve roles akin to those of related rights holders, are not beneficiaries of any form of intellectual property rights, as their interests are outside of the existing domain of the related rights system.

¹²⁷ The Berne Convention states that "*The expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as...*", and proceeds with a non-exclusive and illustrative list of possible classes of works.

¹²⁸ For a discussion on this matter, see Boyle (2003).

¹²⁹ For a discussion on the debate between copyright and patent protection for software, see Hall (2003).

¹³⁰ Database rights, and more particularly, the relationship between database rights and copyright, are discussed in more detail in a subsequent section of this chapter.

¹³¹ See WIPO (2008) paras 1.12 and 8.55.

For illustration, consider the case of works of architecture, which are subject to copyright protection.¹³² An architect may draft blueprints for a building project, but still needs the talents of construction professionals to execute the plan, and embody the work in a form that is perceptible by the general public. For such works of architecture, construction professionals indeed serve the role of market intermediaries, but do not benefit from any type of property right in the final produced work.

Hence, ultimately, the domain of copyright protection can be said to be generally unbound, while the domain of related rights is strictly limited to three distinct and discrete classes (at least in terms of the international legal system). This can be taken as evidence of the fact that evolution of related rights was indeed driven by sector-specific interests.

The following section explores the concepts of ‘market intermediaries’ and ‘embodiment of works in perceptible forms’ more closely.

[3]-5.2 Intermediary Market Agents

In order to set out a meaningful analysis on how the various theories of intellectual property apply to the field of related rights, it is first necessary to focus on the role that these three classes of related rights holders play in the copyright value chain.

[3]-5.2.1 Expression and Fixation

Arguments relating to the justification of related rights may be best analysed in context of the rights of performers of works. While such rights may be conferred in principle upon the performers of any class of works (whether copyright protected or not), in practical terms they generally relate to performers of musical, dramatic or audiovisual works.

The most traditional form of copyright works is the case of literary works, and such works have historically and generally been used as the base case for analysing copyright arguments. However, literary works do not need an intermediary in order to be embodied in form that is communicable to the public; suffice it to say that is, that once a book is written, it is in a form that can be enjoyed by the public by mere virtue of the author’s fixation of their expressions.

This contrasts sharply with the case of works that need to be communicated to the public in an auditory or visual format. For example, a playwright may draft a dramatic work that is subject to copyright protection by virtue of original authorship, but still needs the talents of actors to interpret the work and to embody it in a form that is communicable to the public. Such actors are hence the potential beneficiaries of performers’ rights; the same case holds for audiovisual works (such as film and television programmes). In the case of musical works, a

¹³² The illustrative list of classes of works set out in the definitions section of the Berne Convention includes works of architecture.

composer may not only need the talents of performers to embody the work in communicable form, but also in the case of fixation, the composer needs the capacity of a producer to facilitate the process of sound recording. In this case, related rights not only arise in the form of the hired musicians' performers' rights, but also in the related rights of the phonogram producer.

The above examples are presented in order to establish an argument that in contrast with copyright law, the emergence and evolution of related rights has been driven by sector-specific and subject-matter specific interests, i.e. commercial and artistic interests in the performing and recording arts sectors (music, audiovisual, film and drama). In any instance, the underlying theme seems to be that the beneficiaries of the related rights are agents who facilitate the process of embodying the underlying work in a form that is ultimately perceptible and communicable to the public.¹³³

[3]-5.2.2 Distribution

This above conception of related rights therefore provides for a very interesting benchmark to compare the case of broadcasting rights. Unlike performers and producers, broadcasters do not add value by facilitating the process of embodying a work in a communicable form; rather, they facilitate the distribution and dissemination to the public of works that are generally already embodied in communicable forms and subsequently fixed. As such, the position of a broadcaster within the creative economy is undoubtedly outside of the sphere of production, and inside of the sphere of distribution. It is therefore counterproductive to automatically accept that the arguments used to justify performers' and producers' rights – irrespective of theoretical and philosophical foundation – are equally applicable to the case of broadcasting organisations as beneficiaries of some form of related right.

In this regard, a critical contextual aspect of this entire topic is the observation that unlike all other forms of intellectual property (which are generally concerned with economic issues of production), broadcasters' rights are concerned with economic issues of distribution. Whether or not this distinction is consequential for the design of an optimal intellectual property system remains to be determined.

As alluded to above, literary works traditionally form the default subject matter for traditional discussions on copyright policy. Furthermore, as stated above, literary works such as books do not necessarily require an intermediary agent

¹³³ It is noted that a legitimate argument can be made that the copyright-holder's work is perceptible to a particular sub-group of the general public once fixed in its primary form. For example, a composer's work may be perceptible by a person with the ability to read and perceive sheet music, without the aid of actual musical performers to interpret the work in an auditory form. Likewise, the work of a playwright or screenwriter may be perceptible by a counterpart within their artistic field without the aid of performance interpretations by actors. However, by 'communicable to the public', reference is made in this context to the wider public outside of a closed artistic community, whose 'consumption' is central to the notion of economic exploitation of a copyright protected work.

akin to a performer in order to embody the work in a form communicable to the public. However, like audio and audiovisual works, intermediaries in the distribution level of the supply chain still play an important role in the overall process of economic exploitation of copyright. As such, it is interesting to analyse the market characteristics that place distribution intermediaries in audiovisual markets in such particular circumstances.

In this regard, it may be noted that very specific market institutions have evolved within various sectors of the creative industries in order to facilitate the process of distributing works once they have been produced. For example, book publishers play an important role in reaping the economies of scale that exist in physical reproduction (printing), marketing, and access to final consumer markets. Similarly, in the music industry, music publishers play an important role of serving as a market intermediary between composers and authors of works and potential users of the copyright (such as record labels who wish to licence the songs for performance and subsequent fixation via sound recording).

However, while publishers play an intermediary role in these markets, such activities are facilitated through copyright-based market transactions rather than a unique form of intellectual property itself – i.e. through contract law and licencing agreements.¹³⁴ Furthermore, the role of publishers and publishing agreements as market institutions do not serve as an appropriate benchmark for analysing the role of broadcasters for two reasons. Firstly, publishers generally operate in different space in the economic value chain of copyright exploitation, as compared to broadcasters who strictly operate in the distribution sphere.¹³⁵ Secondly, the broadcasting market is such that very specific market characteristics and possible market failures prevail, which are instructive in analysing the basis for the existence of a unique form of intellectual property to protect the interests of broadcasting organisations. Therefore, while broadcasters are indeed market intermediaries, they form a special case that may require sector-specific policy tools. These market characteristics are discussed in Chapter 4.

¹³⁴ An interesting example is that of the notion of publisher's rights in the music industry. It is established industry practice that an author or composer transfers partial copyright ownership to a publisher in exchange for the publisher's administrative services and market access to licensing and distribution markets. Publishers are hence said to claim 'publisher's rights' in addition to the copyright that is held by the original author/composer. However, 'publishers' rights' do not generally exist as a distinct form of intellectual property in statute, and are merely a result of contractual agreements for joint-copyright ownership. This illustrates how in these sectors, market institutions have evolved to facilitate the economic exploitation of copyright without the creation of a new legally distinct form of intellectual property right.

¹³⁵ Publishers generally serve as a market intermediary between authors and potential licensees (who themselves then undertake some form of economic exploitation or distribution). In some cases, the publisher may serve the role of being the intermediary between the author and the final marketplace (e.g. in book publishing). Broadcasters however, strictly serve the role of being a distribution intermediary - i.e. an intermediary between rightsholders (which may be authors as well as publishers) and the final market place ('consumers' or end-users). In some instances, this relationship is even further intermediated by another market institution such as a collective copyright management organisation, whose role is to reap the economies of scale that exist in copyright administration.

[3]-5.3 Evolution of Related Rights

Given the previous discussion on the closed domain of related rights, it is interesting to consider how these particular rights evolved in the first instance.¹³⁶

According to WIPO performers sought protection for their performances at the international level due to perceived erosion of their incomes from live performances due to increased popularity of recorded performances.¹³⁷ The perception was that they would be placed in the 'awkward position' of competing with their own recordings, and would not derive any secondary revenues from such usage. The development of neighbouring rights hence seems to have been a function of the creative industry's response to technological changes.¹³⁸

Furthermore, producers sought protection due to similar technological trends. The recording industry used to depend partially on the concept of 'needle-time' – a fixed amount of use (usually hours per week) that may be made of a commercial recording for broadcasting purpose.¹³⁹ The purpose of such was to limit the use of sound recordings in order to promote use of live performances. It appears that while these issues were open for debate, broadcasters were similarly able to lobby for protection of their commercial interests through property rights.

The above observations are presented to support the proposition that the closed domain of related rights was driven by sector-specific interests, which contrasts sharply with the open domain of copyright. Such a proposition is intuitive from a public choice perspective given that the recording arts industry at the time may have had very strong lobbying power, unlike many other market intermediaries who may have had similar grounds for being included in the domain of related rights. Rather than adapt business models to changing technology, or submit to the process of 'Schumpeterian Creative Destruction', these interests were able to obtain new property rights to preserve their market presence.

[3]-6 THEORETICAL PERSPECTIVES ON RELATED RIGHTS

The above sections have established a thematic context on the domain of copyright and related rights, and the role that related rightsholders play as intermediary market agents. With this context established, it is now possible to return to the question of applying the various theories of intellectual property to the domain of related rights.

¹³⁶ This section only gives a brief discussion on the emergence of related rights, to support the idea that the closed domain of related rights has been driven by sector-specific interests. An overview of the relevant historical developments in the international copyright system was given in Chapter 2.

¹³⁷ WIPO (2008), para. 8.53

¹³⁸ WIPO (2008), para 8.55

¹³⁹ WIPO (2008), para 8.63

[3]-6.1 Performers

Generally, discussions on related rights tend to primarily focus on the rights of performers. Performers are agents who generally act as intermediaries between authors and audiences by interpreting and expressing works, ultimately facilitating the process of transforming a work into a medium which is communicable and perceptible by the public.

In general, performers are natural persons whose artistic and creative inputs influence the ultimate expression of an underlying work. As such, to the extent that non-utilitarian theories are applicable to the copyright in general, they are certainly equally appealing in the case of performers' rights. In other words, a performer's performance can be seen as an intimate expression of personhood, creativity, and/or labour, hence giving rise to moral entitlement to some form of ownership in the tradition of classical philosophical views on property and natural rights (natural rights theory).

However, consideration must be made for the extent to which a performer's own talents and interpretations are manifested in a particular performance. On one hand, a performer may be bound by strict boundaries in terms of the instructions set out by the original work. In such a case, a performer may merely be a technical agent who gives literal expression to an underlying work.¹⁴⁰ On the other hand, a performer's expression of a work may involve considerable interpretation and unique creative talent, such that performances by different performers exhibit substantive variances. There are therefore varying degrees to which a performance can be deemed as intimately linked with the concept of personhood hence giving rise to a natural right. Clearly, which case applies would depend on the class of the work, the nature of the work, and the approach of the individual performer.¹⁴¹ In the case of performances that exhibit a very high degree of creativity (and hence personhood), a performer may even theoretically have grounds to claim that the performance is sufficiently transformative to constitute a derivative work, which is in itself copyright eligible.¹⁴² In this case, such transformative performances may justify property rights on the same basis as the concept of originality in general copyright. Performers rights in this regard, can even be considered as a weak form of 'pseudo-copyright'.

The case of extending utilitarian theory from copyright to performers rights is hence nuanced. In order to explore the incentives of performers, it is useful to distinguish between performers who are hired by creators, and performers that

¹⁴⁰ This would likely be the case of the construction worker giving expression to a work of architecture as previously discussed.

¹⁴¹ For example, a lead actor in a cinematographic work will likely enjoy more creative scope and hence potential to manifest personhood, than a triangle player in an orchestra playing a composition in which the triangle has a very minor role.

¹⁴² Article 2(3) of the Berne Convention states that "*Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work*". Such works are commonly known as 'derivative works'.

perform for their own purposes (or are coordinated by agents other than creators).

[3]-6.1.1 Performers hired by creators

It is intuitive to understand how property rights serve to incentivise creators to produce literary and artistic works. However, this may contrast with other incentive systems, such as direct payments. In this regard, we may consider the concept of 'work for hire' in which a creator is engaged by another party to create a work, and exchanges rights in the produced work for a fixed payment. This is the principle that underscores much of the creative endeavours that takes place in the modern activities, where creators produce works in the course of their employment, resulting in copyright ownership being vested in their respective employers.

In evaluating how utilitarian theory may apply to the case of performers, we therefore need to consider these agents' motivations, incentives and relationships with copyright owners. As previously noted, traditionally, performers are seen as market agents who facilitate the creative endeavours of copyright holders. In this regard, the typical motivating factor for performers can be seen as akin to a 'work for hire' model, where one-time fixed payments are the dominant method of compensation, as opposed to property rights (which are assets that can potentially generate future earnings). As such, granting such performers a property right over their performances may have little effect on incentive structures, as these property rights may be transferred to the copyright holders who hired them as is the case for work-for-hire agreements in copyright. It is however noted this in theory does represent an exaggerated case (where the performer has an almost absolute preference for immediate payment over property rights).

The actual case may however not actually be that far from this extreme example. This proposition is supported by the observation that related rights are a much more modern concept than general copyright, and market institutions to facilitate economic exploitation are significantly underdeveloped (if existing at all), as compared with those that have evolved over time in the sphere of copyright. The main institutions referred to here are collective copyright management organisations that evolved to minimise the transaction costs that prevail between diffused groups of rights-owners and rights-users. In the case of copyright, particular for public performances of musical works, there are strong international networks that facilitate the collection and distribution of copyright-derived royalties. For performers' rights however, these networks are generally not as developed.¹⁴³

¹⁴³ This development gap between networks for collective administration for copyright and related rights is supported by two observations. Firstly, related rights are generally subject to a much lower extent of international harmonisation than copyright – this is evidenced by the fact there are currently 168 Contracting Parties to the Berne Convention, but only 92 to the Rome Convention. In many jurisdictions, the collection of related rights is delegated to the collection agency for copyright (see Ficsor, 2002). Furthermore, the dynamics of related right exploitation depends both on national legislation (which is more divergent than copyright) and specific market

The above point on (a lack of market institutions to maximise the potential for exploiting performers' rights) is further stressed by the observation that complete transfer of rights is still a very common form of contractual agreement between performers and the agents that employ their services.¹⁴⁴ The result in economic terms, is that the 'elasticity of supply of performances with respect to the scope of protection offered' (for performers), is intuitively lower than the corresponding elasticity of supply of creative works (for copyright owner). While there is no way to empirically test this hypothesis coherently, if the intuition is true, it implies that utilitarian perspectives may actually have limited application to performers' rights.

Based on the above discussion, it would appear that non-utilitarian theories seem to be a more appealing basis to explain the evolution of related rights.¹⁴⁵ Interestingly however, this statement seems to be at odds with factual accounts of the arguments that led to the introduction of performers' rights, as previously noted. This is possibly because the interests that historically lobbied for performers' rights were performers of works generally in the public domain, rather than performers hired by composers for the purpose of fixation of new works.

[3]-6.1.2 Self-employed Performers

The above discussion focussed on performers who are hired by creators to bring expression to their works. However traditionally, many performers perform works on their own accord – often works from the public domain. This was particularly the case for musicians before proliferation of recorded music platforms. For example, consider the performers in an orchestra playing works of classical composers whose compositions have long entered into the public domain.

These types of performers more fit the template of those whose interests were described in the previous section on the evolution of related rights. Furthermore, it is recalled that the arguments put forward by such performers was that recording and distribution technology was possibly eroding income streams from live performances. As such, performers' rights secure these income streams by allowing performers to control fixation and subsequent distribution of the performances. This hence increases the incentives of performers to perform works, by securing their ability to capture the value they create.

It is interesting to now consider how these increased incentives for performers interact with the incentives for creators (i.e. authors and composers). It can be

characteristics. As a result, not all forms of related-right holders rely on collective management systems (EC-SWD, 2012).

¹⁴⁴ See EC-SWD (2012) generally, as well as Sand (2012) for the case of the audiovisual sector.

¹⁴⁵ It is useful to recall the deconstructionist view (discussed in Section 2.2), which suggests even where natural rights may be argued to exist, such rights may be unconstructive in terms of artistic critique implications.

considered that to some extent, the technical skill-sets of performers and creators overlap; however, the extent of this overlap would certainly vary between creative fields.¹⁴⁶ This overlap can be interpreted as the performer's 'cross-elasticity of supply' between the alternative activities of performance of and creation of works. When incentives for one activity increase (e.g. by granting performance rights), the propensity to engage in that activity increases, and the propensity to engage in the alternative activity (i.e. create new works) decreases. Depending on how this cross-elasticity works in practice, the overall creation and performance of total works might either increase or decrease. The result is a conundrum whose interpretation is uncertain, and depends on ideological interpretations of the goals of the copyright system; i.e. '*...how should the copyright system seek to balance the apparently conflicting goals of incentivising distribution of existing works, and creation of new works?*'

[3]-6.2 Producers

The case of producers of phonograms follows much of the same logic as the case of performers set out above. However, there is one key difference – producers do not serve a creative role in their capacity as a market intermediary.¹⁴⁷ Rather, they facilitate the technical process of fixation of performances in sound recordings.¹⁴⁸

As such, there is little appeal for non-utilitarian arguments (particularly the personhood variant thereof) in the case of producers of phonograms, as their contribution to the copyright value chain is purely technical and not expressive in nature.

However, as is the case of performers, the role of the producer was traditionally one whose services were part of a more complex commercial relationship. Unlike performers who may not or may not have significant bargaining power relative to the agents who hire them, producers are normally agents of large institutional players such as record labels. This position, combined with the historical trend of oligopolistic structures in major sound recording markets suggests that phonograph producers may have generally had greater bargaining power than

¹⁴⁶ For example, music composers and music performers may both have the similar skillset of being able to read and interpret sheet music. However, actors may not necessarily have the skills to author a screenplay.

¹⁴⁷ This term 'producer' often creates confusion due its different connotation depending on the context and industry being discussed. In this regard, it may be useful to make an informal distinction between 'executive producer' and 'creative producer'. An executive producer is the agent who facilitates the logistical and business arrangements for sound recordings, while a creative producer assists performers in the process of artistic interpretation and performance. For the purposes of related rights, beneficiaries are 'executive producers'. On the other hand, if a creative producer's inputs are substantial, they may have actual stake in the copyright of particular version of the recorded work (which is distinct from copyright in the underlying work being performed). The Rome Convention states that "*producer of phonograms' means the person who, or the legal entity which, first fixes the sounds of a performance or other sound*".

¹⁴⁸ The discussion here is limited to producers of phonograms (music), as such rights are provided for in international intellectual property law. In practice, many jurisdictions also provide for related rights for film producers.

copyright owners and performers (at least during period when related rights came into being as distinct legal concepts). Furthermore, the dominant contractual practice in the music industry has always been one where record labels assert copyright ownership over sound recordings through ‘work-for-hire’ clauses in the agreements made with both copyright owners and performers. As such, there is little intuitive appeal to suggest that even a utilitarian approach is applicable, in terms of a need to create distinct incentives for the activities of phonogram producers.

Producers’ rights hence seem to have evolved as a mechanism for owners of sound recordings to secure increased rents in music distribution markets.

[3]-6.3 Broadcasters

Applying perspectives of intellectual property theory to broadcasters’ rights – the form of related rights on which is the focus of this manuscript – largely leads to a line of reasoning which is the same as the case of producers discussed above.

Broadcasters, like producers, serve a strictly technical role in copyright exploitation, and do not add value in any artistic or creative capacity. Therefore, there is little appeal for application of natural rights theories. As alluded to above, producers are often agents of larger commercial institutions, and hence the producer may not necessarily be conceived as a natural person. However, in the case of broadcasters, it is certain that the beneficiary of the related right is a legal entity and not a natural person. This observation strengthens the argument that natural rights (or at least personhood) theories are not applicable to the case of broadcasters’ rights.

As such, utilitarian theory is certainly the appropriate frame in which broadcaster’s rights should be analysed. This is grounded on the fact that there are unique market characteristics that define the broadcasting sector, which lead to certain market failures, and the supposed need for incentives. These specific market characteristics are discussed in Chapter 4.

[3]-7 CHANNELLING AMONG MODES

The above sections aimed to discuss how related rights in general connect with the overall intellectual property system, in terms of theoretical perspectives, taxonomy, and the role of the market agents. To further the analysis, and in order to contextualise the position in which broadcasters’ rights sit within the broader framework of the intellectual property system, it is useful to analyse the interrelationships between various form of rights, and the general functioning of the system as a whole.

Menell (2000) states that “...*the overall efficacy of the intellectual property protection regime depends significantly upon the ability of the system to properly channel innovation among the various modes*”. In this regard, Menell identifies four

doctrines that developed to ensure that the overall system functions coherently: (i) election, (ii) functionality, (iii) pre-emption, and (iv) misuse.

Analysing how these doctrines apply to the rights of broadcasting organisations can help in building an understanding of the theoretical bases of such rights, and their functioning within the wider intellectual property system.

[3]-7.1 Doctrine of Election

The doctrine of election suggests that creators actively make a choice of the preferred form of intellectual property pursuant to their particular objectives. This notion is generally mostly applicable to fact that in the field of innovation, patent protection and trade secret protection are two mutually exclusive options for inventors.¹⁴⁹

In the case of broadcasting organisations (or more generally copyright as a whole), there is generally no alternative choice of property rights.¹⁵⁰ As protection is automatic, there is no election on the part of the rightsholder. However it is duly noted that this statement does not consider the possible interrelationships between copyright and other legal instruments outside of the intellectual property system, such as particular doctrines of unfair competition law.¹⁵¹

This lack of applicable alternatives is particularly the case when one considers the notion of broadcasting rights in isolation from the underlying copyright in the works being broadcast. As such, the doctrine of election has very limited applicability to the subject matter under analysis.

Notwithstanding the above, it is possible to conceive of a possible relationship with the subject matter of broadcasters' rights, and copyright in compilations, or even the form of intellectual property known as 'database rights' (which are related to, but distinct from copyright). Article 2(5) of the Berne convention provides for protection of collections that express some element of originality by virtue of selection and arrangement.¹⁵² However, several jurisdictions go further

¹⁴⁹ See Freidman, Landes, and Posner (1991)

¹⁵⁰ This is not to say however that there is no overlap between copyright and other forms of intellectual property. For example, there exist possible circumstances where a particular subject matter may be subject to both copyright and trademark protection, though the scope of applicable rights may diverge.

¹⁵¹ Notwithstanding this comment, it is noted that many accounts of the international development of intellectual property law, include unfair competition as a mechanism inside of the industrial property regime. This is mainly due to the inclusion of protection from unfair competition in Article 10bis(2) of the Paris Convention.

¹⁵² Berne Article 2(5) states as follows: "*Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.*"

by providing for *sui generis*¹⁵³ rights for databases, which would not otherwise meet the originality criteria to qualify for standard copyright protection as collections or compilations. Database rights can be generally considered as particularly strong in Europe, and are provided for via the EU 'Database Directive'.¹⁵⁴

The first objective of the Database Directive is to harmonise the originality standard to applied for copyright to apply.¹⁵⁵ Secondly, the Directive provides for *sui generis* rights for databases that may not otherwise meet the originality criteria for copyright. The applicable standard for *sui generis* protection directly relates to the investment made in creating the database.¹⁵⁶ As such, the applicable standards for database copyright and *sui generis* rights are fundamentally different, as the former applies a standard based on a notion of creativity (an application of the originality doctrine in copyright general), while the latter is based purely on economic considerations.¹⁵⁷

It is therefore conceivable that broadcasters' interests may be protected, if their broadcasts are considered as eligible for either database copyright, or *sui generis* database protection. This is based on the fact that an essential market activity of broadcasters is the 'bundling' of content into a package (usually with some coherent theme or dedicated demographic target)¹⁵⁸. Hence, broadcasting schedules are essentially actually databases of elements that are selected and arranged by the broadcasting organisation, where said elements are themselves works (that may or may not enjoy independent copyright protection). The question then arises as to whether a particular broadcasting schedule meets the originality criteria to constitute a copyright protectable compilation, or

¹⁵³ '*Sui Generis*' is a Latin term meaning 'of its own kind' and implies that something has its own unique characteristics. In the context of intellectual property law, the term is used to describe forms of rights that do not fit within the traditional branches of copyright, patent and trademark, and hence constitute a unique and narrow class of intellectual property in themselves.

¹⁵⁴ Directive 96/9/EC of the European Parliament and of the Council of the European Union of 11 March 1996 on the legal protection of databases, 1996 O.J. (L 77/20).

¹⁵⁵ This is done via Article 3, which reflects almost identical language to Berne Article 2(5) – i.e. the standard to qualify for copyright protection relates to works that are intellectual creations by virtue of selection and arrangement. However, the Article explicitly provides that no other eligibility criteria may be applied, hence preventing any possible heightening of legal standard for originality.

¹⁵⁶ Article 7 provides that Member States must provide for a property right in a database, where "...there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database".

¹⁵⁷ Paragraph 6 of the Preamble of the Database Directive partially justifies the need for *sui generis* database rights based on the un-harmonised nature of legislation and prevailing case law in unfair competition amongst EU Member States. Interestingly, this again reiterates the possibility of overlaps between the intellectual property system and the unfair competition system as alluded to above.

¹⁵⁸ This notion of content bundling is discussed in further detail in Chapter 4.

alternatively meets the economic criteria to attract possible *sui generis* database protection (in jurisdictions where such a right does exist).¹⁵⁹

While this will certainly depend on the particular schedule under consideration, it does suggest that there may indeed be some applicability of the concept of election to the subject matter of broadcasting. However, this will still not be a true application of the election doctrine, as the choice between alternative forms of rights is not opt-in in nature (as is the case for patent and trade secret protection) where the options to the beneficiary are mutually exclusive. Rather, the various forms of rights would be conferred on automatically by virtue of the very nature of copyright law, and its institutionalised lack of formalities. The implications of the lack of formalities in copyright law are discussed below in the commentary on the doctrine of functionality.

In any instance however, any right over broadcasting schedules would relate to subject matter which is distinctly separate from the technical broadcast signal transmission itself, and hence such a right would not be a true form of the doctrine of election.

[3]-7.2 Doctrine of Functionality

The doctrine of functionality refers to the principle that functional elements of innovations or creative works should not be subject to property rights. According to Menell (2000), *“Functionality doctrines serve to ensure that the exacting standards of patent law are not undermined by the bestowing of effective protection for the functional features of a work through other, less exacting, forms of intellectual property protection.”*

This is somewhat embodied in the principle of novelty and non-obviousness in patent law¹⁶⁰. The novelty criterion precludes from patent protection, any innovation that is understood to already be disclosed to the public (i.e. forms part of the ‘prior art’ of the relevant technological field). The non-obvious criterion further precludes from protection, any innovation that would be obvious to a ‘person skilled in the art’ of the relevant technological field. In the field of trademark law, prohibitions on registration of ‘generic’ trademarks can also be seen as an application of the doctrine of functionality. Furthermore, in trademark law, the ‘doctrine of functionality’ refers to the principle that functional elements (characteristic elements of products not specifically used to identify a particular producer) cannot be subject to trademark protection.

¹⁵⁹ Copyright ownership over programme schedules was a central premise of the famous ‘Magill’ Case (*Radio Telefis Eireann (RTE) and Independent Television Publications Ltd. (ITP), appellants, v. Commission of the European Communities; Joined Cases C-241/91 P and C-242/91 P*).

¹⁶⁰ There are typically three criteria for patent protection: (i) novelty, (ii) non-obviousness (or ‘inventive step’), and (iii) utility (or in some jurisdictions – ‘industrial application’). Patent applications are evaluated by national patent authorities to determine whether an invention/innovation meets these three criteria, assuming that the invention/innovation belongs to the domain of patentable subject matter in the first instance.

In the field of copyright law, the functionality doctrine is embodied in the concept of an 'originality threshold' for copyright eligibility. Furthermore, Landes and Posner (1989) note that the idea-expression dichotomy excludes functions features from protection under copyright law.¹⁶¹ Additionally, there are also various doctrines in copyright law, such as the '*scènes à faire doctrine*', which are less harmonised and institutionalised, but still serve a role in applying the wider principle of functionality.¹⁶²

The main purpose of these various embodiments of the functionality doctrine is to achieve the goals that are at the heart of the intellectual property system – to strike a balance between the competing interests of the general public and creators. In this regard, the functionality doctrine serves to ensure that only those elements that are deserving of protection are subject to private property rights. This ensures that the public has access to a commons in the form of a public domain that is rich enough to facilitate further creative activity without undue restrictions from unjustified property rights over functional elements or abstract ideas.

As alluded to above, functionality is hence generally embodied in 'eligibility criteria' that govern the application of the relevant form of intellectual property right. Such eligibility criteria are however only one element of the structure of intellectual property law which serves to balance the goals of the intellectual property system. Other elements include defined domains of protectable subject matter (or rather un-protectable subject matter), statutory exemptions and limitations to property rights, and an appropriate scope of protection.¹⁶³

In terms of the field of copyright and related rights in general, protection is automatic (i.e. property rights are conferred without any formalities or administrative registration), which is a sharp contrast with the case of patent and trademark rights.¹⁶⁴ This is certainly also the case with broadcasters' rights, which are generally conferred on broadcasting organisations by mere virtue of transmission.

However, it is not to say that copyright protection is devoid of eligibility criteria. Indeed, as alluded to above, copyright eligibility is conditioned by various embodiments of the functionality doctrine, and in particular there are often

¹⁶¹ The 'idea-expression dichotomy/divide' is a central pillar of copyright law. It provides that abstract ideas cannot be subject to copyright protection, and that protection is limited to only specific expressions of such ideas.

¹⁶² The '*scènes à faire doctrine*' refers to the principle that elements which are necessary or customary for expressions in a particular genre are not subject to copyright protection. For discussion on the '*scènes à faire doctrine*', see Maxwell, Bolger and Zeggane (2009). Also worthy of note is the more stringent (though controversial) 'merger doctrine', which stipulates that where an idea can only be expressed in one particular expression (i.e. the idea and expression are 'merged'), that expression is not copyright eligible.

¹⁶³ The concept of 'scope of protection' generally refers to a combination of 'length of protection' and 'breadth of protection'. These concepts are explored in more detail in Chapters 5 and 6.

¹⁶⁴ Article 5(2) of the Berne Convention states that for copyright, "*The enjoyment and the exercise of these rights shall not be subject to any formality;...*"

complex legal tests employed to determine whether a particular work meets a respective 'threshold of originality'.

Interestingly, while this notion of 'originality as a fundamental aspect of eligibility criteria' is central to general copyright law, it appears not to extend to broadcast signals as unique subject matter. This is because, as stated above, broadcasting organisations enjoy protection of their broadcasts by virtue of the mere technical act of transmission, without any application of de facto eligibility criteria.

The result is therefore that there is no form of filter akin to an originality threshold or idea-expression dichotomy that prevents some broadcasts from being protected pursuant to balancing the goals of the intellectual property system. As such, it appears that broadcasters' rights hold a very unique place in the overall intellectual property landscape, as it is perhaps the only form of right in which there is no explicit and coherent application of the doctrine of functionality.

More interestingly, the question arises as to whether the concept of functionality even exists at all in relation to broadcast signals, i.e. whether the subject matter contains functional elements in the first place. This is likely not the case as broadcasting signals are technical manifestations, and do not necessarily draw on any elements of an 'information commons'. However, it certainly is the case that underlying copyright protected works, and possibly even database protected programming schedules do draw on some 'information commons', and hence exhibit functionality.

Further evidence of a lack of functionality, and an implication of the lack of eligibility criteria, is that it is completely possible to consider a situation where a broadcast schedule is independently replicable by two different broadcasting organisations.¹⁶⁵ This is possible since a second party broadcaster can in principle acquire the exact same broadcasting rights for all of the copyright protected works in the programme schedule of the first broadcaster, and hence independently replicate the initial transmission without infringing on the related rights of the initial broadcaster.

The above comment on the possibility of independent replication underscores a fundamental premise – the object of protection in the case of broadcasters' rights is the broadcasting signal transmission itself, and not the embedded schedule of programming or audiovisual works (which may or may not be subject to standard copyright protection themselves).

For the sake of discussion, it is interesting to continue consideration of the interface with database rights as presented in the preceding section on the election doctrine. If a broadcasting organisation is able to meet the applicable criteria for database protection (whether in the form of copyright or a *sui generis* right), such protection will cover the schedule of programming as opposed to the

¹⁶⁵ The concept of 'independent replication', and its relevance to copyright and patent law are analyzed in further detail in Chapter 6's discussion on the various elements under the notion of 'breadth of protection'.

technical signal transmission itself. In fact, the existence of such eligibility criteria suggests that the doctrine of functionality is indeed strongly present in the case of database rights. Once again, it is important to conceive that the technical transmission therefore forms a distinct subject matter area, separate from the embedded schedule, which is in itself a (possible) compilation of independent works.

The above commentary on the application of functionality doctrine (or lack thereof), as well as the elaboration on the theme that signal transmissions, programming schedules, and embedded audiovisual works all form distinct subject matter (which are subject to distinct forms of IP rights), establishes an important conclusion.. This is that unlike policy basis for other forms of intellectual property, broadcasters' rights seem to fundamentally be a technical solution to a technical problem.¹⁶⁶

[3]-7.3 Pre-Emption

Pre-emption is a construct of US constitutional law that provides for the supremacy of federal law over State law.¹⁶⁷ Similarly, it is also reflected in the principle of 'supremacy' in EU law. This doctrine is hence of little relevance to the discussion at hand.¹⁶⁸

[3]-7.4 Misuse

The essence of the misuse doctrine is that there is often a need to balance the outcomes of intellectual property law (which is based on notions of temporary market power as forms of incentives), with the outcomes of antitrust law (which is based on notions of preventing restrictions of open competition and the regulation of monopoly power). There is certainly a large body of literature on the interface between intellectual property and competition law, and this issue has indeed attracted significant recent attention from both academics and policymakers.¹⁶⁹

Generally, antitrust concerns in intellectual property are based on the licencing practices adopted by rights holders – this is the case for both copyright and patent law. Hence, misuse doctrines are particularly applicable where the IP right is not an output which is consumed by the final market itself, but is an input into some other productive process for another producer/firm. An analysis of how doctrines of misuse apply to the case of broadcasters' rights must be hence contextualised

¹⁶⁶ The technical problem referred to here is the public good problem that arises in the case of broadcasting markets. This issue is discussed in Chapter 4.

¹⁶⁷ See Article 6, Clause 2 of the Constitution of the United States (the 'Supremacy Clause').

¹⁶⁸ This is not relevant because the research framework of this manuscript is meant to be theoretical and generally 'jurisdiction neutral'.

¹⁶⁹ For a general overview of the interface between intellectual property and competition law, see Gilbert and Shapiro (1997) or Kallay (2004).

by the market structures and licencing practices that define broadcasting value chains.

Antitrust concerns may hence arise where a broadcast signal is used by another commercial entity, at a downstream position in the value chain of copyright exploitation. The most typical instance of such an entity would be a communications service operator, who engages in retransmission of the original broadcaster's signal.¹⁷⁰ While broadcasters essentially bundle content licenced from various sources into a single programming schedule, retransmitters generally bundle various broadcasting channels (each with its own respective programming schedule) into a multi-channel service package.

Competition issues may hence arise where a communications market is characterised by a high degree of vertical integration and concentrated market power. If such characteristics prevail, a broadcaster whose transmissions are in high demand may engage in anti-competitive licencing agreements and provide preferential treatment to an affiliated communications network operator and retransmitter.

It is useful to briefly note here that concerns over such market power issues in terms of broadcasters' rights are somewhat diluted by the popularity of policy tools such as must-carry provisions in broadcast regulation.¹⁷¹ Furthermore, it is necessary to consider that such provisions exist within a wider set of policy tools leveraged by broadcast regulators. One such tool is the regulation of media ownership, which is based on fundamentally different policy concerns than general competition law. In this regard, policy goals in media markets are not solely economic, and include issues such as promotion of freedom of the press, cultural diversity, plurality of information sources, and democratic participation¹⁷². As such, it would be disingenuous to say that regulation of media ownership is a manifestation of misuse doctrine in intellectual property law.

Returning to the analysis of licencing practices, the fundamental principles of competition regulation that apply to intellectual property law in general would generally equally apply to the case of broadcasters' rights. As such, the doctrine of misuse does not necessarily have any unique application or mechanism in this case. Rather, it is a notion that refers to the interface between the entire body of intellectual property law and the body of competition/antitrust law, as opposed to a doctrine that facilitates coherence within the body of intellectual property law itself.

¹⁷⁰ The entire Part IV of this manuscript (Chapters 9-11) is dedicated to discussing issues relating to retransmission activities.

¹⁷¹ These provisions are discussed and analyzed in Chapter 10.

¹⁷² Media ownership regulation and the various policy goals in the broadcasting sector are discussed in Chapter 4. It is important to draw a distinction between competition issues where broadcasters are harmed, and competition issues arising from the behaviour of broadcasters that harm others. In this regard, the doctrine of misuse deals only with the latter in relation to the exploitation of intellectual property rights.

[3]-8 CONCLUSION

This chapter aimed at establishing a legal context for the theoretical bases of broadcasters' rights. It gave an account of the major theories of intellectual property, and the overall taxonomy of the system. It then sought to see how these theories apply to the field of related rights, and the related rights of broadcasting organisations in particular. Lastly, it summarised key doctrines which bring coherence to the larger IPR system itself, and discussed how these doctrines apply to broadcasters' rights.

These discussions can be summarised in a few key thematic points. Firstly, the nature and structure of broadcasters' rights suggest that it is appropriate to adopt a strictly utilitarian perspective for analysis. Broadcasters, as purely commercial and/or corporate entities, do not engage in activities that invoke notions of classical natural rights.

Furthermore, broadcasters serve a capacity as market intermediaries for the distribution of content, and unlike various other forms of intellectual property, such rights are designed to facilitate distribution rather than production (or expression) activities. Additionally, broadcasters' rights can be seen as evolving from sector specific interests, and hence belong to the closed domain of related rights, as opposed to the relatively unbound domain of copyright.

In fact, the discussions in this chapter stress that broadcasters' rights are indeed a very unique IP subject matter area in general, and have little in common with other forms of related rights. As such, in attempting to distil the theoretical bases for broadcasters' rights, very little can be gained by looking towards the existing bases of the other branches of the IPR system.

Lastly, unlike almost all other forms of intellectual property, there appears to be no application of the doctrine of functionality for broadcasters' rights. These observations all underscore the notion that broadcasters' rights are a technical solution to a technical problem. This technical problem arises out of the unique market characteristics of the broadcasting sector, and is discussed in Chapter 4.

In any instance, what is clear from this analysis is that the concept of broadcasters' rights certainly does occupy a unique space within the wider intellectual property system, though its place does seem generally incongruous. Generally, the purported functions of broadcasters' related rights as mechanisms to reward investment and prevent piracy seem to sit oddly in the context of the wider intellectual property system.

The most similar parallel between broadcasters' rights and any other form of IPR is with certain forms of database rights (particularly those not subject to copyright-eligibility). Such database rights and broadcasters' rights do share a common foundation – they are justified in terms of a rationale to incentive investment (a purely welfare-based/utilitarian consideration) in subject matter on the periphery of the copyright system. As such, it would seem to make more sense to view broadcasters' rights as a form of *sui generis* right (as is the case for

database rights), as opposed to a related right. In this regard, it must be stressed that *sui generis* rights by their very nature are constructed as anomalies of the intellectual property system, rather than manifestations of its core principles.

In the case of both broadcasters' and database rights, the question is whether such rights, are the best means to incentivise the activity in question. In other words, the issue is whether these rights are the policy option which solves the public good problem of underproduction with the least social cost.

The next chapter - Chapter 4 - discusses some of the characteristics of broadcasting markets, and notes that there are several existing solutions which promote the provision of broadcasting services, even without private property rights. Furthermore, that chapter will set out various characteristics of broadcasting markets which suggest that if content distribution is restricted through private property rights, this can have high social costs.

CHAPTER 4: THE ECONOMICS OF BROADCASTING MARKETS

Chapter 4 is the second component of Part II of this manuscript. While Chapter 3 focussed on legal theories of intellectual property and how they apply to the related rights of broadcasters, this chapter focuses on the economic context of broadcasting markets themselves. It focuses on the various market characteristics – and market failures – which supposedly characterise the broadcasting sector, and aims at framing how intellectual property rights interface with this context. In this regard, the underlying research question in this Chapter is *“What are the key features of the markets in which the related rights of broadcasting organisations exist?”*

[4]-1 INTRODUCTION

Wireless broadcasting revolutionised the way in which information was disseminated to the public in the early 20th century, and was instrumental in the development of various modern social and cultural institutions. As such, the broadcasting sector also sits in a very important position within the framework of the overall creative economy, serving an important role as a supply chain intermediary between producers of creative works and end-users.

Media markets are generally defined by complicated value chains where intermediaries are needed to facilitate the distribution of content between producers and consumers. Commercial broadcasting organisations are such supply intermediaries, which may generally either be based on (i) advertising revenues (two-sided markets), or (ii) subscription revenues; in television markets, traditional terrestrial channels and cable television channels respectively would exemplify this.¹⁷³

In the case of non-terrestrial broadcasting, it is important to make a distinction between the network operator and the broadcaster. The former represents the service provider who owns transmission infrastructure (or leases infrastructure from an upstream communications firm). The broadcaster on the other hand engages in the activity of ‘bundling’ audiovisual content into a single programming schedule for transmission (i.e. a broadcasting channel), while a subscription service provider ‘bundles’ several broadcasting channels into a single service package which is offered to consumers (end-users).

In order to answer the underlying research question regarding the economic context of broadcasting markets, this chapter is divided into three main sections. Firstly, a discussion is presented on the various market characteristics of the broadcasting sector, and its associated market failures and public policy goals.

¹⁷³ This is not to say that these two financing models are exclusive – they merely represent the typical business models employed in the commercial broadcasting sector. Alternative business models may include support through public financing, with or without supplementary revenues from commercial sources (advertising or subscription revenues). The notion of public financing is central to the concept of Public Broadcasting Service, which is discussed later in this chapter.

Secondly, a discussion is presented on the role of intellectual property as a policy tool to address public good market failures. Thirdly, a short analysis is undertaken on the types of content distributed by broadcasting transmissions, and how they interface with the incentives created by the copyright and related rights system.

[4]-2 PUBLIC POLICY GOALS AND MARKET CHARACTERISTICS

The following section focuses on the key policy and market characteristics of the broadcasting sector in general.

[4]-2.1 Broadcast Regulation and Public Policy

In order to provide context to the discussion, it is useful here to recognise the various public policy goals that the broadcasting sector is meant to achieve. In general, communications sectors have been historically subject to a higher degree of regulatory oversight than other industries.¹⁷⁴ Generally, regulatory issues in the broadcasting sector may be divided into economic issues (competition related) and non-economic issues (public policy).¹⁷⁵ Non-Economic issues can be further separated into issues relating to content and access.

In all spheres of economic activity, policymakers seek to facilitate market institutions that provide consumers with a wide range of high quality goods (or in this case services), at competitively efficient prices. In this regard, the obvious economic goal is to promote variety in services that align with prevailing consumer preferences. Furthermore, policymakers and regulators seek to mitigate the effects of monopolistic market power that undermines economic efficiency. However, due to various unique market characteristics, competition regulation in media markets often takes a different form than in other sectors, i.e. such markets are often subject to sector-specific competition regulation regimes.

Furthermore, building on the distinction stressed in this manuscript between content production and distribution, it should be recalled that broadcasting markets are intrinsically linked to upstream production markets. Therefore, competition concerns in broadcasting markets are not only related to issues of horizontal market structure, but also to the effects that market structures have on upstream production activities.¹⁷⁶ This relationship essentially provides the linkage between the economics of copyright and the economics of broadcasting markets.

¹⁷⁴ Rowart (2007) cites that the communication sector (including its respective aspects of competition regulation) is on average more heavily regulated than other sectors in the OECD, though there is a higher variance.

¹⁷⁵ Rowart (2007) further observes that the degree of international consensus on an appropriate normative framework is lower for non-economic policy issues in the broadcasting sector, as it is for economic policy issues in other sectors.

¹⁷⁶ The effect of the state of competition in communications markets on upstream production markets has attracted significant attention in recent regulatory debates, such as discussions on the issue of Net Neutrality and Intermediary Liability.

Non-economic policy issues which deal with content are typically related to the notion that information goods are often associated with various externalities. In this regard, policy goals include objectives such as the promotion of cultural values, the protection of minors, and the regulation of advertising. In terms of 'access issues', the policy goal is to promote ubiquitous access to information services, pursuant to the notion that access to information can be seen as a fundamental right of the entire citizenry. Such access goals are usually referred to as 'universality' goals.

Furthermore, it is important to note that policy issues in media markets in general are linked to issues of fundamental freedoms and democratic ideals. As such, broadcasting markets should serve the role of facilitating free speech, freedom of the press, and effective democratic and civic participation; these concepts are embodied in the principle of 'media pluralism'¹⁷⁷.

[4]-2.2 Market Characteristics and Regulatory Tools

Based on the above distinction between economic and non-economic goals, the following section discusses key characteristics of the broadcasting sector, and briefly discusses the regulatory tools used to mitigate such problems. However, Armstrong and Weeds (2007) suggest that although there are several prevalent market failures in the broadcasting sector, the majority of these issues (with the notable exception of externalities) are mitigated by trends in digitisation and the consequent shifts in business models.

[4]-2.2.1 Public Good Problem

Broadcasters are understood to incur significant costs in (i) market research into consumer preferences, (ii) negotiating content licences with copyright holders (a form of transaction costs), (iii) actual royalty payments to copyright holders, (iv) capital investment in distribution infrastructure, and (v) operational costs of commercial activities and network maintenance. It is however duly noted that the extent to which items (iv) and (v) enter into the production function depend on whether the broadcaster is an integrated network operator, or a facilities leaser. Furthermore, like all other information industries, broadcasting has a distinct cost function characterized by high fixed costs and zero (or negligible) marginal costs (Seabright and Weeds, 2007).

Once these costs are incurred, it is easy for a second party to free-ride off of a broadcaster's investments by using the already transmitted signal (e.g. by retransmitting the signal with replaced ads, or by inclusion of the signal on a subscription network). Hence, in the absence of the ability to exert some control over the use of their signal, it is argued that broadcasters will not have sufficient incentives to distribute content, to the detriment of social welfare. Broadcaster's

¹⁷⁷ Polo (2007) makes a distinction between 'external pluralism' – a diversified supply of different political opinions in each media market, and 'internal pluralism' – fair, balanced and complete representation of the political spectrum within each media outlet itself.

rights are hence argued as necessary to recoup costs and incentivise content distribution.

As such, the essential market failure that characterises the broadcasting sector is a public good problem in content distribution. This is the principle market failure that relates to the analysis of broadcasters' rights, and hence the most important in the context of this manuscript.

Before analysing the public good problem in more detail in the next section, the following sub-sections briefly discuss other relevant market characteristics.

[4]-2.2.2 Information Good Externalities

Distribution of information goods is often associated with various externalities, which may either be positive or negative. Positive externalities may be present when the information under consideration is of an educational nature and hence promotes the social goals of investing in human capital. Similarly, content which is journalistic in nature may facilitate the social goal of strengthening civic participation and democratic ideals.

Armstrong and Weeds (2007) identify that positive externalities of broadcast content include (i) educational benefits, (ii) network externalities, and (iii) social or 'citizenship' benefits. However, the authors note that network externalities are generally internalised by coordination between consumers, and the incentives of broadcasters, and any remaining externalised effects are unlikely to be significant.

Another interesting example of content that may have strong positive externalities is information relating to emergency situations (for example during natural disasters). For this reason, a common feature of many broadcast regulation regimes is the ability of the government to commandeer broadcasting airtime for public service in times of national emergencies.

Content on broadcasting networks may also exhibit negative externalities. This is the case that is often argued as the basis for codes of practice in broadcasting regulation. The purpose of such codes and regulations is to mitigate the effects of content that is alleged to have negative social externalities, such as programmes that are perceived to be violent, pornographic, or profane in nature. However, it is noted that such regulation necessarily sets against each other, the competing policy goals of protection of minors and the promotion of free speech. Certainly, attitudes toward this conflict depend on the socio-cultural context of a particular jurisdiction.

Additionally, some forms of advertising may be deemed also have negative externalities, particularly in the context of influencing minors. As such, broadcasting codes may also have particular restrictions on advertising during children's programming, or during time periods where children are likely to be part of the general audience. Advertising restrictions are often also employed for goods deemed as 'demerit goods' – although such restrictions are not necessarily unique to the broadcasting sector as an advertising platform (e.g. limitations on

the advertising of alcohol and tobacco products). Broadcast content regulations may also make provisions on ‘truth in advertising’ requirements, which prevent the negative externalities of misleading information; however such requirements are also not necessarily unique to the broadcast media, and more generally belong to the domain of consumer protection law.¹⁷⁸

Conceptually, broadcast content may also have externalities that affect community solidarity and social cohesion. On one hand, the network externalities associated with content may suggest that such externalities are positive. On the other hand however, there are popular perceptions that consumption of media services such as television results in reduced social activity, and hence these externalities are negative. However, these debates appear to be more appropriate for sociological study rather than economic analysis.¹⁷⁹

[4]-2.2.3 Local Content and Cultural Diversity

Another aspect of information externalities – particularly in terms of locally produced programming - is the importance of broadcasting for cultural diversity.

Broadcasting markets are a subset of the media industry, which is in itself a subset of the wider creative economy. However, as a primary distribution platform for creative works, broadcasters are institutions which play an important role in defining trends in the consumption of creative works – particularly for audiovisual and musical works. In the case of music works in particular, broadcasting markets generate significant revenues in the form of performance royalties for copyright holders, which are then remitted back to rightsholders whose works were broadcast. The composition of programming on broadcasting networks therefore plays a major role in the functioning of the overall creative economy. In this regard¹⁸⁰ As such, local content requirements for broadcasting networks are often utilised as a form of industrial policy to promote economic growth in the wider creative economy.

Furthermore, creative works are often viewed as more than economic goods – they can be seen as vectors of value systems and ideals. As such, some policymakers see promotion of local production of creative works as a critical element of building institutions of national identity and preservation of cultural heritage.¹⁸¹ This is particularly true in jurisdictions where natural market forces lead to net importation of creative works, which can be detrimental to the goal of

¹⁷⁸ These comments on advertising externalities (distinct from the disutility of advertising) are particularly relevant when noting the possibility of a market equilibrium characterized by over-advertising (briefly discussed in a sub-section below).

¹⁷⁹ See Armstrong and Weeds (2007) for a brief discussion on this issue.

¹⁸⁰ For example, some collective copyright management organisations base royalty distributions for non-broadcasting revenue streams using data on the use of works in broadcasting. High levels of local content in broadcasting can therefore increase remittances to copyright owners and artists in all revenue streams. Local content on broadcast media therefore create a sort of ‘information externality’ which drives income in other sectors of the creative economy.

¹⁸¹ For a general overview of local content regulation policies in the broadcasting sector, see (Mendel, 2001).

preserving cultural diversity in the media. Pursuant to these goals, local content requirements can sometimes be seen as complimentary to media ownership regulation, where limits are placed on ownership of media assets by non-nationals.

[4]-2.2.4 Media Market Power

Like all economic sectors, media sectors are characterised by some prevailing level of competition both vertically and horizontally. Given the large capital costs needed for rollout of infrastructure, communications markets in general are characterised by significant economies of scale. This can lead to possible monopolistic structures in communication markets, both vertically (integrated operators) and horizontally (media ownership consolidation).

While market power is a market failure in all industries, it takes on additional dimensions in media markets due to the existence of the externalities of information distribution.

As noted above, the media sectors are considered to have public policy goals beyond economic efficiency, and hence are generally subject to some form of sector-specific regulation. Hope (2007) discusses the conflict between competition policy and sector-specific economic media regulation, and notes that this conflict arises due to two factors: (i) general media regulation goals (freedom of expression, diversity, independence, cultural identity, language, and technical issues such as spectrum), and (ii) sector-specific economic issues such as technological convergence and the nuances of two-sided markets.

Buigues and Rabassa (2007) note that the media industries may have characteristics that make vertical foreclosure issues more likely. Such issues may arise from leveraging market power from traditional markets onto new media markets, or situations where a dominant firm (i) denies access to premium content or to scarce distribution network needed by a potential entrant or current competitor, or (ii) grants long-term exclusive licences for premium content to a single operator. The interdependencies of the players in the value chain are exemplified by the fact that while premium contents are by definition scarce inputs for media businesses, access to scarce downstream technical platforms is also of high importance to upstream media operators.¹⁸²

In addition to exclusive licencing agreements, joint-selling of media content (a form of potentially anti-competitive bundling¹⁸³) may also raise competition concerns. Furthermore, competition concerns may arise due to joint-selling or joint-purchasing of content, even when such rights are non-exclusive. In the case

¹⁸² Generally, vertical concentration in communications markets is limited through regulation of platform and network infrastructure access provisions (such as those provided for in the EU Access and Framework Directives). However, Seabright and Weeds (2007), argue that diminishing scarcity of transmission platforms combined with competition between platforms reduces the need for regulation over platform access.

¹⁸³ In this context, 'content licensing bundling' should not be confused with content distribution bundling, which is discussed in a sub-section below.

of joint-buying, the practice may legitimately be based on economies of scale, but may result in exclusionary behaviour and restrictions of competition.

On the horizontal level, media ownership regulation may exist in two tiers: (i) regulation within a particular market, and (ii) regulation between media markets (i.e. cross-ownership). In terms of economic policy goals however, it is noted that these two tiers are inter-related and there may be both substitutability and complementarity between various media platforms. For purpose of competition law, it is notably difficult to analyse issues of potential dominance in the media sector, particularly due to the nature of two-sided markets.¹⁸⁴

Building on insights from industrial organisation literature, Polo (2007) suggests that although market mechanisms may promote differentiation in programming contents, this heterogeneity does not necessarily extend to political views. Furthermore, competition for content can inflate fixed costs and preserve concentrated structures, hence reducing the likelihood that the market will naturally facilitate external pluralism. As such, general competition regulation in media markets can also indirectly promote the non-economic goal of pluralism in addition to the primary economic goal of competitive market structures.¹⁸⁵

As a consequence of these non-economic goals, media markets are generally subject to a stronger degree of ownership regulation, as concentration of ownership (both within and across markets) may have negative implications for external plurality, cultural diversity, and fairness in political representation. Hence, many jurisdictions place explicit restrictions on media ownership within markets (e.g. caps on the number of stations a single corporate entity can own), and between horizontal markets (e.g. limits on cross-ownership of television, radio and newspapers).

[4]-2.2.5 Spectrum Scarcity

Another important characteristic of broadcasting markets is spectrum scarcity. This is a market failure of market power in the sense than an essential upstream input can be monopolised creating restrictions in downstream service provision.

Traditional terrestrial broadcasting is based on transmissions via the technical platform of dedicated electromagnetic frequencies. However, the laws of physics limit the quantity of these frequencies that is available for use in communication applications; i.e. electromagnetic spectrum is a scarce resource.

As such, traditional terrestrial broadcasting markets exhibit a unique barrier to entry – there is a maximum number of competing firms which can be facilitated by the technological platform itself. Once the number of firms operating in the

¹⁸⁴ See Argentesi and Ivaldi (2007)

¹⁸⁵ Intuitively, competition in media markets would generally lead to specialized programming formats, specialized targeted demographics (depending on the extent of heterogeneity of consumer preferences) and specific media outlets will hence general have little private incentives for internal plurality. Hence, external plurality can be seen as the policy goal more complimentary to economic policy goals.

market reaches this limit, there is therefore an absolute barrier to entry that can undermine effective competition.

Furthermore, traditional views on broadcast regulation frame the electromagnetic spectrum as a public resource, and suggest that as a consequence, licensees of spectrum frequencies should promote general public policy goals.

However, technological progress has introduced new platforms on which broadcasting activities can be facilitated, and new protocols for more efficient use of existing platforms. Most notably, digital protocols provide for much more efficient use of scarce spectrum resources, and hence migration to digital transmission somewhat alleviates the barriers to entry issues which arise from traditional analogue transmission platforms.¹⁸⁶

In the case of television broadcasting, individual jurisdictions are in various stages of switching from analogue transmission to digital transmission. The result of such transition is not only a dissolution of the barriers to entry caused by spectrum scarcity, but also a release of certain frequency bands which would no longer be needed for broadcasting services. This released spectrum (the 'digital dividend') can subsequently be allocated to other uses in the communications sector, and ultimately be invested in new technological innovation. Digital switchover can hence itself create positive externalities for the entire communications sector.

[4]-2.2.6 Transaction Costs and Bundling

Market failures of an information asymmetry nature also exist in broadcasting markets. One case is where there is asymmetry between content producers (and distributors) and end-users in terms of *a priori* information on the characteristics of a programme.

Creative goods and services in general are good examples of 'experience goods' – goods for which the consumer is unable to evaluate the utility of consumption *a priori*.¹⁸⁷ Therefore, consumption of goods such as audiovisual and musical works necessarily involves some form of transaction costs, or more particularly a search cost, in order to collect consumption-related information.

Additionally, a central premise of broadcasting services is the concept of bundling. (Seabright and Weeds, 2007) note that such bundling is the source of much of the

¹⁸⁶ Many commentators suggest that falls in the cost of reproducing and transmitting information have greatly reduced barriers to entry in broadcasting markets. In particular, Seabright and Weeds (2007) analyze the hypothesis that given trends in the sector, rents in broadcasting markets increasingly come from control of scarce resources rather than control over means of transmission. As such, content rights are replacing transmission bottlenecks as sources of market power.

¹⁸⁷ Armstrong and Weeds (2007) note that in addition to being experience goods, broadcast programming may be a 'merit good' – i.e. one in which even if the characteristics are known in advance of consumption (not an experience good), but the consumer's utility function is not fixed, and changes after consumption of the previous untried good. Since the market may under-produce such goods, this may be an argument for public service broadcasters to invest in productions of new types of content.

value added in the broadcasting sector, and describe that “...*different scenes are bundled into one programme, different programmes are bundled into one series, different series are bundled into one channel, and different channels are bundled into one subscription*”.¹⁸⁸

In order to analyse the dynamics of consumer behaviour in broadcasting markets, it is necessary to analyse how the concepts of search costs and programme bundling interact. In order to minimise search costs, consumers often develop behavioural heuristics to help optimise their consumption decisions (e.g. partiality for a certain genre of music). Broadcasters are hence able to engage in a sort of ‘preference grouping’ – i.e. the act of targeting their services to consumer demographics which quasi-homogenous preferences, or at least similar heuristics. As such, broadcasters can be seen as agents that facilitate market efficiency by minimising consumer search costs through bundling of works into a single product. Simply put, consumers are able to maximise their utility by supporting their preferred broadcaster (e.g. favourite radio station), even when the utility of each embedded work is uncertain, since it is perceived that the respective broadcaster’s programming format is consistent with the consumer’s personal preferences and heuristics.

Furthermore, bundling in the broadcasting sector not only reduces search costs, but also the ‘cost of making mistakes’ (presumably the opportunity costs associated with consuming programmes which are misaligned with personal preferences). Such benefits arise due to the reputation of the broadcaster (which is subject to economies of scale) or from the presence of positively correlated preferences for the elements of the bundle (Seabright and Weeds, 2007).

This line of reasoning is particularly interesting in debates over the future of the broadcasting industry given new technological developments. Even if consumers migrate from ‘content-push’ (i.e. where content is selected by the service provider and distributed to the consumer) to ‘content-pull’ models (i.e. where the consumer actively searches for specific content), there may still be an important role for broadcasting organisations as agents to reduce search costs, and develop consumer behavioural heuristics.

For completeness of discussion however, it is beneficial to note that the concept of content bundling may also have competition implications. Seabright and Weeds (2007), note that bundling implies a zero or near zero price for additional components of a bundle for a consumer who is already consuming the rest of the bundle. While this may be efficient, it can be difficult for new content to enter into the market, and hence may result in monopolistic or oligopolistic market structures. However, because detailed accounts of consumer preferences are not typically known to competition regulators, it is extremely difficult to track any distinction between efficient and exclusionary bundling practices. Similarly, Armstrong and Weeds (2007) also note that where audience evaluations are

¹⁸⁸ However, the analysis in this Chapter is concerned only with the latter two processes (bundling of content (series) into channels, and bundling of channels into subscriptions), as these two processes are issues of distribution, while the former are issues of production.

heterogeneous, bundling can be used as a tool to promote allocate efficiency though price discrimination.

[4]-2.2.7 Advertising and Two-Sided Market Equilibrium

Another form of information asymmetry in media markets stems from the nature of two-sided markets. The issue of equilibrium in two-sided markets arises where broadcasting organisations are funded through commercial advertising. In such cases, the service is provided 'free' to consumers, and a portion of airtime is sold to advertisers.¹⁸⁹ Such advertising airtime has commercial value to advertisers by virtue of the fact that it provides a captured audience (whose homogeneity of demographic composition depends on the programming format of the particular broadcasting network) for the messages of advertisers. The commercial value of airtime is hence a positive function of the size of the captured audience, and the preference structure of the audience demographic.

Such a market is called two sided, because there are two sets of consumers – the audience who consume the supply of broadcast programming, and the advertisers who consumes the supply of captured audience attention.¹⁹⁰

In such cases, a market failure can arise due to a conflict between the utility function of the audience and the profit functions of the advertiser and the broadcaster. The broadcaster seeks to maximise the profits from the sale of advertising airtime, while the advertiser wants access to the optimal composition of the audience's size and willingness to pay for the advertised product. Consumers on the other hand, want to maximise the utility by consuming programming which is most in-line with their preferences and heuristics. The information asymmetry that exists is therefore between broadcasters and advertisers, and consumers in terms of audience preferences. Additionally, since the broadcaster is merely a medium of exchange between the two groups (advertisers and audiences), there may be a problem of information loss as information is transmitted between the parties. This issue is exacerbated by the fact that since the broadcasting service is 'free' to the end-user, there is no true mechanism to track market consumption trends. For this reason, media organisations often rely on industry reports and studies which track consumption and demographic trends based on 'ratings systems'. However, such industry studies are subject to the limitations that are standard to any sampling methodology, such as questions of the representativeness of the selected sample, time-dependencies of the observed trends, and divergences between artificial choices and actual consumption behaviour.

Notwithstanding the explanatory power of the information asymmetry described above, market failures may arise in more fundamental ways in advertising-funded broadcasting markets. This is due to the fact that the goal is to maximise audience

¹⁸⁹ Disutility from advertising may be regarded at the implicit 'price' paid for free-to-air broadcasts (Armstrong and Weeds, 2007). However, the total effect of advertising is ambiguous, as it depends on the extent to which advertisers are included in the social welfare function.

¹⁹⁰ For a discussion on the economics of two-sided markets, see Rysman (2009)

reach (and hence the value of advertising space), as opposed to genuine satisfaction of consumer preferences. As such, advertising-funded markets may lead to overproduction of 'mass-market' content, and underproduction of niche interest content (Armstrong and Weeds, 2007)

In addition to possible mismatches between preferences and programme supply, a two-sided market may exhibit market equilibrium that is not efficient in terms of advertising prevalence. Anderson (2007) suggests that broadcaster's calculus do not fully internalise the net social costs of advertising, which is viewer disutility minus advertisers' surplus. As such, the market equilibrium may involve either too little or too much advertising relative to the socially optimal level.¹⁹¹ Hence, regulation of advertising length may be necessary if there is over-advertising, but socially harmful if there is under-advertising.¹⁹² Furthermore, considerations must be made for the externalities caused by advertising (e.g. increasing consumer information which promotes economic efficiency in other unrelated consumer markets).

[4]-2.3 Public Broadcasting Service

Given the various public policy goals and market failures set out in the sections above, many jurisdictions implement a Public Broadcasting Service (PBS) provider. Betzel and Ward (2004) suggest that the key remit of the public broadcaster is to (i) contribute to a democratic and/or pluralistic society, (ii) contribute to national culture and language, (iii) provide high quality programming, (iv) meet high journalistic standards, and (v) provide universal service.¹⁹³

The purpose of PBS is to address not only the public good market failure, but also the information externality aspects. Hence, the PBS aims to distribute content that is under-produced by the free market (relative to the socially optimal quantity) due to the existence of positive externalities. With reference to the above discussed market characteristics, a PBS would focus on distribution of content that is locally produced, exhibits positive externalities, is unbiased or reflects a wide range of political opinions (internal plurality), and of niche genres. Furthermore, the PBS should be insulated from undue political and commercial

¹⁹¹ Using a two-sided market model, Anderson (2007) shows that if quality, number and types of programmes are treated as a constant, the market equilibrium is over-advertising for high nuisance costs to consumers, and under-advertising for low nuisance costs to consumers. As with the case of content that exhibits externalities, the problems of over-advertising or under-advertising can compound the problems associated with demerit goods and merit goods respectively.

¹⁹² An example of advertising length regulation can be found in the EU *Television Without Frontiers' Directive (89/552/EEC)*, which sets out that commercial advertising should not exceed 15% of total daily transmission time (average of nine minutes per hour), with a 20% maximum (twelve minutes) in a given one-hour period.

¹⁹³ For a general analysis of best practices in public service broadcasting, see UNESCO (2005).

influence. In terms of funding, a PBS is usually financed by public funds, possibly with additional sources of commercial revenues.¹⁹⁴

In general, public broadcasters are usually involved in both content production and distribution. This is of particular relevance where lack of access to downstream broadcasting markets leads to upstream underproduction of certain types of content; i.e. the market failures in broadcasting transfer to market failures in content production (particularly for niche content and programmes exhibiting positive externalities). Separating the processes of content production and distribution, an alternative of PBS may be to directly subsidise the production of programming which the free market tends to under-produce or under-distribute. This will allow for such content to be available at lower licensing costs to commercial broadcasters, and possibly lead to programme substitution towards the subsidised content. Such direct subsidisation of content can incentivise the dissemination of content with positive externalities, without direct intervention at the distribution level.

[4]-3 PUBLIC GOODS AND ALTERNATIVES TO IPRS

As discussed in the above section, the broadcasting sector is subject to a public good market failure. This is due to the non-rivalrous and non-excludable nature of broadcast transmissions. The general paradigm of intellectual property law is that exclusive property rights are a policy tool that can be used to solve this market failure. However, literature on the economics of intellectual property rights often places great emphasis on the fact that property rights are only one possible solution to public good problems. This section shall discuss other alternatives and general market circumstances that can be used to solve public good failures.

Additionally, it is useful to first note that there may exist various conditions that either mitigate or exacerbate public good problems. The section above discussed how broadcasting content (and information goods more generally) could exhibit various externalities. Where negative externalities exist, there is usually over-production, which can partially offset the under-production due to public good problems. Where there are positive externalities however, the public good problems of under-production are exacerbated.

This section will briefly discuss various factors that affect the severity of public good problems, and how they apply to broadcasting services. This would allow for an understanding of the extent to which private property rights are needed over the signals of broadcasting organisations.

¹⁹⁴ Public funds for a PBS can either come from general budgetary allocations, or from a dedicated tax (usual in the form of levy imposed on households and places of business that have televisions).

[4]-3.1 State Provision and Subsidisation

One of the most traditional solutions to public good market failures is the state provision of the good. In terms of content distribution, non-commercially oriented public broadcasting services would be the analogous example (as discussed above).

A distinct solution from direct government provision of a public good is government subsidisation of private provision of the good. In the case of copyright, this takes the form of government grants to the arts, and in the case of patents this takes the form of innovation and research grants. For the broadcasting sector, the government can subsidize private broadcasters, or even subsidize the production (or acquisition) of particular content in order to effectively reduce the operational costs of private broadcasters (also alluded to in the above section on public broadcasting).

In reality, however there are many instances where public broadcasting operators fit within an overlap between the alternative strategies of 'direct state provision' and 'subsidisation of private provision'. This is because many public broadcasters are allowed to supplement their state provided funding with revenues from commercial advertising. As such, it is often debated that such dual-funding models create market distortions in advertising markets (and hence in broadcasting markets themselves), and may lead to unfair commercial practices.¹⁹⁵ As such, these strategies may solve public good problems, but may also result in further welfare losses due to competition issues. Additionally, publically provided services are generally less able to efficiently adapt to consumers' tastes and preferences.

State provision of public broadcasting services is therefore a non-property rights factor which reduces the public good problem of broadcasting. Additionally, given the interconnectivity of the creative economy however, state investment in arts and culture has various spillover effects. Hence, state support of the arts in other areas also reduces the public good (and externality) problem by possibly reducing the costs of content production and licencing.

¹⁹⁵ OECD (1999) observes that "...public broadcasters may, in principle, offer "dumping" prices for their advertising space, thanks to the public financing received. Public broadcasters, although entitled to compete on this market (with some exceptions), receive from the State additional resources (e.g. licence fees, grants, etc.), which are refused to private operators. Public broadcasters do not need to compete to obtain these additional resources which provide them a safe cash flow that may be used to compete unfairly on the market." It is further discussed that "From the State aid point of view, the easiest solution would be to ban advertising from public broadcasters. Although it would not eliminate all State aid problems (e.g. the sale of programs), this solution would probably cut the legal grounds for most of the related complaints. However, such solution may also have some drawbacks: (i) it may damage seriously public broadcasters, as public resources available are lower than market ones (budget restrictions, difficulties to increase licence fees, etc.), and (ii) it may reduce the appeal of their programs, as they would not need to gain audience." - [pg 294]

[4]-3.2 Lead Time

Lead-time generally refers to the time between the initiation and completion of a process. In the context of competitive markets, it is the time between the decision to enter into a market and production resulting in actual effective competition. Hence, lead-time refers to the fact that there is an inherent first mover advantage in most markets, which an innovator will enjoy. Even if competitors are able to freely copy an innovation and hence 'free-ride' off of the innovator's investment, it would take time to set up production infrastructure and bring a product to the final market. During this time, the original innovator would be able to establish some degree of market power and brand loyalty, which effectively substitutes formal intellectual property protection, albeit to some limited extent.

Consequently, the significance of lead-time as an alternative mechanism to IPRs is very much sector-specific, and is conditioned by prevailing production functions. In the case of the broadcasting sector, technical transmissions are by definition instantaneous, particularly in relation to the concept of retransmission. Assuming that a retransmitting broadcaster (such as a subscription service multi-channel operator) already has established infrastructure, it is possible to use the initial broadcaster's signal immediately. Therefore, lead-time provides no protection and market power in the case of signal transmissions; it is not an effective alternative to property rights.

[4]-3.3 Extra-legal Norms

In many sectors, social norms and other systems of non-legal rules evolve so as to protect the interests of creators, in the absence of formal intellectual property protection. In the intellectual property literature, a commonly cited example is that of stand-up comedy. Due to the nature of the industry, the narrow scope of copyright protection (i.e. the idea-expression dichotomy and the notion of protection from literal substantive copying only), and in some instance a fixation requirement for copyright eligibility, the subject matter of stand-up comedy is often not protected by copyright. As such, stand-up comedians traditionally drew on a commons of jokes within an effective public domain. However, overtime a system of norms evolved which filled the gap in formal law, leading to more innovation, creativity, and overall investment in new jokes (Oliar and Sprigman, 2008).¹⁹⁶ These social norms effectively regulate issues such as authorship, ownership, transfer of rights, exceptions to informal ownership claims and the imposition of sanctions on norms violators.

Such social norms may also exist in other sectors. One such example is that of academic research, which is particular sensitive to the idea-expression dichotomy (and the non-copyright-eligibility of scientific theories), leading to a wide scope

¹⁹⁶ Examples of these norms are 'injunctions' against comedians who appropriate jokes – such comedians lose standing amongst the community, and are barred from performing at certain venues. Other norms include the rejection of joint-ownership claims (even where one comedian helps another), rejection of attribution for 'works-for-hire', and general leniency for younger up-and coming comedians.

for potential free-riding. However, social norms, network and reputation effects, and the varying standards associated with academic publishing may collectively constitute a system of non-legal-norms that protect the interests of academic researchers.

In this context of academia and literary works, it is possible to distinguish between non-legal and quasi-legal forms of sanctions in the context of acts that constitute plagiarism. In terms of non-legal norms, Green (2002) notes that such sanctions are particularly effective when the sanction takes the form of the same social good that the initial activity is meant to produce (i.e. reputation and esteem).¹⁹⁷ Furthermore, there appears to be great variance both within and across sub-communities in relation to how copying may result in social sanctions. Within sub-communities, sanctions tend to be greater on well-known authors and creators, while across sub-communities there are different attitudes in terms of what level of copying is socially acceptable. For example, the scientific community tends to have a very low tolerance for plagiarism, while the field of journalism is much more tolerant. In terms of quasi-legal norms, many fields (and in particular academic research) are further subject to formal codes of ethics and professional standards of conduct. Such codes almost always impose strict sanctions for acts of plagiarism, which can result in not only loss of esteem but also suspensions, dismissals and even revocation of professional licences. Interestingly in such professional codes, standards of plagiarism are almost always much stricter than standards of copyright – i.e. sanctions are imposed on acts of plagiarism even where such acts are not substantive enough to constitute copyright infringement.

Another possible example is that of sports performances, particularly in fields with a strong performance and creative dimension. Generally, sports performances do not constitute copyright-eligible subject matter (discussed later in this chapter). However, in fields such as figure skating and gymnastics, particular performance techniques and innovative routines are often associated with a particular athlete. In these fields, it is very much possible that systems of social norms evolve to protect the interests of creative athletes, and hence promote investment in new techniques and routines. However, social norms in this sector tend to be more focused on assertion of attribution rights rather than prevention of unauthorized copying. Hence, rather than disincentivising free-riders through social sanctions, the main norm is to name specific routines, techniques or skills after a specific athlete. In this regard, great prestige is derived to the performer, which incentivises investment in new skills and techniques.

In the case of broadcasting signals, there is no reason to believe that any system of extra-legal norms would exist to supplement (or stand in for) formal intellectual property rights. This is likely because of two reasons. Firstly, the effectiveness of social norms is likely inversely proportional to the size of the market activity being undertaken – i.e. the disincentive effects of social sanctions are likely to decrease

¹⁹⁷ “A poet, scholar, historian, novelist, or filmmaker who is exposed as a plagiarist will suffer the disapprobation of precisely those colleagues whose opinion he most values. Such a sanction is particularly appropriate because the plagiarist is denied exactly the social good that his unattributed copying is intended to elicit—namely, the esteem of his peers and the benefits that flow from such esteem, such as academic credit, prestige, and financial reward.” – Green (2002), pg 198

with the scale of market activity. Given that broadcasting activities are necessarily undertaken on a very high commercial scale (due to high capital investment costs), it is unlikely that social sanctions (if existing at all) and reputation effects would effectively mitigate free-riding.

Secondly, systems of social norms necessarily depend on the existence of strong network effects and hence reputation costs. Such effects are most common among networks that are comprised of natural persons, as in the case of the examples discussed above (stand-up comedy, academic research, and performance athletics). In this manner, it can be said that social norms - as quasi-substitutes for property rights - are strongly linked to natural rights theories of property rights.

It is however noted that social sanctions and resulting reputation effects may also be applicable to corporate entities that are not natural persons. However, broadcasters are still likely to be quite insulated from direct reputation effects of social sanctions, both from the industry and consumer. In the case of the industry, a broadcaster who violates the rights of another broadcaster (e.g. through unauthorised retransmission) is by definition not engaging in active negotiations with rightsholders; therefore, social sanctions from the industry are likely to have little effect. In the case of consumers, the effectiveness of social sanctions on corporate entities likely depends on the area of commercial activity and the nature of the norm-violation. For example, consumers may have much greater sensitivity to environmental violations (which externalise social costs), than to intellectual property violations (which generally create only private costs for rightsholders). Furthermore, infringing broadcasters will necessarily have lower cost structures due the non-payment of royalties to rightsholders, hence leading to lower prices for consumers; on this basis, it is even likely that consumers would exhibit a preference for infringing broadcasters over IPR-compliant broadcasters.

Hence, given the above discussion, it would appear that social norms would not be an effective mechanism for protecting the interests of broadcasting organisations, and solving public good problems.

[4]-3.4 Inducing Excludability

As previously established, public good problems arise due to the characteristics of 'non-excludability' and 'non-rivalrousness'. Therefore, producers have the natural incentive to transform their outputs into a form that is characterised by excludability.¹⁹⁸ Furthermore, in some instances, legal rules may even reinforce such strategies to induce excludability.

¹⁹⁸ For completeness of discussion, it is noted that it is also possible consider attempts to address the issue of rivalrousness - i.e. to induce artificial scarcity. This notion is problematic for various reasons. Firstly, the very nature of information goods is that they are non-rivalrous; while artificial means can be imposed to make goods excludable, very little can be done in practical terms to make goods rivalrous. However, even if a good is theoretically made rivalrous (but still non-excludable) it would still be subject to an inherent, albeit different market failure. Such non-excludable and rivalrous goods are known as 'common-pool goods' (typically exemplified by common pool-natural resources), which are subject to overexploitation, congestions, and the 'tragedy of

Watermarks embedded by publishers on physical documents would be a traditional example of 'excludability inducing' strategies. While the document may still be copied, the quality of the copy may be diminished (and hence not be a perfect substitute for the original embodied work), or at the least, it would be clearly known to the end-user that the copy is not an original.

[4]-3.4.1 Technological Protection Measures

In the case of the creative industries, a common form of such 'strategies to induce excludability' are known as 'technological protection measures' (TPMs). The purpose of TPMs is to limit the ability of second parties (either users or competitors) to physically reproduce or otherwise use a work.

TPMs have certainly come into much greater prominence in the era of embodying works in digital formats. Digital technologies have significantly reduced the difficulty and cost of reproducing works, hence leading to greater propensities for infringement. Consequently, there have been thrusts by rightsholders to use these same opportunities of digital formats to counteract such infringement.¹⁹⁹ These thrusts have taken the form of technological measures such as access restrictions or encryption protocols which either limit access to a work, or the scope of its possible use.

However, trends in media and technology markets have demonstrated that consumers respond by bypassing such measures (e.g. through decryption, software cracking and other forms of reverse engineering). The result is hence, in theory, an 'arms race' between rightsholders and consumers regarding investment in successive technological protection and subsequent bypass techniques. On one hand, this protection/circumvention (encryption/ decryption) may be seen as an inefficient allocation of resources by both parties, resulting in deadweight losses and compounded transaction costs. On the other hand, this process generates significant positive externalities in the form of investment in new technologies, which ultimately catalyses overall technological development. As interesting as the issue may be, the overall welfare effects of this cycle are yet to be determined.

[4]-3.4.2 Legal Reinforcement and Anti-Circumvention

In order to facilitate the interests of rightsholder, intellectual property protection may be supplemented by provisions that prohibit the circumvention of TPMs.²⁰⁰

commons'. Therefore, the activities known as 'self-help strategies' in the intellectual property literature are generally focussed on inducing excludability rather than scarcity/rivalrousness.

¹⁹⁹ This theme is best captured by the famous phrase of renowned copyright commenter Charles Clark: "*The answer to the machine is in the machine*". (Clark, 1996)

²⁰⁰ The international treaty basis for implementation of anti-circumvention rules is largely Article 11 of the WIPO Copyright Treaty (WCT, 1996). However, it is interesting to note the controversial history of such provisions within the international intellectual property system. Herman and Gandy (2006) discuss the controversial legislative history of anti-circumvention provision in the

As a result of this, copyright owners may enjoy three cumulative layers of protection: (i) the basic legal protection of copyright law, (ii) the technical protection of the works achieved by TPMs²⁰¹, and (iii) the legal protection against the circumvention of the TPMs.²⁰² In essence, layer (i) protects through the mechanism of property rights, layer (ii) via inducing exclusivity (or at least increasing transaction costs for consumers to bypass said exclusivity), and layer (iii) by legal re-enforcement of excludability inducing strategies.

In terms of protection of broadcasting signals, the very nature of the subject matter is based on a technological platform by definition. As such, broadcasting signals are particularly appropriate subject matter for technological protection measures. Indeed, the notion of encryption is a central concept in the commercial broadcasting industry. As discussed in Chapter 2, there are currently various proposals to strengthen the rights of broadcasters in relation to control over unauthorised decryption of their encrypted signals. Therefore, in the case of property rights over broadcasting signals, there is not only legal reinforcement of 'exclusivity inducing' strategies, but such legal reinforcement might actually take the form of a component of the property right itself.

Alternatively, it may also be possible in principle to separate such legal reinforcement from the underlying property right. For example, there may be criminal provisions on decryption, perhaps under general computer fraud and abuse laws. More specifically, many jurisdictions have gone beyond statutory anti-circumvention provisions in implementing the provisions on obligations regarding technological measures.²⁰³ In such jurisdictions, it is prohibited to even distribute 'tools that can be used to facilitate circumvention of TPMs', irrespective of whether the distributing party actually uses such tools for the purpose of copyright infringement.²⁰⁴ The EU Conditional Access Directive is particularly relevant to this discussion, as it is specifically concerned with prohibiting circumvention of TPMs in the broadcasting sector, and provides for the prohibition of distribution of tools that can be used to facilitate unauthorised decryption of conditional access (encrypted) broadcasting signals.

In terms of the above discussion on 'cumulative layers of rights' due to TPMs, the table below summarises the applicable case for broadcast signals.

US, and propose that such provisions came to be included in the international copyright system though deliberate policy laundering by US policy makers.

²⁰¹ It is even possible that the technological measures themselves may constitute 'works of software' in certain jurisdictions, and hence themselves enjoy primary copyright eligibility.

²⁰² See De Werra (2001)

²⁰³ Article 11 of the WIPO Copyright Treaty states as follows: "*Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.*"

²⁰⁴ For example, see the relevant provision of the US Digital Millennium Copyright Act (§1201(a)(2) of USC Title 17), and Article 4 of the EU Directive on Legal Protection of Conditional Access Services (98/84/ECC).

Layer of Rights		Mechanism
1.	Broadcasters' Related Rights	Excludability through legally enforceable property rights
2.	Technological Protection Measures	Technical excludability through encryption – increases transaction costs to end-user, hence disincentivising unauthorised use
3.	Anti-Circumvention Provisions	Legal reinforcement of exclusivity inducing strategy – prohibitions on unauthorised decryption, and distribution of decryption tools

Table 4.1: Technological Protection Measures and Broadcaster's Rights

In terms of discussions on digital copyright issues, TPMs are often at the centre of the debate. Any discussion on TPMs is therefore incomplete without mentioning this debate. Many authors and commenters harshly criticise anti-circumvention provisions. The major criticism put forward is that such provisions add another layer of rights on top of primary copyright protection, and may limit the use of a work by making illegal, activities that would otherwise be legal under copyright law. For example, it may be necessary to circumvent technological protection measures in order to access a work in a way consistent with statutory limitations to copyright or the doctrine of fair use.²⁰⁵ As such, the intellectual property system's balancing act between public interests and private incentives is undermined. For discussion on this issue in the context of US copyright law, see Samuelson (1999) or Kern (2002). Many authors also go further to note that in the case of US law, such anti-circumventions provisions may not only undermine fair use, but may actually also be unconstitutional (e.g. Sheets, 2001).

[4]-3.4.3 Investment in Technological Protection Measures

Thus far, the above discussion on TPMs has focussed on excludability and the use of TPMs to restrict access, as if to imply that such measures are purely binary - i.e. whether access of absolutely open (non-excludable) or absolutely closed (excludable). In reality, producers of information goods may often be able to choose the degree of restrictions imposed by a TPM. Hence, there is conceivably a spectrum of goods ranging from TPM-free to highly-restricted, where there are varying levels of restrictions on the possible scope of use of end-users. For example, a CD or DVD may have copy-protection measure that attempt to physically limit the number of copies made from the original product. Other examples may include e-books that may limit activities such as printing, highlighting, format editing and text copying.

In the case of broadcasting signals, TPMs may limit the terms on which users are able to use broadcast signals and hence the underlying audiovisual works embodied within. For example, broadcasts may attempt to limit end-users'

²⁰⁵ For example, one may wish to extract a short excerpt of a programme for face-to-face teaching, or for news reporting. However, such extraction might be blocked by TPMs, which prevent recording. Circumvention of the TPM might hence be necessary to undertake the otherwise permissible use of the content.

abilities to undertake activities such as record a television programme for future viewing ('time-shifting')²⁰⁶, possibly viewing the programme at a place or on another device than that in/on which the original signal was received ('place-shifting')²⁰⁷, or limiting the user's ability to bypass advertisements.

Such limits on usage are effected through the terms and conditions on which signals are made available to end-users. These terms and conditions (in addition to other metadata such as timestamps and information on the rightsholders) are known as 'Rights Management Information' (RMI)²⁰⁸. As such, legal provisions which prohibit the removal or manipulation of RMI embedded in broadcasting signals is another form of legal reinforcement of the rights of broadcasting organisations.

An interesting question hence arises as to how firms generally invest in TPMs, and how such measures affect competition. According to Rothchild (2005), the inclusion of technological protection measures in information goods cannot be accurately modelled as either a price increase or an undesirable product characteristic. Furthermore, the impact on production is hence uncertain, and highly dependent on consumer preferences for TPMs (or rather for TPM-free goods) and the existing state of competition in the relevant market.

In order to understand the behaviour of firms in the market in relation to TPMs, it is necessary to distinguish between (i) terrestrial (free-to-air) broadcasters who use spectrum as the distribution platform, and (ii) subscription network

²⁰⁶ As discussed above, TPMs may raise major concerns about technical limits on activities that would otherwise be permissible under standard copyright law. Time-shifting is a good example of this conflict, due to a trend in case law that suggests that time-shifting (e.g. by recording a programme for later viewing) does not constitute copyright infringement. In *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), 'the Betamax case', the US Supreme Court ruled that making of individual copies of complete television for the purposes of time-shifting is not copyright infringement, and is allowable pursuant to the principle of fair use.

²⁰⁷ For example, consider a consumer who has a television set and cable connection in their living room, but wishes to set-up a router to stream the signal to their mobile phone or another television set in their bedroom.

²⁰⁸ In addition to providing for the prohibition of anti-circumvention measures, the WIPO Copyright Treaty (WCT) also provides for legal remedies against the removal or manipulation of Rights Management Information. Article 12 of the WCT (Obligations concerning Rights Management Information) states as follows:

"(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention: (i) to remove or alter any electronic rights management information without authority; (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, "rights management information" means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public."

broadcasters ('conditional access' operators), who use 'fixed infrastructure' such as such as cable or satellite platforms.

In the case of terrestrial broadcasting, the existence of multiple competing broadcasters may result in co-ordination problems in terms of the applicable encryption and TPM standards. Furthermore, terrestrial broadcasting stations, though substitutes, are generally simultaneously consumed by end-users (complementary) – i.e. when end-users watch television, they may have a tendency to switch between multiple channels during one sitting. Therefore, diverging standards means increased 'fixed costs' to consumers, as they would need to invest in multiple conversion devices to convert between digital and analogue signals (and hence switch channels). Additionally, switching between conversion and decryption devices necessarily means higher transaction costs (in the form of switching costs) to consumers when navigating through various broadcasting channels.

To put this into proper context, it should be noted that TPMs and RMI embedding is a characteristic of digital transmission (and is not technically possible with analogue signals). Therefore, these issues form part of the regulatory and competitive dimension of the previously discussed process of digital switchover.

Indeed, coordination of digital standards is hence an important policy issue. However, this process is not endogenously determined within the market, and is rather exogenously coordinated by the regulator. This is because the process of analogue to digital switchover is by definition an issue of spectrum allocation and management, which is typically coordinated by a central regulatory authority.²⁰⁹ As such, the issue of competing digital standards generally does not arise. Even in the absence of such exogenous coordination, it is even likely that firms may have some incentive to coordinate amongst themselves, so as to maximise the collective value of consumer demand.

In terms of protection of property rights, the issue thus becomes the extent to which TPM and RMI provisions are included in the prevailing digital standard, and in the general process of digital switchover. Such provisions are often referred to as 'broadcast flags', and provide for restrictions on the ability to produce and distribute equipment that would remove RMI and signal protection metadata, particularly in the process of digital to analogue signal conversion.²¹⁰ Therefore, the issue of TPMs in terrestrial broadcasting is more of a regulatory policy issue, rather than a question of investment behaviour of industry firms.

The case of subscription network broadcasting (whose business models are based on 'conditional access'), the market dynamic is quite different. Generally,

²⁰⁹ For a discussion on regulatory issues in analogue to digital broadcasting transition, see ITU (2010)

²¹⁰ For a discussion on the history of Broadcast Flag debates in the US, in the context of digital television switchover, see Crawford (2003). Worthy of note is the observation that many commentators criticise anti-circumvention provisions on the grounds that they prohibit technological advancements and sequential innovation in communications markets. For a discussion on such possible effects from broadcast flag provisions, see Seltzer (2005).

communications markets tend to be oligopolistic in nature due to high fixed cost of network deployment. Following the findings of Rothchild (2005) summarised above, the presence of market power allows for operators to prevail with fairly restrictive TPMs. Furthermore, there is no need to coordinate standards between operators, for two reasons. Firstly, decryption devices are generally jointly-supplied by service providers (i.e. a cable television subscription comes with the necessary 'set-top box'). Secondly, subscription services exhibit little or no complementarity for consumers, and hence the issue of transaction/switching costs do not arise (i.e. consumers generally do not subscribe to two different cable television providers).

As such, by virtue of prevailing market characteristics TPMs tend to be more prevalent in subscription broadcasting ('conditional access') markets. In any instance, it is clear from the above discussion that strategies of 'inducing exclusivity' are a critical element of any discussion of intellectual property rights over broadcasting signals. The existence of such technical possibilities are a factor which suggest that strong private property rights in broadcast transmissions might not be necessary.

[4]-3.5 Alternative Motivations

A distinct theme put forward by many commentators is that in many fields of intellectual property, agents are motivated by non-commercial or 'intrinsic' factors (as compared to the standard assumption of the profit-maximising producer). In the field of arts and entertainment, artistic passion and creative expression may drive creators and authors to produce literary and artistic works, even where there is little opportunity for commercial gain through copyright protection. In field of science and technology, innovators and inventors may be motivated by the pursuit of scientific ideals, and the desire to push the boundaries of human knowledge, even without the opportunity of commercial gains through patent protection. In other cases, investments in arts or research may even come from sources purely motivated by philanthropy and patronage.

In relation to the broadcasting sector, it was previously discussed that information goods may often have positive externalities. Hence dissemination of such information may be a motivation in itself, irrespective of any guarantee to underlying property rights. Such motivations are particularly relevant for the concept of 'community broadcasting services', as well as public broadcasting services. However, generally speaking, it can be said that commercial broadcasting is motivated largely by profit-maximisation, and hence the popularity of the advertising-funded model. Intrinsic motivation is hence not a likely factor that reduces the public good problems of broadcasting.

[4]-3.6 Prizes

As mentioned briefly in Chapter 3, a large body of literature has developed in the niche of 'innovation economics', a sub-set of which examines the use of prizes as alternatives to patent rights.

Furthermore, many critics of the intellectual property system observe that the patent system will not give adequate incentives for innovations which may have high social value, but low commercial value. Such under-investment may occur for innovations such as medical treatments and pharmaceuticals for diseases that tend to affect poorer demographic groups. Furthermore, given that patents are based on exclusivity and market power, pharmaceutical products that are in global demand may effectively be outside of the economic reach of poorer demographics, at least until patents expire and competition with generic drugs drives prices down to competitive levels. Additionally, market-power derived commercial incentives may lead to over-investment in more profitable lifestyle drugs²¹¹, and under-investment than less profitable lifesaving drugs.

As such, various commentators advocate that prizes form a more appropriate incentive system for certain types of medical research. Prizes would hence complement patents and form part of a larger portfolio of methods for encouraging and supporting research. As commented by Stiglitz (2007) *"a prize fund would work well in areas in which needs are well known – the case for many diseases afflicting the poor – allowing clear goals to be set in advance. For innovations that solve problems or meet needs that have not previously been widely recognized, the patent system would still play a role."*

The extent to which prizes may be an appropriate solution to public good problems is hence conditioned in part by the extent to which the exact desired outcome can be defined a priori. In this regard, the case of broadcasting content certainly diverges from the case of public health policy. In the case of medical research (and the subject matter of the patent system in general), rewards – whether patents or prizes – are granted for specific solutions to clearly defined specific technological problems. In the case of production and distribution of literary and artistic works, outputs are not pursuant to solving specific problems, but are rather products of artistic expression conditioned to some extent by prevailing consumer tastes. Therefore, prizes may not be an appropriate general alternative to copyright and related rights.

However, it is noted that there is indeed some conceptual relationship between the strategies of subsidisation and prizes. Both take the form of direct monetary support; however, subsidies are *ex ante* in nature, while prizes are *ex post* in nature. For *ex post* prizes, there is further some element of uncertainty as to whether investment in the research process will actually pay off (and hence whether the prize will be won). Economic analysis of prizes must hence discount

²¹¹ 'Lifestyle drugs' is not a precise term, but is generally used to refer to medications produced to satisfy non-medical or non-health related goals. Such drugs include those used for beauty enhancement, addressing hair loss, and aesthetic weight loss.

the prize offer to account for the probability of successful discovery, and arrive at the true expected value of research efforts.²¹²

In the case of broadcasting, transmissions are a technical act and are not associated with any uncertainty in terms of success probabilities. Furthermore, the act of technical transmission is instantaneous, as discussed in the discussion above on 'lead time'. Therefore, *ex post* prizes effectively approximate to the case of *ex ante* subsidies in the case of broadcast transmissions. The possibility of prizes to solve the public good problems of broadcasting is therefore a moot point.

[4]-3.7 Overall Assessment of the Broadcast Problem

The above section shows that many of the non-property rights solutions for public good problems that exist in other sectors (e.g. lead time, social norms, intrinsic motivations) do not apply to broadcasting markets. However, state provision of services and funding has a major role to play.

Certain solutions also evolve out of necessity, such as inducing excludability through technical means. Such technical exclusion is also a natural aspect of cablecasting. However, one specific market-based solution has always played a critical role in traditional broadcasting markets – advertising. As discussed previously, by splitting broadcast airtime between programming and advertising content, 'traditional' broadcasters are able to capture revenue from their services, while still providing a service 'free' to end-users. Nevertheless, as noted earlier, these two-sided markets may create certain market imperfections. Furthermore, advertising itself is also associated with possible negative externalities.

The dominance of this approach suggests that – at least historically – broadcasting markets have been able to overcome the purported public good problem without a major role for private property rights. In fact, in an advertising-funded model, free-riding through unauthorised retransmission can actually favour the initial broadcaster by expanding the reach of their signals, and hence the value of their advertising space.

In any instance, such retransmissions would still be subject to copyright liability from content owners, even without a related right for broadcasting organisations. If property rights are bypassed, then the risk to content owners is undermining their business models based on market segmentation. These issues are discussed in Chapter 9.

It would hence appear that the true risk of free-riding (and resulting public good problems) are for content where there is an investment made by the broadcaster, but for which copyright does not apply. This would include content such as news

²¹² Prizes for innovation hence constitute what are known as 'rent-seeking' games. Such games are characterised by competing agents investing in efforts to increase the probability of winning (or share of) some fixed prize. Unlike traditional forms of competition, rent-seeking contests result in unproductive expenditures and hence allocative inefficiencies. The seminal work on rent-seeking games are Tullock (1967).

and sports broadcasts. Interestingly however, these are the exact types of content where value is very time-sensitive and hence an advantage akin to 'lead-time' actually might mitigate the public good problem.

As a final comment, the role of technological progress in broadcasting cannot be understated. The large capital investments associated with traditional broadcasting have given way to lower cost engineering solutions which make more efficient use of spectrum and other resources. Practices of sharing infrastructure to reduce capital requirements – both led by market forces and regulatory policies – reap the economies of scale and scope in providing information services.

The phenomenon of convergence also plays an important role. Information services such as telephony, broadband internet access, and digital broadcasting are now supplied via the same networks, and since cumulative demand for these services drives investment in infrastructure, modern broadcast platforms benefit from large economies of scope. As such, the general claim of public good problems in broadcasting are not only likely overstated, but actually reducing in intensity.

[4]-4 FRAGMENTING THE BROADCASTING SECTOR

The above sections summarised some of the key policy goals and market characteristics that prevail in the broadcasting sector. The following section returns to the analysis of broadcasters' related rights, and focuses on how property rights relate to the public good problem of broadcast transmissions.

The main idea of this section is that that the goal of promoting content distribution is conditioned by the type of content under consideration. Since broadcasting services are a form of distribution, it is necessary to take a step back and dissect the wider creative industries in which the initial content is produced in the first place.

Generally, the discussions in this manuscript consider 'commercial content' in generic terms assuming that content is produced with the goal of profit-maximisation and is subject to copyright protection. The following section sets out two special cases, which provide for an interesting analysis of how different types of content interface with the copyright and related rights regime.

Before stating these two cases however, it should be recalled that in the base case (copyright protected market-based content) a broadcaster's right would be a 'layer' on top of the primary copyright that exists in the underlying work. As such, one of the core concerns with expansion of broadcasters' rights is that the result may be a form of an anti-commons effect.²¹³ An anti-commons effect arises when a property right over a resource is fragmented over multiple rightsholders,

²¹³ For seminal works on anti-commons effects, see Michelman (1982), Heller (1998) and Yoon (2000).

leading to coordination problems, market inefficiencies, and reduced social welfare.²¹⁴

Furthermore, there is the major concern that broadcaster's rights may result in a contraction of the public domain, as a result of a new right applying to content which would otherwise not fall within the scope of primary copyright protection. In any instance, given that the intellectual property system is designed to incentivise production (and distribution) of content, granting protection over content which would otherwise still be produced without incentives would result in inefficient market power without any corresponding/offsetting welfare creation.

[4]-4.1 Special Cases of Audiovisual Content

The first special case is that of parliamentary proceedings, political speeches, and judicial proceedings. Unlike commercially oriented content, there is no need to create economic incentives for parliamentary proceedings and as such, this content is not copyright eligible in many jurisdictions.²¹⁵

In principle, civic duty, political responsibility, and administrative accountability should be the driving forces of parliamentary proceedings, political speeches and judicial proceedings. In reality, income and prestige are also driving forces; in the case of parliamentarians and politicians, the desire to appeal to constituents and gain re-election are also relevant. In any case, in many jurisdictions, live or pre-recorded broadcasts of parliamentary proceedings are available to the public.

In the case of broadcasts of parliamentary proceedings therefore, a broadcaster's right represents a new layer right over content that would otherwise be free from copyright protection; the result is effectively a restriction of the public domain, and hence a possible reduction of social welfare. This example is useful to support arguments that the scope of broadcasting rights (at least limitations and exemptions) should be *at least as strict* as those corresponding to primary copyright protection scope.²¹⁶

The second special case is that of sporting events. It is needless to say that the international sporting industry is a multi-billion-dollar sphere of commercial activity. In many cases, the vast majority of revenue in this sector is generated

²¹⁴ For the sake of illustration, consider an end-user who wishes to use a copyright protected work by recording the work as received through a commercial broadcast, and using it for some subsequent purpose. In order to carry out this activity legally, the end-use may need to obtain authorisation from both the owner of the copyright in the underlying work, and the broadcaster whose transmission was used.

²¹⁵ Article 2bis(1) of the Berne Convention states that "*It shall be a matter for legislation in the countries of the Union to exclude, wholly or in part, from the protection provided by the preceding Article political speeches and speeches delivered in the course of legal proceedings.*"

²¹⁶ This is the central argument and conclusion of Chapter 5. Furthermore, as noted in Chapter 2, Article 15(2) of the Rome Convention allows for Member States to legislate limitations and exemptions to related rights (including the rights of broadcasting organisations) which are equivalent to those provided for in statute in relation to copyright.

through the royalties from licencing of broadcasting rights. However, there is an interesting issue regarding whether live sporting events themselves constitute 'literary and artistic works' and are hence copyright eligible.

Highly influential case law in both the US and EU suggests that the general trend is that performances in sporting events do not constitute copyright protectable subject matter.²¹⁷ The rationale for this non-eligibility for protection is best summarised by the European Court of Justice, which ruled that "...sporting events cannot be regarded as intellectual creations classifiable as works within the meaning of the Copyright Directive. That applies in particular to football matches, which are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright. Accordingly, those events cannot be protected under copyright. It is, moreover, undisputed that European Union law does not protect them on any other basis in the field of intellectual property".²¹⁸

However, it must be noted that there is also a trend in case law where some protection is offered to the organisers of sporting events, though the mechanism of such protection is generally through misappropriation doctrines of unfair competition.²¹⁹

It is also interesting to note that this trend in case law seems to have resulted in two corresponding trends in legislation. Firstly, some jurisdictions have introduced a *sui generis* intellectual property right (distinct from copyright) to protect the interests of organisers of sporting events.²²⁰ Secondly, for major international sporting events, there is the trend of short-term 'ad hoc legislation' in event hosting countries.²²¹

Notwithstanding the above trends, for the purpose of theoretical discussions, there can be assumed non-eligibility for copyright protection over sporting events. Given this absence, it is actually the broadcaster's right that serves as the incentive system to support the international sporting industry. This is especially true for major international events where broadcasting rights are the largest revenue source (as opposed to other sources such as sponsorships and physical ticket sales). Indeed, this special case provides for an interesting contrast with the

²¹⁷ In the US, the important precedent is 'NBA' - (United States Court of Appeals, Second Circuit, January 30, 1997, 105 F.3d 841, The National Basketball Association and NBA Properties, Inc. v. Motorola, Inc. and Sports Team Analysis and Tracking Systems, Inc.).

In the EU, the important precedent is '*Premier League*' and '*Karen Murphy*' - (European Court of Justice 4 October 2011, joined cases (C-403/08) and (C-429/08), Football Association Premier League Ltd and Others v QC Leisure and Others, and Karen Murphy v Media Protection Services Ltd.).

²¹⁸ ECJ *Karen Murphy and Premier League* Judgement

²¹⁹ For discussion on this trend, see Hylton (2011)

²²⁰ For example, see (i) Article L. 333-1-1 of the France *Code du Sport*, or (ii) Article 42 of Brazil's *Pele Law (Lei 9615/98)*.

²²¹ For example, see (i) Australia's '*Sydney 2000 Games (Indicia and Images) Protection Act 1996*', or (ii) South Africa's '*2010 FIFA World Cup South Africa Special Measures Act, 2006*'. For general discussion on such 'ad hoc legislation', see Andriychuk (2008).

base case of typical commercial content, as the broadcasters' rights serves the dual purpose of incentivising both production and dissemination (distribution).

The two special cases above are taken just as practical examples. In general, there are likely several other types of content that might not be protected by copyright at all might actually need no need some incentives for production.

[4]-4.2 Incentive Structures and Market Outcomes

As mentioned multiple times in the preceding sections, the purpose of copyright is to incentivise production of creative works. Conceptually, despite a possible public good problem, some works would still be produced in the absence of copyright protection (albeit at a sub-optimal quantity). Therefore, this economic basis can be used to define two conceptual categories of works: (i) works that would be produced even without incentives, and (ii) works that would only be produced with incentives.

Furthermore, from the discussion above,)above, there are certain special cases in terms of what types of works qualify for copyright protection. This legal basis can also be used to separate works into two groups: (i) works that are copyright eligible, and (ii) works that are not copyright eligible. Combining this legal distinction with the economic distinction made above, there are four possible classifications for works.

For works that need incentives to be produced and are eligible for copyright protection, the intellectual property system successfully serves its role of incentivising production. For works that do not need incentives to be produced, but are still copyright eligible, the market outcome is one of a deadweight loss. This is because the welfare-reducing market power granted by virtue of the property right is not offset by any corresponding welfare-increasing production (as the work would have been produced even without the reward of market power).²²²

The special cases identified above come into play during the analysis of non-copyright-eligible subject matter. In the case where there is a need for incentives for production, there is a resulting market failure of a public good problem; i.e., there is underproduction of the good since the lack of copyright eligibility means that the necessary incentive system is not in place. This may be the special case of commercial sports programming.

In the instance that there is no need for incentives, and the content under consideration is non-copyright-eligible, it can be said that there is 'natural

²²² It is useful to note the trend in artistic communities of using Creative Commons licensing schemes, in order to mitigate this issue of deadweight losses for works that do not need market incentives. For a discussion on Creative Commons, and new attitudes towards copyright, see Goss (2007).

efficiency'; that is to say, that the market comes to an efficient outcome outside of the intellectual property system. These themes are summarised in the table below.

Copyright and Types of Audiovisual Content		Economic Question	
		Need Incentives	No Need for Incentives
Legal Question	Protected	Efficient IPR <i>(Base case - effective solution of Public Good problem)</i>	Deadweight Loss <i>(Due to Market Power)</i>
	Not Protected	Underproduction <i>(Due to Public Good Problem)</i>	Natural Efficiency <i>(Non-IP Solution: e.g.: Parliament, Public Broadcasting)</i>

Table 4.2: Copyright Protection and Market Outcomes

In order to consider how broadcasters' rights affect market outcomes, we consider the respective cases when the types of works discussed above are included in the programming schedule of a broadcasting organisation. Therefore, irrespective of whether the original work was copyright-eligible, the transmission is protected by a broadcaster's related right.

For the case of copyright-eligible works that do need incentives, the market outcome moves from 'efficient' to one in which there is a possible anti-commons effect. This is because an end-user that wishes to use the broadcast transmission must now seek authorisation from both the copyright holder and the related rights holder. The situation is even worse in the case of copyright-eligible works that do not need incentives, as this anti-commons effect now prevails alongside the previous existing deadweight loss.²²³

For works that are non-copyright-eligible and need incentives to be produced, the market outcome goes from 'underproduction' to 'efficient'. In this case, the broadcaster's related right essentially serves as a substitute for initial copyright protection, and hence the needed incentives are provided, albeit through a different legal instrument.²²⁴

In the case of works that do not need incentives to be produced, and are non-copyright eligible, the market outcome goes from 'natural efficiency' to 'deadweight loss', as works which would otherwise be in the public domain are

²²³ Note however that these anti-commons effects only truly exist if the broadcasting signal is the only means of accessing the embedded copyright-protected work. In principle, the end-user can alternatively go directly to the original copyright holder to obtain authorisation. This situation is briefly discussed later in this chapter.

²²⁴ This is a simplified case however, as it implicitly assumes that the organization producing the content to be broadcast is also engaging in the technical transmission itself. In reality, these practices may be a bit more complex. In the case of sporting events, the entities organizing events may control access to the event by physical limitations on which broadcasters are able to access the premises and install their transmission equipment. This controlled access essentially serves as a substitute for 'broadcasting rights' (within the copyright bundle of rights), where the content (sporting performance) under consideration is not copyright eligible.

now subject to private property rights. However, it should be noted that this would only be the case if there were neither a need for market-based incentives to produce nor distribute the content. This is likely the case for content where the positive externalities associated with information dissemination provide the basis for the state to engage in distribution activities. Indeed, this would adequately describe the situation for the special case of parliamentary proceedings, and more generally, the content associated with public broadcasting services. These themes are summarised in the table below.

Copyright and Types of Audiovisual Content		Economic Question	
		Need Incentives	No Need for Incentives
Legal Question	Protected	Possible Anti-commons effect	Deadweight Loss and Possible Anti-commons effect
	Not Protected	Efficient IPR <i>(new layer of rights solve initial market failure)</i>	Possible Deadweight Loss

Table 4.3: Related Rights Protection and Market Outcomes

These negative outcomes, particularly those relating to anti-commons effects assume the extreme case where a user can only access a work through a broadcast transmission; i.e., there is no other option but to obtain authorisation from both rightsholders. It is therefore useful to analyse these notions of anti-commons effects in a less strict case. Such an analysis is presented in the following section.

[4]-4.3 Competition with Fragmented Rights

The literature on anti-commons effects suggest that total market price can actually increase where property rights are fragmented amongst multiple rightsholders. This is especially true when coordination problems arise due to sequential pricing. The essence of this effect is that underutilisation of a resource arises due to the ability of multiple rightsholders to withhold authorisation.

However, the case being discussed is not a true anti-commons scenario, as access to a copyright protected work can be gained directly from the primary copyright holder, without necessary authorisation from the broadcaster. Therefore, in principle, there is competition between the copyright-holder (exercising sole exclusive rights), and the copyright-holder and broadcaster together (both possessing the complimentary rights). In such a case, competition drives the cost of access to a level that mitigates any possibility of an anti-commons effect.

A rudimentary analysis of this competition is presented in *Annex 3* of this manuscript. This analysis demonstrates two key points. Firstly, if the royalty rate charged by the copyright-holder is fixed, then the royalty rate charged by the broadcaster must be set lower than the transaction costs for the consumer to

unilaterally locate and negotiate with the copyright holder. Secondly, and more importantly, it demonstrates that the possibility of anti-commons effects (as induced by introduction of broadcasters' rights as a layer on top of initial copyright) are limited to circumstances where the only way to access a work is through a broadcast. This may indeed be true for certain types of works where the copyright owner is not easily identifiable ('orphan works'), or where the broadcaster is the only licensee with access to the content - either through an exclusive licence, or where the broadcaster is the agent who actually engaged in the initial fixation of the work (e.g. broadcast of a live event).

[4]-5 CONCLUSION

This chapter posed the research question of "*What are the key features of the markets in which broadcasting organisations exist*". Firstly, these markets are defined by various unique characteristics, which lead to specific policy and regulatory issues. One of the key market failures in this regard are various dimensions of the externalities associated with broadcast programming.

Another is the supposed prevalence of a public good problem in the provision of broadcasting services; this is the issue that the related rights of broadcasting organisations are meant to address. Due the complexity of the market environment however, it is important that intellectual property rights be seen as one element in a larger set of policy tools.

In terms of this public good problem, it was discussed that there exist various solutions which mitigate the issue of underproduction without private property rights. These solutions range from interventionist (public broadcasting), technical (technological protection measures, and network protocols), to purely market based (advertising). Furthermore, it was noted that the role of digitisation and convergence further reduce the likelihood of suboptimal investment. As such, public good problems in the provision of broadcasting services are likely to be overstated.

Further to the issue of public good problems, it can be recalled from Chapter 3 that even in the absence of broadcasters' rights, it might be possible for a broadcaster's programme schedule to be protected by some other property right such as a *sui generis* database right. Such a right can be seen as 'protecting' a broadcasters' investment in assembling a unique programme schedule, and adding-value through the process of bundling. However, there is simply no reason to believe that any public good problem in unique programme bundles (akin to databases) exists. There is no evidence that large-scale appropriation of schedules occurs between broadcasters wishing to independently reproduce the programming schedules of their competitors. Hence, while the activity of content bundling by broadcasters does indeed create value, this in itself cannot be a basis for justifying unique related rights.

This chapter also discussed that the effects of broadcasters' rights depend on the type of broadcasting content contained in a transmission. In many cases, such

rights can result in welfare-reducing social costs due to anti-commons effects, unnecessary market power, and limiting access to the public domain.

However, one major understated function of broadcasters' rights is that they serve to close a gap in the intellectual property system for content such as sports performances, which are not copyright eligible. This however neither fits within the purported justifications for broadcasters' rights discussed in Chapter 3, nor does it serve as a policy solution specifically formulated for this specific problem. Hence, this might suggest that the economic rationale for these rights are misplaced. This further reinforces the conclusions in Chapter 3 that these rights have a very uneasy fit within the overall intellectual property system.

Like with all forms of intellectual property, the concern of the policy-maker is to strike the optimal balance between different competing interests. If broadcasters' right do have some value in incentivising content production, these benefits must be balanced with the possible resulting social costs.

If broadcasting services are associated with positive externalities, then it is welfare generating to increase distribution and use of programming content. The question is whether related rights are necessary to incentivise this distribution and whether they do have such an intended effect. A lack of property rights might reduce some forms of content dissemination if the public good problem really does exist. However, overbroad rights might reduce content dissemination by restricting access and use of content by both consumers and other parties such as retransmitters. The natural question is therefore one of appropriate scope of these rights, and it is on this matter that next part of this manuscript focusses.

PART III: MODELLING BROADCASTERS' RIGHTS

CHAPTER 5: INCENTIVE-ACCESS MODEL OF COPYRIGHT

Part III of this manuscript focuses on modelling approaches to the topic of broadcasters' rights, and their relationship to copyright. This chapter specifically analyses the question of 'optimal scope of protection'. While Chapter 5 provides the technical modelling background to how this manuscript approaches this question, it leaves some practical elements of the discussion for the subsequent Chapter 6. Chapter 7 also uses a modelling approach to analyse the issue of rights enforcement in broadcasting markets. This part is therefore the main part of this manuscript that explicitly employs a Law and Economics methodology.

[5]-1 INTRODUCTION

The underlying research question in this chapter is "*What is the optimal scope of protection for the related rights of broadcasting organisations?*" The approach used to answer this question is an attempt to analyse how existing models of optimal scope of copyrights and patents can apply to the unique subject matter of broadcast signals.

However, it is observed that the industrial organisation based models which are prominent in the existing literature on optimal scope of intellectual property rights are not well suited for adaptation to the subject matter under analysis. As such, a more high-level welfare oriented approach is needed; in this regard, the model of Valkonen and White (2006)²²⁵ is used. This chapter sketches the Valkonen and White model, and discusses how the key parameters apply in the case of specific characteristics of broadcasting signals as intellectual property subject matter.

This analysis concludes with the general result that the optimal level of protection for broadcast signals should be set lower than that for general copyright. This general result is further applied to the case of anti-circumvention provisions, to discuss why liberal limitation and exemptions to the rights of broadcasting organisations are necessary.

[5]-2 DOMINANT ANALYTICAL APPROACHES

This section briefly discusses existing approaches to the question of modelling intellectual property protection, and the issues encountered in attempting to apply these approaches to the case of broadcasters' related rights.

²²⁵ Valkonen and White (2006) - *Economic Model for the Incentive/Access Paradigm of Copyright Propertization: An Argument in Support of the Orphan Works Act*, An. Hastings Comm. & Ent. LJ, 29, 359.

[5]-2.1 Literature on Welfare Approaches to IPRs

The literature on intellectual property is very wide in terms of the various analytical approaches employed. As discussed in Chapter 3, theoretical perspectives on IPRs generally comprise of two main branches: utilitarian and non-utilitarian perspectives. Welfare based approaches, i.e. those whose roots are generally based on the tools of economic analysis, fall into the utilitarian branch, which would include the analysis of issues of 'optimal scope'.

As Chapter 3 already provided a literature review of theories of intellectual property, it is not necessary to repeat such here. However, what is important is to recall the foundations laid by the likes of Pigou (1924) who noted the appropriability problem for inventions, and Arrow (1962), who noted the zero marginal cost nature of information.

In terms of actually modelling the scope of protection of intellectual property rights, Nordhaus (1967) provides the seminal model in the case of patent protection, which was later expanded on by Gilbert and Shapiro (1990). In the case of copyright protection, the seminal work in modelling remains Landes and Posner (1989).

[5]-2.2 Applicability of Analytical Approaches

Further to the literature mentioned above and discussed in Chapter 1, an attempt to apply existing models of optimal IPR scope would likely begin with an analysis of Nordhaus (1967) and Gilbert and Shapiro (1990) in the case of patents, and Landes and Posner (1989) in the case of copyright. While there are indeed several other models and authors that can be considered, these three papers serve well to capture the overall methodological approach used to address the question of optimal scope.

The models set out by these authors (and those building upon their work) largely analyse the issue of scope of IPRs by considering industrial organisation and market structure issues. The property entitlement is seen as a form of market power that permits the rightsholder to charge a price above marginal cost by preventing competitors from using the protected technology or work. The main theme is therefore the trade-off between welfare-enhancing private gains from new works and technologies, and the welfare-decreasing deadweight losses induced by property-right-derived market power.

Consequently, these models are generally focussed on 'copying' – in the case of patents, the ability of a competitor to appropriate a given technology, and in the case of copyright, the ability of a competitor to reproduce a given work. Unfortunately, these 'copy-centric' models do not lend themselves well for adaptation to the case of broadcast signals where the key issues are not akin to copying *per se*, but are rather rights regarding issues such as fixation and retransmission. This stems from the fact that unlike patents and copyrights that

are designed to incentivise production activities, broadcasters' rights are designed to incentivise distribution activities.

In essence, the main thrust of both copyright and patent law has come from the concept of unauthorised appropriation of ideas. As such, while the current structure of copyright law is that copyright is a 'bundle' of several different rights (e.g. reproduction, public performance, communication, rental, attribution, etc.), the analytical focus has always been based on the core issue of copying (i.e. the right of reproduction).

In the case of broadcast signals however, this sense of emphasis on a 'copying' is not particularly instructive, even though the acts of fixation and retransmission can be considered as forms of 'copying'. As such, the industrial organisation basis of the dominant analytical approaches is not particularly useful for analysis of broadcaster's rights.

Building on the framework of Landes and Posner (the 'L-P Model'), Valkonen and White (2006) present a more generalised model for copyright that is not explicitly based on industrial organisation foundations. While the Valkonen and White model ('V-W Model') is certainly much less widely known than the L-P Model, it does provide a general framework that can be adapted to the cases of different respective subject matters. The next two sub-sections attempt to review the key premises of the L-P and V-W Models, and how the V-W framework can be adapted to the case of broadcasters' rights.

[5]-3 MODEL FOR INCENTIVE-ACCESS PARADIGM

This section outlines the main technical elements of the Landes-Posner, and the Valkonen-White models.

[5]-3.1 Degree of Propertisation

The L-P Model conceives of a single parameter 'z' which captures all elements related to copyright protection, including issues of length and breadth. This parameter hence connotes the 'degree of propertisation' and ranges between zero and one; zero represents a complete absence of copyright, and one represents absolute propertisation without limits.

$$0 \leq z \leq 1$$

The simplicity of a single variable implies that it accounts for both statutory considerations (e.g. length of copyright entitlements as set out in legislation), and judicial considerations (e.g. the stringency of the standards and tests applied by courts when making determinations on potential infringements). Hence, **z** is

essentially a vector of various legal considerations that affect copyright scope (z_i), and the optimal level z^* is a weighted function of the elements z_i .²²⁶

Obviously, the optimal level of protection (and hence each element itself) is case specific – both in terms of the type of work and author, and the type of use under consideration. For example, a novelist and an architect may have very different production functions, and hence the incentives needed to stimulate production of works (e.g. copyright length) are different for both. Similarly, a literature professor who wishes to quote the author’s novel and a visual artist who wishes to reproduce the architect’s building as a sculpture certainly have different utility functions in terms of using the respective copyright protected works. However, the L-P model considers the ‘average case’ of copyright works, and is hence an overall generalisation of the various subject matters, beneficiaries, and types of users within the domain of the copyright system.

For completeness of discussion, it is noted here that in general, intellectual property rights are a second best solution by construction. This stems from the fact alluded to above that different agents would require different incentives to produce different outputs, depending on their particular preferences, non-property right incentives, and production functions. As such, the first best solution would always be to grant an ad-hoc property right that is specifically tailored on an individual case-by-case basis that creates no more deadweight loss than that which is necessary to push the creator over the margin of indifference between production and non-production. However, there are many obvious problems with such a notion, where the core issues would include the following:

- (i) The massive information asymmetries which would exist between the potential creator and the property right granting entity;
- (ii) The significant decision costs which would be incurred in attempting to tailor a unique property grant for every single case of potential creation; and
- (iii) The unintended consequence of a counterbalancing disincentivisation effect due to uncertainty surrounding the nature of a property grant which is only granted on an *ex post* basis.

As such, intellectual property rights are seen as a second best solution where various different creators, types of works, and types of users are pooled together so as to optimise the efficiency of the system at the ‘average’ level. Notwithstanding the fact that in some jurisdictions, the nuances of copyright law are slightly tailored to different subject matter (e.g. by granted different protection terms for different classes of works), it is indeed the general case that copyright law (and patent law) is structured to consider the ‘average case’.

²²⁶ The issue of optimizing z as opposed to the elements z_i is discussed in a later section.

[5]-3.2 Benefit Function

Building on the premises of the L-P model, the V-W Model conceives of a social benefit function (**W**) that is dependent on the level of investment in works (**I**), the average social value of a work (**v**), and a discount rate (**r**).

$$W = (I)(v/r)$$

The level of investment **I** is a positive function of the level of propertisation (**z**). Furthermore, the investment function has two important characteristics. Firstly, it contains some given level of 'independent investment' that prevails even in the complete absence of copyright protection. Secondly, the function is subject to diminishing return to **z**, and hence adopts a concave shape. This is because the marginal incentives to creators are inherently higher closer to the core of an initial property grant, as opposed to periphery of the expanding boundary of copyright scope.

The investment function is hence defined as follows:

$$I = f(z)$$

- $dI/dz = f'(z) > 0$
- $d^2I/dz^2 = f''(z) < 0$
- When $z = 0$, $f(z) = \alpha$

V-W supposed that a possible characterisation of this function is $I = \alpha + \log(z)$

[5]-3.3 Cost Function

Again, building on L-P, V-W conceives of two categories of cost – (i) Coasean costs, and (ii) Market Imperfection costs.

Coasean costs are those that exist in a 'frictionless society', i.e. a Coasean world devoid of transaction costs. This is essentially the deadweight loss to society from market power and resulting exclusionary practices. V-W note that the relationship between this cost category and the degree of propertisation are difficult to specify *a priori*. For example, the **z**-component of length would likely have a concave shape, as the welfare-reducing effect of an additional year of protection is inherently less when consideration extensions further away from the date of original creation. However, for a **z**-component such as restrictions on the doctrine of fair use (or more generally limitations and exemptions to copyright), an increase in propertisation restricts more and more activities at the expanding boundaries of the copyright, hence leading to the possibility of a convex relationship. Nevertheless, for simplicity, V-M model the Coasean cost function as linear, where **p** represents the average deadweight loss associated with a copyright work.

The second cost component in the V-M model is called ‘market imperfection costs’, and are those related to transaction costs (including search and enforcement costs).²²⁷ This function is convex, as the further the extensions of the boundaries of a right, the lower the threshold for activities which require authorisation. Therefore, increasing z means an increased number of claims and licencing requests which may have otherwise been exempted under a lower value of z (for example under a *de minimus* exception). Furthermore, unlike real property, extensions of the boundaries of an intellectual property right may be associated with increased uncertainty as to where the boundary/border actually ends.²²⁸ V-W suggests that a possible specification may be an exponential function.

The total cost function is hence a summation of the Coasean cost function and the market imperfection cost function.

<i>Coasean Costs:</i>	$C_q = z\rho$ <ul style="list-style-type: none"> • $dC_q/dz > 0$ • $d^2C_q/dz^2 = 0$
<i>Market Imperfection Costs:</i>	$C_m = z^\delta, \text{ where } \delta > 1$ <ul style="list-style-type: none"> • $dC_m/dz > 0$ • $d^2C_m/dz^2 > 0$
<i>Total Costs:</i>	$C = C_q + C_m$ $C = z\rho + z^\delta$ <ul style="list-style-type: none"> • $dC/dz > 0$ • $d^2C/dz^2 > 0$

[5]-3.4 Net Welfare

Obviously, the net welfare function is the difference between the social benefit and social cost functions. Since, the social benefit function (W) is concave, and the social cost function (C) is convex, the welfare function ($N = W - C$) takes the form of an inverted parabola. As such, there exists a distinct point z^* which corresponds to maximum social welfare (i.e. optimal scope of copyright protection).

²²⁷ Some readers might note that the use of the terms ‘Coasean Costs’ (for costs in a ‘frictionless world’; i.e. without transaction costs), and ‘Market Imperfection Costs’ (for transaction costs) might seem counterintuitive. However, the original terminologies are used to be consistent with the original model.

²²⁸ On this point, it is duly noted that the issue of uncertainty mainly arises for intermediate levels of z . At very low values of z , users may reasonably assume that the majority of possible uses do not require authorisation, as the property right is weak; at very high values of z , the opposite is true – users may assume that the majority of uses do require authorisation, as the property right is very strong. There is no uncertainty at the extremes (values of 0 and 1).

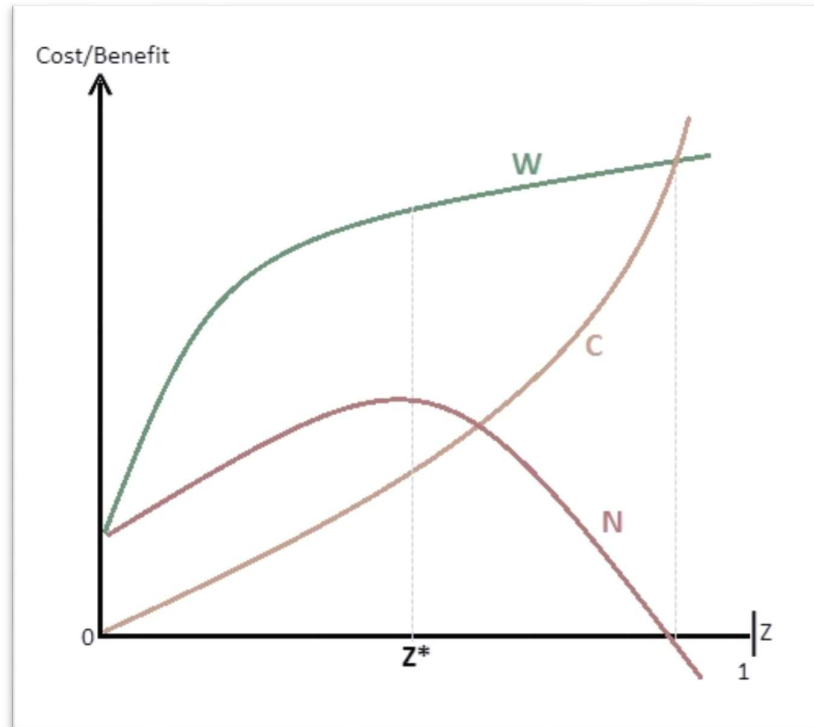


Figure 5.1: Net Welfare for General Copyright Case

[5]-4 APPLICATION TO BROADCAST SIGNALS

The V-W model summarised above is admittedly crude and very generalised. However, its general nature makes it easily adaptable to compare various subject matters. In order to consider the question of scope of protection for broadcast signals, we may hence analyse how the intuitions and conjectures underlying the model apply to this unique subject matter.²²⁹

[5]-4.1 Benefit Function

In the case of the social benefit function, the critical departure from the case of 'average copyright work' is the applied discount rate (r). Recall that the nature of a broadcast signal is to bundle various works (which may or may not themselves be subject to copyright protection). It is hereby conjectured that the discount rate for a broadcast signal (and the embedded bundle of works) is significantly greater than that for typical copyright works.

Firstly, the value of the bundle itself is tied to time-specific consumer preferences and trends in the entertainment industry. Therefore, even if the value of individually bundled works depreciates relatively slowly over time, the value of a

²²⁹ In the following discussion a 'prime' variable represents the case of the broadcast signal subject matter (e.g. where z is the degree of propertisation for general copyright protected works, z' represents the degree of propertisation in the case of broadcast signals).

given bundle depreciates much more rapidly, as the complementarity between the bundled elements deteriorates. For example, consider that even if a user enjoys a particular radio programme made and distributed fifty years ago, they will not necessarily enjoy the totality of broadcast schedule in which that programme was initially included. In economic terms, it is postulated here that the positive correlation between the utilities of individual programme schedule elements decreases overtime, irrespective of the absolute value of the individual utilities.

Secondly, the very technical nature of a broadcast is that it exists as a transient and non-material form. By definition, a broadcast is a frequency or electromagnetic signal that persists only for duration in which the broadcast is actively transmitted. As such, it is impossible to derive value from the signal itself after the transmission has ceased, as it fails to perpetually exist in physical form, although its content may be perpetuated in 'derived' forms such as specific fixations.²³⁰

Following from the above discussion, it is conjectured that the discount rate for broadcast signals (r') is significantly greater than that which applies in the case of general copyright (r).

$$r \ll r'$$

In terms of the other key variables in the social benefit function, an intuition for broadcast signal subject matter is much less obvious. For the level of independent investment (α), it is quite likely that the applicable level for the case of broadcast signals is greater. In the complete absence of copyright, an author or creator may have little potential (beyond the lead time due to the delay of copiers entering into the market) to accrue revenues. The entry of copiers pushes price down to marginal cost, and since copyright protected works are information goods with zero (or negligible) marginal costs, market price falls to zero. However, in the case of broadcast signals, broadcasters are able to capture significant revenues even without property rights; in fact, this is the business model of the two-sided-market that has underpinned the broadcasting industry for decades.²³¹ Hence, we can conjecture that the level of revenue potentially accruing in the two-sided market, and hence the incentive to invest in the absence of a property right (β) is much greater than the independent investment in the case of general copyright.

$$\beta > \alpha$$

In addition to the level of independent investment, the actual shape of the investment function may also differ. General copyright activity can conceptually cover a very wide range of activities and potential uses. However, the range of

²³⁰ However, control over fixation of content embedded in signals is quite different to other aspects of broadcasters' rights, as it often directly relates to issues more akin to primary copyright (production), rather than broadcasting activities (distribution). In this regard, it can be noted hoe the concept of post-fixation rights creates various conceptual problems, particularly where it overlaps with underlying copyright.

²³¹ Chapter 3 provided a discussion on issues of two-sided-market equilibrium in broadcasting markets.

activities that may derive value from broadcasts is generally more limited. As such, most of the incentivisation effects of property rights are closer to the core of the broadcasters' rights (i.e. more concentrated at the initial levels of propertisation). Commercial-scale activities further towards the boundaries of extensions of the property rights are rare for broadcast signals, and hence likely have even less revenue generating potential than the case of general copyright. The result is that it is very likely that the incentive function for broadcasters exhibits quicker and more substantial diminishing returns, as compared to the case of general copyright. We may relate then concavity of the broadcaster's investment curve to that of the general copyright investment curve by some factor $\theta < 1$.

$$\begin{aligned} \text{For example, if: } I &= \alpha + \log(z) \\ \text{then: } I' &= \beta + \log(\theta z) \end{aligned}$$

The last remaining key variable is the 'average value' of the subject matter under protection (v). As stressed in Chapter 3, the role of general copyright is to incentivise production, while the role of broadcasting rights is to incentivise distribution. The value of a broadcast is hence inherently tied to two factors: (i) the value of the work(s) embedded in the broadcast, and (ii) the extent to which the broadcast acts as the primary mode of distributing the work to the public. We may hence postulate that the value of a broadcast is a function of the value of copyright protected works by some factor λ (i.e., $v' = \lambda v$). Given that a broadcast signal is only indirectly demanded (i.e. its utility is derived solely from the utility of the underlying work being distributed), it is quite reasonable to postulate that v is the upper-boundary of v' ; this is to say that the average value of a broadcast cannot logically exceed the average value of an average copyright protected work (i.e. $\lambda \leq 1$).^{232, 233}

Additionally, a given copyright protected work can be embodied in various forms and those forms can be communicated in various ways. A broadcast of a work is a very specific form of distribution of a particular embodiment. As such, a general argument can be made that the average social value of a broadcast work is less than that of an average work.²³⁴

²³² However, it is acknowledged that a rebuttal to this conjecture is that the positive correlation of utilities of the elements of a bundle may lead to complementarities that result in a total utility greater than the sum of the utilities of the individual elements. In such a case, the value of a broadcast which bundles n works together may be greater than nv , hence implying that on average, v' can actually be greater than v when the complementarity effect on total utility is very strong.

²³³ Interestingly, it might be possible that for come very specific works, the only value might be that derived from broadcast transmission. Firstly, such content might be content produced outside of a purely commercial context (e.g. a programming segment providing an emergency information bulletin). This might also more generally be time-sensitive (or 'live') programming such as sports and news broadcasts; as discussed in Chapter 4, these categories should be seen as special cases. In any case, the very nature of the process of designing an intellectual property is to consider the average case within the subject matter classification, and such 'broadcast-only' value works would unlikely represent a majority of total transmitted works.

²³⁴ For example, consider a copyright protected short story, which can be embodied in the form of a literary work and subsequently be distributed as physical books for sale. Alternatively, the work can be performed and fixed (embodied) as a short film, and distributed via broadcast. That same embodiment can also be distributed via the sale of physical DVDs. Hence, the broadcast represents

Furthermore, on the issue of competing modes of distribution, trends in the entertainment industry certainly suggest that the role of broadcasting as a primary means of content distribution is diminishing. Even within the communications industry, end-users are shifting from traditional broadcasting services (centralised programme scheduling and one-way communication) towards new de-centralized and two-communication modes of distribution (e.g. video on demand services), which do not constitute the act of broadcasting for the purpose of copyright law. The result is that the value of 'λ' is also likely decreasing with changes in technology and the culture of content consumption.

$$v' = \lambda v$$

where $\lambda \leq 1$

[5]-4.2 Cost Function

In terms of Coasean Costs, the relevant variable to analyse is that of 'average deadweight loss'. Intuitively, the social value of a good and the deadweight loss associated with market power over that good are proportionally related.²³⁵ Generally, we may assume that the ratio between social value (v) and deadweight loss (ρ) is constant over different classes of copyright protected works. Since, λ represented the relationship between value in the cases of copyright general and broadcast signals (v' = λv), this same factor can be used to relate respective deadweight losses.

$$v/\rho = v'/\rho'$$

$$v' = \lambda v$$

$$\rho' = \lambda \rho$$

where $\lambda \leq 1$

However, further adjustments need to be made to this relationship, which will be revisited shortly after the below discussion on anti-commons effects.

For cost functions, the most substantial divergence from the general copyright case comes into play for market imperfection costs. It is hereby conjectured here

a very specific embodiment and distribution whose expressive scope is much less than the underlying short story itself, which may be embodied and distributed in several alternative ways. The broadcast hence may have lower social value than the underlying work due to its limited expressive scope. It is noted though that this may not necessarily always be the case, as there may be examples of low value works whose value increased because of the efforts and talents of individual performers (think about great actors who excelled in otherwise average movies). However, in such cases the increase in social value is derived through performers' rights (which are distinct concepts and property entitlements) rather than any inherent change in the social value of the underlying copyright protected work.

²³⁵ Deadweight loss arises because some users are excluded from the market because their willingness to pay is less than the price charged (which is above marginal cost due to property right-derived market power). For goods with a high average social value, the cost of exclusion is likely to be correspondingly high. Similarly, for goods with a low social value, the cost of exclusion is likely to be similarly low.

that transactions costs are inherently higher in the case of broadcast signals. This is because the broadcasters' rights are effectively a secondary right as they are 'neighbouring onto the rights of copyright'. As discussed in Chapter 4, this may lead to anti-commons effects for certain types of content, as a user who wishes to use a work as embodied in a broadcast would need to attain authorisation from both the broadcaster and the rightsholder in the embedded work.

Any transaction costs that exist in the case of the general copyright case hence also exist in the case of broadcast signals, in addition to further transaction costs that arise due to the need to negotiate with two classes of rightsholders. However, as noted in Chapter 4, this anti-commons effect might be limited by the extent to which a user is able to find and negotiate directly with the copyright holder, as opposed to negotiating through the broadcaster and being subject the need for a dual licence. This hence relates to the extent that a broadcast is the primary means of accessing a particular work (which was one of the components of the parameter λ discussed above). We may hence isolate the 'broadcast as access medium' component (ϵ) from the other factors that are captured in the variable λ . This additional degree of transaction costs can be incorporated into the market imperfection cost function as follows:

$$C_m = z^{(\delta + \epsilon)}$$

where $\delta > 1$, and $\epsilon \leq \lambda \leq 1$

Now, revisiting the Coasean Cost function, it is useful to recognise that the possibility of an anti-commons effect not only has implications for transactions costs, but also for deadweight loss, as an anti-commons is associated with underutilisation of a given resource. Hence, the component ϵ should also be incorporated into the Coasean cost function to account for this additional deadweight loss.²³⁶

$$\rho' = (\lambda + \epsilon)\rho$$

$$C'_q = z(\lambda + \epsilon)\rho$$

Summing the two cost functions yields the following total cost function.

$$C' = C'_q + C'_m$$

$$C' = z^{(\delta + \epsilon)} + z(\lambda + \epsilon)\rho$$

[5]-4.3 Net Welfare

In essence, the above mathematical formulations represent the intuitions when consideration how the case of broadcasting signals differs from the case of copyright general in the V-W model.

These intuitions are summarised as follows:

²³⁶ It may even be viable to argue that the Coasean Cost function for broadcast signals is even convex. This is because the periphery of the expanding property right is populated with activities that have low commercial value but high social value, such as incorporating portions of journalistic broadcasts in news reporting, or using fixations of transmissions for archiving.

- (i) There is greater independent investment;
- (ii) There are more significant diminishing returns to investment;
- (iii) There is less average social value;
- (iv) There is a greater discount rate;
- (v) There relative deadweight loss is indeterminate;²³⁷ and
- (vi) There are greater transactions costs

The cumulative effect of these conjectures is that the social benefit and social cost curves maintain their respective concave and convex shapes, although they converge more quickly. Furthermore, the absolute distance between the curves is greater due to the higher level of independent investment. However, this independent investment affects only the intercept of the social benefit function, and hence does not affect the curvature of the net welfare function, but only the point at which that function becomes negative.

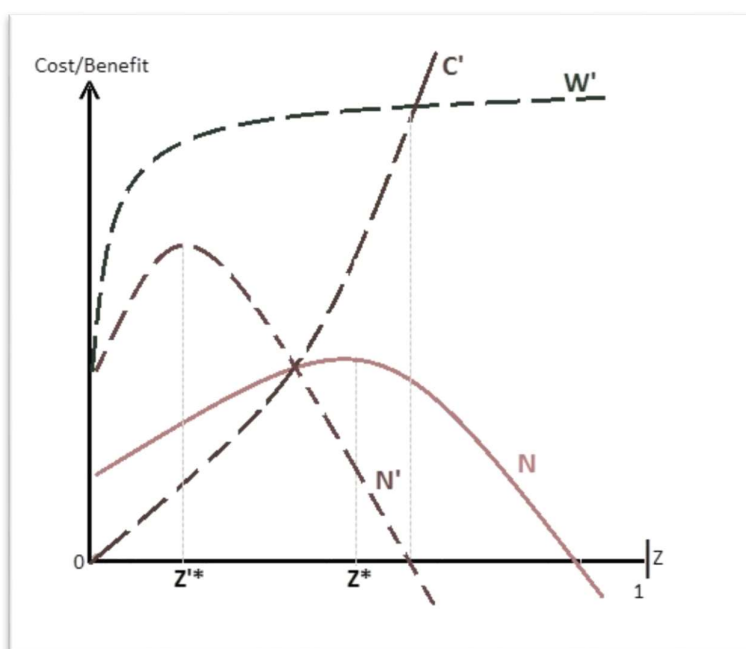


Diagram 5.2: Net Welfare for Case of Signals

The result is that under these conditions, the optimal level of propertisation for broadcast signals (z') is less than in the case for copyright general (z^*). This result is important as it implies that the level of protection offered for general copyright works, should be an upper boundary for the level of protection offered to broadcasting signals.

²³⁷ This depends on the values of λ and ϵ , both of which are less than one (and where $\lambda > \epsilon$). Deadweight loss is greater in the case of broadcast signals ($\rho' > \rho$) only where λ has a value much greater than 0.5, and ϵ is also very large; this would occur mainly in situations where the broadcast transmission is the primary means via which users have access to a given work, and where that work is not expressed and embedded in alternative media.

Therefore, in constructing a policy for property rights over broadcast signals, the scope of protection offered should not exceed that already offered in the case of primary copyright. Admittedly, this line of reasoning assumes that the current state of copyright protection is at least up to the optimal point (i.e. $z \geq z^*$). However, it is not controversial to claim that there is a widespread view from various perspectives that the existing scope of copyright protection is already too high.²³⁸

Even if one were to deny this view that copyright is already too strong, trends in copyright law suggest a continued expansion of copyright scope. In the case of Europe, one may infer a trend that the overall scope of copyright protection has been increasing in the last two decades via the cumulative effect of the following: (i) the *EU Copyright Harmonisation Directive* – which provides for a baseline copyright length of life of author plus seventy-five years, which is twenty-five years greater than the WTO-TRIPS baseline, (ii) the *ECJ Infopaq Case* ruling – which generally lowered the standard of originality for copyright eligibility, and (iii) the *EU Database Directive*, which exemplifies the expanding domain of copyright (or copyright-like) eligible subject matter.

Furthermore, in the case of the US, Lemley (2004) notes, “*By virtually any measure, intellectual property rights have expanded dramatically in the last three decades. Terms of protection are longer, the number of things that are copyrightable has increased, it is easier to qualify for copyright protection, copyright owners have broader rights to control uses of their works, and penalties are harsher. In addition, Congress has created entirely new rights.*”²³⁹

[5]-5 ANALYSIS: APPLICATION TO LIMITATIONS AND EXEMPTIONS

The above analysis concludes with the very general result that the optimal scope of protection for broadcasters’ rights is less than that for copyright. This result is particularly interesting in considering the case of limitations and exemptions, and anti-circumvention provisions. As discussed in Chapter 4, the non-excludable nature of information goods gives rise to incentives to employ ‘excludability inducing strategies’.

In terms of scope of copyright protection, one form of expanded scope is the legal reinforcement of such strategies. These are known as ‘anti-circumvention’ provisions, and stipulate that permission is needed for users to by-pass technological protection measures (TPMs) such as encryption and copy protection. The result is a three-tiered regime that consists of (i) a primary legal entitlement in the form of copyright, (ii) the increased transactions costs due to TPMs, and (iii) legal reinforcement through anti-circumvention provisions.

²³⁸ The notion that existing copyright protection has gone beyond what is necessary to achieve its underlying policy objectives is a theme explored from many different perspectives. Generally, see Ricolfi (2011) on the issue of copyright reform in the modern era, Lessig (2011) on the issue of the changing role of copyright in the digital economy, and Choen (2007) on how the claims about the role of copyright in stimulating creativity seem to be harmfully inflated.

²³⁹ Lemley (2004) at page 14

A key issue with this regime is that it may limit the ability to engage in activities that are permissible at the base level as they are allowable under doctrines of fair use or statutory limitations and exemptions. This is because the activity in question may only be carried out if the user bypasses the TPMs put in place; the result is that the user is in violation of anti-circumvention provisions, even where the activity attempted is permissible under 'standard' copyright law.

In the case of broadcasting signals, an example would be the ability of a user to time-shift – i.e. record a programme for viewing at a later time or date. Such an activity is established as permissible under copyright law under doctrines of fair use and limitations to copyright, largely triggered by the outcomes of the US *Betamax Case*.²⁴⁰ However, in a digital broadcasting environment, a broadcaster may include in a broadcasting signal, certain metadata known as Rights Management Information (RMI) that stipulates the conditions under which the transmitted work may be used. Such conditions may possibly include restrictions on a user's ability to record a given programme. Furthermore, the RMI may even interface with the user's terminal equipment to technically prohibit activities such as recording for later viewing. For the user to engage in the otherwise legal activity of time-shifting for later enjoyment, they would either have to find a technical means to bypass the TPM, or strip the RMI from the broadcast signal – both of which would constitute violations of anti-circumvention provisions.

One possible perspective on this matter is that an adequately competitive market should be able to allow the 'efficient level' of TPMs to prevail. However, as argued in Chapter 4, the nature of broadcasting markets would not provide for such a result, given that (i) broadcast markets tend to be generally oligopolistic, and (ii) technological protocols in terrestrial broadcasting markets are subject to centralised regulation from the spectrum management authority.

In any instance, the result of the model discussed in this chapter simply suggests that allowing over-broad protection through strong anti-circumvention rules is simply not socially optimal. This is because copyright scope at the 'general copyright' level is conditioned by certain fair use and limitations and exemption provisions. Given that z'^* should be set less than z^* , it implies that individual components of the matrix of elements z_i should be set less than z_i . One such component which influences copyright scope is indeed the applicable fair use and limitations and exemption provisions. Hence, the same activities that are permitted under general copyright law should be also allowed at minimum under the rules relating to the rights of broadcasting organisations. In other words, fair use doctrines and/or limitations and exemptions to broadcasters' rights should be at least as liberal as those that prevail for general copyright.

²⁴⁰ In *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), 'the Betamax case', the US Supreme Court ruled that making of individual copies of complete television programmes for the purposes of time-shifting is not copyright infringement, and is allowable pursuant to the principle of fair use.

Furthermore, it follows that where some particular type of broadcasting content is not subject to copyright protection (i.e. $z=0$), then the broadcast signal in which that content is embedded should also not be subject to protection (i.e. $z'=0$).

[5]-6 OPTIMISATION ISSUES

It is acknowledged here that the above implication that *'for z' to be set lower than z , each element z'_i should be set lower than the corresponding z_i , where z' and z are both weighted indices of these respective elements'* can be mathematically misleading.

In other words, if $z = z(z_1, z_2, \dots, z_n)$, and $z' = z'(z'_1, z'_2, \dots, z'_n)$, setting $z'^* < z^*$ does not imply that $z'_i < z_i$. Firstly, if this were true, it would imply that the relative weightings in these indices are the same; certainly, this should not be the case, as the broadcasting sector is subject to unique public policy issues as compared to other copyright-based sectors in general (as stressed in Chapter 4). This is to say that the functions z and z' themselves cannot and should not be assumed to be the same.

Furthermore, there would not be a direct mapping of z_i elements to z'_i elements, as the structure of general copyright law and the specific provisions governing broadcasters' related rights are different; hence, the relevant policy elements that affect scope of protection are different. This is to say that not only are the number of elements n and n' different, but some of the elements z_i or z'_i may have zero values for a given value of i .

Take for example, the concept of 'substantial similarity' for copyright infringements, which is certainly a key element of z . The level of substantive similarity needed to trigger legitimate copyright infringement claims is one of the strongest judicial considerations that affect the overall scope of copyright protection. Furthermore, while this concept is most normally conceived in qualitative terms (i.e. the essence and character of the allegedly infringing copied elements), it can also be conceived in quantitative terms (i.e. what proportion of the allegedly infringing work is comprised of elements of the copied work). Hence, this concept lends very well to the idea of a continuous variable like an element z_i .

In the case of broadcasters' rights, the activities under the scope of protection have much less of a continuous character, and are generally more binary in nature. For example, the act of a secondarily retransmitting an initial broadcaster's signal cannot be evaluated in continuous variable terms – a signal is simply retransmitted or not. The same logic also applies for activities such as decryption – an encrypted signal is simply successfully decrypted or not – in practical terms, there are generally not 'degrees of decryption'. One element of the bundle of rights of the broadcasting organisation that may be analysed in continuous terms may be the right of fixation.²⁴¹ However, fixation rights for broadcasts generally exist

²⁴¹ For example, various degrees of fixation can be made from a live television broadcast: ranging from a single frame/picture, clips of varying duration, to fixation of the complete programme. Furthermore, these fixations may be audio only, picture only, or audiovisual. Hence these different

in a much different policy space all together, and need to be analysed in conjunction with primary copyright law, which further complicates the issue of extrapolating a relationship between the optimisation of \mathbf{z} and \mathbf{z}' .²⁴²

In any instance, notwithstanding the ways in which standard copyright and broadcasters' rights diverge, the strongest criticism of the logic that *each element of \mathbf{z}' would need to be set lower than the corresponding element of \mathbf{z} in order for \mathbf{z}^* to be set lower than \mathbf{z}^** is that it simply ignores the main lesson from the economic analysis of patent law. That key lesson is that the various elements that affect scope of protection of an IPR (i.e. length and breadth) are inherently substitutable in nature, and hence form a policy trade-off. As a result of their respective subject matter characteristics, copyright law has evolved to have a very long term and (relatively) narrow breadth, while patent law is characterised by a relatively short term and very broad protection. In fact, it is on this notion of a policy trade-off that Gilbert and Shapiro argue for a patent right that can be virtually infinite in duration, with breadth adjusted to meet a defined award structure. In other words, there are conceivably different combinations of the elements \mathbf{z}_i or \mathbf{z}'_i which can result in the same overall value of \mathbf{z}^* or \mathbf{z}'^* .

[5]-7 CONCLUSION

This chapter focussed on the question of the 'optimal scope of protection for the rights of broadcasting organisations'. In order to answer this question, it attempted to see how the existing literature on models of patent and copyright protection might be applicable to broadcast transmissions. However, instead of using models based on industrial organisation considerations, it used an 'Incentive-Access' model based on a broader welfare-perspective.

Analysing this model and adjusting its parameters to the case of broadcast transmissions, the main conclusion is that the optimal scope of protection for broadcasters' related rights is lower than that for 'primary' copyright. In applying this result, it was argued that there should be liberal interpretations of limitations and exceptions to copyright and related rights, particularly in terms of provisions on technological protection measures, and the application of anti-circumvention provisions. In this regard, regulations such as 'broadcast flag' policies might be undesirable.

One constraint to this application is however the fact that there are different policy aspects that affect the scope of broadcasters' rights, than those for other forms of intellectual property. As such, it is necessary to pay some attention to how these various policy elements differ; this very issue will be discussed in Chapter 6.

extents of fixation can conceivably be arranged on continuum akin to a scale of substantial similarity.

²⁴² The right of fixation exists in a much different policy space, as its main purpose may not be to protect broadcast transmissions *per se*, but rather to protect content which is not eligible for primary copyright-protection (such as live broadcasts of sports performances), and hence the broadcasters' rights serve as a mechanism to fill the public good gap left by general copyright law (see discussion in Chapter 4).

CHAPTER 6: POLICY LEVERS FOR BREADTH OF PROTECTION

This chapter directly follows from the previous Chapter 5, which analysed the issue of optimal scope of protection of broadcasters' related rights, relative to copyright. Chapter 5 noted that the concept of 'scope' generally had two aspects – length and breadth of protection. This chapter focuses on the concept of 'breadth' of protection. In this regard, the underlying research question in this chapter is “*What are the practical policy dimensions that affect the scope of protection for the related rights of broadcasting organisations?*”

[6]-1 INTRODUCTION

Following from the discussions on the relationship between the optimal scope of broadcasters' rights relative to that of 'primary' copyright, Chapter 5 noted some issues in how this relationship is to be construed. Central to this relationship are the various parameters which affect the overall scope of protection for the given subject matter, i.e. the elements z_i of the vector \mathbf{z} , where 'z' is a parameter that represents the overall level of 'propertisation'.

As noted previously, these parameters are normally separated into the concepts of (i) length and (ii) breadth. While the notion of length of protection is straightforward²⁴³, the concept of breadth of protection is complex as it groups together many different policy parameters and market characteristics. This chapter hence seeks to analyse the various constituent elements of the vector \mathbf{z} – i.e., the various technical aspects of breadth and scope of protection, as they relate to the unique subject matter of broadcasting signals. This is done by analysing key features of both the copyright and patent law systems.

By analysing the various policy levers that affect scope of protection in other areas of intellectual property, this chapter concludes that that these levers for protection breadth²⁴⁴ simply have little (or special case) significance to the case of broadcast signals. Hence, it is argued that the element of 'limitations and exemptions' should have a very high weighting in the over index \mathbf{z}' (the scope of protection for broadcasters' rights). Consequently, the discussion attempts to justify the conclusion of Chapter 5 that 'exemptions and limitations for broadcasters' rights should be set less than that for general copyright' (i.e. that indeed z_i^* should be less than z_i^* , where 'i' is the '*restrictiveness of limitations and exceptions and/or fair use doctrines*'). This strong focus on limitations and exceptions is also briefly supported through a market correction perspective.

²⁴³ See Denicolo (1996), at 251.

²⁴⁴ For an overview of some of the considerations that can affect protection breadth in the case of patent law, see Denicolo (1996).

[6]-2 ELEMENTS OF BREADTH OF PROTECTION

The following section will review some of the key elements that are considered as affecting this breadth parameter, as identified in the literature on copyright and patent law.²⁴⁵ It will then briefly discuss how each element can or cannot be applied as a policy tool in the case of constructing broadcasters' rights, and manipulating the overall scope of protection

[6]-2.1 Substantive Qualifying Requirements

In order to understand the concept of breadth in patent law, it is important to recall the relevant requirements for patent protection.²⁴⁶ To be eligible for patent protection, an invention or innovation must fall within defined statutory patentable subject matter, and be deemed as having (i) novelty, (ii) non-obviousness or inventive step, and (iii) utility or industrial application.

The novelty requirement ensures that the innovation is indeed a new solution to some technical problem, and is in place to ensure that protection is not given to knowledge which already exists (either under separate protection, or within the public domain). This avoids creating a duplication of rights or deadweight losses which do not correspond to the creation of new knowledge. Similarly, the inventive step or non-obviousness criteria determines whether the technical solution proposed would be 'obvious' to a person skilled in the relevant art of the subject matter; this ensures that patent applications are granted only where there is substantial and demonstrable advancement in the technical field, as opposed to minor incremental innovations.²⁴⁷ The third criterion of industrial application or utility, is arguable the least important criterion in terms of impact and economic significance – it requires that the patent application can be demonstrated as having practical value and are implementable in real world environments.²⁴⁸

As patent protection is predicated on an application process, applications are examined to determine whether such requirements are met. Therefore, the

²⁴⁵ As noted previously, patents are construed as having a relatively short length of protection, while having a wide breadth. Copyright on the other hand has a relatively long term of protection and relatively narrower breadth. Given the nature of how these rights are structured, discussions on the concept of 'breadth of protection' are more developed in patent literature than for copyright, and as such, many of the factors discussed in this section are drawn from literature on the economic structure of patent law.

²⁴⁶ The case of copyright requirements is discussed in the below sections on subject matter and legal certainty.

²⁴⁷ In some jurisdiction, a separate legal entitlement exists for 'utility models' or 'petty patents' for incremental innovations that are not substantial enough to qualify for patent protection. However, Utility Models are generally not integrated into the system of agreements that underpins international harmonization of intellectual property policy. For an overview comparison between Utility Models and Patents, see Brack (2009).

²⁴⁸ A common example of an invention that would not meet this criterion would be a perpetual motion machine, as such a machine is not possible to implement, as it would be in defiance of the natural laws of physics.

‘strictness’ of these requirements and extent of examination effectively form a sort of delineation to determine which applications are granted and which are not.²⁴⁹

As such, one of the main factors that affect patent breadth is the stringency of requirements and prudence of examination. This is a function of both direct policy considerations, and institutional capacity. On the policy level, patent requirements are set out in the governing legislation and regulations, and are refined through precedents of the granting authority as well as case law where applicable. Furthermore, institutional factors such as resource and expertise constraints may affect the prudence of examination, especially in smaller, less developed jurisdictions.²⁵⁰ Therefore, the ability to obtain a patent may differ between jurisdictions (or even subject matter) even where substantive law is relatively similar²⁵¹, thus affecting the scope of protection of the patent system as it determines what applications are able to actually obtain protection.

In the case of copyright, there is no requirement for formal registration to obtain protection.²⁵² As such, there is no notion of a formal examination *ex ante* to the granting of a right. Copyright is considered as being granted by mere virtue of original authorship of a literary or artistic work.²⁵³ Therefore, one of the main policy dimensions that affect the overall scope of the protection of the copyright

²⁴⁹ The principle of patent grants is the exchange of private exclusive rights for socially beneficial technical information. As such, central to the patent examination process is an evaluation as to whether there is ‘sufficient’ disclosure – i.e. whether the information provided in the claims and description allow for effective reproduction of the innovation. In some jurisdictions, the applicant is also required to disclose the ‘best method’ of executing the disclosed innovation, which may include supplementary information outside of the scope of protection. In such cases, there is a greater degree of information disclosure, which may imply a lower overall effective scope of protection, as such supplementary information if kept secret, may provide some competitive advantage for the innovator, even after the patent has expired (hence providing a form of residual protection by increasing the costs of duplication for competitors).

²⁵⁰ One extreme is to grant patents after applications are examined for formalities only, and no examination is done for compliance with substantive qualifying requirements. Such a system hence amounts to a registration system rather than a search and examination system, as technical validity examination *ex post* grant is fully delegated to the courts. For a brief overview of how this compares to other regimes, see *WIPO (2014) - Policy Guide on Alternatives in Patent Search and Examination*. Lemley (2001) goes as far to even suggest that the patent office may make a rational decision to be ignorant of the validity of patent applications, and that courts are able to determine validity more efficiently.

²⁵¹ Bond and Zissimos (2010) provide a model of asymmetric equilibrium that should how optimal patent breadth can vary across countries, even if countries are identical. These differences arise from policy decisions regarding the role of innovation in overall economic development.

²⁵² Article 5(2) of the Berne Convention states that “The enjoyment and the exercise of these rights shall not be subject to any formality”. This provision is incorporated into international trade law through Article 9 of the TRIPs Agreement. However, which formalities are not necessary for the grant of copyright, some jurisdictions operate voluntary registration systems. Under US copyright law for example, an incentive for registration is given through the provisions that make registration necessary for claims for statutory damages; as such, registration facilitates a wider range of legal remedies in addition to providing increased legal certainty and lower burden of proof in instances of litigation. For a discussion on various rationales for registration, including market-based incentives, see Oliar et al (2014).

²⁵³ The issue of the assumption of existence of copyright is discussed in the section below on legal certainty.

system, is the applicable standard for ‘originality’.²⁵⁴ The originality requirement in copyright law is generally considered to be low, particularly relative to the novelty requirement in patent law; in terms of this (which again reinforces the assertion that the cumulative effect of copyright is much broader than that of patents).

[6]-2.1.1 Application to Broadcast Transmissions

A broadcast transmission is generally not required to meet any formal requirements to enjoy protection as a related right. There is no requirement akin to the concepts of ‘originality’ in copyright law, or ‘novelty’ in patent law.²⁵⁵ Therefore, the applicable standards for such criteria do not form part of the policy dimensions which can be adjusted to affect the overall scope of protection.

This lack of qualifying criteria is related to the fact that broadcasting is a technical rather than creative or innovative act, and hence there is certainty in the nature of the subject matter and its characteristics. Furthermore, the nature of a signal itself, independent of the content embedded within, is such that its protection does not constitute a removal of material from any information commons; as such, the very idea of qualifying criteria would not necessarily make sense for this subject matter.

[6]-2.2 Certainty of Subject Matter

Following from the above discussion, it follows that some qualifying criteria in intellectual property rights are continuous in nature. For example, there is conceivably a spectrum of different ‘levels of inventive step’ for a given field of innovation, and the scope of the patent system is partially set by the given standards used by the examining office.²⁵⁶ Likewise, there is conceivably a spectrum of different levels of ‘originality’ for a given class of creative works, and the scope of the copyright system is partially set by defining the level of originality, where any works beneath that level are not able to qualify for copyright protection. Therefore, it can be said that there is some level of inherent uncertainty about the qualifiability of both patent and copyright subject matter.

However, there are more (relatively) discrete criteria that also affect the qualifiability of protection – the concept of protectable subject matter. In both patent and copyright law, the set of protectable subject matter is normally defined by statute. However, given the practically infinite nature of the varieties of

²⁵⁴ As discussed in Chapter 5, the standard of originality for copyright is not only relatively low, but there is a trend in case law in various jurisdiction which suggested that the standard is becoming periodically lower.

²⁵⁵ See Chapter 3 for discussion on this issue, particularly the lack of application of the functionality doctrine for broadcasters’ rights.

²⁵⁶ For example, non-obviousness or inventive step is measured with respect to what a ‘person having ordinary skill in the art’ of the relevant technological field would consider as an obvious technical solution. As such, the way in which this notion of ‘a person ‘skilled in the art’ is construed and interpreted would have implications for the stringency of the non-obviousness criteria. For a discussion on some of the considerations for this concept, see Meara (2002).

different technical and artistic fields, the set protected subject matter is often defined on a negative basis; i.e. it is common for statute to set out what is not protectable subject matter, rather than what is.²⁵⁷ These definitions of protectable subject matter therefore form an important element of the overall scope of both the patent and copyright systems.

Furthermore, the segmenting of different subject matter groups allows for various policy dimensions to be applied differently to different subject matter sub-groups, depending on public policy issues and the nature of the subject matter. While this is not common in patent law, it is practiced in some sub-fields of copyright law.²⁵⁸

In any instance, the policy dimension of defining subject matter groups depends on the degree to which the overall subject matter group is heterogeneous, and the ease of defining sub-groups which are relatively homogeneous. As such, there is an inherent trade-off in stratifying subject matter groupings; on one hand, there is a presumed increase in efficiency, as the system becomes more tuned to the nature of different subject matter classes, and their respective market characteristics and underlying incentives. On the other hand however, the more stratified the system becomes, the more arbitrary the delineations between different subject matter classifications, which necessarily introduces legal uncertainties and ambiguities which might even reduce the effective scope of protection in some cases.²⁵⁹

²⁵⁷ Article 2 of the Berne Convention (which is incorporated into the TRIPs Agreement though TRIPs Article 9) provided a non-exclusive list of the types of works that are included under the general definition of 'literary and artistic works'. However, Berne Article 2(6) goes on to state that it is a matter of domestic policy "*to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts*".

Article 27(1) of TRIPs sets out that patents shall be available for "*inventions, whether products or processes, in all fields of technology*", while 27(2) and (3) set out conditions and subject matter which may be excluded from patent protection.

²⁵⁸ Under TRIPs Article 12, the minimum length of protection is 'life plus fifty years'; however, some jurisdictions may choose to offer longer terms, though this longer term need not necessarily be for all classes of works.

²⁵⁹ Consider for example the case of copyright subject matter. It is intuitive that there is substantial certainty in delineating between two very different types of subject matter - for example works of music and works of architecture. The copyright system can thus be fine-tuned to take into consideration the different market characteristics and production incentives of these two classes of works. However, if the subject matter classification of 'musical works' is to be further stratified, it might imply making a delineation based on some relative structural characteristic such as genres of music. This would therefore involve some sort of subjective judgment on what constitutes different sub-groups, and introduce legal uncertainties and ambiguity, which reduces the scope of effective protection in the parent subject matter group as a whole. This may be seen as an economic basis for the doctrine of aesthetic neutrality, which provides that in the context of interpreting copyright law, the courts should not make judgments on the artistic merit or social value of works. This is partially the reason why extravagant symphonic orchestral composition and three-chord punk rock songs attract the same legal protection, despite their presumed differences in market characteristics and production incentives.

[6]-2.2.1 Applicability to Broadcast Transmissions

The technical nature of broadcasting means that there is a high level of certainty about what constitutes broadcast transmission, and hence the subject matter scope is relatively well defined. Furthermore, given that broadcasting is defined for public policy regulation, there is even more certainty as to who possible beneficiaries are. There are however different possible ways to stratify broadcasting signals into sub-groups. Some of the ways to make distinctions between types of transmission include the technology used, the market of the intended transmission, and the geographical basis of the transmission. As such, these distinctions can be used as policy dimensions in constructing the scope of protection for broadcasting organisations. However, given that these distinctions are technical in nature, they more accurately mirror the issue of beneficiary definitions rather than subject matter definitions.

[6]-2.3 Classes of Beneficiaries

The nature of the beneficiaries of a right can also be a policy dimension that affects overall scope of protection. While not generally practiced, it might be possible to legislate different terms of protection²⁶⁰ for different patent owners; for example, it can be stipulated that state or publicly funded research institutions enjoy a patent term shorter than that offered to their private counterparts.

In the field of copyright law, the beneficiary is generally understood to be the 'author' or a work; however, copyright may be vested in another party such as an employer under the 'work for hire' doctrine where there is an employee-employer relationship, and the work is created in the course of employment. Therefore it is, in principle, possible to define different terms of protection for different beneficiaries.²⁶¹

[6]-2.3.1 Applicability to Broadcast Transmissions

As discussed above, it is indeed possible to make distinctions between broadcast signals depending on technical and market characteristics. In terms of technical mode of transmission, different subject matter in this regard would relate to different types of broadcasters, and hence beneficiaries.

In terms of considering the scope of protection for broadcast transmissions, a key consideration is therefore the types of transmission and broadcasters that are

²⁶⁰ While this part of the discussion deals with different terms of protection, it is included as a factor affecting breadth of protection (as opposed to length), as the policy dimension is based on how the different possible groups of beneficiaries are partitioned. Furthermore, the differentiated treatment can also be on some other practical aspect of protection rather than term length.

²⁶¹ This is done, as the basis for calculating the beginning of the fixed-protection time is different. The standard case is to consider the life of the author and add on a fixed statutory length of protection (fifty years minimum), while a different basis for works-for-hire can be the date of publication or the date of production.

afforded protection.²⁶² This is indeed a very critical issue as it relates to the role intellectual property plays in the evolving landscape of technology and content consumption.

As discussed in Chapter 2, a central aspect of the current international debate is whom the beneficiaries of broadcasters' rights should be. In this regard, the critical question remains as to whether webcasting should attract similar protection as that offered to traditional broadcasting. Another way of differentiating between beneficiaries might also be to structure rights differently for commercial and public service broadcasters. As will be discussed in Chapter 10, this is partially done – at least in terms of the right of retransmission.

[6]-2.4 Territoriality and Exhaustion

Generally, an underlying premise of intellectual property law is the principle of territoriality – an intellectual property right is only valid in the jurisdiction in which it is granted. Therefore, the exact scope of a right (or even its very existence) over the same innovation or work may differ between jurisdictions depending on national legislation.

Stemming from this principle of territoriality, a significant economic policy dimension of intellectual property rights is the principle of exhaustion. The applicable exhaustion doctrine determines whether a party can legally (re)-sell a good protected by intellectual property in a national or international market.

National exhaustion (sometimes referred to as the 'doctrine of first sale') exists in most jurisdictions, and provides that once a protected good is sold to the first buyer, the rightsholder is no longer able to exercise control over subsequent secondary sale of the good. Therefore, the intellectual property right is said to have been exhausted in the national market. This principle is rooted in considerations that analogous to policies on vertical restrictions in competition law.²⁶³ More controversial however is the principle of international exhaustion. Where international exhaustion exists, a rightsholder cannot restrict importation of a good that has been initially sold in a foreign market. Therefore, international exhaustion determines whether parallel importation of a protected good is possible – a factor which has a major impact on the economic power of a rightsholder where the good is subject to significant international trade and inter-market arbitrage.²⁶⁴ It can therefore be said that all other things being equal,

²⁶² The issue of how to treat different possible beneficiaries, or rather which beneficiaries to define, is a central issue in current policy debates on the protection of broadcasting organizations. In particular, the contentious issue is whether to extend the protection given to traditional broadcasters, to online broadcasters, which hence alludes to the application of the concept of technological neutrality. For further discussion, see Chapter 2.

²⁶³ For discussion on relationship between exhaustion regimes and price controls, see Maskus (2000) at pp213

²⁶⁴ The issues of exhaustion, parallel importation, and competition are particularly critical in the field of pharmaceuticals. Such policy dimensions are hence very important in debates about the

jurisdictions which practice international exhaustion offer a lower effective scope of protection than those which do not. In particular, it represents a restriction on a rightsholder's exclusive right to authorise importation of a protected product.

[6]-2.4.1 Applicability to Broadcast Transmissions

For the most part, the concept of parallel importation is captured within the broadcasters' retransmission right. Indeed, the concept of a retransmission of a broadcast signal is analogous to 'resale' of the protected subject matter, in that they are both a secondary distribution. However territorial considerations do not affect the application of this right.

For example, consider a Broadcaster 'A' is operating in jurisdiction A, and a broadcaster B retransmits A's signal. It does not matter whether B is based in jurisdiction A or some other jurisdiction B, as authorisation from Broadcaster A is needed in both cases. The only territorially significant question is if the broadcast signal of A spills over into jurisdiction B; in such a case, the question arises as to whether the laws of jurisdiction B also apply. This matter is discussed in detail in Part IV of this manuscript, with particular regard to the 'country-of-origin principle'.²⁶⁵

Therefore, the concept of exhaustion – at least in terms of national vs. international exhaustion – is already captured in the concept of a retransmission right. It hence does not provide for a unique policy level to affect breadth of protection.²⁶⁶

[6]-2.5 Scope of Claims and Similarity Standards

Intellectual property rights are generally exclusive in nature, and they give the rightsholder control over authorisation and prohibition of certain activities relating to the protected subject matter. Furthermore, the economic basis of both patent and copyright law is the use of property rights to solve a public good market failure. Therefore, the economic power of intellectual property rights is in their negative assertion rather than their positive assertion; i.e. control over prohibition of activities.

In understanding the scope of protection of intellectual property rights, it is therefore important to understand not only how the rights are constructed and granted, but also how they are applied to users and/or enforced against potential infringers. The natural corollary of the 'set of activities that are protected' is

role of intellectual property in economic development, and more specifically, health policy. Generally, see Love (2006) or Correa (2006).

²⁶⁵ The country-of-origin principle provides that for the purpose of copyright law, a broadcast is deemed to have been made in the jurisdiction in which it was transmitted, irrespective of the jurisdiction in which it might be received.

²⁶⁶ For completeness, it is stressed that the above comments relate to exhaustion of a broadcast communication. In terms of exhaustion of the copyright over the content embedded in a broadcast, the scenario is different. This issue is analysed in Chapter 10.

therefore the 'set of activities that second parties can undertake without resulting in infringement'.

In patent law, the exact limits of protection are determined by interpreting the claims set out in the patent filings. The drafting of patent claims is a strategic decision by the patent applicant, as there is an inherent trade-off in the specificity of the claims. The applicant has the incentive to draft the claims as broadly as possible, so as to maximise the scope of protection for the innovation; i.e. occupy the maximum space possible within the technological field.²⁶⁷ However, too broad claims are likely to be rejected by the granting authority as not being compliant with the substantive requirements of patent law, and the principle of 'sufficient disclosure'.

It is therefore not only possible, but a critically important aspect of the innovation ecosystem as a whole, for second parties to engage in 'inventing around'. This refers to finding another technical solution to the same technical problem addressed by a patent, without infringing on the claims of that patent.²⁶⁸

Broadly construed claims, which would partially result from the standards of examine criteria used by the examining office (as discussed above)²⁶⁹, imply a wide scope of protection enjoyed by the rightsholder. This in turn translates to a lower scope for 'inventing around' by second parties, as there is a higher probability that a given (alternative) technical solution would violate the claims defined in the patent.²⁷⁰

In terms of copyright law, the issue of infringement is assessed with reference to the concept of 'substantive similarity' between the protected work and the allegedly infringing work. The lower is the standard for similarity (or the more

²⁶⁷ Yiannaka and Fulton (2001) challenge the traditional assumption that an applicant would claim for the broadest level of protection possible. The authors consider the chosen breadth of claims as a strategic decision, in addition to the traditional decision of whether to patent or not, and conclude that the profit maximising firm will chose a level of protection to induce the desired behaviour by the entrant competitor.

²⁶⁸ Denicolo (1996) discusses four interpretations of patent breadth from an industrial organisation perspective: (i) The fraction of cost reduction that does not spill out as freely available technology to the non-innovating firms, (ii) the 'distance' between the patented produce and the products other firms can sell without infringement (where a wider patent implies a high demand curve), (iii) the cost of imitation, and (iv) the number of applications of an innovation in independent markets which are reserved for the patentee. Furthermore, in modelling the optimal policy mix of patent length and breadth, the seminal treatment of Gilbert and Shapiro (1990) considers a very general definition of patent breadth – *"the breadth of a patent with the flow rate of profit available to the patentee while the patent is in force"*.

²⁶⁹ Scotchmer et al (1998) at pg 24 states – *"The US patent statute does not refer to patent breadth, except implicitly in how claims are limited by the enabling disclosure, and in the requirements of novelty and non-obviousness. These requirements mean collectively that the claimed technologies must differ substantially from "prior art." The disclosure requirement is a test of whether the patentee actually invented the technologies claimed."*

²⁷⁰ In analysing the role of effect patent life and breadth in technological progress, Scotchmer et al (1998) make a distinction between 'lagging breadth', which protects against imitation, and 'leading breadth', which protects against new improved products; the existence of the latter obviously implies a wider overall scope of protection.

lenient the applicable test) to trigger a finding of infringement, the greater is the scope of effective protection enjoyed by the copyright holder.²⁷¹

However, in addition to the issue of substantive similarity, some courts, when considering copyright infringement claims, examine the issue of likelihood of access to the protected work. The probability that the alleged infringer actually accessed the original work, is construed as a determinant of the probability that an infringement actually took place. As a result, courts may consider the factors of substantive similarity and likelihood of access in an inversely proportional manner, in making determinations on infringements. This is to say that where a very high likelihood of access has been established, a low degree of similarity can trigger a finding of infringement. What follows is that it is possible to have a finding of non-infringement even where there is a high degree of similarity, as the likelihood of access is very low.

While the judicial practice described above is specific to the US copyright system, it is presented as it is a good exemplification of an important concept in intellectual property law – independent creation. The example above discussed a scenario where although two works may have been extremely ‘similar’, the likelihood of that the alleged infringer accessed the allegedly infringed work is so low, that the reasonable conclusion is that the allegedly infringing work was created independently, and similarities are relegated as mere coincidences. In copyright law, independent creation is permissible, and hence there is no finding of infringement in this scenario. The reasoning behind this is that the possible range of human creativity and its consequent expressions is so boundless, that the possibility of two creators producing the same work is so negligibly small, that permitting independent creation as a defence against infringement does not really restrict the effective scope of copyright protection in practical terms.

In patent law however, independent creation is generally not permitted; i.e. ignorance of the existence of an existing protected technical solution is not an accepted defence against infringement of that patent.

The existence of this policy follows from the fact that the number of viable technical solutions to a technical problem is finite, and constrained by the state of overall existing technology. Hence, the probability of two innovators producing the same innovation is relatively high²⁷², and so permitting independent creation would result in major restriction on the overall scope of patent protection.

²⁷¹ However, the foundation principle of the copyright system is that copyright is extended to creative expressions, but not conceptual ideas – this principle is known as the ‘Idea-Expression Dichotomy’, and is established in TRIPs Article 9(2), which states that “*Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such*”. The role of the court is therefore sometimes to determine whether an alleged infringement is merely an independent creative expression of the same underlying conceptual idea.

²⁷² A major branch of patent economics literature deals with patent races, where firms compete in R&D expenditures to obtain a patent. Such literature often raises concerns about the social losses from rent seeking and duplication on costs. However, it does underscore the point that a given probability of competition firms arriving at the same technical solution is a common theoretical premise.

Furthermore, as the patent system is based on a system of filings and openly accessible documentation, it is a viable expectation for entities engaged in innovation to conduct patent searches and investigations into the current state of the art, to ascertain whether their activities infringe on existing rights.²⁷³

[6]-2.5.1 Applicability to Broadcast Transmissions

The nature of broadcast transmission as intellectual property matter is very different than that in the patent and general copyright system. The subject matter of protection is a technical signal, and not necessarily abstract information whose protection represents some direct detracting from the public domain of possible knowledge.²⁷⁴ Furthermore, the protected subject matter is not of a creative or innovative nature.

Consequently, the issue of infringing secondary creations does not arise – infringements only arise based on possible uses of the subject matter itself. Therefore, the issue of constructing a scope of protection through a notion such as an applicable standard for similarity does not apply. Indeed, substantively similar independent creation is indeed theoretically possible, if a second party broadcasting organisation assembles an identical programming schedule and transmits it independently. As such, the issues of similarity standards and claim scope do not form part of the policy dimensions that affect the overall scope of protection for broadcast transmissions.

[6]-2.6 Costs of Application, Monitoring and Enforcement

Where there is a formal system for application, examination, and registration, (such as the case of the patent system), the issue of fees is critical. Patent application fees and prosecution procedures are notoriously costly, and involve the expenditure of significant resources. While this does not affect the overall scope of protection per se, it does create a sort of barrier to entry in some cases, as it affects who can participate in the system before even being granted a property entitlement. High patent fees and complicated prosecution procedures therefore disproportionately affect small and medium enterprises in a negative way, as such firms have greater limitations in terms of access to financing, legal expertise, reaping economies of scale in patent administration, and overall ability to bear risk.

Regulation of application fees and procedural complexity can therefore indirectly affect the overall scope of protection from the specific perspective of an individual firm.

²⁷³ This is however not possible for those engaged in production of literary and artistic works, as not only is copyright not based on a compulsory registration system, but the nature of artistic and creative activities tends to be more dispersed (implying very significant search costs).

²⁷⁴ See Chapter 3 for detailed discussion on this.

[6]-2.6.1 Applicability to Broadcast Transmissions

As stated multiple times previously, copyright is generally a non-registration system, and hence the issue of fees and procedural complexity does not arise. This is also the case for broadcaster's rights, where registration serves little possible purpose due to the lack of qualifying criteria.

However, all branches of the intellectual property system (including broadcasting) require monitoring and enforcement in order to make protection effective. Therefore, the ability to absorb the costs of monitoring and enforcement activities is a relevant factor for the effective scope of protection enjoyed by any rightsholder. Nevertheless, such costs are determined by market environment factors, which are outside of the control of the policy maker.²⁷⁵

[6]-2.7 Negative and Positive Rights

Notwithstanding the above comments on monitoring and enforcement, one aspect that can affect these dynamics is the way that the property right is constructed – namely the notions of 'prohibition' and 'authorisation'.

To understand this concept, it is useful to first take examples from the language of the key intellectual property treaties. In terms of copyright, the TRIPs Agreement refers to the Berne Convention, which in turn sets out certain rights in the format that the copyright holder has the 'exclusive right of authorising' certain uses of a protected work. The WIPO Copyright Treaty also sets out rights using this same language.

However, the Rome Convention sets out rights for broadcasting organisations with the language that broadcasting organisations 'shall enjoy the right to authorize or prohibit' certain actions. As discussed in Chapter 2, the TRIPs Agreement does not explicitly provide for broadcasters' rights, but instead contains a provision that 'broadcasting organizations shall have the right to prohibit' certain actions. The Rome Convention however provides performers with a different right that takes the form of 'the possibility of preventing' (i.e. prohibiting) certain actions.

Therefore, in the realm of copyright and related rights law, the textual basis of a right can take the form of the right to (i) 'authorise', (ii) 'prohibit', or (iii) 'authorise and prohibit' certain actions.

In the area of patent law, TRIPs Article 28 sets out that patent owners have the exclusive rights to 'prevent third parties not having the owner's consent' from undertaking certain acts. TRIPs Article 16 also uses similar language for the exclusive rights of trademark owners. The applicable provisions in the field of industrial property hence generally seem to take the form of a prohibition right.

²⁷⁵ See Chapter 7 for analysis of issues related to enforcement.

However, the explicit reference to the concept of the 'owner's consent' also implies that these rights have an authorisation element.

The difference between a 'right to authorise' and a 'right to prohibit' is not just semantic and is indeed quite significant. The notion of a 'right to authorise' implies a default state that authorisation is needed; an activity is therefore infringing if it is undertaken without such authorisation. A 'right to prohibit' however suggests that the right needs to be asserted; i.e. an action is only infringing if it continues after the rightsholder has asserted the right to prohibit. The right to authorise can therefore be exercised *ex ante* a restricted act but that act does not necessarily have to subsequently take place.²⁷⁶ The right to prohibit however can be exercised either *ex ante* or *ex post* a restricted act, either pre-emptively before an act has taken place, or reactively after the act has necessarily taken place.

The right to authorise is therefore a positive right as it requires a certain action by the user (i.e. to seek authorisation), while the right to prohibit is a negative right, as it requires inaction (i.e. for the user to desist from the restricted act). Furthermore, the positive right implies a corresponding negative right, as prohibition of a restricted act naturally arises from the default state of withholding authorisation. The reverse is however not true, and the negative right (to prohibit) does not imply a corresponding positive right (to authorise); i.e. the rights are asymmetrical.

The choice of wording can have major implications for the way in which rights are administered, and the terms under which certain activities are framed as permissible. Substituting an exclusive 'right to authorisation' with a 'right to prohibit' is therefore a shift in the default rule of permissible activity. Protection arises from a 'right to authorise' without an assertion of that right by the rightsholder. A 'right to prohibit' however, creates protection only when it is actively asserted by the rightsholder.²⁷⁷ Such an action of assertion might possibly involve the incursion of some form of transaction cost, and hence the net benefits to the rightsholder are lower for prohibition as compared to authorisation.

From a Coasean bargaining perspective, it should not matter whether the right is one of authorisation or prohibition, as the 'right to undertake the action' or the 'right to prohibit the action' would be efficiently negotiated and allocated irrespective of the initial property endowment. This is of course only the case in the absence of transaction costs. Where transaction costs do exist, the most desirable legal rule is one that bestows the property right onto the party that is able to administer it most efficiently. In this regard, transaction costs – specifically in the form of monitoring costs – are most certainly asymmetrical between rightsholders and users.

²⁷⁶ This is of course a simplified discussion on a static basis. In some circumstances, an authorisation right might also be granted retroactively *ex post* a restricted act.

²⁷⁷ For completeness, it should however be noted that this discussion only affects the scope of protection offered by the property right itself. In reality, even where the right is only a right of prohibition, other legal rules might also prevent unauthorised actions by users. For example, there might be criminal liability for some intellectual property infringements.

A user – by definition – has knowledge of their own activity, and hence the possibility of potentially infringing on the rights of a third-party; of course, in practical terms, this is limited by certain legal uncertainties in the boundaries of existing rights (discussed below). However, it is extremely costly and very impractical for a rightsholder to actively monitor the activities of every potential user to ascertain potential infringements. Hence, it is less costly to administer a rule that users seek permission from rightsholders, rather than a rule that rightsholders must actively assert their rights in every case. For this reason, the majority of the intellectual property system is efficient in using authorisation rights as opposed to prohibition rights.

These differences in cost of excising rights might also exist in actual adjudication. If a right to authorisation exists, the burden of proof for defence is generally on the accused infringer. For a right to prohibit however, the burden of proof is generally on the rightsholder to prove that the right was indeed asserted by not complied with.

For these reasons, the ‘right to prohibit’ is necessarily a weaker right. This is entirely consistent with the general observation that related rights tend to be more restricted in scope as compared to primary copyright, and that patent rights are generally seen as very strong.²⁷⁸

[6]-2.7.1 Applicability to Broadcast Transmissions

It is indeed very much possible to frame broadcasters’ rights as a negative right (i.e. a right to prohibit) rather than positive rights (i.e. a right to authorise). Indeed, such an approach would seem quite consistent with the existing system of related rights law. However, the practical use of this policy lever would differ based on the different elements of the rights.

For example, in the case of retransmissions, the restricted use is technical in nature and the pool of potential users (at least traditionally speaking) is finite and known with some degree of certainty. As such, monitoring costs are relatively low and the administration of the right is characterised by low transaction costs. Hence framing the broadcaster’s retransmission right as a negative right might have little impact in most cases. It may however still have market effects, as it shifts the burden of these transaction costs away from the user and towards the broadcaster, which might favour players with low bargaining power such as small cable networks in developing countries (who retransmit content from large foreign broadcasters).

For rights such as fixation (and post-fixation), reframing broadcasters’ rights as negative rights might be desirable. Since such fixation rights are associated with various social costs (such as public domain enclosure and anti-commons

²⁷⁸ What is not insignificant is also to consider that the textual basis of copyright, patents, and trademarks all refer to an exclusive right. The word ‘exclusive’ is not used in the case of related rights, which seems to be an acknowledgement of the fact that related rights are often layered onto of primary copyright.

problems), negative rights might prevent restrictions of certain welfare-enhancing uses for which the rightsholder might be rationally apathetic to potential infringements. However, the same goal can be achieved with more legal certainty by implementing strong limitations and exceptions to broadcasters' rights, irrespective of how they are constructed.

[6]-2.8 Legal Uncertainty

Any discussion on how to construct the scope of a property right obviously presumes the existence of a right in the first place. However, this may not always be the case. In terms of real property, there is an extremely high degree of certainty in terms of the existence of a right (e.g. it is affirmed in the physical form of a deed). In contrast, in intellectual property cases, a contended issue might be the existence of the right itself.

Within the intellectual property system, there is often varying degrees of certainty about the existence of a right. Generally, certainty is very high in registration systems such as patents, as an application for a right has been vetted by an examining authority, and affirmatively granted by the granting authority.

However, the courts often have a further role in either upholding or negating an intellectual property right when litigation arises. As such, the court serves as sort of a mechanism for the secondary validation of a registered right. This role stems from the fact that before a determination can be made on whether a right has been infringed, it must first be established that that right exists. Furthermore, the competitive nature of technological (and sometimes creative) markets means that the court also serves the role to adjudicate between rightsholders and those in opposition to the existence of the supposed right, even outside of the context of infringement allegations.²⁷⁹

This role of the court depends on the institutional strength of the examining and granting offices, which is often interpreted as translating into the quality of granted patents. High quality patents are deemed to stem from a system that has very comprehensive examination procedures for applications, and applies relatively high standards for qualifying criteria. In such cases, the role of the court as a secondary vetting instrument is often minimal, and therefore there is a high degree of certainty in the right (i.e. that its existence will be recognized and upheld by the court), even before any legal issue is brought to trial.

Furthermore, many more developed jurisdictions have 'opposition proceeding' as part of the patent prosecution process, where third parties have an opportunity to give submissions on whether the application is compliant with the respective qualifying criteria. The purpose of such opposition proceedings is to strengthen

²⁷⁹ Given the nature of the sectors, challenges to patent validity generally come from competing firms. However, in the case of copyright validity, challenges generally arise by users rather than competitors. As such copyright validity debates are often linked to public policy grounds (e.g. free speech), rather than just pure economic interests.

the quality of the patent system, by providing an administrative alternative – *ex ante* patent grant – to the costly process of applying for a declaratory judgment before the courts for the nullification of a patent *ex post* grant.

In contrast, institutional capacity for patent examination is often weak in many less developed jurisdictions. In fact, in some jurisdictions, only a general formalities check is done, and evaluating compliance with the requirements of substantive patent law is effectively delegated to the court system. In such cases, there can be said to be a high degree of uncertainty regarding the validity of the right, even though the granting authority has formally granted it.

In the case of copyright, since there is no mandatory registration system, the existence of a right is only presumed by a rightsholder before the court affirmatively recognizes it. However, given the predictability of the applicable standards for originality and subject matter definitions, the assumption of the existence of copyright over most works is often reasonable. There is therefore less ambiguity about the existence of a right in the case of copyright – the issue tends to be on the nature of the exercise of the right, and the interpretation of whether a given activity constitutes infringement or not. A defence in the form of a counter-claim for the nullification of a right is indeed much less common in copyright litigation than it is in patent litigation.

The effect of the uncertainties regarding the legitimacy of a right directly reduces the effective scope of protection, as a rightsholder needs to discount the expected gains from any enforcement action to account the possibility that the right is nullified all together.

However, it may also increase the scope of effective protection in some cases, as it implies some possibility of the existence of a right over subject matter that may have otherwise been rejected by a granting office, or deemed as non-protectable by the court. This would therefore dis-incentivize users and competitors who are very risk-averse as they would rather avoid the possibility of infringement all together, rather than engage in an activity even when the likelihood of upholding the right is very low. To add to this, uncertainties about the validity of a right often reinforce the power of the rightsholder where litigations costs are prohibitively high; debates over patent and copyright trolls are a testament to this.

Nevertheless, the overall relationship between the issue of legal uncertainty and scope of protection seems to be ambiguous, case-specific, and difficult to generalise for analytical purposes.

[6]-2.8.1 Applicability to Broadcast Transmissions

The nature of broadcast signals is such that there is very high degree of certainty regarding the existence of a right. The activity is technical in nature, and therefore inherently determinate, and there are no subjective qualifying criteria.²⁸⁰

²⁸⁰ This certainty is also related to the point discussed above about the clarity of subject matter definition.

Therefore, there are no policy tools that can be manipulated in terms of affecting legal certainty for protection of signals, which translate into affecting the overall effective scope of protection.

[6]-3 LIMITATIONS AND EXEMPTIONS

Limitations and exemptions on the exercise of rights are one of the most important policy dimensions of the intellectual property system. A central theme of the intellectual property system is the objective of balance, and limitations and exemptions are critical tools for achieving this balance. They generally aim to provide a counterpoint to the grant of intellectual property rights and balance the interests of users with that of rightsholders.

One perspective is that limitations and exemptions aim to correct market failures that arise when certain types of activity or users are marginalised from the market place. More generally however, they aim to correct market failures that may arise where public policy considerations (resulting from positive externalities, or moral positions) are seen as strong enough to supersede market-based transactions of authorisation or prohibition.

In the context of international trade law, the scope of possible limitations and exemptions in both patent and copyright law are constrained by the requirement that they ‘must not conflict with the normal exploitation of the right’.²⁸¹

In the field of patent law, the most common exemption is the ‘research exemption’, which is normally constricted to application in the pharmaceutical sector. Such an exemption provides that research, clinical tests and trials pursuant to regulatory approval processes by potential market entrants, do not constitute infringement of a protected drug.²⁸²

Limitations and exemptions in copyright however are more complex. Generally, there are two approaches: (i) an enumerated statutory list of limitations and exemptions, or (ii) a doctrine such as ‘Fair Use’, which must be interpreted and applied by the courts on a case-by-case basis. These two approaches reflect two different mechanisms of legal rules, where the former takes the form of a rule while the latter that of a standard.²⁸³

²⁸¹ See TRIPs Article 13 for provisions in international trade law on limitations to copyright, and Article 30 for provisions on limitations to patents.

²⁸² For example, see (i) in US Law see the exemption provided for by USC 35 §271(e)(1), or (ii) EC Directives 2001/82/EC and 2001/83/EC

²⁸³ For a general discussion of the economics of legal rules versus standards, see Kaplow (1992). In terms of different models of limitation and exemptions to copyright, the relative advantages and disadvantages of either approach flow from the analysis of rules versus standards generally.

Nevertheless, even in the case of doctrinal standards such as fair use, there are established precedents for the types of uses that constitute fair use.²⁸⁴ It is therefore evident that principles of limitations and exemptions, whether through enumerated lists or doctrinal standards, form an important policy dimension which affects the overall scope of protection in copyright law, and to a lesser extent patent law.

Like copyright, broadcasters' rights are a bundle of rights that generally corresponds to different types of uses and activities. Furthermore, given that the demand for broadcast transmission is derived from the demand for the underlying programming content, the various uses of signals are derivative of the various uses of works. Therefore, limitations and exemptions to broadcasters' rights are an important element of the overall scope of protection for that subject matter, just as is the case for primary copyright.

[6]-3.1 Applying Limitations and Exemptions

As previously discussed in Chapter 2, under international law, limitations and exemptions to copyright are permissible if they are compliant with the principles of the three-step-test.²⁸⁵ This means that the limitations are (i) confined to certain special cases, (ii) do not conflict with normal exploitation of the work, and (iii) do not unreasonably prejudice the interests of the rights holder.²⁸⁶ The question thus arises as to the relationship between limitations and exemptions for primary copyright and broadcasters' rights.

The purpose of limitations and exemptions are to provide for certain uses of copyright without explicit authorisation. Hence, all 'special cases' that warrant limitations and exemptions are based on specific uses of content, rather than the mode of access to such content. As such, the same special cases that apply in general copyright, would apply for broadcasting, as broadcasting is merely a single medium through which content can be accessed, and does not impute any implied unique use.²⁸⁷

The second step of the three-step-test deals with the exploitation of subject matter. Copyright protected works can be exploited through various distribution modes and platforms, of which broadcasting is only one. In other words, despite the fact that the party undertaking the exploitation is different (the beneficiary of

²⁸⁴ For example, the majority of the exemptions and limitations explicitly provided for in Article 5 of the EU Copyright Directive (Directive 2001/29/EC) have also been established as fair use scenarios under US case law.

²⁸⁵ Article 13 of the TRIPs Agreement states as follows: "*Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.*"

²⁸⁶ For a detailed analysis of how the test should be interpreted, see the WTO Copyright Panel Decision of 2000; Case WT/DS160

²⁸⁷ However, it is acknowledged that only certain types of works are distributed via the broadcast media, namely musical and audiovisual works. As such, limitations and exemptions that apply other classes of works (e.g. works of art situated in public places) simply have no relevance.

the right is the broadcaster, as opposed to the copyright-owner), broadcast signal exploitation is merely a subset of the total possible forms of exploitation of the underlying copyright protected content. Therefore, if a given activity does not conflict with normal exploitation of a work, it is implied that it does not conflict with exploitation through the medium of broadcasting. As such, any user activity that passes this aspect of the test for copyright, would also pass for broadcasters' rights.

The last step assesses whether a proposed limitation prejudices the interests of the rightsholder. According to Gieger et al (2003), this step is related to, but offers more flexibility than the second step, partially because the legitimacy of interests can have a normative rather than strictly positive dimension. Additionally, rightsholders may have interests that are not directly economic in nature; indeed the classical pedagogy of copyright law makes a distinction between economic rights and moral rights.²⁸⁸ As such, a certain activity may prejudice some non-economic right of a rightsholder even if it does not conflict with normal exploitation of the work. However, given the nature of signals as subject matter, natural rights perspectives (or at least notions of moral personhood) are not applicable and hence rights are generally restricted to those, which are economic in nature.²⁸⁹ Therefore, proposed limitations and exemptions which pass step two would generally pass step three.

[6]-3.2 Transaction Cost Perspective

The above discussion on the applicability of the-three step test mainly analyses limitations and exemptions from a legal compliance perspective. In terms of economic efficiency, Gordon (1982) postulates that the optimal standard for permitting fair use (the doctrinal standard alternative to rule-form limitations and exemptions) is to consider whether, in a world of zero transaction costs, the rightsholder would consent (or rather be indifferent) to the proposed use.

This perspective suggests that the role of limitations and exemption provisions are to facilitate uses that would otherwise be excluded from the market because net gains to either party are outweighed by the search and transaction costs involved in voluntary authorisation.

Again, due to the derived demand nature of broadcast transmission, any proposed use of a broadcast signal by a user implies a desired use of the content embedded in that signal. Furthermore, in the case of using a work as accessed through a broadcast signal, the user must obtain authorisation from both the copyright owner and the broadcaster. Therefore, certain uses of content within broadcast transmission imply increased transaction and search costs, as well as a risk of anti-commons issues such as holdout problems. If legislating limitations and

²⁸⁸ Furthermore, this distinction is rooted in the interactions different theories on intellectual property, such as welfare-oriented and natural rights perspectives. See Chapter 3 for a discussion on this issue.

²⁸⁹ This point was argued in Chapter 3.

exemptions has an economic basis in mitigating information asymmetry market failures that arise in high transaction cost environments, then this argument is certainly applicable for the case of broadcast transmissions. Furthermore, given that some uses are hindered by the increased transaction costs of layered rights, it is possible to even argue that limitations and exemptions should be stronger for broadcast transmission than as for standard copyright.

Furthermore, Loren (1997) argues that information asymmetry derived transactions costs are not the only market failure that copyright limitations seek to mitigate. Voluntary market exchanges also result in inefficient outcomes where the activity concerned results in positive externalities. As such limitations and exemptions provide for a mechanism to internalise these externalities by bypassing the price mechanism of market exchange. This is also a powerful argument for limitations and exemptions to broadcasters' rights, and more specifically to copyright as supplemented by broadcasters' rights, as traditional approaches to broadcast policy have placed strong emphasis on the positive externality aspects of information dissemination through the broadcast media.²⁹⁰

[6]-4 CONCLUSION

The conclusion of Chapter 5 was that the scope of protection for broadcasters' rights (\mathbf{z}') should be set less than that for copyright (\mathbf{z}).

The scope of protection is affected by two parameters – length of protection, and breadth of protection. Chapter 5 however noted that length of protection is not a major policy lever for the scope of protection for broadcasters' rights; i.e. changing this parameter does little to affect the overall effective level of protection. This chapter therefore went on to explore the various policy levers that affect breadth of protection and how they apply to broadcasting signals.

All of these parameters (including length) can be represented as elements (\mathbf{z}_i or \mathbf{z}'_i) which affect the overall protection of copyright or broadcasters' rights respectively. Chapter 5 noted that the issue of setting $\mathbf{z}' < \mathbf{z}$ can be complicated. This is because of the mathematical relationship between the elements – they form a of weighted index to result in the overall level of protection.

It would therefore be superficially incorrect to just assume that if $\mathbf{z}' < \mathbf{z}$, every element of those indices follows the same relationship (i.e that $\mathbf{z}'_i < \mathbf{z}_i$, for $\forall i$). This is because if the elements are weighted, there are various different combinations of the elements which can yield a given relationship. One aspect of breadth of protection can be greater for broadcasters (than for copyright owners), while still resulting in an overall level of protection lower for broadcasters.

²⁹⁰ See Chapter 4 for discussions on the market failures and public policy dimensions in the broadcasting sector, including positive externalities.

The analysis in this chapter stressed that several of the policy levers that apply in patent and copyright law simply do not apply for broadcasts. Therefore, those particular elements (z_i) have zero values or zero weightings.

This chapter further argued that limitations and exceptions are among the most important elements for affecting breadth of protection – particularly for broadcasters; that ‘lever’ should hence have a very high weighting in the overall formulation of z' . Given the lack of ‘breadth levers’, and the importance of the ‘limitations lever’ in particular, this chapter argues that in order to ensure that $z' < z$, the specific parameter of limitations and exceptions must be stronger (i.e. create a narrower breadth of protection) than for general copyright.

The practical policy conclusion is that it is important to ensure that the limitations and exemptions implemented for broadcast transmission protection are at least as liberal as those offered for primary copyright. This chapter suggested that not only would such a construction be compatible with the relevant guiding legal principles, but that this approach is supported from a market failure correction perspective.

CHAPTER 7: ENFORCEMENT IN BROADCASTING MARKETS

This is the third chapter of Part III of this manuscript. While Chapters 6 and 7 focused on the theme of scope of protection, this chapter analyses the theme of enforcement of rights. In the regard, the underlying research question of this chapter is *“What are the dynamics of intellectual property in broadcasting markets?”*

[7]-1 INTRODUCTION

As stressed throughout this manuscript thus far, broadcasters’ related rights are independent of any copyright that may subsist in the content embedded within a broadcast.²⁹¹ This layering of rights can lead to certain issues, such as possible anti-commons effects.²⁹² Such anti-commons effects arise where a user wishes to make use a particular work (as accessed through a broadcast transmission), and must obtain authorisation for usage by both the copyright owner and broadcasting organisation. This results in a possible overall exacerbation of the existing problems of a copyright system that seems to be subject to a general trend of an expanded scope of protection.²⁹³ Another social cost of broadcasters’ rights is that it may result in an enclosure of the public domain and creation of deadweight losses, specifically for works which are not subject to copyright protection, or whose term of protection has expired. Hence, it is important to analyse whether and how the various aspects of broadcasters’ related rights contribute to market outcomes. One process through which such outcomes might be generated is the in the enforcement actions taken against infringements in broadcasting markets.

This chapter develops a framework to discuss how market characteristics affect the distribution of possible outcomes. It then concludes by suggesting a system of reassigning enforcement standing from copyright owners to broadcasters as an alternative to implementing unique and independent intellectual property rights for broadcasting organisations.

[7]-2 BROADCASTERS’ RIGHTS IN THE MARKETPLACE

Before moving on to creating a model to analyse enforcement, this section briefly recaps some basic premises of broadcasters’ rights, and how they function within the broadcasting market.

²⁹¹ Article 1 of the Rome Convention (which deals with Related Rights including the Rights of Broadcasting Organisations), provides for the safeguard of Copyright Proper, and states that protection of all related rights *“...shall leave intact and shall in no way affect the protection of copyright in literary and artistic works.”*

²⁹² An anti-commons effect arises when a property right over a resource is fragmented over multiple rightsholders, leading to coordination problems, market inefficiencies, and reduced social welfare through general under-utilization; for a general overview, see Buchanan and Yoon (2000).

²⁹³ This observation is discussed in Chapter 5.

[7]-2.1 Elements of Broadcasters' Rights

Like most forms of intellectual property, including general copyright, the 'rights of broadcasting organisations' should be considered as a bundle of different inter-related rights. There are several possible constituent elements of the 'bundle of rights' that are the intellectual property rights of broadcasting organisations in relation to their own transmissions. Generally, broadcasters' rights dictate activities between the broadcaster and two groups of second parties: (i) end-users (consumers), and (ii) competing broadcasters.

For analytical purposes, this discussion shall generally focus on the 'Right of Fixation', i.e. the ability of the broadcasting organisation to authorise or prohibit fixations (e.g. recording in material form) of the material from their broadcasts. However, it is noted that some aspects of this analysis can be generalised to cover other elements of the bundle of rights. Furthermore, this discussion focuses on the enforcement of this right in terms of the relationship between broadcasters and end-users.

[7]-2.2 Fixation Rights and Consumers

In relation to consumers, broadcasters' rights can be seen as tools to preserve market relationships that prevail at the level of primary copyright protection. In particular, this refers to the intermodal relationships between different media platforms, including both physically distributed forms (e.g. DVDs) and intangible modes of communication (e.g. broadcast signals or live performances). The idea is that a given copyright protected work can be delivered to consumers via different platforms and media formats, and that these platforms and formats have some inherent degree of substitutability. Hence, control over consumers' use of broadcast signals minimises potential losses in other horizontal markets.

For example, a broadcaster's right to fixation provides that authorisation is needed for fixation (e.g. recording) of a broadcasting signal; hence, the inability of a consumer to freely record a television programme (i.e. produce their own physical reproduction) preserves the consumer's willingness to pay for an authorised physical reproduction in the horizontal market (e.g. purchase a DVD).

However, it is not necessarily immediately obvious whose market interests a broadcaster's fixation right preserves. Certainly, a broadcaster's ability to limit a user's ability to fix a transmission of a particular work indeed somehow relates to the interests of primary copyright holders.

Only in instances where (i) the broadcaster is also the producer of the work and hence owner of the underlying copyright, or (ii) the underlying work is not eligible for copyright protection in the first instance, will the broadcaster be the main and

sole beneficiary of enforcement of fixation rights. Sports broadcasts are the primary example of this type of scenario.²⁹⁴

In the more typical 'base case' however (i.e. where the work being broadcast is licenced from a programme supplier who holds copyright), the commercial interests of the primary copyright holder in horizontal markets come into play. As such, broadcaster's rights that affect consumer incentives in horizontal markets presumably create positive externalities for primary copyright holders.²⁹⁵

[7]-2.3 Basic Example

The following discussion sets out the basic premise on which the Models in Sections 3 and 4 are based.

Consider for example, a consumer 'X' who wishes to obtain a copy of a certain programme, where the content owner 'C' holds the copyright in the programme. In addition to licensing the work for broadcast to broadcaster 'B', C also markets authorised copies of the programme in some horizontal media market.

It becomes known that X has obtained a copy of the programme by unauthorised fixation of B's broadcast. X is assumedly infringing on both C's right of reproduction (a component of primary copyright), and B's right of fixation (a component of the broadcaster's right).

It is now interesting to analyse what B and C's incentives are to pursue an enforcement action against X.

As B has already transmitted the programme, it is inferred that the relevant benefits to B have already been gained from X. In particular, X has already been subjected to the advertising contained in same transmission in which the infringed programme was embodied (hence giving commercial value to the overall transmission), or has done their part to finance B through the legitimate receipt of the transmission (e.g. by paying their statutory television use licence fee, or subscription fee).

Therefore, it would appear that only C has incentive to pursue enforcement action as the unauthorised activity represents lost potential revenue in the horizontal market for physical distribution (limited of course by the price in that market relative to X's willingness to pay). As such, while C might be interested in passing off the costs of enforcement to B, it is questionable whether B has any real private incentive to enforce.

²⁹⁴ As discussed in Chapter 4, sports performances are generally not considered as eligible for traditional copyright protection, and hence broadcasters' rights somewhat fill in this gap of subject matter protection eligibility.

²⁹⁵ These externalities are only positive where the copyright holder is a profit-maximiser. In certain cases, a copyright holder's goal may be that of maximum distribution – in such cases, enforcement actions by the broadcaster may restrict access and distribution, and hence create a negative externality.

Now, consider the case where C has licensed the work to two broadcasters: B₁ and B₂. For simplicity, and assuming the absence of embedded metadata to prove otherwise, it cannot be known with certainty whether a particular copy was obtained from a fixation of the transmission of either B₁ or B₂. Indeed, if there is only one single fixation, the incentives do not change much.

[7]-2.4 Subsequent Distribution

The situation changes if X seeks to distribute copies of the programme to another consumer Y. Firstly, each copy made is a successive infringement on C's reproduction right. The exact infringement of the broadcaster's rights however depends on how that bundle of rights is constructed. As with before, there is the infringement of unauthorised fixation of the broadcast transmission. However, there may now be the related additional infringement of subsequent distribution of an unauthorised fixation.²⁹⁶ As such, there are multiple infringements of C's copyright, as well as infringements of the broadcaster's fixation and subsequent distribution rights (though it is not known whether it is B₁ or B₂).

For each reproduction and subsequent distribution, there is an additional loss to C in terms of potential revenue in the horizontal market, in addition to that from the first fixation. Additionally, there is some loss to the broadcaster in the form of a contraction of its potential audience. This would mean a marginal decline in the size of the audience reach for advertising (meaning an erosion of advertising space value), or loss revenue in terms of a potential subscription or statutory licence (as each consumer Y chooses not to consume the content through the medium of broadcasting at all).

Therefore, B₁, B₂ and C all have incentives to enforce against X, where X is engaging in subsequent distribution. However, they all also have an incentive to try to free ride off of each other's possible enforcement efforts.

Generally, it is reasonable to consider that C's stake is likely to be larger than B's (for example, the lost revenue from a potential DVD sale is greater than the lost revenue from a marginal viewer).²⁹⁷ Also, it should be noted that the loss in revenue to the broadcaster is relative to the significance of the infringed programme in the overall programming schedule. As the number of separate unauthorised programmes that are fixed and distributed by increases (as a proportion of the broadcaster's overall programming schedule), the broadcaster's stake in enforcement action increases.

²⁹⁶ Conceptually, a fixation rights are distinct from post-fixation rights, which include subsequent distribution of the content of a fixed signal. For an overview on the debate regarding this distinction, see paragraph 23 of WIPO SCCR/17/INF/1 (2008).

²⁹⁷ Of course however, the loss in revenue to the copyright holder is tapered by the consumers' willingness to pay and likelihood of purchase in the horizontal market.

Furthermore, since the work was licenced to another broadcaster B_2 , uncertainty arises as to which broadcasters' right of fixation was violated. Hence, as the number of 'co-broadcasters' increases, everyone's incentive to enforce changes due to the desire to free-ride on each other's enforcement actions.

Essentially, a public good game arises in terms of the copyright owner and various broadcasters' investments in monitoring and enforcement actions.²⁹⁸

The following Sections now aim to discuss a simple model of how the enforcement behaviours of copyright holders and broadcasters interact. Section 3 presents a model of a single copyright owner licencing content to multiple broadcasting organisations. It seeks to analyse the circumstances that affect how broadcasters' related rights influence market outcomes or create externalities for primary copyright holders.

[7]-3 MODEL 1: MULTIPLE BROADCASTERS AND SINGLE COPYRIGHT OWNER

This Model summarizes the interactions between the Copyright owner (C), and n different broadcast licensees B_i (who are assumed to be uniform in behaviour and structure).

The scenario is premised on the following:

- i. Copyright owner C licences a programme to n different (identical) broadcasters
- ii. X illegally records one of the broadcasts and distributes m copies.
- iii. Each copy is a loss of R to the broadcast market (R/n for each broadcaster)
- iv. Each copy is a loss of P to the copyright owner (in a horizontal market)
- v. Either a broadcaster or the owner can pursue enforcement at cost E

Variable	Meaning
m	Number of distributed infringing copies
n	Number of content licenced broadcasters
P	(WTP-Adjusted) price in horizontal market
E	Cost of enforcement
R	Revenue from single broadcast viewer

Table 7.1: Summary of Model Variables

For a given user, the work can either be accessed through broadcast media (i.e. one of the n broadcasters), or through the horizontal market (i.e. either a legitimate copy from C, or an unauthorised from X).

²⁹⁸ It is important to note that in this chapter, enforcement actions are understood as actions which stop infringements or result in injunctive relief only. This part of the chapter does not consider the issue of award of damages for intellectual property right violations.

If there is effective competition between the broadcasting and horizontal markets, then there should be an equilibrium of relative prices. In other words, the prices in the two markets should be equal when adjusted for (i) the contribution of the specific work to the overall broadcast service, and in (ii) any premium that the consumer places on the 'horizontal' copy over enjoying the programme via broadcast.²⁹⁹

Consider that \mathbf{R} is the price paid for a broadcasting service (e.g. either the subscription fee, or the per-user average commercial value of the advertising space on a terrestrial service), while \mathbf{P} is the price paid for a legitimate copy in the horizontal market. \mathbf{R} and \mathbf{P} represent the income that a broadcaster or copyright owner gets from a legitimate user/consumer.

Since the broadcast is comprised of several programmes, the specific programme contributes only a proportion of the total value of that service ($\alpha\mathbf{R}$). Consumers might also gain more utility from one form more than the other, so consider that there is a higher willingness to pay for the good in the horizontal market by some factor β . Hence, consumers are indifferent between the broadcasting service and the horizontal market where the adjusted prices are in equilibrium at ($\alpha\beta\mathbf{R} = \mathbf{P}$).

When some legitimate enforcement action is undertaken which results in an injunction against the infringing distributor (no matter by whom), the consumers who were previously served by the infringing market would now be redistributed between the n broadcasters and the market for legitimate copies sold by C. Suppose that a proportion μ of these users are not redistributed, and they leave the market as that they are no longer able to utilize the possibly lower priced (or free) infringing copy. Of the remaining consumers, θ might uptake broadcasting services (as under equilibrium prices they are indifferent), while the remaining purchase legitimate copies.

Enforcement against the infringer therefore creates a direct gain to the collective broadcasting sector, valued at ($\theta\alpha\beta\mathbf{R}$); the gain to the copyright holder would be $(1-\mu-\theta)\mathbf{P}$. As these additional parameters are inconsequential to this analysis, the per-unit gains to the broadcasting sector and the copyright owner can be simplified as just \mathbf{P} and \mathbf{R} respectively. \mathbf{P} and \mathbf{R} in themselves hence account for the fact that only some consumer would 'legitimise' their consumption in line with their willingness-to-pay.

Furthermore, these gains would be uniformly distributed between the n broadcasters. For each infringing sale stopped, the individual broadcaster would gain \mathbf{R}/n , or a total of $(m/n)(\mathbf{R})$ for the total of m infringements stopped. The copyright holder on the other hand, will gain a total of $m\mathbf{P}$.

If no enforcement takes place, the infringements will continue, and neither the broadcasters nor the copyright owner will gain or lose anything. However, if at

²⁹⁹ For example, consumers may be will to pay more for a physical copy as it can be enjoyed multiple times, and at any time unlike a transient broadcast.

least one party enforces, all parties gain their respective amounts, but anyone who enforces will also incur an enforcement cost **E**.

As each of the broadcasters and the copyright owner can choose to either pursue enforcement action or forbear, their choices and relevant payoffs can be summarised as presented below.³⁰⁰

		B: Broadcaster i	
		Enforce	Forbear
C: Copyright Holder	Enforce	C: $(mP - E)$ B: $((m/n)(R) - E)$	C: $(mP - E)$ B: (mR/n)
	Forbear	C: (mP) B: $((m/n)(R) - E)$	C: 0 B: 0

Table 7.2: Enforcement Model 1 Payoffs

It is not immediately possible to define an equilibrium for the above game, particularly because the dynamics of behaviour depends on the multiple exogenous variables (**E**, **P**, and **R**). However, it is obvious to note that either party (C or a single broadcaster 'B:') would only consider enforcement when the costs of enforcement are outweighed by the private benefits of enforcement.

As such, the different possible outcomes can be summarised as follows:

1. *No Enforcement Necessary* – The sum of the total private gains to all parties from enforcement is less than the cost of enforcement. Neither will any party choose to enforce, nor is enforcement even socially desirable at all.
2. *Duplication of Efforts* – The private gains from enforcement for both parties individually are greater than the costs of enforcement. Hence, both parties have an incentive to unilaterally enforce. This may result in a duplication of efforts and costs, which is a socially undesirable outcome.
3. *No Enforcement Pursued* – The like with '*duplication of efforts*' above, the net private gains for both parties might be positive, but both parties may choose to forbear in an attempt to free-ride off of the other. As a result, no enforcement action is pursued, even though it would have been socially desirable to do so.

³⁰⁰ This analysis generally assumes that gains are only from stopping infringement or attempting to legitimise consumption. In principle, these gains can hence be actually *ex ante* the act of infringement through promoting compliance. In any instances, the gains are not in the form of damages ordered by an adjudicating body.

4. *Public Good Failure* – The sum of the total private gains to all parties from enforcement is greater than the cost of enforcement. However, the individual private gains for each party are less than the cost of enforcement. No party has the incentive to unilaterally enforce, despite the fact that enforcement would be socially optimal.
5. *Single Party (One way) Free-riding* – The private gains are greater than the cost of enforcement for only one party. This party has the incentive to unilaterally enforce, while the other does not. However, the party without an incentive to enforce will still enjoy some positive gain without spending. In other words, the enforcing party creates a positive externality from which the non-enforcing party benefits. A key feature in this case is that the certainty that one party will enforce and the other will not.

These various possible outcomes, as linked to the relevant parameters, can be summarised as follows:

Scenario		Outcome
1.	C's benefits less than enforcement costs; Individual B's benefits less than enforcement costs $mP < E$; $(m/n)R < E$	No Enforcement Undertaken <i>(No party has a unilateral incentive to enforce)</i>
1.1	Sum of C and all B's benefits is greater than enforcement costs. $mP + mR > E$	Public Good Market Failure <i>(No party has a unilateral incentive to enforce, even though it would be so socially beneficial)</i>
1.2	Sum of C and all B's benefits is less than enforcement costs. $mP + mR < E$	No Enforcement Desirable <i>(Neither does any party has a unilateral incentive to enforce, nor would it even socially beneficial)</i>
2.	C's benefit is greater than enforcement costs. $mP > E$	C has an Enforcement Incentive
2.1	Individual B's benefits is less than enforcement costs. $(m/n)R < E$	B _i Free-rides <i>(B_i has no unilateral incentive to enforce. C will thus enforce with certainty, creating a positive externality for B_i; i.e. B_i free-rides 'one-way')</i>
2.2	Individual B's benefits is greater than enforcement costs. $(m/n)R > E$	Strategic Decision <i>(Both C and B_i have a unilateral incentive to enforce, and a strategic game arises. This may either result in (i) A duplication of enforcement efforts, of (ii) neither party enforcing in an attempt to free-ride off of the other. Both of these outcomes are socially inefficient)</i>
3.	Individual B's benefits is greater than enforcement costs. $(m/n)R > E$	B _i has an Enforcement Incentive
3.1	C's benefits is less than enforcement costs. $mP < E$	C Free-rides <i>(mirror of 2.1)</i>
3.2	C's benefits is greater than enforcement costs. $mP > E$	Strategic Decision <i>(same as 2.2)</i>

Table 7.3: Enforcement Model 1 Outcomes

Given the above set-up, a market may be conceived as being defined by the following variables:

- (i) 'm' which is essentially a rate of infringement;
- (ii) 'n' which is the number of broadcast licensees; and
- (iii) Exogenous parameters:³⁰¹
 - i. P - average willingness to pay in the horizontal market
 - ii. R - average revenue from a single broadcast consumer
 - iii. E - cost of monitoring and enforcement

This gives a distribution of outcomes over various values of 'm' and 'n' as illustrated in Figure 1 below. For analytical purposes, it can be assumed that various markets are characterised by some distribution of 'm' and 'n'. Hence, if this distribution is assumed to be uniform, the relative areas on the plane 'm vs. n' represent relative probabilities.³⁰²

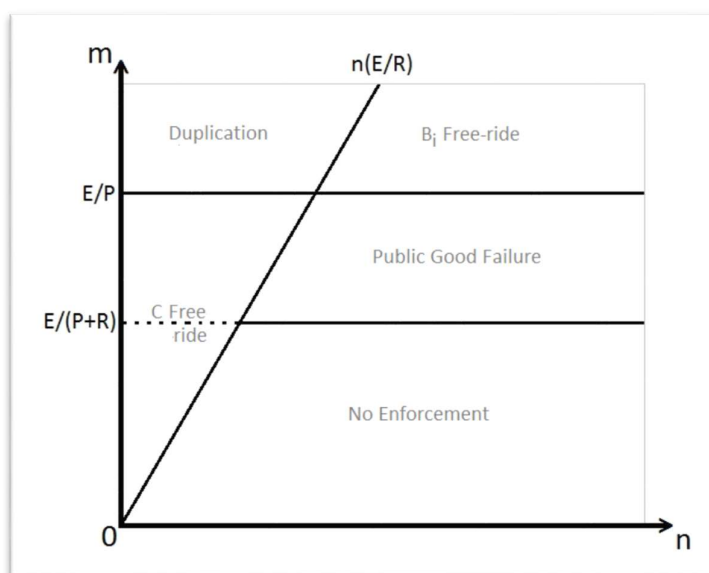


Figure 7.1: Multiple Broadcasters with Unitary Elasticity

³⁰¹ For convenience of graphical analysis, it is assumed that $R < P < E$, as per the discussion on the relative losses to the different parties. However, this assumption is only for the ease of graphical presentation of the discussion. It is not a strict limitation on the interpretation of the results. Furthermore, it is acknowledged that a major limitation in this analysis is that E is likely to be several magnitudes of order greater than P and R ; as such, any enforcement actions would only be viable at extremely high values of m , and the relative values of the other parameters would be generally inconsequential.

³⁰² Of course, the assumption that the market is uniform distribution of m and n is quite unreasonable. This comment is only made to illustrate how the figures can be interpreted. Furthermore, the exact (non-uniform) distribution would not necessarily be clear, as while the distribution of the number of licensee would be apparent, the rates of infringement would not be known with certainty.

A few interesting observations arise out of analysis of Figure 1. Firstly, it is noted that the outcome 'C free-rides' is only possible for values of $n < R/P$. Under the assumption that $R < P$, this means that this outcome never occurs.³⁰³

Secondly, in high infringement markets (high values of 'm', where $m > (E/P)$), the outcome is either (i) A duplication of efforts (or attempted mutual free-riding), or (ii) B free-rides off of C. The distribution between these outcomes depends on the slope of the line ' $n(E/R)$ '. Where R is low (the broadcasting market is characterised as a relatively low-revenue market), the line is steeper, and the area defined by duplication of efforts decreases.

Thirdly, and of most concern from a welfare perspective, is the observation that the area defined by a 'public good failure' depends on distance between (E/P) and $(E/(R+P))$, and hence the value of R . In low revenue markets (low value of R), the distance between these lines is minimal, and hence the scope for a public good market failure is less.

[7]-3.1 Price Elasticity of Demand for Programmes

Now, it is noted that the above analysis is based on a constant value of 'R' – this means that the number of licensees does not affect the total revenue in the broadcasting market accrued from the programme under consideration. When the number of licensees (value of 'n') increases, this means a shift in the supply curve for the programme under consideration to the right, resulting in a lower equilibrium price, and a high equilibrium quantity of programming consumed in the broadcasting market. Hence, assuming a constant value of R implicitly assumes that the Price Elasticity of Demand is unitary ($\epsilon = 1$), i.e. that the increase in quantity is exactly proportional the decrease in price.³⁰⁴ Relaxing this assumption, there may be two other possible situations:

- (i) Demand is inelastic ($\epsilon < 1$), meaning that total revenue is *decreasing* in n ; Or
- (ii) Demand is elastic ($\epsilon > 1$), meaning that total revenue is *increasing* in n .

The distribution of outcomes in in these cases is illustrated in Figures 2 and 3, which can be compared to the base case in Figure 1.

³⁰³ Outcome 'C free rides' only occurs when $n(E/R) < (E/P)$, i.e. where $n < R/P$. If the assumption $R < P$ holds, then the outcome corresponds to $0 < n < 1$. Since n is defined as the number of licences in the market, it is a positive discrete number (i.e. $n \geq 1$), hence this outcome is not possible if $P > R$.

³⁰⁴ Price Elasticity of Demand (ϵ) is a measure of how responsive quantity demanded is to changes in price. This responsiveness determines the effect on total revenue from a price change, as it gives an indication to the extent that a change in price induces a positive (or negative) quantity change effect significant enough to compensate for the negative (or positive) price effect on total revenue (which is equal to quantity demanded times price). Hence, Price Elasticity of demand give information about the relationship between total revenue and price changes.

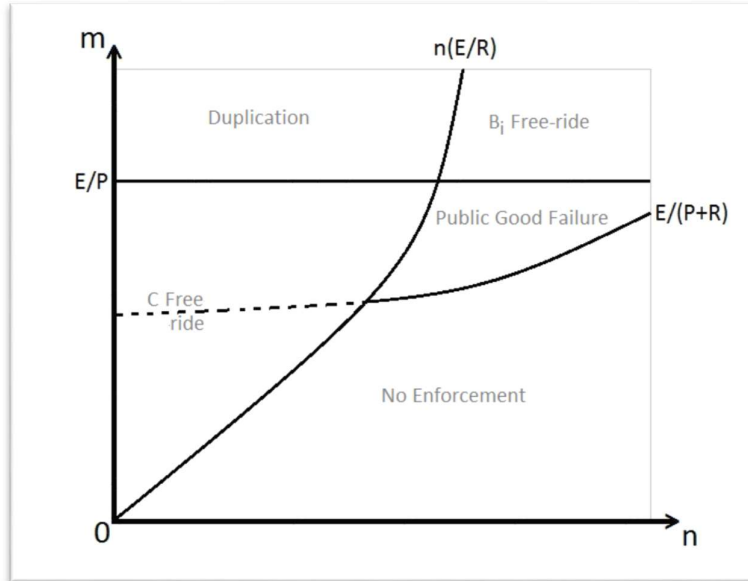


Figure 7.2: Multiple Broadcasters with Inelastic Demand

In inelastic markets, as the value of 'n' increases, the space defined by 'no enforcement necessary' increases for low values of 'm', while at high values of 'm' the rate of expansion of the area defined by possible 'duplication of efforts' decreases.³⁰⁵ More importantly, the space defined by a public good problem decreases, and actual closes off as n tends to infinity.

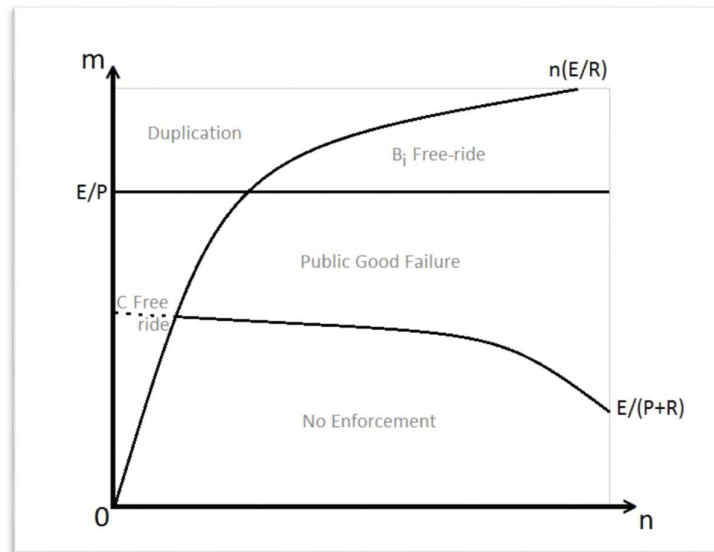


Figure 7.3: Multiple Broadcasters with Elastic Demand

³⁰⁵ In the context of this discussion, 'low levels of m' refer to when $m < E/(R+P)$, and high levels of m are when $m > (E/P)$.

In elastic markets, as the value of 'n' increases, the 'no need for enforcement' area contracts at low levels of 'm', while at high levels of 'm', the probability of 'duplication of efforts' dominates (increases at a faster rate than) the possibility of 'B free-riding off of C'. Furthermore, as n tends to infinity, the probability of a public good problem arising increases significantly.

[7]-3.2 Interpretation of Results

[7]-3.2.1 Broadcasters' Perspective

The analysis suggests some general but interesting conclusions. Firstly, low revenue markets are less prone to undesirable enforcement outcomes, such as duplication of enforcement efforts, mutual attempts at free-riding off of enforcement actions, and public good problems in enforcement.³⁰⁶ Furthermore, low revenue markets are more likely to result in a situation where broadcasters are able to free-ride off of the enforcement efforts of copyright holders without copyright holders being able to pass off enforcement costs to broadcasters. As such, low revenue markets seem to be preferable in terms of social outcomes, and for private outcomes of broadcasters. Similarly, broadcasters will enjoy free-riding outcomes more often in competitive (high value of n) markets.

Secondly, the elasticity of demand for programming has a major impact on the distribution of enforcement outcomes. In the case of elastic demand for programming, an increase in the number of licensees is associated with an increased likelihood of undesirable social outcomes.³⁰⁷ The probability of a public good problem in enforcement also increases, and the probability of duplication of efforts or mutual free-riding increases at a greater rate than the probability of broadcasters being able to free-ride off of copyright-holders' enforcement efforts. There is also a decrease in the probability of a 'no enforcement necessary' outcome.

In inelastic markets, an increase in the number of broadcast licensees is associated with a lower likelihood of undesirable outcomes, i.e. - duplication of enforcement efforts, mutual attempts at free-riding off of enforcement efforts, and public good problems in enforcement. Furthermore, an increase in licensees is also associated with a greater likelihood of broadcasters' free-riding off of the enforcement attempts of copyright owners (relative to the probability of duplication of efforts). As such broadcasters will generally prefer the enforcement environment in an inelastic market.³⁰⁸

³⁰⁶ A speculative example of such markets would be public broadcasting service content.

³⁰⁷ A speculative example of such markets would be daytime television, mass syndicated programming, and some 24-hour news networks.

³⁰⁸ It is interesting to note that the analyses of (i) low revenue markets, and (ii) increasing the number of broadcast licensees, yield similar results. However, it cannot be said with certainty whether these effects would compound each other, as a decrease in total revenue (keeping the number of licensees the same), decreases the revenue per broadcaster and hence alters their incentives to enforce. In contrast an increase in the number of licensees in an elastic market does result in an increase in total revenue (as the increase in quantity consumed is more than

The general conclusion here is that inelastic markets will generally have lower tendency to demonstrate enforcement equilibrium problems. In fact, at higher levels of competition, there are generally lower likelihoods of undesirable outcomes. As such, for the broadcasting sector collectively, there appears to be a trade-off between the effects of increased competition: the effect on total revenue and the favourability of enforcement conditions, where the direction of these effects depends on the (in)elasticity of the market.

From the perspective of the individual broadcaster which wishes to free-ride off of a copyright holder, enforcement outcomes are more desirable in either a (i) more-competitive elastic market, or (ii) a less-competitive inelastic market. Of course, these private gains would need to be weighed against the revenue earning capacity of the broadcaster relative to the state of competition. Therefore, the question arises as to whether the broadcaster ever wishes to exercise their exclusive rights over fixation and subsequent distribution.

[7]-3.2.2 Copyright Owner's Perspective

From the various outcomes, it can be seen that fixation rights may in fact always be particularly useful for the broadcasting organisation, as it is not necessarily leveraged with absolute certainty in many scenarios.

In fact, where the outcome is '*duplication of efforts*', the existence of the broadcaster's ability to enforce actually introduces uncertainty about whether the copyright owner will enforce, as both parties wish to free-ride off of each other. In these cases, removing enforcement as an option (by stripping the broadcaster of their related right), might actually be favourable to the broadcasting sector as a whole.

The only scenario in which the broadcaster's fixation right is conclusively useful is when unilateral enforcement would give rise to a net private gain to the broadcaster and not the copyright-holder. As discussed previously, such an outcome (i.e. copyright-holder free-rides off of broadcaster) is not possible when $P > R$. Similarly, such a situation is the only scenario in which a copyright holder is certain to lobby for the existence of broadcasters' fixation and subsequent distribution rights.

It is possible to further consider this issue by relaxing the assumption that the revenue loss in the horizontal market for the copyright-holder (P) is greater than the revenue loss to the broadcasting sector (R). As shown in Figures 1-3, the outcome '*C free-rides off of B*' is only possible where $n \leq (R/P)$. As such, the copyright holder would want to lobby for broadcasters' rights when $R > P$, so that there is the possibility of free-riding off of broadcasters' enforcement efforts. This would be the case for programming content which is primarily consumed via the

proportional to the decrease in price), but it is uncertain whether this increase will result in an increase in revenue per broadcaster.

broadcast media, and has little commercial value in horizontal markets (e.g. time-dependent live event).³⁰⁹

Furthermore, for the most favourable enforcement environment, the copyright holder would licence a number of broadcasters up to $n = R/P$, so as to maximise the relative probability of being able to successfully free-ride. Therefore, there is the interesting conclusion that when broadcasters are given exclusive rights over their transmission, the copyright owner faces a trade-off between revenue maximisation from multiple licensees, and the favourableness of the enforcement environment.

A final point of discussion concerns non-profit-maximising copyright owners. These are copyright owners whose goal is to maximise distribution rather than profit. In terms of the model discussed above, this would be equivalent to a copyright owner who does not operate in a horizontal market, or whose price in such market is zero. These owners would wish to avoid situations where broadcasters create negative externalities through enforcement actions which limit distribution and access to their works. As such, they would prefer low revenue and elastic broadcasting markets.

From the perspective of the regulator, the policy goal is to maximise the certainty of enforcement, and minimise instances of infringements.³¹⁰ Hence, such regulators would prefer to exercise oversight in elastic markets, or at least inelastic markets with a low number of broadcasters. Interestingly, while all parties would seem to favour an elastic environment, the broadcaster prefers a more competitive licensee market, while the copyright owners prefer a smaller number of broadcasters.

The main lesson to take away from this analysis is that, to the extent that the policy-maker can influence competition in the licensee market, the nature of the demand for programming content must be taken into consideration. This would be of particular relevance for issues such as considering which type(s) of content are permitted to be subject to compulsory licencing regimes, and which types are left up to the licencing discretion of the copyright owner.

Furthermore, and most importantly, this discussion demonstrates that the range of scenarios in which broadcasters' related rights necessarily improve enforcement outcomes is limited.

³⁰⁹ This may lead to questions about why X would fix and distribute the content if a horizontal market for the content does not exist. Such concerns would indeed be valid when discussing fixation of signals and after-markets for content post-broadcast. However, infringing activities can also include distribution without initial fixation; for example, communication to the public for the broadcast of a live event, or even retransmission through an illegal cable connection. This is an important point, as it shows how the discussion which began with a focus on fixation rights can be generalised to other types of rights for both copyright holders and broadcasting organisations.

³¹⁰ Irrespective of overall welfare implications, regulators and policy-makers (such as the broadcast commission or the intellectual property office) have a strong incentive to minimise infringements and maximise deterrence and compliance through monitoring enforcement, in order to signal stability and predictability in the regulatory environment.

Building on the analysis above of Model 1 (single copyright-owner and multiple broadcasters), Model 2 examines the case of a single broadcaster and multiple copyright owners.

[7]-4 MODEL 2: SINGLE BROADCASTER AND MULTIPLE COPYRIGHT OWNERS

At its core, the business model of broadcasting is to bundle content for distribution to the public. As such, a single broadcaster would generally licence content from multiple copyright holders, and assemble them into a programming schedule for eventual transmission.³¹¹

As such, we can consider the case of a single broadcaster B who obtains the rights for programming content from several copyright owners C_i .³¹² Each copyright holder also presumably has commercial interests in other horizontal markets – these markets may be licencing to other broadcasters operating in the same market space, broadcasters in other markets, or other distribution platforms.

When an infringer X records a broadcast without authorisation, they are violating the fixation rights of the broadcaster, as well as the reproduction rights of each copyright owner whose programmes were contained in the fixed recording. These copies may then be distributed to different third parties Y.

However, the distributions of unauthorised copies in this form are more likely for individual programmes (as opposed to significant portions of an entire programming schedule). What is possible however, is that X can illegally redistribute the broadcast connection itself to Y (e.g. in the form of an illegal cable connection). In essence this can be considered as akin to a form of retransmission, but one undertaken by an independent infringing party rather than another entity operating in the broadcasting market.³¹³

This model is set up similar to Model 1, but instead of a single copyright holder and n broadcasters, there is a single broadcaster and n copyright holders. The scenario can be summarised as follows:

- i. Broadcaster B licences programmes from n different copyright owners C_i
- ii. X illegally redistributes the broadcast to m recipients
- iii. Every infringement m represents a loss P to each of the n copyright holders

³¹¹ See Chapter 4 for a discussion on issues regarding bundling of content in broadcasting markets, and how they relate to possible sector-specific market failures.

³¹² As with the multiple licensees in Model 1, we assume that the multiple licensors in Model 2 are identical in structure and behaviour. This implies that the value of the licenced programmes is homogeneous.

³¹³ For this reason, Model 2 is much more useful than Model 1 as it moves away from specific analysis of fixation and subsequent distribution rights, and can be generalised to understand other aspects such as retransmission rights. Part IV of this manuscript examines issues in retransmission rights in detail.

- iv. Every infringement **m** of each programme **n**, represents a loss of **R** to the broadcaster³¹⁴
- v. Either the broadcaster or one of the copyright owners can pursue enforcement at cost **E**

The logic of the losses to the broadcaster (**R**) and to copyright owners (**P**) is the same as in the previous Model 1. In this case however, the gains from enforcement are different. Each copyright owner C_i would gain the value **P** from each infringement that is stopped, totalling **mP** for the **m** total infringements. For the broadcaster however, the gains are of an amount **R** for every programme infringed upon, hence totalling **nmR** for **m** number of infringements of **n** number programmes.

As with before, all parties derive their respective gains is at least one party enforces, net of any enforcement cost that they might expend. If no party enforces, then no one derives any gains or costs.

Again, as each party can choose to either pursue enforcement action or forbear, their choices and relevant payoffs can be summarised as presented below.

		B: Broadcaster	
		Enforce	Forbear
C: Copyright Holder i	Enforce	C: (mP - E) B: (nmR - E)	C: (mP - E) B: (nmR)
	Forbear	C: (mP) B: (nmR - E)	C: 0 B: 0

Table 7.4: Enforcement Model 2 Payoffs

As with Model 1, there is no obvious equilibrium, as it depends greatly on the exogenous parameters **P**, **R** and **E**. Furthermore, it is again obvious that each player would only consider enforcement if the private benefits net the private costs are positive. The possible outcomes are the same as in Model 1, i.e.: (i) *No Enforcement Necessary*, (ii) *Duplication of Efforts*, (iii) *Public Good Failure*, or (iv) *Single Party Free-riding*.

³¹⁴ Total loss of expected broadcast revenue '**R**' has a direction proportional relationship with the number of infringed programmes '**n**'. This is because, the more programmes infringed upon imply a greater likelihood of obtaining legitimate access (e.g. through paying subscription fees), or viewership for a longer period (and hence a greater extent of advertising impact). This relationship is assumed to be linear.

The various possible outcomes can be summarised as below.

Scenario		Outcome
1.	Individual C_i 's benefit is less than enforcement costs; B's benefits less than enforcement costs $mP < E$; $nmR < E$	No Enforcement Undertaken <i>(No party has a unilateral incentive to enforce)</i>
1.1	Sum of all C_i 's and B's benefits is greater than enforcement costs $nmP + nmR > E$	Public Good Market Failure <i>(No party has a unilateral incentive to enforce, even though it would be so socially beneficial)</i>
1.2	Sum of all C_i 's and B's benefits is less than enforcement costs $nmP + nmR < E$	No Enforcement Desirable <i>(Neither does any party has a unilateral incentive to enforce, nor would it even socially beneficial)</i>
2.	B's benefit is greater than enforcement costs $nmR > E$	B has an Enforcement Incentive
2.1	Individual C_i 's benefit is less than enforcement costs $mP < E$	C_i Free-rides <i>(C_i has no unilateral incentive to enforce. B will thus enforce with certainty, creating a positive externality for C_i; i.e. C_i free-rides 'one-way')</i>
2.2	Individual C_i 's benefit is greater than enforcement costs $mP > E$	Strategic Decision <i>(Both B and C_i have a unilateral incentive to enforce, and a strategic game arises. This may either result in (i) A duplication of enforcement efforts, of (ii) neither party enforcing in an attempt to free-ride off of the other. Both of these outcomes are socially inefficient)</i>
3.	Individual C_i 's benefit is greater than enforcement costs $mP > E$	C_i has an Enforcement Incentive
3.1	B's benefit is less than enforcement costs $nmR < E$	B Free-rides <i>(mirror of 2.1)</i>
3.2	B's benefit is greater than enforcement costs $nmR > E$	Strategic Decision <i>(same as 2.2)</i>

Table 7.5: Enforcement Model 1 Outcomes

As with Model 1, it can be considered that various markets comprise some distribution of the number of licensors ' n ' and an infringement rate ' m ', where the parameters P (price in horizontal market), R (revenue in broadcast market), and E (enforcement costs), are exogenous. The distribution of outcomes is illustrated in Figure 4 below.

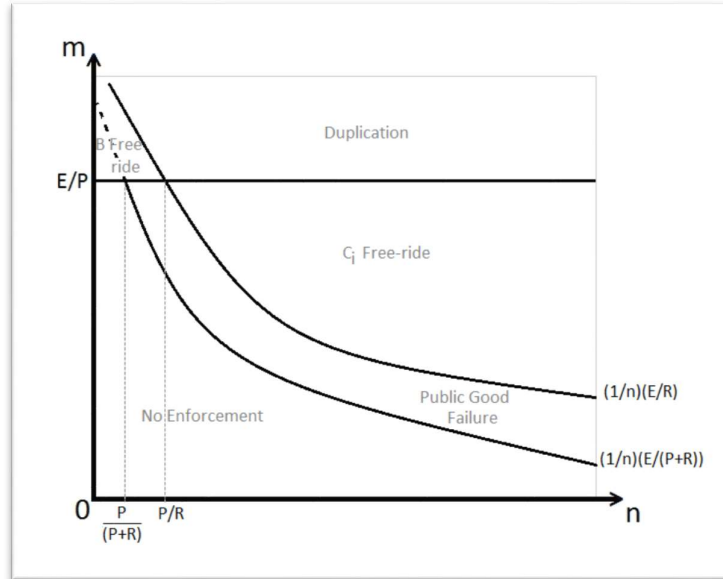


Figure 7.4: Multiple Licences (with Fixed Price)

Analysis of Figure 4 shows some observations comparable with Figure 1. Here, high values of m and n correspond to the 'duplication of efforts' outcome, while low values of m and n correspond to the outcome 'no enforcement necessary'. Generally, as n increases, the probability that 'enforcement is not necessary' decreases, and the probability that *copyright holders free-ride* off of the broadcaster's enforcement efforts increases.³¹⁵

The ratio (P/R) is also of much importance in this Model. The outcome '*B free-rides off of C_i* ' only occurs for high levels of m ($m > (E/P)$), and where n is less than (P/R) . Therefore, the enforcement environment is more favourable to broadcasters (in terms of one way free-riding possibilities) when P is very high relative to R .

Similar to Model 1, the problematic space '*public good problem*' depends on the distance between (E/R) and $(E/P+R)$. In markets where P is low (i.e. there is little or no horizontal market, and the broadcast sector is presumably the primary mode of distribution), there is little worry about a public good problem arising.³¹⁶

[7]-4.1 Cross Elasticity of Demand for Programming

Further to the observation that public good failure depends on the value of programming in horizontal markets, an interesting use of this set-up is to consider

³¹⁵ As noted previously, the exact distribution of markets in terms of m and n is not known, and this distribution would be the basis for determine exact probabilities of different outcomes. However, one can consider that the number of licensees' n is known, and probability analysis is based on the fact that the infringement rate m is unknown, and hence there is uncertainty in the exact outcome.

³¹⁶ A Speculative example of such markets would be long distance broadcasts of sporting events.

how the distribution of outcomes in the broadcasting market depends on its relationship with such horizontal markets.

The intuition behind this discussion so far, has been that there is some substitutability for particular copyright protected programme, as distributed via different platforms. The parameter of interest is hence the Cross-Price-Elasticity between the broadcast market prices and quantities in horizontal markets (ϵ_{hb}).³¹⁷ As the assumption is that the distribution platforms are substitutes in the minds of (at least some) consumers, the prevailing intuition is that ϵ_{hb} is positive (or at least non-negative). However, different types of content would have different magnitudes of cross-price-elasticity, which define how price changes in the broadcasting market affect demand (and hence price changes) in the horizontal market.

In this Model, 'n' is defined as the number of copyright licensees that a broadcaster negotiates with. For small values of n, a few (or even a single) copyright holders have a monopolistic supply position with respect to the broadcaster (in its capacity as an intermediate consumer of the copyright content). When n is much larger however, there is increased competition amongst copyright holders for licences with the broadcaster, resulting in downward pressures on royalty rates.³¹⁸ Furthermore, the royalties paid to copyright holders are a major variable cost component of the broadcaster, and hence lower royalty rates imply lower costs, and lower prices to end-users. Hence, the price of content to consumers in the broadcasting market is decreasing with respect to the value of n. Since the content in the broadcasting market is a substitute for content in the horizontal market, these prices affect prices in the horizontal market. Lower prices in the broadcasting market then decrease demand and thus prices in the horizontal market.

Therefore, the variable 'P' is decreasing in the variable 'n' by a rate conditioned by the cross-price-elasticity. Where there is high cross-price-elasticity, P decreases more rapidly with a steeper slope. In the extreme case where $\epsilon_{hb} = 0$, P is fixed with respect to n (the case illustrated in Figure 4). The case of a positive cross-price-elasticity is illustrated below in Figure 5.

³¹⁷ Cross Price Elasticity (ϵ_{hb}) is a measure of the responsiveness in the quantity demanded for one good to changes in price of another good. It provides insight into the relationship between two goods, and more specifically, the degree of substitutability of goods. In this case, focus is on the relationship between the programme in the broadcasting market under analysis and the same programme in the horizontal market. A reduction in the price of broadcasting services, will cause a greater uptake of such services, as consumer substitute away from the horizontal market, lowering demand and reducing price in that market. The greater the value of ϵ_{hb} , the greater the degree of this cross-platform substitution price effect.

³¹⁸ This logic of course only holds when there is a free market in licensing, and royalty rates are determined by the price mechanism. Indeed, in some cases, royalty rates may be regulated as in cases of statutory or compulsory licences.

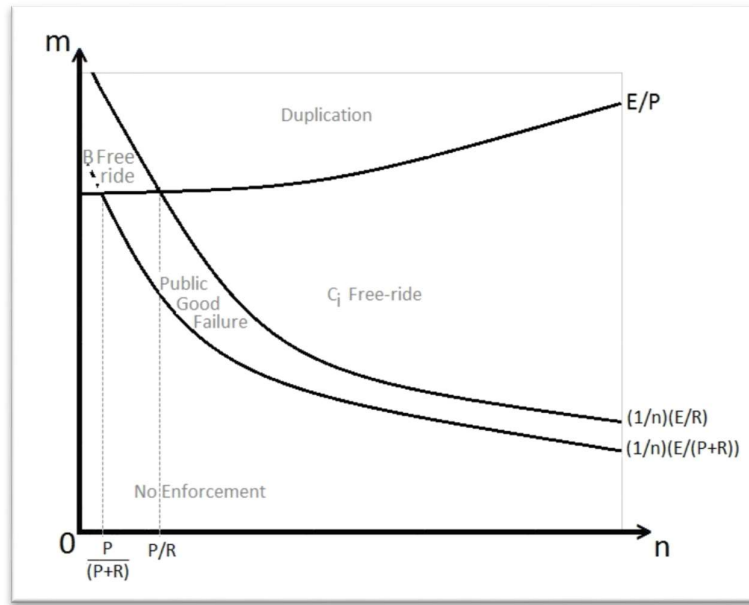


Figure 7.5: Multiple Licences with Decreasing Price ($\epsilon_{hb} > 0$)

Comparing Figure 5 with Figure 4 gives rise to some interesting observations. Firstly, a positive cross-price-elasticity (P is increasing in n) causes the curve $(1/n)(E/P+R)$ to relatively steepen as n increases, hence reducing the space defined by a 'public good problem' outcome. Therefore, as n increases, the probability of a public good failure decreases.

Secondly, as n increases (and P decreases), value of (E/P) increases, hence widening the space defined by the outcome 'duplication of efforts'. All of these effects are more pronounced and significant, the higher the degree of cross-price-elasticity.

[7]-4.2 Interpretation of Results

These observations give rise to a very interesting proposition – in markets defined by a high degree of cross-price-elasticity³¹⁹, the more competitive the licensor environment (i.e. supply of programming content), the more favourable the enforcement environment for copyright holders, in terms of one way free-riding off of a broadcaster's enforcement efforts. In fact, while the market in its entirety benefits from lower royalty rates when there is competition between copyright holders, there are additional welfare gains from more certainty in enforcement conditions (reduced probability of duplication of efforts).

From the perspective of copyright holders, the existence of broadcasters' related rights (and hence ability to enforce) are more beneficial for markets with high cross-price elasticity, and high levels of competition. Similarly, regulators presumably prefer such markets as they imply greater certainty and high extents

³¹⁹ A speculative example of such markets would be premium movie networks.

of enforcement against infringements. Furthermore, such markets are less preferable to broadcasters as they imply a reduced scope for free-riding, which is only possible at low levels of licensor competition irrespective of cross price elasticity.

As with Model 1 in the previous Section, this discussion demonstrates that the range of scenarios in which broadcasters' related rights necessarily improve enforcement outcomes depends on market context.

[7]-5 STANDING AND ENFORCEMENT RULES

The general theme of the above discussion is that market context plays an important role in affecting enforcement behaviour for broadcasters' rights infringements. However, these nuances and possible uncertainties themselves stem from the fact that both copyright holders and related right holders are able to enforce against a joint infringement. Hence, in order to further understand how broadcasters' related rights contribute to market outcomes, different hypothetical enforcement rules can be compared against the base case (where both the copyright owner and broadcaster can enforce).

[7]-5.1 Alternative Enforcement Rules

The following section briefly discusses some possible alternative enforcement rules, and how they affect market outcomes. The table below summarises the outcomes pursuant to the discussion that follows.

Base Case Outcome	Copyright Enforcement Only (No BRR)	B'caster Enforcement only (Mandatory)	B'Caster Enforcement via Pooled Standing
No Enforcement Necessary	No Enforcement Necessary	No Enforcement Necessary	No Enforcement Necessary
Duplication of Efforts or Mutual Freeriding	One-Way Freeriding C enforces; B freerides [+]	One-Way Freeriding B enforces; C freerides [+]	Duplication of Efforts (dis-incentivized) [o]
Public Good Problem	Public Good Problem	Public Good Problem	One way free-riding B enforces; Remits to C [+]
One-Way Freeriding C enforces; B freerides	One-Way Freeriding C enforces; B freerides	Public Good Problem [-]	Duplication of Efforts (dis-incentivized) [o]
One way free-riding B enforces; C freerides	Public Good Problem [-]	One way free-riding B enforces; C freerides	One way free-riding B enforces; C freerides

Table 7.6: Alternative Enforcement Rules

Different enforcement rules and resulting outcomes. **[+]** represents a presumed improvement in outcome, **[-]** represents a presumed worsening, and **[o]** represents a change which is an improvement contingent upon the structure of net gain remittances (as compared to the base case of overlapping copyright and broadcasters' related rights (BRR))

The first hypothetical rule, is one in which broadcasters' rights do not exist, and hence enforcement can be undertaken only by the copyright holder. In such scenarios, the outcomes where the broadcaster would have considered enforcement would now be different. The first case is where both the broadcaster and the copyright owner considered enforcement in the base case (and risked duplication of effort and/or mutual free-riding); the copyright owner will now certainly enforce and the broadcaster would enjoy one-way freeriding off of these efforts. From a social point of view, this is an improvement in outcome. The second case, is where the broadcaster would have enforced, and the copyright owner enjoys a one-way free riding position. Since the broadcaster cannot enforce under this hypothetical rule, the result is a public good problem, as it is socially optimal to enforce, but yet no enforcement takes place. This is hence a worsening of the outcome as compared to the base case.

The second hypothetical rule is where only the broadcaster can enforce where infringements are through a violation of broadcasters' rights, irrespective of the substantive claim that there is an infringement of copyright. In other words, where there is a joint infringement, only to broadcaster can enforce. This situation is essentially the mirror case of the first hypothetical rule discussed above. Where both parties would have previously considered unilateral enforcement, only the broadcaster can now enforce, and hence the outcome of possible duplication of efforts and/or mutual free-riding is replaced with an improved outcome of the broadcaster enforcing and the copyright owner enjoying one way free-riding. However, where in cases where the broadcaster would have previously unilaterally enforced (allowing the copyright holder to one way free-ride), there is now a public good problem which is a certain worsening of the social outcome.

The third hypothetical rule is one in which the broadcaster does not have a unique legal entitlement (in the form of an independent intellectual property right), but has 'standing' on behalf of the copyright owner. This means that when the broadcaster is able to undertake enforcement action in its capacity as a licensee of the copyright owners whose rights are being infringed upon. The Models in this chapter focus on injunctive relief as the outcome of enforcement actions; hence, this 'standing' hypothetical rule does not change any of the existing incentives, and the outcomes are identical to that of the base case. All that has changed is the legal basis on which enforcement action is taken.

The situation changes if enforcement gains in the form of actual damages are now taken into consideration (as opposed to mere injunction). In such a case, the broadcaster's standing to take action now essentially acts as a mechanism to pool both the broadcaster and the copyright owners' claims into one single enforcement action.³²⁰ Therefore, there is a change in the structure of incentives.

This 'pooling of claims' notion is most significant in scenarios which would have otherwise been public good market failures. Under a single enforcement action,

³²⁰ The reasoning behind this approach parallels the concept of claims pooling in tort law. For a general discussion, see Aryres (1990).

the broadcaster can now claim for damages both for itself and on behalf of its copyright licensors; collectively, these gains are now significant enough to justify the costs of enforcement. The broadcaster would then be made liable to remit part of those net gains back to copyright holders, where every party receives a part of net gains proportional to their share in gross gains (and hence contribute to enforcement costs proportionally to their gains).

The more interesting case is that in which under the base case, the copyright owner would have had incentive to unilaterally enforce, and the broadcaster would have enjoyed one way free-riding. Since the broadcaster can now claim on behalf of the copyright owner, both parties now have an incentive to enforce. In the first instance, there is hence a new risk of duplication of efforts and possible mutual free-riding. However, given the notion described above where an enforcing broadcaster would remit part of the gains to each copyright holder, and where each party contributes a proportional share to enforcement costs, the copyright owner would be dis-incentivized to undertake unilateral enforcement. This is because total expected gains would be greater to the copyright holder if the broadcaster exercises its standing to sue on the copyright holders' behalf, as the enforcement costs would be effectively apportioned between the different parties. Therefore, under this hypothetical rule, there is an improvement in social outcomes, even when the base case was a possible duplication of efforts.

[7]-5.2 Broadcaster Standing: Context and Issues

Out of the various possible hypothetical enforcement rules, permitting the broadcaster to have standing to sue on behalf of copyright holders seems to be an attractive alternative to layered independent intellectual property rights. This attractiveness is partially rooted in the cost savings from a single enforcement action, and the apportionment of such costs and resulting benefits.

However, even without broadcaster standing or some form of broadcasters' rights, there may still be mechanisms to mitigate public good problems and risks of duplication of efforts. Where an infringement affects multiple copyright owner, these owners may coordinate amongst themselves in order to pursue a single enforcement action. However, this would be essentially structured as a prisoners' dilemma game (or more specifically as cartel problem), and as the number of copyright owners increases, the incentive to defect increases, and hence there is a high risk of each party defecting in an attempt to free-ride off of the efforts of others increases. Granting a single party the standing to enforce on behalf of the other parties essentially by-passes this strategic problem, as explicit co-ordination amongst all parties is not necessary for the efficient outcome.

Furthermore, this system works as there is an alignment of incentives between the parties; in the context of this discussion, every infringement against the broadcaster is also an implied infringement against the copyright owner(s).

Most importantly, this system is particularly attractive as it accomplishes at least part of the objectives of intellectual property rights for broadcasting organisations

without the accompanying social costs. As discussed above, licensee standing facilitates the objective of allowing the broadcaster to protect its commercial interests by enforcing against infringers. However, the action being enforced against is an infringement on only one right (primary copyright, rather than both copyright and a related right). Therefore, legitimate use is more viable as the risk of an anti-commons problem has been mitigated, an effect which itself can possibly reduce the incidence of certain types of infringements.

Additionally, the absence of an additional layering of rights (in the form of a broadcaster's related right) avoids the problem of public domain enclosure. Therefore, for works which are not subject to copyright protection, or for which the copyright-holder has partially relinquished part of their rights, there is no deadweight loss from property rights which do not correspond to production incentives.³²¹ This is because there simply is no active legal entitlement, on which standing to enforce can be based and hence delegated. This is of particular relief for copyright-holders which are not profit maximisers, as the broadcaster is unable to create negative externalities through unwanted enforcement.

[7]-5.2.1 Issues and Limitations

However, as attractive as this system is on a theoretical basis, there are some evident practical problems. Firstly, this system only works if the broadcaster is fully aware of the copyright owner's circumstances in the horizontal market. In reality, there would be a significant information asymmetry between the broadcaster and its content licensors. Only the copyright owner would be fully aware of consumption trends in its works across all media platforms (which determines losses in the horizontal market), and in any cases, both parties would necessarily have imperfect information about infringement rates.

Secondly, this system does nothing to change incentives if enforcement results in only injunctive relief. However, it does lead to the same outcomes as the 'base case' (of simultaneous copyright and broadcasters' related rights), without the social costs associated with layered property rights. If enforcement is interpreted as resulting in damages and/or compensation however, incentives do change. The attractiveness of a broadcaster standing approach however assumes a lot about the process of awarding such damages. It assumes that damages can be effectively calculated and awarded, which in itself is extremely problematic. Furthermore, it assumes a cogent mechanism for copyright holders' shares in net gains to be remitted.

Lastly, a system of broadcast licensee standing is based on pooling the interests of a single broadcaster and their content licensors. An enforcement action by a broadcaster will not only produce gains for these interested parties, but also for other third party broadcasters (or horizontal platform distributors) who may also be licensees of some of the respective content owners. As such, these third party

³²¹ This includes works for which copyright protection has expired, works which are not subject to copyright protection in the first place, and works for which owners have voluntarily opted for an open licencing scheme (such as Creative Commons).

broadcaster are able to obtain some gain without contributing to enforcement costs.³²² While the broadcaster standing approach addresses the issue of free-riding amongst the broadcaster and its copyright licensors, it does not address the issue of free-riding amongst broadcasters with the same content licences. If there are several broadcasters who licence the same content, there may still be issues of mutual freeriding problems.

[7]-5.3 Standing, Contracts and Property

At this point, it is useful to further discuss the concept of standing to sue in the capacity of a licensee; in fact, the issue of licensee standing to sue is a fairly contentious area of intellectual property enforcement. The general doctrine that has emerged over time however, appears to be that only an intellectual property rights holder can initiate an enforcement action against an alleged infringer. In some cases, an exclusive licensee may have standing if the infringement action solely concerns the exclusive right which was subject to the licence, but the general rule appears to be that non-exclusive licensees do not have standing for enforcement action.³²³ This doctrine has a particularly strong impact on broadcasting markets, where copyright licences are generally non-exclusive in nature. The policy basis of this doctrine appears to be the prevention of multiple actions by various non-exclusive licensees.

An interesting perspective is provided by Balganes (2007), who reasons that broadcasters' rights can be interpreted as a mechanism to 'propertise' certain rights, which are normally granted via a copyright licence. Hence, these rights are structured as a shift from a contract law paradigm to a property rights paradigm, pursuant to efficiency arguments of property rights as a tool to reduce transaction costs.

The author argues that these efficiency arguments, as applied to the right (or rather entitlement) to bring enforcement actions, fail for three reasons.³²⁴ Firstly, such rights go beyond the idea of minimising the costs of obtaining similar rights, as these rights could not have been contracted into in the first place (under the doctrine of 'no standing for non-exclusive licensees'). Secondly, an independent broadcaster's right does more than move the entitlement; it actually replicates it, hence going beyond a mere 'propertisation' of contractual terms which would have otherwise been included in a copyright licence. Thirdly, the efficiency (of

³²² Recall that in Model 1, total sector revenue (loss) was split between n broadcasters who have the same content licence. In this chapter, Model 1 discussed the case of a single copyright-holder licensing to multiple broadcasters, while Model 2 discussed the case of multiple copyright holders licensing to a single broadcaster. In reality, a given media market would be comprised of multiple copyright holders and multiple broadcast licensees with varying interrelationships.

³²³ While this doctrine is not universal, it does appear in the legal systems of several jurisdictions. For a discussion on this issue in the context of the US Intellectual Property system, see Blair and Cotter (1999). In the context of the EU, and more specifically, the lack of harmonization on this issue within the Internal Market, see de Werra (2013).

³²⁴ Balganes (2007), at pg. 1321

contract term propertisation) argument ignores the fact that transaction costs exist on both sides of the producer-consumer equation.³²⁵

To this, it can be added that any purported efficiency gains from minimising transactions costs are likely to be negligible. This is because broadcasters and copyright owners are repeat players – they have well established networks amongst themselves, and do perpetual business with each other as their business models are actually based on their relationships with each other. Therefore, transaction costs in terms of contracting into rights would be negligible, as the market place would naturally produce standard term contracts as a matter of course of business.

As a concluding point, it would be noted that broadcasters' rights appear to facilitate the exact opposite goal of the 'no standing for non-exclusive licensees' doctrine; while the doctrine is akin to a '*floodgates principle*', in that its purpose is (at least partially) to avoid multiple actions, the existence of broadcasters' rights by definition create the possibility for two different actions against a single infringement.

Given the distinct characteristics which define the relationships between copyright owners and broadcast distributors, it is here argued that such licences should be exempt from the doctrine of 'no standing for non-exclusive licensees'. In fact, one example of where there is actually a statutory exemption to this doctrine can be found in the US Copyright Code.³²⁶

[7]-6 CONCLUSION

The existence of a unique intellectual property right for broadcasting organisations in relation to their programme-carrying signals must be analysed in the context of the wider intellectual property system.

More specifically, such rights provide broadcasters with a cause of action against infringers which overlaps with the cause of action enjoyed by the copyright holders with whom the broadcasters have licencing arrangements for content

³²⁵ The argument here is that even if property rights reduce the transaction costs associated with contractually acquiring certain rights, it creates new transaction costs for users who must now navigate through an additional layer of liability, in order to facilitate authorised usage.

³²⁶ See USC Title 17, §501(c), which states as follows: "*For any secondary transmission by a cable system that embodies a performance or a display of a work which is actionable as an act of infringement under subsection (c) of section 111, a television broadcast station holding a copyright or other licence to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that television station.*" However, it is acknowledged that this particular exemption is specific to television broadcasters taking action against cable retransmitters within their own local service jurisdictions. Furthermore, this policy seems to have evolved as a competition regulation tool in telecommunications and broadcasting regulation, rather than being born out of wider copyright policy and intellectual property considerations.

distribution. This creates a dynamic where the enforcement behaviour of broadcasters and copyright owners becomes interrelated.

This chapter presented two simple models to demonstrate that market characteristics, specifically elasticities of demand, infringement rates, and market concentration, have a major impact on these interrelationships. More specifically these factors affect the extent to which socially undesirable outcomes such as public good problems in enforcement or wasteful duplication of efforts arise. Furthermore, such market context likely differs between different types of audiovisual content. This results in a situation where the effect of intellectual property rights (or rather enforcement thereof) is heterogeneous across different types of copyright protected works.

Additionally, these discussions showed that there are at least some contexts in which copyright holders can 'pass-off' at least some aspects of their enforcement activities to distributors such as broadcasters, when broadcasters have unique rights on which to pursue enforcement action. As such, a strengthening of broadcasters' related rights can have an indirect effect of strengthening the position of commercially-oriented copyright holders. This is an important observation as it implies that the issue of 'optimal scope of protection' should be addressed holistically in terms of the entire copyright and related rights system, and analysis of specific related rights should not be disjoint from analysis of general copyright; these systems need to be 'calibrated' in conjunction.

Finally, this chapter proposes that some of social costs associated with the rights of broadcasting organisation can, at least in principle, be mitigated through an exemption to the 'no standing for non-exclusive licensees' doctrine. An allocation of enforcement standing from copyright holders to broadcasters can hence be an alternative to at least some aspects of unique and independent broadcasters' related rights.

The discussions in this chapter are theoretical. The actual socially optimal level of enforcement is an empirical question, which would require information on the infringement and losses – information that is necessarily opaque in nature. Furthermore, a truly complete social welfare analysis would require a consideration of the welfare-enhancing aspects of unauthorised use of signals, which needless to say is an extremely complicated task beyond the intended scope of this manuscript.

PART IV: ANALYSIS OF RETRANSMISSION RIGHTS

CHAPTER 8: THE EU LEGAL FRAMEWORK FOR RETRANSMISSION

Part IV of this manuscript focuses specifically on the topic of retransmission rights – both in terms copyright holders’ broadcasting rights, and the retransmission rights of broadcasting organisations. Retransmission rights are one of the most complex areas of copyright, and peruse the most commercially significant aspects of broadcasters’ rights. As will be discussed in this Part, retransmission activities also exhibit high transactions costs, particularly relevant for Law and Economics analysis.

The goal of this Part is to construct some understanding of the relationship between the retransmission rights of broadcasters and those of other classes of rightsholders (namely copyright owners). As these specific rights are inseparable in their exercise, such an analysis will ultimately contribute to a better understanding of the theoretical bases of broadcasters rights themselves.

In order to achieve this, Chapter 8 first uses the European Union legal framework as a case study to ascertain the various policy aspects of retransmission. However, the European framework is currently in a time of transition, where reforms to the transmission regime are being considered. Chapter 9 builds on the framework established in Chapter 8, and critically analyses the arguments on which the proposed reforms are based. Finally, Chapter 10 sets out the substantive contribution of this Part, building on the different approaches identified in Chapters 8 and 9.

As Chapters 8 and 9 are largely legal described, and readers exclusively interested in Law and Economics may wish to bypass to Chapter 10.

[8]-1 INTRODUCTION

This chapter aims at analysing the framework of the European Union for retransmission activities. The purpose of this case study is to ascertain the various possible approaches and dimensions of retransmission regulation, so as to return to the question of the theoretical bases of broadcasters’ rights in Chapter 10. In this regard, the underlying research question of this chapter is “*What are the key features of the current European Union legal framework for regulating retransmission activities?*”

This chapter thus focuses on the case study of European Union law, and gives a historic and analytical account of the broadcasting *acquis* – the various directives, regulations, and key judgements that are relevant to broadcasting and retransmission rights. The main existing instrument dealing with retransmission

rights is the Satellite-Cable Directive.³²⁷ As this Directive was adopted in 1993, the technological context of broadcasting has significantly changed since then, creating many new issues for the application of copyright law in this sector. To this end, the European Commission recently published a new proposal for a legal instrument to address online broadcasting services.³²⁸

The subsequent Chapter 9 analyses this new proposal, in the context of the wider framework of applicable European law established in this Chapter 8. Specifically, the policy proposals are contextualised by a network of several existing Directives: The Television Without Frontiers Directive, the Satellite-Cable Directive, the Audiovisual Media Services Directive, the Collective Management Directive, and relevant case law from the CJEU.

[8]-2 BASIS FOR COPYRIGHT AND RELATED RIGHTS IN THE EU

Authors of literary and artistic works enjoy certain protections under copyright law. Copyright is however, a bundle of separately exercisable rights relating to different activities; one such element of copyright is the right to authorise (or prohibit) communication of a protected work to the public, including via broadcast. Protection is also offered for other forms of communication, such as the ‘making available’ of a work at a place and time determined by a user, which is mostly relevant for on-demand type services.

Furthermore, it should be recalled that the exploitation of a given work may not only involve the copyright of an author, but also the related rights (or neighbouring rights) of other contributing parties. The international legal framework for intellectual property rights generally covers three distinct categories of related rights holders: (i) performers, (ii) producers, and (iii) broadcasting organisations.³²⁹

When exploiting audiovisual works (such as communicating them via a broadcast), authorisation is generally needed from both the copyright holder, and the performers whose performances are fixed in that work. In the case of musical works, authorisation is also needed from a third category of rights holder – the producer of the phonogram (sound recording). Collectively, the rights of all of these different right holders in relation to authorising a broadcast of a work can be called ‘broadcasting rights’, which are distinct from the ‘broadcaster’s rights’ which are held by broadcasting organisations.

³²⁷ 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

³²⁸ European Commission 2016/0284 (COD) - *Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes*

³²⁹ While there are other possible categories of related rights, these three categories are the ones provided for in the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*.

If a broadcast signal is then retransmitted, authorisation is presumably again needed from all of these rights holders, in addition to the initial broadcaster themselves, who holds a related right over the use of their broadcast transmission. Collectively, the rights of all of these different right holders in relation to authorising a retransmission of a work can be called 'retransmission rights'.

In order to have a meaningful discussion on the legal framework for how broadcasting and retransmission rights are regulated, it is useful to first discuss the basis under which these rights are established.

[8]-2.1 Information Society Directive

There are several EU instruments that contain provisions relevant to copyright law. However, arguably the main instrument is the Information Society Directive.³³⁰ This directive sets out three general categories of rights: (i) Reproduction rights (Article 2), (ii) Right of Communication (Article 3), and (iii) Distribution Rights. In the context of broadcasting, the most relevant of these categories is the right of communication to the public.

Article 3(1) provides for an exclusive right for authors, covering the rights to *“to authorise or prohibit 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 them from a place and at a time individually chosen by them.”*

It is interesting to note that the use of the word 'including' in this provision, implies that the 'making available to the public right' is a sub-set or fragment of the broader 'communication to the public' right; this concept of making available to the public mainly relates to on-demand type services, as qualified by the concept of the public being able to access the work at an individually chosen time and place. Article 3(1) hence provides a broadly constructed 'communication to the public right', which covers both wired and wireless communications, and on-demand type services.

Article 3(2) sets out the rights of related right holders. It provides for a 'making available right' for performers, producers (of both phonograms and films), and broadcasting organisations (in relation to fixations of their own broadcasts). This making available right however only deals with on-demand service type situations. The Information Society Directive itself does not provide for broadcasting rights for related rights holders; these rights are provided for in a separate instrument – the Rental Directive.

³³⁰ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

[8]-2.2 Rental Directive

The Rental Directive³³¹ adds a new category of rights to those already provided for in the Information Society Directive – rental and lending rights. Furthermore, this Directive also contains various substantive provisions on related rights.

In relation to broadcasting activities, Article 8 of the Rental Directive is relevant. Article 8(1) of the Directive provides for performers to have an exclusive right to authorise or prohibit *'broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation'*. While the language of this provision covers only broadcasting via wireless means, it also includes *'communications to the public'*, which would cover both wired and wireless communications.

Article 8(2) then provides for some rights for phonogram producers. More specifically, where a phonogram is used for broadcasting (or any communication to the public), a single equitable remuneration is to be paid by the user, covering both the performer's right and the producer's right. Therefore, in the case of musical works, producers and performers do not have exclusive rights, they have a more limited right to remuneration. Furthermore, this remuneration right must be administered together for both classes of related rights holders, in a single payment made by users; how this remuneration is then shared is deferred to the agreements between producers and performers, or in the absence of such - the national laws of Member States.

For completeness, it is noted that while film producers have a *'making available'* right under the Information Society Directive, they do not have a public communication right under the Rental Directive.

Article 8(3) of the Rental Directive makes provision for the rights of broadcasting organisations. This Article reads as follows: *"Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee."*

Under this provision, broadcasters have an exclusive right to authorise or prohibit the *'rebroadcasting of their broadcasts by wireless means'*. Broadcasters are also provided with a specific *'communication to the public'* right, which covers communications where the broadcast is *'made in places accessible to the public against payment of an entrance fee'*.

Analysing the cumulative effect of the above provisions, it would appear that in terms of a broadcaster's rights – the right to communication to the public is much

³³¹ Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property

narrower in scope than that of other classes of rights holders. While other rights holders have a general right of communication, which can – in principle - apply to any communication made in a public place (for example if a television set is on in a bar), the broadcasters right only applies where access to the public place is subject to a fee (e.g. where a bar charges an entrance fee to watch a popular programme).

A very important point to note is that the scope of the retransmission right is limited to rebroadcasts by wireless means. Hence wired rebroadcast – such as those made on a cable or IPTV network - are not covered. However, the scope of this right does go beyond what is provided for in the Rome Convention, where the right is limited to simultaneous rebroadcasts.³³² Furthermore, the beneficiaries of this right are not limited to traditional broadcasters whose initial transmissions are necessarily wireless.

Despite this specific scope of the broadcaster’s retransmission right in the Rental Directive, this does not mean that a broader retransmission right – particularly one that covers non-wireless retransmissions – does not exist. It is very much the case that in transposing the Directive, individual Member States may decide to provide more protection to broadcasting organisations.³³³

[8]-2.3 Relevance to Discussions

The purpose of the previous section was to establish that within the framework of European copyright law, copyright and related rights holders have a broadcasting right which is sometimes construed as a fragment of the broader right of public communication. In the specific case of producers and performers of phonograms, this is not an exclusive right, but a right to equitable remuneration. In the rest of the discussions in this paper, copyright and related rights holders will be generally grouped together and referred to as ‘rights holders’ for ease of discussion – a generalisation which does not detract from the accuracy of the discussions due to the similar scope of these exclusive rights.

[8]-3 COPYRIGHT FRAMEWORK FOR THE BROADCASTING SECTOR

. The European framework for broadcasting consists of several legal instruments which will be roughly presented in chronological order.³³⁴ However, it should be

³³² Article 3(g) of the Rome convention states that rebroadcasting “means the simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation.”

³³³ Recital 16 of the Rental Directive states that “Member States should be able to provide for more far reaching protection for owners of rights related to copyright than that required by the provisions laid down in this Directive in respect of broadcasting and communication to the public.”

³³⁴ Although the Directives below will be presented and discussed in chronological order, it is acknowledged that the first two Directives discussed below – the Television Without Frontiers and Satellite-Cable Directives, were adopted in 1989 and 1993 respectively, while the Directives above – the Information Society and Rental Directives, were adopted in 2001 and 1992 respectively.

noted that the discussions below are not just on the legal instruments relevant to intellectual property, but in some cases also more general media policy; the need to discuss these latter instruments is to provide a coherent context for understanding the overall policy framework in which the regulation of broadcasting and retransmission rights exists.

[8]-3.1 Television Without Frontiers

An appropriate starting point to discuss European-wide policy on retransmission is the 1984 Green Paper on Television without Frontiers (*Green Paper on the Establishment of a Common Market for Broadcasting, Especially by Satellite and Cable*). This Green Paper sets out a vision for a common European market for audiovisual works and broadcasting. As the issue of copyright law and retransmission was discussed in this Green Paper, it was not discussed in depth in the subsequent 1988 Green Paper on Copyright and Challenges of Technology.

The 1984 Green Paper discusses various options for addressing the problems associated with cross-border broadcasting and retransmission.³³⁵ It takes the view that a legislative solution is necessary, which can either take the form of (i) continuing to grant exclusive broadcasting rights, but regulating their exploitation, or (ii) imposing a statutory licence on broadcasting rights, or reducing them to an entitlement to remuneration.³³⁶ The Green Paper analyses these two options, their mechanisms, and their compatibility with various existing agreements, most notably Article 222 of the EEC Treaty³³⁷. The paper ultimately takes the view that “*a statutory licence might be recommended as the most effective means of achieving liberalisation*”.³³⁸

Most of the Policy positions in the Television without Frontiers Green Paper were subsequently implemented through in the Television without Frontiers Directive, which was adopted in 1989. However, this Directive mainly dealt with the issue of broadcast content regulation, such as content quotas, advertising regulations, and protection of minors; the Directive did not address the issue of copyright law and

³³⁵ From a Law and Economics perspective, there is the matter of what degree of harmonisation is actually optimal. However, this chapter largely takes the goal of market integration as given. As this chapter is main descriptive, Chapter 9 contains a sub-section of the economic significance of the policy issues analysed in Chapters 8 and 9.

³³⁶ Television Without Frontiers Green Paper, pg. 318

³³⁷ Article 222 of the EEC Treaty (TFEU Article 345) states that the Treaties in no way prejudice the rules in Member States governing the system of property rights. The question to be answered is therefore whether restrictions on broadcast rights imposed at the Community level would amount to such prejudice. The Green Paper concludes that such restrictions are not in violation of EEC Article 222, based on arguments extending from existing jurisprudence that stress the difference between the existence of a property right, and the exercise of those rights.

³³⁸ Television Without Frontiers Green Paper, pg 330. This historical commentary is provided, as for many it might seem surprising to learn that European policymakers were at one time actively considering statutory licencing as an option. The prevailing negative view of statutory licencing might thus be seen as a modern result of the strong lobbying power of copyright owners.

retransmission. Hence, although the matter was not included in the 1988 Green Paper on Copyright and Challenges of Technology, it was discussed in the 1991 follow-up to that paper. One of the concluding actions of this follow-up paper was a *“Proposal for a directive on the coordination of certain rules concerning copyright and neighbouring rights applicable to satellite and cable broadcasting”*.

Generally, after adoption of the Television without Frontiers Directive, the lack of harmonisation in the field of copyright law as it applies to broadcasting seemed to be a major hindrance to the achievement of a free internal market for broadcasting services, as envisioned in that Directive.³³⁹

[8]-3.2 Satellite-Cable Directive

Coordination of policy regarding copyright for broadcast retransmissions came in the form of the Satellite-Cable Directive, which was adopted in 1993.³⁴⁰ This Directive put forward an ambitious framework for the application of copyright law for broadcasting services. The Directive’s significance is characterised by two key concepts – (i) the country-of-origin principle, and (ii) mandatory collective management.

The Satellite-Cable Directive begins by asserting that an author’s exclusive right to authorise the communication of a work to the public exists, particularly in terms of communication via satellite. This Article effectively confirms that transmission via satellite is indeed included within the scope of the general copyright concept of ‘communication to the public’.

In order to fully appreciate the significance of this Directive, it is necessary to first recall that the act of broadcasting (and retransmission) is very transaction cost

³³⁹ In recapping the significance of the Television without Frontiers Directive, the European Commission in its 2002 Implementation Report of the subsequent Satellite-Cable Directive made the following comments (pg 3):

“However, despite this instrument (Television without Frontiers Directive), the cross-border broadcasting of television programmes by satellite and their retransmission by cable from other member States was still being hampered by a degree of legal uncertainty arising from disparities in the national provisions on copyright. This legal framework had to be completed as regards copyright. A Community audiovisual area could not in fact take concrete shape without effective protection for copyright and related rights. Indeed, such protection is a factor which favours the creation of new works within the European Union by enabling the right holders and users to benefit fully from the European dimension of broadcasting. Moreover, this protection, which sometimes takes the form of an exclusive right, helps to avoid a situation in which right holders are implacably opposed to the broadcasting or re-broadcasting of programmes beyond national borders, and thus avoids fragmentation of the internal market.”

³⁴⁰ As noted by *van Eechoud (2009)* this Directive differs from other Directives aimed at harmonization of various aspects of substantive copyright law within the EU, as it deviated from the prevailing approach of approximating national laws, and introduced an entirely new approach. (Ch. 1, pg. 6).

intensive, and involves a very large number of rights holders with whom authorisation agreements must be concluded.³⁴¹

[8]-3.2.1 Country-of-Origin Principle

A key policy point of this Directive is that it establishes the country-of-origin principle (principle of origin). This is significant, as before the Directive, there were competing views as to the jurisdiction for the applicable laws, where satellite transmissions cross national borders.³⁴² This principle is established in Article 1, which defines the terms 'satellite' and 'communication to the public via satellite'.³⁴³

In summary, the country-of-origin principle asserts that - for the purposes of copyright law - a communication to the public is deemed to have been made in the jurisdiction where a broadcast transmission is initiated. This contrasts with the competing principle that a separate communication to the public has been made in every jurisdiction in which the broadcast transmission can be received. The consequence of the principle is that only a single body of national copyright laws is applicable to a cross-border transmission.³⁴⁴

The principle-of-origin, as set out in the Satellite-Cable Directive is a very interesting legal mechanism, as it not only clarifies a possible legal ambiguity, but it does so by actually extending the application of certain provisions of national copyright law outside of traditional jurisdictional boundaries.³⁴⁵

³⁴¹ According to EBU (2017), "a major public service broadcaster is likely to conclude more than 70000 contracts with rightsholders to produce hundreds of thousands of hours of programming every year. A single one-hour TV programme can be made up of around 70 different contributions and involve up to 100 rightsholders."

³⁴² The debate about the applicable law is discussed in the original Television Without Frontiers Green Paper (pg. 303). The legal ambiguity in terms of whether the applicable law is the jurisdiction of signal reception or that of signal transmission is referred to in Recitals 7 and 14 of the Satellite-Cable Directive.

Furthermore, according to Hugenholtz (2009, pg. 8), previous to the adoption of the Directive, several national courts determined that satellite broadcasts were a restricted act in every jurisdiction within the reception area of the transmission, which is reflective of a country-of-reception principle.

³⁴³ Article 1(2)(b) states the following: "The act of communication to the public by satellite occurs solely in the Member State where under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth."

³⁴⁴ One interesting perspective on the principle-of-origin principle is that it creates a unitary right of transmission via satellite, which can only be exercised in the country of transmission uplink. See Hugenholtz (2009), pg. 7

³⁴⁵ According to the 2002 Satellite-Cable Directive Implementation Report (at pg. 6): "The object of the Directive, with the definition of the notion of communication to the public by satellite at Community level, was to put an end to the legal uncertainty regarding the rights to be acquired, by specifying the place where the act of communication occurs and the copyright legislation applicable to contractual relations regarding the transfer of rights. The applicable law is that of the Member State in which the programme-carrying signals are transmitted; its application extends beyond national borders into the Member States in which the signals are received (although, in technological terms, the footprint covers many areas other than those of the Member States, the term "footprint" in

As a result of the country-of-origin principle, a broadcaster transmitting a broadcast via satellite to different jurisdictions, only needs to obtain authorisation with respect to communication to the public in the jurisdiction of transmission; this hence provides for more legal certainty (and less negotiating complexities) when compared to the alternative of needing a licence in every jurisdiction in which the signal is received (which would be the case under a principle-of-reception, i.e. where a communication to the public is deemed to have taken place in the jurisdiction in which the transmission is received).

[8]-3.2.2 Mandatory Collective Management

The second major policy aspect of the Satellite-Cable Directive is its introduction of a novel regime for clearing retransmission rights through mandatory collective management. This regime was introduced as an alternative to the controversial compulsory licence (or statutory licence) system originally envisioned in the 1984 Green Paper, which was resisted by rights holders.³⁴⁶

According to Article 8, cross-border retransmissions are to be based on individual or collective agreements between the retransmitting parties, and the rights holders. This Article therefore precludes Member States from opting for a system of involuntary licencing. As such the Directive not only deviated from a compulsory licensing scheme as originally envisioned in the Television Without Frontiers Green Paper, but actively prohibits the possibility of such. Instead, it created a regime of mandatory collective management.

The core of the Directive's collective management mechanism is Article 9, which provides that the transmission right of copyright or related right holders must be exercised through a collective management organisation (CMO). Article 9(2) extends this mandatory collective management approach set out in 9(1) by making a provision for cases in which a rights holder has not transferred the management of their rights to a CMO; in these cases, the CMO within that jurisdiction which manages the respective category of rights for other rights holders, shall be deemed to manage the rights holder's rights. This hence has the effect of automatically expanding the repertoire of works that any given CMO represents. However, it should be noted that where there is more than one such CMO managing a category of rights, the rights holder is free to choose which organisation is to represent their interests.

In terms of the retransmission rights of broadcast organisations themselves, the Directive provides in Article 10 that the provisions of Article 9 do not apply. As such, the obligation to use a collective licensing regime does not apply to rights held by a broadcasting organisation. Such rights would include the related rights of the broadcasting organisation over its signal, the copyrights/related rights for

this Report refers only to the territory of the Member States). This principle avoids the cumulative application of several national legislations of the various Member States covered by the footprint (recitals 14 and 15)."

³⁴⁶ See Hugenholtz (2009), pg 8

content created by the broadcaster, or the copyright/related rights for content created by a third party but transferred (or exclusively licenced) to the broadcaster.³⁴⁷ Furthermore, it is interesting to note that while Article 9 does not apply to the broadcaster's related rights, Article 8 still applies. Therefore, the Directive does not permit a compulsory licencing regime for rights held by the broadcaster, and as such, the licencing of individual broadcast signals for transmissions must be done on a voluntary basis.³⁴⁸ It is however important to note that licencing on a voluntary basis does not mean licencing on an individual basis. In fact, while collective licencing is not mandatory for rights held by the broadcasting organisation, the broadcaster can still opt to have a CMO manage their rights, and hence use voluntary collective licencing.³⁴⁹

An interesting implication of the Article 10 exemption is in cases where the original broadcaster acquired the retransmission rights for all of the programming content within its transmission. The broadcaster would therefore be able to legitimately licence the entire bundle of rights needed for retransmission (i.e. the right to communicate to the public for the broadcaster's own related right, as well as the copyright and related rights in the embedded

³⁴⁷ The original language of Article 10 is not explicit in articulating the exact rights which are exempt from Article 9. The exact wording of Article 10 is as follows: *"Member States shall ensure that Article 9 does not apply to the rights exercised by a broadcasting organization in respect of its own transmission, irrespective of whether the rights concerned are its own or have been transferred to it by other copyright owners and/or holders of related rights."*

The phrase *'the rights exercised by the broadcaster in respect of its own transmission'* implies reference to the broadcaster's related rights. However, the following phrase *'irrespective of whether the rights concerned are its own or have been transferred to it by other copyright owners and/or holders of related rights'* qualifies the preceding with reference to copyrights and related rights in the programmes themselves.

However, based on a comment in the 2002 Report on the application of the Directive, it appears that Article 10 is meant to apply to copyright and related rights in relation to programming content. That comment reads as follows: *"Article 10 takes into account the particular situation of broadcasting organisations. These are, in effect, both holders of exclusive rights to their own programmes and acquirers of rights for the initial broadcasting of the programmes which they have acquired. In this context, they have been given latitude to negotiate the acquisition of rights for the retransmission of programmes, without rightholders being mandatorily represented by a collecting society"*

³⁴⁸ Article 8 does not explicitly refer to the related rights of broadcasting organisations in relation to their signals. However, Recital 21 clarifies that statutory licencing would not be permitted, even for broadcaster's rights. This Recital reads as follows: *"Whereas it is necessary to ensure that protection for authors, performers, producers of phonograms and broadcasting organizations is accorded in all Member States and that this protection is not subject to a statutory licence system; whereas only in this way is it possible to ensure that any difference in the level of protection within the common market will not create distortions of competition"*

³⁴⁹ This possibility is clarified in Recital 29 of the Directive, which states: *"Whereas, in order to ensure that the smooth operation of contractual arrangements is not called into question by the intervention of outsiders holding rights in individual parts of the programme, provision should be made, through the obligation to have recourse to a collecting society, for the exclusive collective exercise of the authorization right to the extent that this is required by the special features of cable retransmission ; whereas the authorization right as such remains intact and only the exercise of this right is regulated to some extent, so that the right to authorize a cable retransmission can still be assigned ; whereas this Directive does not affect the exercise of moral rights"*

content); in such a case, there would therefore be no need for a CMO to act as a market intermediary.

[8]-3.3 Territoriality and Market Fragmentation

Despite the ambitions of European policymakers, the Television Without Frontiers and Satellite-Cable Directives would ultimately fail at creating a truly integrated Pan-European market for audiovisual works and services.

[8]-3.3.1 Satellite-Cable Implementation Report

In 2002, the European Commission published a Report on the Implementation of the Satellite and Cable Directive. The general tone of this report was that the objectives of the Directive had not been met. In particular, the Report pointed to the role of copyright licensing practices in hindering the realisation of a free internal market for broadcasting. In commenting on the ways in which copyright licencing practices have hindered the objectives of the Directive, the 2002 Implementation Report noted the following:

“Recent years have seen a proliferation of television channels, a large number of which are encrypted and accessible by subscription only. However, even if a viewer located outside the Member State in which transmission is organised is prepared to make the requisite payment, they often receive a negative response from the broadcasting organisation concerned, as the latter does not hold the copyright relating to broadcasting in the Member State in question. The absence of a transfer of rights may result in the absence of an economic interest on the part of the broadcasting organisation in ensuring that its programmes are broadcast outside its national market (given the reduced audience) or in the absence of a willingness to transfer on the part of the rightholders...”

A trend is thus emerging whereby producers sell their programmes to broadcasting organisations on condition that satellite transmissions are encrypted so as to ensure that they cannot be received beyond national borders. This encryption enables producers to negotiate the sale of the same programmes with broadcasting organisations in other Member States.

However, the principle laid down by the Directive, in keeping with the logic of the internal market, envisages the transfer of rights, under the law of the country in which the communication is introduced, for the entire footprint: in practice, a transfer on a national basis has the effect of fragmenting the market and runs counter to the principle of the Directive.”³⁵⁰

As previously noted, the principle-of-origin implies that the default situation is that once a right to communicate a work has been transferred to a broadcaster (to broadcast the work in the domestic market of the broadcaster), the initial communication to the public is legitimate in any jurisdiction (inside the internal

³⁵⁰ - European Commission Satellite and Cable Implementation Report, 2002; pg. 7

market) in which that transmission can be received. In these jurisdictions, cable operators can then retransmit these signals, by clearing rights under the collective licensing regime. The success of a market for retransmissions is therefore somewhat predicated on a community-wide market for initial broadcasts based on the principle-of-origin.

However, it has apparently been the practice of rights holders to licence the communication to the public for their works for exploitation only in the jurisdiction in which the original broadcast is made. As such, the principle-of-origin does not manifest into its envisioned form of creating a community-wide market for broadcasts. The consequence of this is that exploitation of the original transmission (including possible retransmission) in other jurisdictions cannot be based on the combination of the principle-of-origin, and the fact that communication to the public has already been authorised in that originating jurisdiction. The result is the fragmentation of the internal market through national licencing business models. This fragmentation is made possible and is facilitated by rights management practices such as signal encryption; if a cable operator were to attempt to retransmit the signal in another jurisdiction, they would need to decrypt the signal, and hence possibly be in violation of anti-circumvention provisions³⁵¹.

It is clear that the difficulties in creating an internal market with true freedom of movement of goods and services arise from the very territorial nature of intellectual property rights. In this regard, there are many interesting possibilities regarding the creation of a truly unified European legal framework for copyright; however such a new framework would generally represent a massive reform, and possible structural changes in the certain fundamental principles of copyright law.³⁵² For example, the possibility of a Community-wide system of copyright registration has been discussed³⁵³, but such would only be possible as an option system, as the Berne Convention requires that copyright protection not be subject to formalities³⁵⁴. Similarly, the creation of a single unified Community-wide copyright would mean a fundamental shift away from the principle of territoriality, and hence represent not just a regulatory reform in how intellectual property rights are exercised, but a radical change in the basis of the system.

The current system of harmonization of copyright law by means of Directives does not have an impact on the territorial reach of national legislations. This means that broadcasting rights will remain national rights. A supranational broadcasting

³⁵¹ As noted in Chapters 2 and 4, Anti-circumvention provisions refer to legal rules which supplement intellectual property rights, by prohibiting the bypassing of technological protections measures (such as provision) which are used to restrict access to content protected by copyright.

³⁵² For an analysis on the principle of territoriality, and the challenges it poses in the context of European copyright law reform, see EPRS (2015a).

³⁵³ Question 14 of the European Commission's 2011 Consultation Green Paper on online distribution of audiovisual works was "*What are your views on the introduction of an optional unitary EU Copyright Title? What should be the characteristics of a unitary Title, including in relation to national rights?*"

³⁵⁴ Berne Convention Article 5(2)

right would require a European copyright regulation, but this is not on the cards. Even if it were, EU authorities would not be entitled to prejudge the national property rights system of Member States. Consequently, EU-wide copyright would not deprive national legislation of its substance but would lead to a dual system of rights, as is the case with European trademark and design law.³⁵⁵

[8]-3.3.2 Premier League Case

A major development in European broadcasting law came with the 2011 judgement by the European Court of Justice on the Premier League Case. The judgement in this case set many significant precedents, which had implications on a variety of issues in European copyright law.

In this case, the Football Association Premier League had the practice of licencing the television broadcast rights of its matches on an exclusive and territorial basis. In order to maintain this territorial market fragmentation, licensees were contractually obliged to encrypt their transmissions, and prohibited the broadcaster from selling signal decoders to parties outside of their respective jurisdiction. The dispute arose when parties in the UK were found to have purchased decoders from the broadcaster licensee in Greece (at a lower price than it would cost in the UK).

In terms of the issue of market fragmentation, the Premier League case therefore gives a good example of the practice of combining territorial licencing with a contractual obligation for signal encryption.³⁵⁶ The Court provided interesting clarifications on EU law on a variety of issues arising from this dispute. Firstly, it found that the purchased foreign decoding devices are not 'illicit devices' within the meaning of the Conditional Access Directive (98/84/EC).³⁵⁷

The Court also found that national legislation, which prohibits the sale and use of foreign decoding cards, would be inconsistent with the principles of European Union law.³⁵⁸ Firstly, such a prohibition would be contrary to Article 56 of TFEU,

³⁵⁵ EBU (2011), page 31 in response to Consultative Question 14 of the 2011 Green Paper.

³⁵⁶ Paragraph 35 of the judgement summarised this practice, and reads as follows: "*In order to protect the territorial exclusivity of all broadcasters, they each undertake, in their licence agreement with FAPL, to prevent the public from receiving their broadcasts outside the area for which they hold the licence. This requires, first, each broadcaster to ensure that all of its broadcasts capable of being received outside that territory – in particular those transmitted by satellite – are encrypted securely and cannot be received in unencrypted form. Second, broadcasters must ensure that no device is knowingly authorised so as to permit anyone to view their transmissions outside the territory concerned. Therefore, broadcasters are in particular prohibited from supplying decoding devices that allow their broadcasts to be decrypted for the purpose of being used outside the territory for which they hold the licence.*"

³⁵⁷ Ruling 1 of ECJ Judgment Premier League Case (*Judgment of 4. 10. 2011 - Joined Cases C-403/08 AND C-429/08*)

³⁵⁸ The Court noted that such a prohibition could not be justified either by the objective of protecting intellectual property rights, or encouraging the public to attend live football matches.

The Court's discussion on protection of intellectual property rights is particularly interesting and has many significant implications. Firstly, the Court noted that there is no copyright in sports matches themselves (*paragraphs 96-99*); however, it is possible for a Member State to provide

which prohibits restrictions of freedom of provision of services.³⁵⁹ Furthermore, the Court found that the clauses of an exclusive agreement between a rights holder and a broadcaster, which oblige the broadcaster not to supply decoding devices to consumers outside of the territory of that licencing agreement, amount to a restriction on competition, and are hence prohibited under TFEU Article 101.³⁶⁰

Lastly, the ruling of the Court clarified that acts of reproduction incidental to the process of broadcasting and communication to the public, can be subject to limitations and exemptions from normal copyright exclusivity.³⁶¹

In the context of this discussion, however, the important consequence of this judgement is that the existing practices which facilitated broadcast market fragmentation could neither be maintained through legislative nor through contractual provisions.

For completeness of discussion, it should also be noted that in terms of interpreting the Satellite-Cable Directive, other ECJ case of relevance – the ‘Airfield Case’. This case involved the interpretation of Article 2 in the context of the Directive, arising from a dispute between collective management organisations, and a ‘satellite package provider’ (company which offers a package of several channels, as transmitted by satellite, and can be viewed by subscribers via the use of a provided decoder). In this case, the Court ruled that Article 2 must be interpreted as requiring the package provider to obtain authorisation from rights holders.³⁶²

some other form of protection for sports performances, and such protections would not be contrary to EU law (*paragraphs 100-104*). Assuming that some protection does exist, the rights holder is entitled to reasonable and appropriate remuneration, which does not necessarily mean the maximum possible remuneration (*paragraphs 107-116*). Therefore, appropriate remuneration does not include a premium resulting from market segmentation through territorial exclusivity; such premiums are reflective of price differences between national markets, where such partitioning is irreconcilable with the fundamental aim of facilitating the internal market (*paragraphs 114-116*).

³⁵⁹ Ruling 3 of ECJ Judgment Premier League Case (*Judgment of 4. 10. 2011 - Joined Cases C-403/08 AND C-429/08*)

³⁶⁰ Ruling 4 of ECJ Judgment Premier League Case (*Judgment of 4. 10. 2011 - Joined Cases C-403/08 AND C-429/08*).

For completeness, it should however be noted that ECJ case law on the issue asserts that the act of territorial licencing itself is not an anticompetitive act (paragraph 137 of Premier League judgement). This principle was established in the Coditel II Case (Judgement of 6.10.1982, Case 262/81).

³⁶¹ Ruling 8 of ECJ Judgment Premier League Case (*Judgment of 4. 10. 2011 - Joined Cases C-403/08 AND C-429/08*)

³⁶² The Ruling of the Airfield case states as follows “Article 2 of 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 must be interpreted as requiring a satellite package provider to obtain authorisation from the right holders concerned for its intervention in the direct or indirect transmission of television programmes, such as the transmission at issue in the main proceedings, unless the right holders have agreed with the broadcasting organisation concerned that the protected works will also be communicated to the public through that provider, on condition, in the latter situation, that the provider’s intervention does not make those works accessible to a new public.”

[8]-3.3.3 Coditel I Case

A discussion on the Premier League case, and its implications for the Satellite-Cable Directive would not be complete without contrasting that case with a previous case heard by the Court of Justice of the EEC - the Coditel I case³⁶³.

The Coditel I case involved a dispute arising from the rights to exploit a French film. The owners of the copyright to the film in question had granted an exclusive licence to distribute the film in Belgium; a German television channel subsequently broadcast the film, and that broadcast could be received in Belgium. The Coditel companies in Belgium then relayed the relevant broadcast over their cable diffusion networks (which relayed both Belgian and foreign broadcasts). The Belgian licensee had then not only brought action against the Coditel companies, but also the French rights holder, for not observing its exclusive licence.

The referring court had ruled that Coditel undertook a communication to the public, and that the authorisation given to the original German broadcaster did not authorise distribution outside of Germany. The argument put forward by the Coditel companies was that the exclusive licence given to the Belgian licensee was in violation of the provisions of the EEC Treaty. This resulted in referring to the Court of Justice, certain questions on the interpretation of certain EEC Articles. Ultimately, the Ruling of the Court of Justice was as follows:

“The provisions of the Treaty relating to the freedom to provide services do not preclude an assignee of the performing right in a cinematographic film in a Member State from relying upon his right to prohibit the exhibition of that film in that State, without his authority, by means of cable diffusion if the film so exhibited is picked up and transmitted after being broadcast in another Member State by a third party with the consent of the original owner of the right.”

-European Court of Justice Ruling on Case 62/79/1980/ECR 4, pg. 905

In summary, the Court ruled that the holder of an exclusive licensee could assert their rights to prevent a retransmission of a work, which was originally broadcast in another jurisdiction. As such, the implication is that the practice of territorial licencing for audiovisual works does not amount to a restriction of freedom to provide broadcasting services across borders.

Of most interest are the grounds on which this ruling was based. The Court noted that the rights holder and the assignees have a legitimate interest in calculating fees based on the probable number of performances, and in authorising television broadcast only after the film has been exhibited in cinemas for a certain period of time. Hence, these two forms of exploitation are interrelated, and this context must be considered.³⁶⁴

³⁶³ C-62/79, *Coditel and others v. Ciné Vog Films and others* (1980)

³⁶⁴ Paragraphs 13-14 of Coditel I ruling

The Court goes on to make a very strong statement in grounds 15 that “*Whilst Article 59 of the Treaty prohibits restrictions upon freedom to provide services, it does not thereby encompass limits upon the exercise of certain economic activities which have their origin in the application of national legislation for the protection of intellectual property, save where such application constitutes a means of arbitrary discrimination or a disguised restriction on trade between Member States. Such would be the case if that application enabled parties to an assignment of copyright to create artificial barriers to trade between Member States.*”

Further to this, the Court thus asserts that right holders have freedom of contract to define the geographical boundaries to which a licence applies; the wording of subsequent grounds put forward also implies that the Court did not see relevance in the fact that these geographical boundaries were national territories.³⁶⁵

In any instance, it is interesting to note how the Coditel I Case anticipated emerging issues regarding the application of copyright law to cross-border broadcasting activities. This case hence very much set the context for subsequent policy discussions. In fact, the European Parliamentary Research Service actually describes the Satellite-Cable Directive as ‘a (not so timely) reaction’ to the Coditel I Case.³⁶⁶

[8]-3.3.4 Comparison of Coditel I and Premier League Cases

Considering that the Coditel I Case was ruled on in 1980, and the Premier League Case in 2011, it is interesting to see how the rulings in these two cases compare; the general theme of the Coditel ruling was one favourable to territorial licensing, while that of the Premier League case was not.

Interestingly, in determining its judgment in the Premier League Case, the ECJ actually explicitly considered the implications of the Coditel case.

The Premier League judgment had concluded that prohibitions on the use of foreign decoders cannot be justified in light of the objective of protecting intellectual property rights.³⁶⁷ The Court then went on to explicitly clarify that this conclusion is not inconsistent with the Coditel I ruling that community law does not preclude the practice of territorial licensing.³⁶⁸ The Court based this

³⁶⁵ “*The effect of this is that, whilst copyright entails the right to demand fees for any showing or performance, the rules of the Treaty cannot in principle constitute an obstacle to the geographical limits which the parties to a contract of assignment have agreed upon in order to protect the author and his assigns in this regard. The mere fact that those geographical limits may coincide with national frontiers does not point to a different solution in a situation where television is organized in the Member States largely on the basis of legal broadcasting monopolies, which indicates that a limitation other than the geographical field of application of an assignment is often impracticable.*” - Grounds 16 of Coditel I Case Judgment

³⁶⁶ EPRS (2015b) at pg. 59

³⁶⁷ Premier League Case ruling, paragraph 117

³⁶⁸ *Doubt is not cast on this conclusion by the judgment in Coditel I, which has been relied upon by FAPL and others and by MPS in support of their arguments. It is true that, in paragraph 16 of that judgment, the Court held that the rules of the Treaty can- not in principle constitute an obstacle to the geographical limits which the parties to a contract of assignment of intellectual property rights*

statement on the assertion that the contexts of the two cases were different.³⁶⁹ Specifically, the Court noted that in the Coditel I case, the cable broadcasting company did not have authorization for communication to the public of the work (in the jurisdiction where that communication originated). However, in the Premier League Case, the broadcasters did have authorization to carry out acts of communication to the public in the jurisdiction of broadcast.³⁷⁰

In the Coditel I Case, the original German broadcaster was not a party to the dispute – it was rather the Belgian retransmitter. As such, no conclusion can be made as to whether there was any liability on the part of the German broadcaster, who had rights to broadcast the work inside of Germany, but whose signal transmission spilled over into Belgium. In principle, liability would be incurred if the act of communication to the public took place in a jurisdiction in which the broadcaster had no authorization to do so. As such, liability for infringement would be dependent on whether the act of communication was deemed to have taken place in the jurisdiction of the transmission, or the jurisdiction of reception; in the former case, the broadcaster would not be liable as it had authorization to broadcast the work in Germany, and in the latter case it would be liable as it did not have authorization in Belgium. This ambiguity again highlights the significance of the introduction of the principle-of-origin in the Satellite-Cable Directive.

In the Premier League Case, the broadcast in question was made by the Greek broadcasting organization. Since this took place after the adoption of the country-of-origin principle, the broadcaster would have only needed authorization to communicate the work to the public in the jurisdiction of the broadcast's origin. As such, even though the signal was received in the UK, there is no liability for infringement as for the purposes of copyright law, the communication to the public is deemed to have been made in Greece, where the broadcaster indeed had authorization to broadcast the work. As such, the broadcast and reception of the Greek broadcaster's signal was legitimate; pursuant to this logic, the Court took the view that preventing the use in the UK, of signal decryption decoders sourced from the Greek broadcaster, was not justifiable as a means to purportedly protect the intellectual property of the communicated work.

[8]-3.4 E-Commerce Directive

The E-Commerce Directive³⁷¹ was adopted in 2000 and does not directly deal with copyright issues, nor specific media sector policies. However, it codifies a very

have agreed upon in order to protect the author and his assigns and that the mere fact that the geographical limits in question coincide, in some circumstances, with the frontiers of the Member States does not require a different view. – Paragraph 118 of Premier League Judgement

³⁶⁹ Premier League Case ruling, paragraph 119

³⁷⁰ Premier League Case ruling, paragraph 120

³⁷¹ *Directive 2000/31/EC of The European Parliament and of The Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)*

important principle in communications law – the principle of intermediate liability. This principle addresses how certain classes of service providers in the communication sector are exempt from liability resulting from infringements made by the underlying communicated content.

This issue of intermediary liability is addressed through the ‘mere conduit’ principle of Article 12 of the Directive, reproduced below.

Where an information service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

- (a) does not initiate the transmission;*
- (b) does not select the receiver of the transmission; and*
- (c) does not select or modify the information contained in the transmission.*

The concept of intermediary liability is relevant to this study, as it is interesting to consider how it might apply to the business of broadcast retransmission.

Consider the example of a cable television service provider, who provides a subscription-based service of multiple different channels. Further consider that there are three groups of channels on the service: (i) Channels where the content is compiled by the service provider, (ii) channels directly provided by a third party (‘cablecaster’), and (iii) channels which are simultaneous and unaltered retransmissions of broadcasts made by over-the-air broadcasters.

Considering the service provision as a whole – it is unquestionable that the service provider initiates the transmission; it therefore fails to meet criterion ‘a’ for mere conduit status. It will also likely fail to meet criterion ‘b’ as a subscription business model implies that the service provider does indeed select the recipients of the transmission. In principle, it might meet this criterion if its model was to openly transmit the content to the unrestricted public.

The interesting aspect of this analysis is criterion ‘c’. If the entire service is taken as a single transmission, then the service provider clearly fails to meet this criterion, as it indeed actively selects the individual channels to be included in its service. However, if each individual channel is interpreted as being a separate transmission, then the situation is different. For channels where the content was assembled by the service provider, the criterion is not met. For cablecasts and retransmitted broadcasts however, the service provider does not exercise any editorial control – the content is neither selected nor modified. However, in the case of retransmissions, modifications are not even possible in the first case, if these retransmissions are made under the regime of the Satellite-Cable Directive. In the Satellite-Cable Directive, retransmission is defined as being ‘simultaneous, unaltered and unabridged’. In theory, it is possible for the service provider to retransmit a broadcast with some delay or alterations; however, such a retransmission would not be subject to compulsory collective management.

In conclusion, the practice of retransmission, for all intents and purposes, does not qualify for 'mere conduit' status under the E-Commerce Directive. This is an important point, as it affirms that retransmitters are indeed liable to the content they transmit. However, given the particularly unique context of such transmissions, unique activity-specific solutions for mitigating such liability are justified. In the context of copyright law, a such solution is the regime of mandatory collective management. In the field of public law, the solution lies in how retransmissions are treated in the context of content regulation; this is discussed in a subsequent sub-section of this chapter.

[8]-3.5 Audiovisual Media Services Directive

In order to have context to discuss the policies that apply to copyright and broadcasting law, it is useful to also discuss broader policies that affect media services.

[8]-3.5.1 Taxonomy of Services

Generally, media services can be categorised as either 'linear' or 'non-linear'. Linear services refer to traditional broadcasting services, where the broadcaster takes multiple works, bundles them into a programming schedule, and transmits such to end-users. In contrast, non-linear services differ from broadcasting services in that the time of communication is determined by the user, and not the service provider.

As such, non-linear services can be thought of as analogous to a 'digital library', where users can select a preferred work to be viewed at any time. These services can be provided on a flat-fee subscription basis, or a pay-per-view basis. However, what is important to note is that generally, these services are comparable to broadcasting in that the selected work can only be viewed immediately – no reproduction of the work is made for the purpose of transferring such a copy to the user (as would be the case where a digital download is purchased).³⁷²

In European law, the legal distinction between linear and non-linear audiovisual services is rooted in the Audiovisual Media Services Directive. This Directive was adopted in 2010, and among other things, provides an update to the Television Without Frontiers Directive (and its subsequent amendments).

³⁷² It is however important to note that in order to provide such online (on-demand) services, broadcasters need to clear a different set of rights than those required for the initial broadcast, namely the reproduction right and the making available right. According to the EC 2011 Green Paper on Online Audiovisual Distribution, "It is noted that these rights are technology neutral. The need to clear the making available right arises from the service provided (the making available of a work "on demand") regardless of delivery platform or protocol used (e.g. cable network, internet protocol or other). These rights are provided by the international treaties of which the EU and its Member States are members (the WIPO Copyright Treaty and the WIPO performances and phonograms Treaty) and in the EU acquis (Directive 2001/29/EC of 22 May 2001, the "Information Society Directive". (pg. 8)

The Directive distinguishes between two forms of audiovisual media services – traditional (linear) services such as television, and on-demand (non-linear services). In the context of this Directive, linear broadcasting includes analogue television, digital television, live streaming, webcasting, and near-video-on-demand^{373,374} Interestingly, the definition of audiovisual media service in Article 1(a)(i) explicitly states that all services are either a television service, or an on-demand service. As such, this definition represents a widening of the legal view of television, by adopting a technologically neutral definition with included online broadcasts, once they are meant for simultaneous viewing. Excluded from the definition of audiovisual media services are platforms for user-generated content, and private correspondence.³⁷⁵ Furthermore, the Directive covers audiovisual media, and hence does not apply to audio transmissions and radio services.

In terms of on-demand services, the Commission justifies bringing such services under the scope of regulation as they compete with television broadcast services.³⁷⁶ However, the Directive recognises that the very nature of non-linear services is such that the user has more choice and control than in the case of non-linear services, and hence the impacts on policy issues (such as content regulation) are different; on this basis the Directive imposes lighter regulation on on-demand services, where the rules are less restrictive.³⁷⁷

The Directive places certain obligations on media service providers. However it is important to note that the definition of a ‘media service provider’ is linked to the concept of ‘editorial control’; As such parties which engage in mere transmission of content (where editorial responsibility lies with a third party), do not fall within this definition.³⁷⁸ This can be seen as a re-iteration of the ‘mere conduit’ principle, as set out in the E-Commerce Directive, which provides for exemptions from regulatory liability for intermediaries.³⁷⁹

³⁷³ ‘Near-video-on-demand services’ refer to the practice of some broadcasters to repeat a single programme continuously at staggered time intervals. The user is therefore not able to arbitrarily choose the time of enjoying a programme (as would be the case in full video on demand), but is at all times able to wait for a short period for the next airing of the programme.

³⁷⁴ Recital 27 of Audiovisual Media Services Directive

³⁷⁵ Recitals 21 and 23 of Audiovisual Media Services Directive, respectively

³⁷⁶ Recital 24

³⁷⁷ Recital 58

³⁷⁸ Recital 26

³⁷⁹ The Audiovisual Media Services Directive acknowledges the significance of its relationship with the principle set out in the E-Commerce Directive in Recital 25 and Article 4(8).

The relevant provision of the E-Commerce Directive dealing with the ‘mere conduit’ principle and intermediary liability is Article 12(1), which states as follows: *“Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider: (a) does not initiate the transmission; (b) does not select the receiver of the transmission; and (c) does not select or modify the information contained in the transmission.”*

[8]-3.5.2 Country-of-origin principle

The core of the Directive is the ‘country of origin principle’, which is the essential provision for the creation of an internal market.³⁸⁰ Under this principle, only one Member State should have jurisdiction over an audiovisual media service provider.³⁸¹ Following from this, a service provider only needs to meet the regulatory obligations and law of the country in which their communications originate.

This principle is set out through a combination of Articles 2 and 3 of the Directive. Article 2 states that Member States shall ensure that all media service providers under their jurisdiction comply with the requirements applicable to audio media services intended for the public in that jurisdiction. This hence sets out a kind of primary jurisdiction that the Member State has over the service providers established within its territory. It is noted here that the criteria for ‘country of origin’ is different here than it is in the Satellite-Cable Directive; in the former, the relevant jurisdiction is that of the service provider’s establishment, while in the latter it is the jurisdiction in which the communication is initially transmitted.³⁸²

Article 3 of the Directive sets out that Member States “*shall ensure freedom of reception and shall not restrict retransmissions on their territory of audiovisual media services from other Member States for reasons which fall within the fields coordinated by this Directive.*” The implication of this provision is that once a service meets the legal requirements in its country of origin, it can be received or retransmitted in another country without having to meet separate legal requirements in the importing country. The result is that Article 3 essentially asserts that the primary jurisdiction established in Article 2, is an exclusive jurisdiction.³⁸³ Therefore, the result of the principle is a reduced regulatory burden on service providers and greater legal certainty, which both contribute to promotion of cross-border services and the development of the internal market.

[8]-3.5.3 Regulatory Provisions and Rights for Major Events

The remaining provisions of the Directive relate to various issues, such as: (i) provision of basic information to consumers, (ii) content regulation (restrictions on hate speech, protection of minors, advertising regulations, local content quotas, etc.), (iii) support for production and distribution of local and independent works, (iv) exclusive rights and news reporting, and (v) administrative provisions. As noted above, the regulatory burdens are generally lower for on demand services as compared to linear services.

³⁸⁰ Recital 33

³⁸¹ Recital 34

³⁸² The likely reason for this is because of the technical difficulty in determining the origin of a communication in an online context.

³⁸³ The policy basis of the country of origin principle is elaborated in Recital 36, which states that “*The requirement that the originating Member State should verify that broadcasts comply with national law as coordinated by this Directive is sufficient under Union law to ensure free movement of broadcasts without secondary control on the same grounds in the receiving Member States.*”

For all intents and purposes, the Directive does not contain any major provisions on the application of copyright law for audiovisual services. However, Chapter V of the Directive (Articles 14 and 15) does contain some provisions which set out interesting policy provisions with implications for copyright licencing practices.

Article 14 provides the possibility for Member States to take measures to prevent broadcasters under their jurisdiction, from broadcasting events that the Member State regards as being 'of major importance for society', on an exclusive basis such that a substantial proportion of the public is excluded from following coverage on free television. The Article also obliges Member States to prevent broadcasters under their jurisdiction from exercising exclusive rights in such a way that the public of another Member State (in which the programming in question is deemed to be of major importance for that society) is denied coverage. In practice, such events are normally major sporting events.

This Article hence represents a restriction on the freedom of contract of both broadcasters and owners of broadcasting rights for such events; Such restrictions on the private interests of these parties are deemed to be justified in light of the social benefits of accommodating the public interests in ensuring access to widespread coverage. The provisions of course do not preclude the possibility of licencing broadcasting rights on an exclusive basis, but merely place a restriction on how those rights are exercised, once granted.

Article 15 sets out further restrictions on the scope of exclusive rights for coverage of events of major social significance. This Article sets out that where a broadcaster has exclusive rights to broadcast a high public interest event, all other broadcasters (including those from other jurisdictions) must have access to the exclusive content for the purpose of short news reports. Such access must be provided on a fair, reasonable and non-discriminatory basis, and there should be freedom for the second broadcaster producing the news segment to choose the short extracts. However, such extracts can only be used for broadcasting news programmes; the extracts can only be used for on-demand services if it is provided by the same media service provider on a deferred basis. Furthermore, compensation for the use of these extracts is limited to the marginal costs of providing access to the content for the producers of the news programme.

Article 15 hence provides an obligatory duty to deal for holders of exclusive rights in high public interest events, and a prohibition on profiting from such dealings, though this is limited to licencing extracts of the works for incorporation into news programmes. This provision is hence comparable to the limitations and exceptions to exclusive copyrights that exist in some jurisdictions for news reporting. In fact, the list of possible limitations and exceptions to copyright contained in Article 5 of the Information Society Directive, does include the cases of "*reproduction by the press, communication to the public ...of broadcast works..., ... in connection with the reporting of current events, to the extent justified by the informatory purpose...*". However, unlike the possible limitations and exemptions set out in the Information Society Directive (which are at the discretion of

implementing Member States), the limitation implied by Article 15 of the Audiovisual Services Directive is mandatory.

The purpose of taking note of this provision on major events is to stress that exceptions and limitations to the norms of intellectual property exploitation – and specific policies for specific public policy purposes and market circumstances – are an important part of the intersection between media law and copyright law.

[8]-3.5.4 Latest Developments

For completeness, it is noted that in *May 2016*, the European Commission issued a new Proposal to amend the Audiovisual Media Services Directive, to account for various changes in the market environment.³⁸⁴ The main elements of the proposed amendments are: (i) simplifying the rules for determining country of origin, (ii) reducing burden of advertising limits for television broadcasters, (iii) allowing for new approaches for promoting European works, including imposing financial contributions on on-demand service providers, (iv) updated prohibitions on hate speech, (v) new provisions on protection of minors (including restrictions applied to online and on-demand services), (vi) inclusion of video-sharing platforms, and (vii) new provisions on the independence of regulators. As of October 2018, these amendments are anticipated to be soon adopted.³⁸⁵

[8]-3.6 Collective Management Directive

The final existing legal instrument relevant to discussing copyright and media services is the Collective Management Directive of 2014.³⁸⁶

The Directive sets out provisions dealing with two issues: (i) the principles and rules under which all CMOs should function, and (ii) multi-territory licensing for online music services.

The Directive is important, as CMO play a critical role in the overall intellectual property landscape, and the policy objectives of many other instruments (such as the Satellite-Cable Directive) require effective and efficient CMO operations to be fulfilled. Before the Directive, significant difference existed between the national rules governing the functioning of CMOs.³⁸⁷ As such, there was a clear need to

³⁸⁴ *Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities*; 2016/0151 (COD) 287 final; 25.5.2016, Brussels, COM(2016)

³⁸⁵ <https://ec.europa.eu/digital-single-market/en/news/european-parliament-approves-revised-rules-audiovisual-media-across-europe>; accessed on 18-10-2018.

³⁸⁶ *Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market*

³⁸⁷ Recital 5 of Collective Management Directive

codify a legal instrument to ensure a high standard of governance and transparency in CMO operations across the internal market.

Title II of the Directive outlines provisions that apply to all CMOs, operating in all categories of rights management. It sets out provisions on issues such as the rights of rights holders (in relation to their dealings with CMOs), membership rules, governance principles, supervisory functions, and the general obligations of CMOs. The directive also sets out specific principles on how licences are to be granted, and licensing revenue is to be collected, used, and distributed, including how deductions are made. Furthermore, the Directive sets out broad principles for how representation agreements³⁸⁸ are to be managed, and how information is to be made available to all stakeholders, including the public.

[8]-3.6.1 Online Music Services as Users of Works

Before proceeding to discuss the second policy area of the Collective Management Directive, it is first useful to undertake a short discussion on why online music services warrant special treatment. The example below aims to illustrate this.

Like audiovisual media services, audio (generally music) media services can either take the form of traditional linear broadcasts or on-demand services. However, on-demand music services have a unique characteristic in that the size of the repertoire of works that are used is of orders of magnitude greater.

For the purpose of illustration, consider a hypothetical traditional television broadcaster who broadcasts without interruption, a programming schedule of thirty-minute programmes, where no programme is broadcast more than once for an entire year. This broadcaster will broadcast a total of 17,520 works in a calendar year.³⁸⁹ Of course, this is an extreme estimate for the number of works the broadcaster has to clear rights for, as (i) certain works are aired several times, (ii) multiple individual works are likely different episodes in series or catalogue of works controlled by the same rights holder, and hence subject to a single licensing agreement, (iii) some of the programmes aired might be produced by the broadcasters themselves, and hence the issue of rights acquisition for broadcasting does not arise, and (iv) some not insignificant proportion of airtime would consist of commercial advertising.

Similarly, consider a hypothetical traditional radio broadcaster who broadcasts without interruption, songs of three minutes in length, where no song is broadcast twice in a calendar year. Such a broadcaster would broadcast a total of 175,200 different works.³⁹⁰ Again, this is an extreme estimation, as (i) for commercial

³⁸⁸ A 'representation agreement' is an agreement between two CMOs, where one CMO acts on behalf of the other, in conducting licensing agreements. It contrasts with a 'reciprocal agreement' where this representation is mutual – i.e. both CMOs act on behalf of the other, usually in terms of licensing agreements within the national jurisdiction of the acting CMO.

³⁸⁹ Two programmes per hour, for 24 hours a day, for 365 days a year results in 17,520 individual programmes.

³⁹⁰ 20 three minute songs per hour, for 24 hours a day, for 365 days a year results in 175,200 individual songs.

radio, a small number of popular works in a given season are repeatedly broadcast, and (ii) radio broadcasting airtime would also consist of a large proportion of advertising, announcements, and other non-music content.

Estimating the number of works used in on-demand services is much more difficult, as the specific catalogue offered varies greatly between service providers. Nevertheless, one estimate puts the maximum size of the catalogue of one the largest online on-demand audiovisual service providers in the US as around 8,000 works.³⁹¹ In contrast, major on-demand music services tend to offer a catalogue of over 30 million works.³⁹²

Content	Service	Works Used
Audiovisual	Television Broadcasting	17,520
	On-Demand	8,000
Music	Radio Broadcasting	175,200
	On-Demand	30,000,000

Table 8.1: Hypothetical estimate of maximum number of works used by different types of media service providers³⁹³

It is hence clear that even using the most liberal estimates, the number of works involved in on-demand music services is of orders of magnitude greater than that for traditional radio or television broadcasting, or on-demand audiovisual services. This characteristic makes for a particular challenge for administering copyright, especially in the context of online services, which are accessible in multiple countries. Barring the application of any principle to the contrary, rights would therefore need to be cleared for an enormous number of works, in every jurisdiction in which the service is offered.

This also creates challenges for CMOs representing performance rights for musical works. Because of the scope of operations of online on-demand music services, advanced administrative infrastructure is needed by the CMO, particularly in terms of data processing relating to the licensing and use of protected works, and the disbursement of payments to rights holders.

³⁹¹ At its peak in 2014, Netflix offered a total of 8,103 titles (both movies and television shows), in the US market. The size of this repertoire has been shrinking due to competition from other digital media providers. For context, Netflix is widely seen as one of the market leaders in the provision of on-demand audiovisual services, though its market share seems to be decreasing due to greater competition. *Note on Source: The original source – Allflix (a website dedicated to cataloguing the programmes offered on Netflix) – is no longer online, but the data in the report was cited by several notable news outlines, such as Time (<http://time.com/4272360/the-number-of-movies-on-netflix-is-dropping-fast/>; accessed on 18-10-2018)*

³⁹² For example, Spotify, one of the market leaders in online music streaming services, claims to offer access to over 35 million individual songs. *Source: <https://newsroom.spotify.com/companyinfo/>; accessed on 18-10-2018.*

³⁹³ For avoidance of doubt, these are certainly not meant to be realistic estimates; they are highly exaggerated maximum estimates, used merely to highlight the magnitude of the differences.

Consider that the scale of this operation is a function of not only the licenced repertoire, but of the number of end-users and the level of usage of the average end-users. Tracking every individual use (e.g. stream or download) of every single user, can hence amount to managing data of millions of individual transactions. Hence without adequate automated processes, the processing of those uses would not be economically viable.³⁹⁴

Furthermore, it is useful to note that while on-demand audiovisual services generally offer the ability to stream a programme, on-demand music services may offer the option to download works as well as stream works. Where downloads are involved, this might involve clearing 'mechanical rights' (as opposed to the 'performance rights' involved in streaming) – not only are these rights possibly held by different rights holders, but they may be managed by different CMOs. Clearing the rights for download and streaming services is therefore more complex than clearing for just streaming.

[8]-3.6.2 Multi-Territory Licensing for Online Music Services

Because of the scale of use of works in on-demand music services, special policies for such services can be justified. Furthermore, in the online context, which is generally by definition a cross-border service, the issue of clearing rights for multiple territories also arises.

Licensing for online music services also raises challenges for CMOs and rights holders themselves. One of the challenges how national legal frameworks – which are designed for licensing activities that take place on a national basis – apply when providing multi-territory licences, or providing licences to users in other jurisdictions. As such, there is legal uncertainty that acts as a deterrent to participation in the multi-territory licensing market.³⁹⁵

Furthermore, it appears that in some cases, commercial users of works sometimes obtain two sets of rights: (i) multi-territory licences from parties representing major repertoires of works, and (ii) mono-territorial licences limited to national territories.³⁹⁶ The latter mono-territorial licences are obtained from national CMOs who have reciprocal agreements with other societies, and are used to cover repertoire that is not already covered by the former major multi-territorial licences.³⁹⁷

The result of the prevailing legal uncertainty is hence that some online services are licenced through a combination of multi-territorial and national licences. This is undesirable as it not only increases the contracting costs of service providers,

³⁹⁴ Collective Management Directive Impact Assessment, pg. 25

³⁹⁵ Collective Management Directive Impact Assessment, pg. 26

³⁹⁶ Collective Management Directive Impact Assessment, pg. 27

³⁹⁷ 'Reciprocal Agreements' refer to agreement between two CMOs to enter into a partnership in which either member is permitted to act on behalf of the other member within its respective jurisdiction. Revenue collected on behalf of the other CMO are then remitted accordingly.

but it can also limit the provision of services to the territories in which both the multi-territory and the national licence simultaneously apply.³⁹⁸

Furthermore, the overlap of multiple licences can result in blurred boundaries of the represented repertoires, especially where there are both multi-territorial and national licences from CMOs that might already have reciprocal agreements with each other. The result is that it is possible for certain single uses of works to be double-invoiced to users, further increasing legal uncertainty and operation costs. It is further possible that where CMO offers multi-territorial licences, but lacks the requisite data management systems, certain works that should be covered under the licence are not matched when tracking usage by the licensee. Hence, national licences might be used by users in order to provide a sort of 'insurance' in cases where there are gaps in the administration of the multi-territorial licence due to data management deficiencies.

Therefore, improved coordination between CMOs is necessary, particularly as it relates to reciprocal and representation agreements. This further reiterates the need for general coordination on national standards for CMO operation. It also means that the qualitative nature of the data kept on works needs to be improved in order to prevent instances of conflicting claims of ownership and/or representation – an issue which would largely not have previously existed where licensing practices were limited to a national territorial basis. This again underscores the need to ensure that CMOs operating in the multi-territory licensing market need to meet high standards in terms of their capacity to administer licences and undertake the necessary data processing.

Title III of the Collective Management Directive sets out provisions which specifically apply only to CMOs who grant multi-territorial licences for online rights in musical works.

Mainly, the provisions ensure that when CMOs administer such licences, that they have the technical and administrative capacity to do so. This specifically refers to the capacity to *“process electronically, in an efficient and transparent manner, data needed for the administration of such licences, including for the purposes of identifying the repertoire and monitoring its use, invoicing users, collecting rights revenue and distributing amounts due to right holders.”* (Article 24)

Hence, some investment in information technology systems would be necessary for CMOs wishing to offer these specific multi-territory licences. Further provisions ensure that the information of the CMO's repertoire of works is accurate and transparent, and there is accuracy and timeliness in invoicing, reporting, and payment to rights holders.

An important mechanism of the Directive, is the relationship it sets up between CMOs, in order to encourage multi-territory licensing for the use of musical works online. Article 29 provides that representation agreements are of a non-exclusive

³⁹⁸ Collective Management Directive Impact Assessment, pg. 2).

nature. As such, CMOs are encouraged to enter into reciprocal agreements with multiple other CMOs for multi-territorial online licensing.

This non-exclusivity compliments the provisions of Article 30, which provides that where a CMO (which does not grant multi-territory licences) seeks a representation agreement with another CMO (which does offer multi-territory licensing), the receiving CMO is obligated to accept the request.

Furthermore, under Article 31, if a CMO does not offer multi-territory licensing, and does not enter into a representation agreement with another CMO which does, the members of that CMO can withdraw their online rights in musical works for the purpose of multiple-territory licensing (without having to withdraw these rights for the purpose of mono-territory licensing); these withdrawn rights can then be exercised individually by the rights holder, or collectively through another CMO. The effect of this provision is that a rights holder always has access to the possibility of multi-territory licensing.

The cumulative effect of these provisions is to promote the aggregation of repertoire through facilitating representation agreements, and encouraging more efficient multi-territory licensing practices.

The concept behind the Directive seems to be one of giving CMOs a strategic choice as to whether they wish to invest in the data processing upgrades necessary to administer multi-territory licences. The general alternative to this choice would be to execute representation agreements with other CMOs for the purpose of multi-territory licensing. For CMOs that meet the requirements necessary to administer licences on a multi-territory basis, the legal requirements would apply to its own repertoire, as well as the repertoire of other CMOs it represents through representation agreements. Therefore, it is envisioned that there would emerge a few CMOs with a large number of representation agreements, and hence a large 'aggregated repertoire'. These CMOs are referred to as 'passport entities', and would be able to reap the economies of scale necessary through repertoire aggregating, to offset the compliance costs of the legal requirements set out in Title II of the Directive.³⁹⁹

[8]-3.6.3 Extended Collective Licencing and Country-of-origin principle

Ultimately, the Directive shows that for online music services, European policy makers chose a strategy of encouraging aggregation of repertoires and developing the administrative infrastructure for multi-territory licensing.

The chosen strategy clearly deviates from the country-of-origin principle set out in the Cable and Satellite Directive, as well as the Audiovisual Media Services Directive. Under the Collective Management Directive, for the purposes of copyright law - a provider of online music services still engages in acts of communication to the public (and reproduction in the case of providing downloads) in every territory in which services are offered. Hence authorisation

³⁹⁹ Collective Management Directive Impact Assessment, pg. 44

from rights holders is needed in each one of these territories; the Directive merely invokes an environment more favourable to a market for multi-territory licences.

In contrast, if the country-of-origin principle were applied to online music services, then the copyright relevant acts of the service provider would be deemed to occur only in the territory in which that service provider is based. As such, only a single national licence would be needed for rights clearance. The mechanism of the country of origin principle is therefore equivalent to a legal fiction that a single national licence has the scope of a multi-territorial licence, or at least the legal presumption that national CMOs are always able to grant multi-territory licences.

For the country of origin principle to work in this context it would have to be applied alongside a system of extended collective licencing. Extended collective licensing is where a single CMO is deemed to represent the entire repertoire of works; hence the repertoire administered by the CMO is 'extended' to include all other works not within that CMO's repertoire, hence creating a presumption that the CMO is able to grant a full blanket licence for the use of all works. Normally, the chosen CMO is the organisation that represents the largest proportion of rights holders and the universal repertoire, and acts on behalf of all other CMOs. The effect of this mandate extension is an automatic aggregation of repertoire; this is in contrast with the 'licencing passport' model, where repertoire aggregation is undertaken on a voluntary contractual basis.

Furthermore, it should be noted that under extended collective licencing, individual rights holders (onto whose rights the extension applies) can still opt out of the extended licence and exercise their rights individually (or through another collective organisation). Therefore, the model of extended collective licencing does not actually mandate rights administration through the selected CMO, but merely creates a default rule under which the selected CMO acts as an agent on behalf of all rights holders.

The Commission however notes that one problem is that in an online context it is difficult to determine the exact 'country of origin' based on technical criteria.⁴⁰⁰ However, it is noted that the criteria used to apply that principle in the context of the Audiovisual Media Services Directive is one of a legal establishment nature.

As such, it would appear that while the Commission is willing to adopt an online application of the country of origin principle in the general content regulation and authorisation context, it is reluctant to do so in the context of copyright law.

However, the most relevant argument against adopting a combination of extended collective licensing and the country-of-origin principle to online music services again rests on the demands of those services on systems for copyright administration.

For all online media services, the major market failures are the high transaction costs and legal uncertainties associated with provided cross-border services.

⁴⁰⁰ Collective Management Directive Implementation Report pg. 46

Policy interventions therefore must focus on mechanisms to reduce these transaction costs and provide legal certainty – this is exactly what collective licensing and the country-of-origin principle achieve respectively. However, for online music services, there is the additional market failure of the capital investments needed by CMOs to invest in data processing, and enter into the multi-territory licensing market (as quasi-natural monopolies).

Applying the country of origin principle to online service would therefore shift the burden of these data processing requirements to the CMO selected to act as the extended collective licensing agent, without providing any real incentive for that CMO to make the necessary investments. Furthermore, obliging the CMO to make these investments would amount to a disproportional regulatory burden, and possibly undermine the freedom of enterprise (fundamental freedom to conduct a business) of the organization. The licensing passport model, while lacking the elegance of the principle-of-origin, can therefore be seen as having one main advantage – it leaves compliance with standards for capacity requirements for multi-territory licensing as a voluntary and strategic decision for individual CMOs to make. Presumably, as technology advances and the burden of the costs of massive data processing become less significant, these grounds for preferring the licensing passport model will erode.

[8]-3.6.4 Parallel Direct Licencing

Besides the country-of-origin principle and the licensing passport model, another possible policy approach considered by the Commission was a system of 'Parallel Direct Licensing'.⁴⁰¹ Under this model, CMOs would be prohibited from representing rights holders on an exclusive basis, at least in terms of online distribution rights.

Rights holders themselves would then negotiate licences (specifically for online use) with users, without having to withdraw their rights from the CMO.⁴⁰² The result is hence a system of 'parallel direct licences'. A variation of this approach, is allowing rightsholders to choose between exclusive and non-exclusive mandates. Hence, where the CMO does not offer multi-territory licences, the rights holder can opt to licence these rights themselves or through another CMO.

This option is attractive as it does allow for more market-based flexibilities in licensing practices. However, the increased range of licensing choices might be at the cost of the freedom of contract of rights holders, if they are not able to grant their chosen CMO an exclusive mandate.

In terms of legal certainty, this policy option may have effects in both directions.

⁴⁰¹ Collective Management Directive Impact Assessment, pg. 42. It is noted that the Commission also considered a fourth option – a 'Centralized Portal', where individual CMOs pool their repertoires for clearance through a centralized portal, so the purposes of multi-territory licensing. However, this option was rejected as it would create de facto monopoly whose functioning would necessitate price fixing and customer allocation, and hence whose very existence would be in violation of European competition law. (pg. 47)

⁴⁰² Collective Management Directive Impact Assessment, pg. 44

On one hand, more flexibility means that users have greater certainty that they would be able to secure authorization from rights holders, particularly when CMOs do not offer multi-territory licences. However, parallel direct licences administered by rightsholders might result in uncertainties about the precise repertoires covered by CMOs.

Furthermore, there would be some increase in the administrative costs of CMOs, due to the need to adjust licensing agreement and invoices to 'carve out' for the rights administered directly by individual rights holders. There will of course also be some transaction (and administrative) costs to rights holders who not have to negotiate and execute rights on their own, rather than the normal channels of their CMO. Economies of scale to rightsholders in negotiating and contracting might also therefore be lost.

Also, there is the obvious increase in transaction costs for users, who also need to now execute agreements with users who choose to directly administer their rights. However, only rights holders with a portfolio of high valued works would likely have the resources and bargaining power necessary to execute parallel direct licences. Without there being recourse to an alternative CMO that does offer multi-territory licences, it is thus possible that a large proportion of the universal repertoire – particularly works with lower market values – will fail to find opportunities for legitimate online distribution. The result is hence a possible restriction of content diversity, and a consolidation of market power in the online market by rights holders in more popular works. The policy framework should hence focus on ensuring that all rights holders have access to opportunities for multi-territory licensing agreement for the use of works online.⁴⁰³

An interesting perspective on this model is considering how it relates to the policy objective of encouraging CMOs to make the necessary investments to administer multi-territory rights for online use. On one hand, the scale of the data processing requirements for administering multi-territory licences decreases, as the CMO does not unavoidably have participation agreements with other CMOs. However, this does not necessarily mean that the costs of such administration are significantly lower, as there are high economies of scale in large-scale data processing. Hence, having multiple CMOs invest in such capacity seems less efficient than designing a policy mechanism to promote the aggregation of repertoire to reap these economies of scale.

[8]-3.6.5 Multi-Territory Licensing for Broadcasters

In terms of administering multi-territory licences for online use of musical works, it is important to take notice of Article 32 of the Collective Management Directive. This Article provides that the entire Title II of the Directive on multi-territory

⁴⁰³ It is useful to note that aggregating repertoires of different valued works is in the best interest of the market itself, as there are strong supply-side economies of scale. Online services are attractive not only for access to popular works, but for the number of total works which can be accessed, given the value-added functionality of content discovery algorithms which recommend new (often previously unknown and hence low-economic value) works to users based on their preferences and usage trends.

licencing does not apply to licences offered to broadcasting organizations, in relation to a broadcaster's simulcasts and ancillary online services.⁴⁰⁴

The rationale for exempting licences for broadcasting organisations is not explicitly spelt out by the Commission; however, some context for this policy position is given by Recital 48 of the Directive.⁴⁰⁵ It would appear that in the view of European policy makers, the existing status quo of obtaining national licences from local CMOs is sufficient for licencing broadcasters' online ancillary services.

Broadcasters would generally have licencing agreements with their local CMO for the primary broadcasts, and under the principle-of-origin (as set out in the Satellite-Cable Directive), rights clearance is only needed in the jurisdiction of initial signal transmission. However, the country-of-origin principle does not currently apply to the ancillary online services of a broadcaster, and hence such online communications are – for the purposes of copyright law – deemed to have taken place in every territory in which the online services are accessible. Therefore, the broadcaster would need a multi-territory licence in order to provide its ancillary online services.

However, compared to online on-demand music services, the scope of use of musical works for broadcasters is much smaller. Therefore, multi-territory licencing administration for broadcast licensees is not associated with the major data processing requirements that arise for on-demand music services. This less-complex scope of usage is also not just a function of the number of works used, but also how the use is distributed amongst end-users. In the case of online-music services, each end-user would have a different usage of works pattern, and these individual uses need to be aggregated in order to determine the total usage of a licenced work; this layer of complexity does not apply in the case of licencing works for use in broadcasts, as the number of end-users ultimately accessing a

⁴⁰⁴ Simulcasts refer to the online distribution of broadcast transmissions (radio or television), undertaken simultaneously with the traditional terrestrial transmission. 'Ancillary services' is a broader term that refers to various services offered by a broadcaster online, which compliment, but are subordinate to, its primary terrestrial broadcast. This hence includes simultaneous as well as differed online broadcasts and previews; this does not include the making available of individual works on an on-demand basis.

⁴⁰⁵ Recital 48 of the Collective Management Directive states as follows: "*Broadcasting organisations generally rely on a licence from a local collective management organisation for their own broadcasts of television and radio programmes which include musical works. That licence is often limited to broadcasting activities. A licence for online rights in musical works would be required in order to allow such television or radio broadcasts to be also available online. To facilitate the licensing of online rights in musical works for the purposes of simultaneous and delayed transmission online of television and radio broadcasts, it is necessary to provide for a derogation from the rules that would otherwise apply to the multi-territorial licensing of online rights in musical works. Such a derogation should be limited to what is necessary in order to allow access to television or radio programmes online and to material having a clear and subordinate relationship to the original broadcast produced for purposes such as supplementing, previewing or reviewing the television or radio programme concerned. That derogation should not operate so as to distort competition with other services which give consumers access to individual musical or audiovisual works online, nor lead to restrictive practices, such as market or customer sharing, which would be in breach of Article 101 or 102 TFEU.*"

work is the number of end-user who at most receive – or at least actually watch or listen to – a specific broadcast. The distribution of the use of individual works is therefore linear in this regard.

As a result of these considerations, it seems unnecessary to apply the strict regulatory obligations set out in Title II of the Collective Management Directive, as a high level of administrative capacity is not a prerequisite for effective administration of multi-territory licences for broadcast organisations as a specific sub-set of licensees.

[8]-4 MODERNISING THE POLICY FRAMEWORK

Returning specifically to the issue of broadcast policy and regulation, the old Television Without Frontiers Directive was repealed and updated by the Audiovisual Media Services Directive; these updates were largely a response to changes in technology. However, no corresponding instrument has (to date) been adopted to update the Satellite-Cable Directive.

It is important to understand that the Satellite-Cable Directive deals with original broadcasts which are transmitted via terrestrial means or satellite, and where that signal is retransmitted by a cable broadcaster (or by microwave system). Hence, the collective management regime in the Directive does not apply to other forms of retransmission.

For non-cable forms of retransmission, the existing ‘standard’ legal provisions on copyright and related rights would be relevant. In particular, these would be the exclusive rights of authors, performers, and producers to prohibit or authorise the communication of their works to the public (or the making available of their works to the public).⁴⁰⁶ As such, individual holders of both copyright and related rights would hold exclusive rights (or at least a right to remuneration) in relation to communication to the public via retransmission that is not made via cable. This however does not mean that collective management for such retransmissions is not possible, but only that it is not mandatory. It can therefore be said that regulation of retransmission within the internal market does not follow the principle of technological neutrality.

In the 2002 Implementation Report, for the case of retransmission via satellite, the Commission took the view that to treat such retransmitters the same as cable retransmitters would amount to ‘equality of treatment in appearance only’, as they are different situations. More specifically, the Commission noted that while cable retransmissions are restricted in their geographical reach, satellite retransmissions can go beyond national borders, or even outside of the internal market.⁴⁰⁷ It concludes that the Commission does not therefore consider it

⁴⁰⁶ These rights are established under Directives 92/100/EEC (the Rental Directive) and 2001/29/EC (Information Society Directive). This interpretation is explicitly supported by the 2002 Cable Satellite Directive Implementation Report (pg. 14).

⁴⁰⁷ European Commission Satellite and Cable Implementation Report, 2002, pg. 15

appropriate (at least at that stage) to extend the CMO model to other mediums and technological platforms for broadcast retransmission.

The Commission justified its disapproval of extending the collective management model to satellite retransmissions with the following comments:

“To impose the principle of collective management on retransmission activities would amount to limiting considerably the freedom of rightholders, who would no longer be able to object to the retransmissions in question. However, some of the programmes contained in these retransmissions are not only the subject of an act of communication in the broadcasting context, but may also be presented on other media, in accordance with a chronology designed to maximise potential remuneration in respect of the work concerned. It should be noted that the chronology for the various acts of communication for a particular work is organised on a national basis, depending on the initial success achieved in the Member State where the work was produced.

However, the retransmission of programmes in packages broadcast by satellite is part of this media chronology: to the extent that the technical means used ensure a vast reach for the method of retransmission concerned, a limitation on the exercise of exclusive rights would jeopardise this chronological chain and thus, to a certain extent, the potential remuneration in respect of a work.”⁴⁰⁸

The above language is interesting, as it seems to signal a scaling back of the Commission’s enthusiasm for the collective licencing model. In fact, previous statements seemed to explicitly justify limiting the freedoms of rights holders due to the unique characteristics of retransmission markets. Furthermore, the notion of protecting/facilitating media chronology practices⁴⁰⁹ goes against the very goal of creating a market in which there is free movement of audiovisual and broadcasting services, as these practices by definition are meant to create market fragmentation.

More recently however, the need to revisit this issue has again come to the forefront. In 2015, the European Commission published a communication titled A Digital Single Market Strategy for Europe. One of the major objectives of the strategy was improving cross-border online access to content throughout the internal market; as a part of this aim, the Commission noted the need to review the Satellite and Cable Directive to “*assess the need to enlarge its scope to broadcasters’ online transmissions and the need to tackle further measures to ensure enhanced cross-border access to broadcasters’ services in Europe.*”⁴¹⁰

[8]-4.1 Technological Neutrality and Taxonomy of Platforms

In order to understand how the regulation of retransmissions interfaces with the changing technological landscape, it is important to consider the concept of

⁴⁰⁸ European Commission Satellite and Cable Implementation Report, 2002, pg. 15

⁴⁰⁹ ‘Media chronology practices’ refers to practices relating to publishing a work at different times depending on geographical markets, and distribution platform. This is discussed further in 4.8 of this chapter.

⁴¹⁰ Digital Market Strategy 2-15, pg. 7

‘Technological Neutrality’.⁴¹¹ Technological Neutrality is a principle often applied in telecommunications law; it suggests that regulatory frameworks should apply equally to all technological platforms in terms of service delivery or content distribution; i.e. legal rules should neither favour nor discriminate against any particular form of technology, as such might create market distortions and possible impediments to innovation.

In order to have a context for discussing technological neutrality and its relevance for broadcasting and retransmission, it is useful to first set out a very broad overview of different broadcasting services.

Firstly, there are traditional broadcasts, which have generally been the focus of this manuscript up to this point. Such broadcasts are undertaken on a terrestrial basis using specific frequency bands, and are hence transmitted ‘over the air’. Terrestrial broadcasts can also include broadcasts via satellite, which allow for greater coverage of a transmitted signal, and more efficient use of scarce spectrum resources. These transmissions have traditionally been via analogue protocols, but in recent times, most developed jurisdictions have switched over to the provision of digital broadcasting services. Under digital broadcasting systems, less spectrum is used, meaning there is room for a greater number of broadcasters in the market. Furthermore, there may be a role for content aggregators who collect the signals of broadcasters in order to have greater efficiency with a consolidated digital transmission.

In terms of the online world, it is necessary to differentiate between two forms of broadcasting over the internet. The first form is where a broadcaster streams their programming schedule online, in parallel to their traditional (offline) broadcast. As this is undertaken simultaneously, this form of online broadcasting is known as ‘simulcasting’. In principle, a simulcast is technically a broadcaster’s online retransmission of its own broadcast.

For completeness, it is useful to note that there are also scenarios in which broadcasters may stream their programming schedules online with some delay. These services are sometimes called ‘catch-up’ services, as their deferred nature is designed to allow viewers to re-watch a programme a second time, in case that they were not able to view the initial broadcast. It is critical to note that for both simulcasting and catch-up services, the broadcaster is in control of the transmitted content and the scheduling. These services hence do not include the provision of individual programmes selected at a specific time by the viewer; such services are known as on-demand or non-linear services (as opposed to the linear nature of traditional pre-determined broadcasting schedules).

The second form of online broadcasting is the case where the broadcaster only operates online, and does not transmit any analogous terrestrial signal; this form of content distribution is normally referred to as ‘webcasting’.

⁴¹¹ For a discussion on technological neutrality in the context of copyright law, see Siu (2013).

In terms of retransmissions, the technical platforms used can generally be categorised into ‘closed’ and ‘open’ networks. Closed networks refer to cases in which services are provided through a physical connection to the infrastructure and network of the service provider. This physical connection hence means that the network is not ‘open’ to anyone wishing to access services. This category would hence include traditional cable services, digital terrestrial services, IPTV (Internet Protocol Television) provided over closed circuit networks, subscription satellite services, and mobile networks.

The category of ‘open networks’ essentially refers to the open network of the internet; content distribution services provided exclusively through the internet are often referred to as ‘over the top’ services, as their delivery does not involve any owner of fixed infrastructure, and there is no specific allocation of bandwidth for the content communication (i.e. it is transmitted in parallel to the wide array of other forms of data also transmitted over the internet).⁴¹² Since these services are in principle accessible to anyone with an internet connection (and on any device), they are considered to be provided over ‘open’ networks.

[8]-4.2 Proposal for New EU Regulation

Further to the Digital Single Market Strategy, and under the theme of “Modernisation of the EU copyright rules”, in 2016 the European Commission issued a bundle of new proposed legal instruments in the field of copyright law. These proposals were:

1. A Proposed Regulation on Online Transmissions⁴¹³,
2. A Proposed Directive on copyright in the Digital Single Market⁴¹⁴, and
3. Two instruments concerning the implementation of the Marrakesh Treaty⁴¹⁵

⁴¹² Assuming of course that internet service provision is guided by the principle of ‘Net Neutrality’, under which all data transmitted over the network is treated equally.

⁴¹³ *European Commission 2016/0284 (COD) - Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes - (‘Proposed Online Transmissions Regulation’).*

⁴¹⁴ *2016/0280 (COD) Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market.* This draft instrument contains various proposals to address a number of modern copyright issues. There are however three particularly contentious issues which are currently being debated: (i) Article 3 which deals with permission for text and data mining, (ii) Article 11 which introduces a new ancillary right for news publishers, and (iii) Article 13 which stipulates possible monitoring obligations for intermediaries. The Directive also proposes certain new mandatory exceptions and limitations.

⁴¹⁵ The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, is a copyright treaty administered by WIPO (The World Intellectual Property Organisation), which was adopted in 2013. The two European legal instruments were adopted in September 2017 – (i) *Directive (EU) 2017/1564 Of The European Parliament And Of The Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society,* and (ii)

The Proposed Regulation on Online Transmissions was produced further to preceding exercises on the Satellite-Cable Directive including a Retrospective Evaluation, and a 2015 Public Consultation⁴¹⁶. Even before these evaluations however, the Commissions issued a 2011 Green Paper on Online Audiovisual Distribution.⁴¹⁷ In any instance, the Proposal appears to be a welcome, but overdue, initiative to update the policies originally set out in the Satellite-Cable Directive, and to adapt them to the online environment.

As noted by the Proposal, the principle-of-origin does not currently apply when a broadcaster clears rights for its online services.⁴¹⁸ Furthermore, the system for clearing rights for retransmissions, through mandatory collective management does not currently extend to retransmissions for means other than cable or microwave systems. The Satellite-Cable Directive can hence be said to not reflect the principle of technological neutrality. The new proposed regulation is thus an attempt to fill the gaps created by the non-technologically neutral nature of the Satellite-Cable Directive.

Unlike the Satellite-Cable Directive, the proposed instrument is a regulation; unlike Directives, which must be transposed into national law, regulations are directly binding law the Member States of the EU. According to the Commission, the instrument of a regulation was chosen so as to have direct application and to ensure uniform application as well as their entering into force at the same time.⁴¹⁹

As an important note, the Proposal clarifies that the proposed regulation would neither oblige broadcasting organisations to provide services across borders, nor to oblige retransmission service providers to include in their services programming from other Member States.⁴²⁰

[8]-4.3 Extending Country-of-origin principle

One of the new concepts introduced by the Proposal is the concept of ‘ancillary services’.⁴²¹ These are services that are ‘those services offered by broadcasting

Regulation (EU) 2017/1563 Of The European Parliament And Of The COUNCIL of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled.

⁴¹⁶ Survey and data gathering to support the evaluation of the Satellite and Cable Directive 93/83/EEC and assessment of its possible extension – Final Report; European Commission, 2016

⁴¹⁷ European Commission (2011) *Final Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market - COM(2011) 427*

⁴¹⁸ Reasons for and objectives of proposal, page 2

⁴¹⁹ Recital 17

⁴²⁰ Recital 19

⁴²¹ Article 1(a) of the proposed regulation defined ‘ancillary online service’ as “...an online service consisting in the provision to the public, by or under the control and responsibility of a broadcasting organisation, of radio or television programmes simultaneously with or for a defined period of time

organisations which have a clear and subordinate relationship to the broadcast'.⁴²² As such, this would include simulcasting, catch-up, and other possible services, but explicitly excluding the provision of access to individual works (on demand services).

Article 2 of the proposed regulation then extends the principle-of-origin to such ancillary online services. Recital 9 also explicitly clarifies that the principle-of-origin is only to apply for ancillary services, and not to any subsequent communications or reproductions of works.

[8]-4.4 Extending Treatment of Retransmissions

The Proposed Regulation defines retransmissions as being simultaneous, unaltered, and unabridged retransmissions. It includes retransmissions made by means of closed networks, but explicitly excluded those made over the open internet.⁴²³

Article 3(1) of the Proposal then goes on to provide that retransmission rights can only be exercised via a CMO. Article 3 is hence an extension of Article 9(1) of the Satellite-Cable Directive to other technological platforms. Similarly, the principle of automatic extension of the repertoire of the CMO to cover rights holders who have not transferred their rights (as contained in Article 9(2) of the Directive), is also contained in the Proposal's Article 9(2). However, on this matter, the Proposal does contain one additional layer of detail. In both the Directive and the Proposal, where there are more than one CMO representing a certain category of rights, and a rights holder has not transferred their rights to any of these, the rights holder is free to choose which CMO is to represent them; the Proposal goes further than this to clarify that in cases where the non-transferring rights holder has not made such a choice, the Member State in which rights are to be cleared may indicate which CMO is mandated to manage such non-transferred rights. While the Directive did not preclude this exercise by implementing Member States, explicitly providing for this possibility indeed adds to increased legal certainty.

Additionally, Article 4 of the Proposal is analogous to Article 10 of the Directive; it provides that the rights held by the initial broadcasting organisation itself are exempt from the requirement of mandatory collective licencing.

after their broadcast by the broadcasting organisation as well as of any material produced by or for the broadcasting organisation which is ancillary to such broadcast".

⁴²² Recital 8

⁴²³ Article 1(b) of the proposed regulation defines 'retransmission to mean "...any simultaneous, unaltered and unabridged retransmission, other than cable retransmission as defined in Directive 93/83/EEC and other than retransmission provided over an internet access service as defined in Regulation (EU) 2015/2120 of the European Parliament and of the Council¹⁹, intended for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite but excluding online transmission, of television or radio programmes intended for the reception by the public, provided that such retransmission is made by a party other than the broadcasting organisation which made the initial transmission or under whose control and responsibility such transmission was made."

An interesting point to consider is that while the principle-of-origin does not apply to webcasts, the definition of retransmission only refers to ‘an initial transmission from another Member State’. As such, the mechanism of mandatory collective licencing can hypothetically apply for a retransmission of a webcast.

[8]-4.5 Current Status of Proposal

It is important to note that the Proposal being analysed in this chapter is subject to on-going activities as of the time of writing. For completeness, it is necessary to therefore make brief observations about current developments. However, the analysis will still focus on the 2016 Proposed Regulation, as this remains the published benchmark for anticipated EU policy. For avoidance of doubt, it is stressed that recent and future developments do not change the fundamental analysis and theoretical arguments presented in this chapter.

In the forum of the European Parliament, a May 2017 Rapporteur’s report seemed to support an even wider scope for the Proposed Regulation, and generally seems to support broader application of a country-of-origin principle.⁴²⁴ The concluding explanatory statements is even that *“Cable retransmission must be made technology-neutral where it is equivalent to retransmissions from cable network operators, in order to take account of technological progress in this area too.”*

However, the final position adopted by the European Parliament’s Legal Affairs Committee in November 2017 deviated from the earlier Rapporteur’s Reports in its positions, and reflected a vision a more restricted Regulation.⁴²⁵ The Committee rejected extending the principle-of-origin to all ancillary content, and proposed to narrow its scope to cover only “news and current affairs content”. Additionally, it allows for broadcasters to geo-block their online content if this is agreed upon with rightsholders.

Furthermore, the European Council has also agreed on a position which differs from the Commission’s original Proposal.⁴²⁶ The Council’s position is that the country of origin principle should also be reduced in scope, to cover only works that are financed and controlled by the broadcasting organisation, and to exclude all sports events, both for radio and television.

⁴²⁴ *Draft Report on the proposal for a regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes*; European Parliament Committee on Legal Affairs; 2016/0284(COD); 10.5.2017

⁴²⁵ *Report on the proposal for a regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes*; European Parliament Committee on Legal Affairs; A8-0378/2017; 27.11.2017

⁴²⁶ European Council/Council of the EU Press Release of 15/12/2017 - <http://www.consilium.europa.eu/en/press/press-releases/2017/12/15/online-cross-border-tv-and-radio-broadcasts-council-agrees-negotiating-stance/> (accessed on 21-10-2018)

It is therefore clear that it is not certain what the final scope of the Proposal Regulation will be. According to the European Parliament Legislative Train Web portal “*Interinstitutional negotiations to reach an agreement on a final text have started in January 2018. The first and the second trilogue took place respectively in February and March 2018 without noticeable progress.*”⁴²⁷ Furthermore, information is not currently available on the outcome of the most recent October 2018 negotiations. It would hence seem that the exact path of this legal instrument cannot be anticipated at this time, even though some progress is anticipated to be made soon.

[8]-4.6 Other Recent Developments

Before moving on to detailed analysis of the new Proposed Regulation, it is useful to also take stock of recent developments in European media and communications law. Most notably two recent legal instruments have been adopted, dealing with geo-blocking, and cross-border service portability.

[8]-4.6.1 Geo-Blocking Regulation

Geo-blocking refers to the practice of blocking a user or consumer’s ability to access an online interface (website or application) based on geographical location. More generally, it relates to discriminating between consumers in terms of pricing, access, or terms and conditions of providing a good or service, based on consumers’ locations. As such, is associated with restrictions of cross-border commercial transactions in digital markets.

In February 2018, a new EU Regulation addressing geo-blocking was adopted.⁴²⁸ The Regulation prohibits geo-blocking practices, and hence promotes the objective of a Single Digital Market. However, media services - broadcasting (and retransmission) services, and well as non-linear services – are not subject to the Regulation.⁴²⁹

This is provided for in Article 4(1)(b) that states that traders are prohibited from applying different conditions to access of goods or services based on geographical grounds, where a customer seeks to “*receive electronically supplied services from the trader, other than services the main feature of which is the provision of access to*

⁴²⁷ European Legislative Train Schedule: <http://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-jd-regulation-on-online-transmissions> ; (accessed 21-10-2018)

⁴²⁸ Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers’ nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC

⁴²⁹ According to Recital 8, “...this Regulation should apply, inter alia, to non-audiovisual electronically supplied services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter, subject, however, to the specific exclusion and the subsequent evaluation of that exclusion for which this Regulation provides. Audiovisual services, including services the principle purpose of which is the provision of access to broadcasts of sports events and which are provided on the basis of exclusive territorial licences, are excluded from the scope of this Regulation.”

and use of copyright protected works or other protected subject matter, including the selling of copyright protected works or protected subject matter in an intangible form” (emphasis added). This would hence obviously include online broadcasting, retransmission, content streaming, and audiovisual on-demand services. However, it should be noted that it would also include other services associated with delivery of copyright protected works, such as computer games and e-books.

However, Article 9 provides that by 2020, a review of the Regulation shall take place, with specific attention to the exemption of services associated with copyright-protected works are provided for by Article 4(1)(b).

This Geo-Blocking Regulation is relevant to discussions on copyright administration for broadcasts and retransmissions because it shows that despite concerted moves by European policy-makers towards a Digital Single Market, the issue of cross-border media services remains particularly contentious. In fact, this Regulation shows a special regulatory space continues to be carved out for the issue of online broadcasting.

[8]-4.6.2 Online Service Portability Regulation

The Online Service Portability Regulation⁴³⁰ was adopted in June 2017, and came into force in April 2018⁴³¹. The purpose of this Regulation is to allow users of online content services, to continue to use such services when travelling to other Member States. Without such a regulation, when a user travels within the Internal Market, they might not be able to use online services to which they are a legitimate subscriber, because the terms of usage might limit use to with the user’s jurisdiction of residence; this can also be a result of market segmentation licencing practices by rightsholders, who might licence certain content to online service providers only within specific territorial boundaries. The Regulation hence ensure that users are able to enjoy cross-border portability of services to which they are subscribers while staying temporarily in any Member State, as if they were in their own country of residence.

Article (2)(5) of the Regulation defines the services to which cross-border portability must apply, as audiovisual media services (as defined in the Audiovisual Media Services Directive), broadcasting services, and on-demand services.⁴³² The main provision that creates cross-border portability is Article 3(1) which places a direct obligation on service providers to allow users to access

⁴³⁰ Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market.

⁴³¹ Corrigendum to Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market; Official Journal of the European Union L 168 of 30 June 2017.

⁴³² Article 2(5) - ‘online content service’ means a service as defined in Articles 56 and 57 TFEU that a provider lawfully provides to subscribers in their Member State of residence on agreed terms and online, which is portable and which is: (i) an audiovisual media service as defined in point (a) of Article 1 of Directive 2010/13/EU, or (ii) a service the main feature of which is the provision of access to, and the use of, works, other protected subject-matter or transmissions of broadcasting organisations, whether in a linear or an on-demand manner;

and use their services while temporarily in any Member State, as if they were in their own Member State of residence.⁴³³

Most relevant for this analysis however, is the legal mechanism through which the Regulation's objectives are made possible, as set out in Article 4 ('Localisation of the provision of, access to and use of online content services'), which states that *"The provision of an online content service under this Regulation to a subscriber who is temporarily present in a Member State, as well as the access to and the use of that service by the subscriber, shall be deemed to occur solely in the subscriber's Member State of residence."* Furthermore, Article 7 even goes on to even invalidate contractual provisions between rightsholders and online content service providers that would conflict with application of the Regulation.⁴³⁴

The provisions of the Regulation are interesting in how it compares with the country-of-origin principle as applied in the Satellite-Cable and Audiovisual Media Services Directives. In those Directives, the core point is that a communication to the public is deemed to be made – for legal purposes – in the country from which it is transmitted, rather than the country in which it is received.

In the Portability Regulation, a cross-border service is also – for copyright purposes – essentially deemed to be used in a user's country of residence (which might not even necessarily be the country of origin of the transmission), rather than the country in which the user is temporarily located and using the service. The main difference is that under an actual country-of-origin principle, once the transmission is legitimately made in the original country, any user in any country can benefit from its receipt. However, under the cross-border portability system, the beneficiaries are restricted to users who would have legitimately been able to receive the transmission in their country of residence.

In both cases however, a legal fiction is created so as to reduce transaction costs, and ensure cross-border access to media content services. Furthermore, Recital 23 clarifies that the legal fiction created in the Regulation is not one in which the user is considered to be located in their country of residence (even when travelling), as they are still allowed to access services that might only be accessible in the visited Member State.⁴³⁵

⁴³³ Article 3(1) – *"The provider of an online content service provided against payment of money shall enable a subscriber who is temporarily present in a Member State to access and use the online content service in the same manner as in the Member State of residence, including by providing access to the same content, on the same range and number of devices, for the same number of users and with the same range of functionalities."*

⁴³⁴ Article 7 – *"Any contractual provisions, including those between providers of online content services and holders of copyright or related rights or those holding any other rights in the content of online content services, as well as those between such providers and their subscribers, which are contrary to this Regulation, including those which prohibit cross-border portability of online content services or limit such portability to a specific time period, shall be unenforceable."*

⁴³⁵ Recital 23 states that *"In order to ensure that providers of online content services covered by this Regulation comply with the obligation to provide cross-border portability of their services, without acquiring the relevant rights in another Member State, it is necessary to stipulate that those providers should always be entitled to provide such services to subscribers when they are temporarily present in a Member State other than their Member State of residence. This should be achieved by establishing*

This Regulation is relevant to the analysis at hand, because it shows that European policymakers not only acknowledge how territorial copyright practices can undermine the rights and interests of consumers and user, but they also recognise the importance of adjusting copyright rules concerning the application jurisdiction for online transmissions.

While the Online Services Portability Regulation does not create direct implications for the Proposed Regulation for Online Transmissions, there is certainly some conceptual connection between the two legal instruments. Most certainly, the policy goals facilitated by the Online Services Portability Regulation largely parallel the objective that would be achieved of updating the provisions of the Satellite-Cable Directive to apply to new technological distribution platforms. The idea of adopting a technologically neutral approach to the principle-of-origin, would therefore not be inconsistent with the willingness for European policymakers to adopt the recent Online Services Portability Regulation.⁴³⁶

that the provision of, access to and use of such online content services should be deemed to occur in the subscriber's Member State of residence. This legal mechanism should apply for the sole purpose of ensuring the cross-border portability of online content services. An online content service should be considered to be provided lawfully if both the service and the content are provided in a lawful manner in the Member State of residence. This Regulation, and in particular the legal mechanism by which the provision of, access to and use of an online content service are deemed to occur in the subscriber's Member State of residence, does not prevent a provider from enabling the subscriber to additionally access and use the content lawfully offered by the provider in the Member State where the subscriber is temporarily present."

⁴³⁶ The conceptual relationship between these two legal instruments is best summarised by the comments made by the European Parliament Committee on Legal Affairs Rapporteur in the May 2018 Report on the Proposed Regulation for Online Transmissions:

"The rapporteur takes the view that the regulation (Proposed Regulation on Online Transmissions) will greatly improve the everyday lives of people in a wide range of groups in the EU. While the regulation on the cross-border portability of online content services in the internal market (hereinafter: the Portability Regulation) guarantees the cross-border use of payment services for services which have already been purchased, it makes this conditional on the user's stay in another Member State being merely temporary. This includes stays for travel, holiday or study purposes.

The regulation under consideration here, meanwhile, focuses on groups of people who are permanently resident in a Member State and yet have a legitimate interest in accessing the online services of broadcasting operators established in other Member States.

This covers the 13.6 million or so people who, along with their families, are actively exercising their right to freedom of movement under EU law. This shows up particularly clearly the rigid nature of the borders that still exist in the digital internal market, unlike in the analogue single market. While freedom of movement for persons and goods in the internal market is guaranteed, access to broadcasting services, and thus to programmes from one's home country, is not.

The regulation will also benefit linguistic minorities in a number of Member States. In border areas in particular it is hard to explain to people why access to programmes broadcast in their native language is possible using old technologies, but not via the internet - which is by now also an established technology.

The regulation will also protect the legitimate interest in promoting foreign languages, which are the basis of understanding between European nations, by enabling people to listen to programmes broadcast in languages other than their own.

It will also simplify pan-European access to programmes from other Member States, thus making an important contribution to forming a European viewing public.

Lastly, the services covered by the Portability Regulation mostly provide only entertainment, while access to news and information services is excluded from its scope. Such access, however, is essential,

[8]-5 CONCLUSION

The legal framework for retransmission rights in the EU is complex. It is comprised of a network of different legal instruments that seem to amount to an overall patchwork. This network consists of various different Directives, case law precedents, and more recently – regulations, which create a very complex system of media and communication law. Given the complexities of this network, it is clear that the regulation of retransmission activities must be analysed in the context of the wider framework for media and communications law.

While the Information Society and Rental Directives provide for the intellectual property rights that are relevant to media services, the Satellite-Cable Directive is the most important Directive in terms of how those rights are administered – particularly in terms of retransmission activities. The most important features of the Satellite-Cable Directive are the country-of-origin principle for broadcasts, and mandatory collective management for retransmission rights. However, the Satellite-Cable Directive's origins show that European policymakers originally considered a statutory licence.

Since the implementation of that Directive, there has still been significant market fragmentation, and the *Coditel I* and *Premier League* cases both provide context as to how such fragmentation interfaces with the overall legal framework. It is clear from these experiences that there exists a fundamental tension between the EU drive to market integration, and the territorial nature of intellectual property rights.

Furthermore, there are several other legal instruments that define the legal framework, such as the Audiovisual Media Services Directive; this Directive also applies the country-of-origin principle, although on a much different basis than the Satellite-Cable Directive. Additionally, online audio services are subject to an entirely different regime under the Collective Management Directive, which uses a separate approach to promoting cross-border services through the administration of copyright.

Other recent developments, such as the Geo-Blocking and Online Service Portability Regulations show that the development of integrated cross-border media markets are a priority for European policy-makers. However, there is still a need to update the Satellite-Cable Directive. In this regard, the new Proposed Regulation on Online Transmissions aims at filling the gaps in the existing legal framework. Chapter 9 analyses this proposal in more detail, and assesses the arguments that underpin its policy positions.

particularly in the era of 'fake news' and declining trust in traditional media. It has special relevance as a tool for fostering democracy. Easier access to programmes from other Member States is to be welcomed in the interests of promoting an information society."

-Draft Report on the Proposal for Regulation 2016/0284(COD), 10.5.2017; page 22

CHAPTER 9: THE EU PROPOSAL ON ONLINE TRANSMISSIONS

This Chapter directly follows on from Chapter 8. While Chapter 8 set out a detailed description of the current European Union framework for retransmissions, this Chapter analyses the issue of updating that legal framework. In this regard, the underlying research question in this Chapter is *“Does the Proposed European Union Regulation on Online Transmission succeed in adequately updating the legal framework for retransmission?”*

As with Chapter 8, readers exclusively interested in Law and Economics analysis may wish to skip to Chapter 10.

[9]-1 INTRODUCTION

As discussed in detail in Chapter 8, the main instrument for regulating retransmission rights in the EU is the Satellite-Cable Directive. The core principles of that Directive are the country-of-origin principle for broadcasts, and the use of mandatory collective management for retransmission rights.

However, this Directive is based on a technological context that has changed dramatically. In this regard, the recent Proposal for a new EU Regulation on Online Transmissions has been published. The intention is for such a regulation to update the legal framework for regulating retransmission rights. This chapter analyses the new Proposed Regulation, particularly in the context of the wider legal framework established in Chapter 8.

The next section summarises and compares the various legal instruments discussed in Chapter 8, and notes the general exclusion of online services from the Proposal. Each subsequent section then critically analyses the various arguments put forward to justify this exclusion. The overall conclusion is that bases of these arguments are likely misplaced, and that there ideally reforms to the retransmission framework should be made on a technology-neutral basis.

[9]-2 COMPARISON OF LEGAL INSTRUMENTS

Based on the analysis in Chapter 8, the European legal framework for the application of copyright in the broadcasting sector is comprised of several different instruments. Furthermore, the principles and policy positions of these instruments seem to be applied differently across different sub-sections of the media sector landscape.

Table 9.1 below summarises how these various instruments and principles apply to different media platforms and services, and allows for a quick and easy comparison of how different policy principles apply to different services.

Platform	Service	Applicable Instrument(s)	Jurisdiction (public law)	Jurisdiction (copyright)	Copyright Administration
Offline	Terrestrial Broadcasting	Sat-Cable Directive; AV Media Directive	Country-of-origin principle	Country-of-origin principle	Individual licensing (by default)
	Retransmission (Cable)	Satellite and Cable Directive	National (by default)	National (by default)	Mandatory Collective Licensing
	Retransmission (other closed networks)	Online Broadcasting Regulation	National (by default)	National (by default)	Mandatory Collective Licensing
Online	Simulcasting	Online Broadcasting Regulation; AV Media Directive	Country-of-origin principle (<i>AV only</i>)	Country-of-origin principle	Individual licensing (by default)
	Webcasting	AV Media Services Directive	Country-of-origin principle (<i>AV only</i>)	National (by default)	Individual licensing (by default)
	On-demand Audiovisual	AV Media Services Directive	Country-of-origin principle	National (by default)	Individual licensing (by default)
	On-demand Music	Collective Management Directive	National (by default)	National (by default)	Licensing Passport Entities
	Retransmission	AV Media Services Directive	Country-of-origin principle	National (by default)	Individual licensing (by default)

Table 9.1: Summary of European Legal Framework for Media Services

[9]-2.1 Application of Country-of-Origin Principle

One of the first major observations from this table is that the country-of-origin principle seems to be applied quite inconsistently. Generally, it is more widely applied for the purposes of public law and content regulation than it is for copyright law. Three particular comments are relevant in this regard.

Firstly, this gap in application of the principle is in large part due to the combination of the wide scope of the Media Services Directive, and the unwillingness of European policy-makers to consider an extension of the country-of-origin principle to online services besides webcasting.

Secondly, the country-of-origin principle is never applied to any offline retransmission services. The purpose of the principle is to prevent simultaneous application of multiple national laws. However, generally speaking, issue of conflicts of law or simultaneous application of multiple national laws do not arise for offline (closed network) retransmission services, as these services are typically territorial in nature. This is because these services use physical telecommunications infrastructure, which is often restricted to the boundaries of

a single member state. Furthermore, the regulatory authorisation of the rights for provision of electronic communications networks and/or services is still granted on national basis, and the regulatory obligations associated with such authorisation may differ between Member States.⁴³⁷ As a consequence, even where specific network infrastructure extends across national borders, service provision over these networks may be restricted by the necessities of having legally distinct operations in every Member State. Hence, the problems that the country-of-origin principle seeks to fix, simply do not exist in the case of retransmissions over closed networks.

Thirdly, it is noted that the country-of-origin principle is not applied to any class of audio media services (at least in the field of public law); such services are discussed separately below.

[9]-2.1.1 Country-of-Origin and Retransmissions

The above comments noted that the country-of-origin principle is neither applied, nor necessary for closed network retransmission services. In the field of copyright law, the application of the principle is inconsequential, as service provision is limited to actual territory of (re)transmission origin. However certain problems do arise with retransmitted signals themselves, in the field of public law.

The following example helps illustrate this scenario – Consider a broadcast made in territory A, and retransmitted by a service provider based in territory B. Furthermore, the service provider operates on a closed network, and only provides services to end-users in B.

The country-of-origin rule states that the provider is making a public communication in territory B. Hence, B's laws apply. Even if no country-of-origin rule was applied, there is no question as to where the communication to the public takes place.

If the service provider also provides services to the neighbouring countries C and D, then without a country-of-origin principle, the laws of B, C, and D would all apply. Hence the principle is useful for cases of cross-border service provision.

The example so far only considered the application of the laws of two groups of territories – those where the service originated, and those where the service is received. The service provider does not make any communication to the public in territory A (and A is hence irrelevant in terms of copyright issues concerning the retransmission). However, the laws of country A – where the original broadcast was communicated – are also relevant in terms of public law. In fact, the broadcast would have already presumably met the content regulation standards and applicable public law requirements of country A.

⁴³⁷ See the Authorisation Directive (*Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services. This Directive harmonises provisions regarding how public telecommunications and broadcasting service providers are granted authorisation to operate*).

When that broadcast is retransmitted in country B (and C and D), it would again have to meet new regulatory standards. Without a country-of-origin rule for retransmissions it would have to meet the standards of B, C, and D (in addition to A). With the rule, it would have to meet the standards of B (in addition to A). Even with the principle applied, the broadcast is simultaneously subject to multiple national laws. These are not exactly the kind of situations that country-of-origin rule seeks to prevent, as in this case, the liability for the content is on two different parties – the broadcaster is liable in territory A, and the retransmitter in territory B. Nevertheless, it does represent a significant regulatory burden for the retransmitter; just as they have little *a priori* information regarding copyright liability (i.e. the works used, and the identities of the respective rights holders), they have little *a priori* information for content liability.

In addition to providing for the application of the country-of-origin principle for audiovisual media services, the Audiovisual Media Services Directive also harmonised certain substantive regulatory provisions. One of the purposes of such harmonisation is to ensure that the regulatory standards of each Member State are sufficient to facilitate a cross-border market for audiovisual services, unencumbered by cumulative regulatory costs/burdens. The thinking is therefore that once an audiovisual media services meets the regulatory requirements of one Member State, it does not necessarily need to meet the requirements of another State, when programmes are provided across borders (either through cross-border transmissions, or retransmission by other service providers in the second jurisdiction).⁴³⁸

One possible way to address this problem would be to interpret country-of-origin in the context of a retransmission to mean the country-of-origin of the original broadcast that is being retransmitted. However, there are undesirable implications of this. It can imply that the act of retransmission is a neutral act for regulatory purposes, and that the retransmitter is only acting as conveyance network.

Such an interpretation would clearly be at odds with the established principle that a retransmission is in fact a separate communication to the public under copyright. Considering a retransmission to be commensurate with an initial broadcast – for the purpose of public law – would hence amount to an unnecessary and inconsistent legal fiction. Furthermore, such legal fiction would imply that the retransmitting part has a status akin to that of a ‘mere conduit’ (even though it does not meet that criteria), and might create major uncertainties as a precedent for intermediary liability.

The Audiovisual Media Services Directive provides a much more parsimonious

⁴³⁸ This is thinking is articulated in Recital 36 of the Audiovisual Media Services Directive, which states as follows: “The requirement that the originating Member State should verify that broadcasts comply with national law as coordinated by this Directive is sufficient under Union law to ensure free movement of broadcasts without secondary control on the same grounds in the receiving Member States. However, the receiving Member State may, exceptionally and under specific conditions, provisionally suspend the retransmission of televised broadcasts.”

solution to this problem. It simply provides for a general prohibition on restrictions of retransmissions, which supersedes the regulatory requirements in the territory of retransmission. Article 3(1) of the Directive provides that “*Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of audiovisual media services from other Member States for reasons which fall within the fields coordinated by this Directive.*”⁴³⁹ Hence, by default, retransmissions are essentially exempt from national public law provisions.

[9]-2.1.2 Audio Media Services

Observation of Table 9.1 shows that the policy framework separates the treatment of radio and television services.

In particular, the entire Audiovisual Media Services Directives does not apply to radio broadcasting or audio services; this is made clear by Recital 23 of that Directive which states that for the purposes of that Directive “*the term ‘audiovisual’ should refer to moving images with or without sound, thus including silent films but not covering audio transmission or radio services.*” Hence, the main policy tools of that Directive – the country-of-origin for public law, and content regulation provisions – do not apply to audio services.

However, radio services are included under the Satellite-Cable Directive. The definition of ‘communication to the public by satellite’ set out in Article 1(2)(a) of that Directive only refers to ‘programme carrying signals intended for reception by the public’; no comment is made to suggest that such ‘programmes’ should be interpreted as excluding audio works. Furthermore, the definition of ‘cable retransmission’ under Article 1(3) refers to “*simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public.*” Hence, radio broadcasting is explicitly covered by the retransmissions provisions of the Satellite-Cable Directive.

In terms of the new Proposed Regulation on online broadcasting, radio services are indeed included – in fact, radio programmes are explicitly referred to in the very name of that proposed instrument.⁴⁴⁰ Furthermore, the case of online music services is seen as a special case, in that the issue of significant data processing capacity for CMOs (a quasi-public good problem in terms of investment) is unique to that class of services – therefore, such services are subject to unique provisions in the Collective Management Directive.

⁴³⁹ For completeness, it is however noted that the remaining provisions of Article 3 do provide for derogations from these prohibitions under certain condition, particularly where there is concern that content is in potential violation of Article 27 (on the protection of minors) or Article 6 (on hate speech).

⁴⁴⁰ *Proposal for a Regulation of the European Parliament and of The Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes; (emphasis added)*

Therefore, it is useful to question why audio and audiovisual broadcasting are treated similarly for the purposes of copyright law, while they are treated separately for the purposes of public law.

[9]-2.1.3 Content Neutrality and Regulation

All things considered, differentiating between audiovisual and audio content is indeed a somewhat arbitrary distinction. 'Audiovisual' by its very etymology has both an 'audio' and a 'visual' (moving images) component. However, the definition of audiovisual includes silent movies (i.e. works with a visual component but no audio component). By corollary, there are some types of works which might have an audio component but no corresponding visual component, and such programmes would need to be classified; such programmes might include dramatic readings of screenplays, audiobooks, talk shows, and editorial commentaries on current events.

For these types of works, the potential for their distribution to create negative social externalities is no different than for audiovisual works. For example, two of the areas in which there is specific concern about negative externalities of audiovisual content, are protection of minors and hate speech.⁴⁴¹ Article 6 of the Audiovisual Media Services Directive Member prohibits the broadcast of programming content that might '*contain any incitement to hatred based on race, sex, religion or nationality*'. Article 27 of the Directive, addresses content that '*might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence*'.

Generally, one can postulate that the possibility of inciting hatred arises from the audio component of audiovisual works – in particular, the utterances made by individuals, especially in the context of editorial programming like talk shows. However, in the case of violence and pornography, these issues are more likely to arise from the moving images component of the works. Therefore, taking the various issues and goals of content regulation collectively, there is no reason to make an arbitrary differentiation between how regulatory rules apply to different combinations of sounds and images.

Furthermore, modern broadcasting exists in a context of rapid changes in technologies for content distribution and the culture of content creation. However, legal rules cannot necessarily anticipate in advance how these changes will impact markets and business models. As such, regulation which is technology and content specific will necessarily be reactive in nature.

For example, with current technological trends, it is possible that three-dimensional entertainment might become popular in the near future. Furthermore, future technologies might facilitate broadcast-type services that

⁴⁴¹ While are various aspects of content regulated under the Audiovisual Media Services Directive, programming which is either (i) harmful to minors, or (ii) likely to incite discriminatory hatred is chosen as the examples because these are the areas which, under Article 3(2), can justify exemptions to the provisions against restricting foreign retransmissions.

incorporate components beyond sound and images – such as interactive elements of touch, taste and smell simulation. Obviously, the regulatory issues surrounding such innovative services cannot be fully anticipated. However, there is no reason to believe that the changing nature of these services will preclude possibilities of content-related issues such as abuse of minors, and incitement of hatred. Therefore, a content-neutral approach to regulation would be consistent with prevailing public policy goals.

Therefore, harmonisation of content regulation – including the application of the country-of-origin principle - should take a content neutral approach, or at least treat audiovisual and audio services similarly.

[9]-2.1.4 Country-of Origin Principle and Online Audio Services

As noted previously, the uniqueness of online music services justifies a *sui generis* approach to copyright management – the licencing passport model. The justification for choosing this approach was to ensure that only CMOs that have made the necessary investments in high capacity data processing are able to administer multi-territory licences.

The reason that the country-of-origin principle is not applied (in conjunction with the principle of extended collective management), is that there is no guarantee that the relevant CMO(s) in the country where communications originate would have made these investments in data processing capacity. Furthermore, to oblige CMOs to make such investments on an involuntary basis might amount to a disproportionate regulatory burden. However, in the long term, as data processing technologies become cheaper and more advanced, high capacity operations are likely to become the norm for all CMOs operating in this field. Therefore, at that point, it might become viable to apply the country-of-origin principle for online music services.

At this point, to apply the country-of-origin principle might not even necessarily even be at odds with the licencing passport model. Under the Collective Management Directive, individual rights holders always have the option of being represented by a CMO which offers multi-territory licences, even if that is not their primary organisation. This gives rise to a number of ‘passport licencing agencies’ – CMOs that have aggregated content and are able to administer multi-territory licences. Applying the country-of-origin principle would merely mean that a multi-territory licence is not needed for online music services; only a licence in the jurisdiction of communication origin is needed. However, the licencing fees paid by the service provider would take into account the actual reach of its services, and the number of territories covered. The multi-territory licence would hence be converted into a national licence, where the licencing base goes beyond national reach, and thus the extra-territorial reach is internalised. Hence, entities that qualify to offer multi-licencing licences will still be able to administer the ‘extended’ national licence, if it is that the rights for the country or origin are included in its aggregated repertoire. Like the current system, royalty payments will simply be remitted to other CMOs through existing representation or reciprocal agreements.

One argument against such an application is that it might result in potentially destructive competition between CMOs. This is because several CMOs can offer multi-territorial licences – and hence an ‘extended’ licence in the country of service origin – and hence service providers would be able to choose the CMO which offers the most attractive licencing terms. This argument is analysed in a later sub-section of this chapter.

[9]-2.1.5 Overall Assessment

In addition to inconsistent application of the country-of-origin principle, and the isolation of audio services, the last major observation based on Table 2 is that different copyright administration tools are used for different services. Generally, a regime of individual licencing is the default mechanism; of course rights holders are free to voluntarily opt for collective licencing. When specific services are provided under certain conditions however, it may be necessary to restrict the freedom of contract of rights holders and implement some form of limitation on certain rights. In this regard, it is noted that online music services, and retransmissions services are such special cases – the respective natures of both of these cases, and why they necessitate an alternative to individual licencing have already been discussed in detail. However, it is noted that online retransmission services have been excluded from the tool of mandatory collective management.

Together, the choice to neither apply the country-of-origin principle to online services (besides simulcasting), nor apply mandatory collective management to online retransmissions reflects a general exclusion of online services from the policy framework for broadcasting rights and retransmissions. The following sections of this chapter shall be dedicated to analysing the arguments on which this exclusion is based.

[9]-2.2 Exclusion of Online Services

One of the main observations arising from taking a holistic look at the European Legal Framework, is that even with the new Proposed Regulation, online services are generally excluded from key copyright policy mechanisms. In particular, the country-of-origin principle does not apply to many online services for the purposes of copyright, even though it applies for other regulatory purposes. Furthermore, the mandatory collective management regime does not apply to retransmission services provided online.

Analysis of the new Proposed Regulation can give some insight into the basis of such exclusion. According to the Commission, various options were explored for dealing with the issue of right clearance for cross-border broadcasts and retransmissions.⁴⁴²

⁴⁴² Impact Assessment on the Modernisation of EU Copyright Rules (2016)

[9]-2.2.1 Online Broadcasts

For online broadcasts, three options were considered. The first option was a non-legislative option which promotes voluntary agreements for online services. This option was rejected as the outcome would depend on rights holder's willingness to licence on a voluntary basis, and hence would not ensure a homogenous licensing regime. The second option was to legislate the application of the country of original principle to broadcasters' ancillary services. This is the option that ultimately formed the basis for the Proposed Regulation.

Option 3 was to extend the application of the country of origin principle to all online transmissions, even webcasting services which are not aligned to an 'offline' broadcast.⁴⁴³

Any application of the country of origin principle would reduce transactions costs, and make online broadcasts more viable. However, Option 3 was rejected on the basis that "*...the webcasting market is still at a development stage and that online operators may easily relocate their establishment in the EU*" and that "*...it would also generate legal uncertainty for right holders and could lead to a lowering of the level of protection.*"⁴⁴⁴

Furthermore, review of the Impact Assessment which accompanied the publication of the Proposed Regulation suggests further concerns with a wide application of the country of origin principle.

This main concern seems to be that a country-of-origin principle, combined with the principle of free movement of services, will lead to a risk of 'establishment shopping' (regulatory arbitrage) by service providers who easily relocate their activities. This might hence lead to a 'race to the bottom' in terms of the level of copyright protection, as well as copyright fees.⁴⁴⁵

An associated concern is that if there is indeed a 'race to the bottom' for copyright fees, this – along with the more general perceived reduction in the ability engage in territorial licencing – will incentivise rights holders to administer licencing on an individual basis rather than through a CMO (the issue of 'repertoire disaggregation').⁴⁴⁶

Lastly, one interesting perceived downside of applying the country of origin principle to webcasts is that it might create a legal grey area. This would result from the fact that the line between webcasting (linear online services) and on-demand services (non-linear online services) might be a bit blurred.⁴⁴⁷ Hence, a legal framework which applied the country-of-origin principle to webcasts, but not on-demand services might create certain legal ambiguities. However, for

⁴⁴³ Impact Assessment; pg. 36

⁴⁴⁴ Proposed Regulation; pg. 7

⁴⁴⁵ Impact Assessment; pg. 37

⁴⁴⁶ Impact Assessment; pg. 34-35

⁴⁴⁷ Impact Assessment; pg. 36

context, it should be noted that that Commission did not examine the possibility of an ever wider application of the country of origin principle (to include even non-linear on-demand services), as such a policy would have been outside of the targeted objected of the Digital Single Market Strategy to enhance cross-border broadcasting services.⁴⁴⁸ Nevertheless, it can be expected that the main opposition to such a wide application of the country-of-origin principle to on-demand services would be based on claims that it would undermine rights holders' ability to engage in territorial licencing.

[9]-2.2.2 Online Retransmissions

In the field of retransmissions, the Commission similarly considered two options. The option that ultimately formed the basis of the Proposed Regulation, was to limit the application of mandatory collective licencing to IPTV retransmissions, and services over similar closed networks. The alternative was to consider extending the mandatory collective licencing model to all forms of retransmissions, as long as they 'are provided to a defined number of users'; this would hence include application to over-the-top services over the open internet. In justifying the exclusion of over-the-top retransmission services, the Commission gives the following rationale:

"Although Option 2 would allow a wider range of retransmission services to benefit from reduced transaction costs for the clearance of rights, it would also entail risks of undermining right holders' exclusive online rights and distribution strategies, leading to a reduction of licensing revenues. Option 1 did not present such a risk, as most of the retransmission services provided over "closed" electronic communications networks rely on the established infrastructures located in a particular territory."

– Proposed Regulation; pg. 7

Recital 10 of the Proposed Regulation gives further context to the scope of application of the mandatory collective licencing regime for retransmissions, and the significance of being linked to fixed infrastructure. It suggests that operators of retransmission services offered on closed networks provide services that are equivalent to those of cable providers. As such, they should enjoy the same benefits of rights clearance through the collective management mechanism set out in the Satellite-Cable Directive. However, retransmissions services which are offered on the open internet have different characteristics – they are not linked to any particular infrastructure, and their ability to ensure a controlled environment is limited.

This still does not provide a clear economic rationale for excluding online retransmission services over open networks. However, the Impact Assessment does suggest that the general theme is 'loss of control over licencing fees and licencing terms'.⁴⁴⁹ In particular, it refers to a perceived risk that *"...that rightholders would not always be able to choose the optimum business strategies in*

⁴⁴⁸ Impact Assessment, pg. 27

⁴⁴⁹ Impact Assessment, pg. 49

order to obtain the return on investment made."⁴⁵⁰ It is further suggested that this concept of 'optimal business strategies refers to the practice of having different release windows for works in different markets, and over different platforms.

Based on the above discussions, it would appear that there is much overlap in the justifications for excluding online services from both the country-of-origin principle and mandatory collective licence for retransmissions. Specifically, there is the general concern that rightsholders lose control over their ability to contract into the licencing terms that maximise their profits due to a loss of 'online exclusivity'. There is also a strong fear of a possible 'race to the bottom' caused by regulatory arbitrage, which would drive down remuneration, and lead to possible repertoire disaggregation. Specifically, for online retransmissions, there is also the perceived issue of undermining practices related to media release windows.

Finally, there is a connecting undercurrent through all of these arguments that because the online market environment is still in its developing stages, it is difficult to anticipate how these markets will react to new regulatory instruments; as such, the approach seems to be one of waiting to see how the markets evolve, and hence avoid a truly technology-neutral approach. While this perspective does have some credence it does point towards a reliance on reactive rule making, rather than regulation based on robust high level policy principles. Furthermore, it can even be said that deficiencies in the legal framework can actually hamper the development of new markets, as applying old rules in new environments creates market distortions; in this regard, a 'wait and see' policy approach can actually be quite harmful.

[9]-2.3 Collective Management meets the Country-of-Origin Principle

The above discussions look at application of mandatory collective management, and the country-of-origin principle separately. However, for online retransmissions, it is interesting to consider how these two policies might interface.

In the case of closed networks, retransmission is by nature restricted to the physical location of network infrastructure. Hence, such services are generally offered within a single national market, or at most between contiguous national markets. Hence, the conflicts of law and uncertainties of the country-of-reception principle do not apply. However, these issues would apply in the context of online retransmissions, as such services are necessarily provided across borders.

Therefore, to have a meaningful discussion on extending the collective management model to online retransmissions, there must also be a discussion on similarly extending the country-of-origin principle.

⁴⁵⁰ Impact Assessment; pg. 50

If the country-of-origin principle applies to online retransmissions, then the service provider would only need to clear rights in the country in which they operate. If the mandatory collective management model is also extended, then the service provider would only need to negotiate with the CMO representing rightsholders in the country of origin.

If there is no extension of the country-of-origin principle, but there is an extension of the collective management principle, service providers would need to negotiate licences from CMOs for every territory in which they wish to provide services. Generally, where service providers offering cross-border services licence works through CMOs, they can either obtain a multi-territory licence from CMOs with aggregated repertoires (as in the case of online music services), or they can obtain several individual national licences.

Therefore, in order to promote true cross-border retransmission services, there should be some kind of mechanism to promote multi-territory licencing, in the absence of extending the country-of-origin principle. The model of promoting repertoire aggregation to create licencing passport entities, as is done in the case of online music services, is one possible option. However, this is likely to be ineffective, as the high data processing requirements of online-music licencing is the driving force for such repertoire aggregation. As these requirements do not exist, and therefore do not constrain the administering of licences for retransmission service providers, there is little scope for a mechanism to promote multi-territory licences. A retransmission service provider will hence still have to clear rights from multiple national CMOs, and there is no guarantee that all relevant rights for all of the content being retransmitted will be included, to prevent hold-out problems from individual rights holders.

The alternative of applying the country-of-origin rule, and the principle of extended collective licencing is hence perhaps preferable (as is done for closed network retransmission).

For completeness of discussion, it is noted that in order to apply the principle of extended collective management, it is theoretically not necessary to extend the country-of-origin principle. These two principles, while working together, solve two different problems. The country-of-origin principle prevents the application of multiple national laws, and the need to clear multiple territorial rights. The mandatory CMO model prevents hold-out problems from individual rights holders, and minimises the transaction costs incurred by retransmitting parties. Mandatory collective management without a rule of origin will hence not ensure that the service is provided in multiple cross-border markets in the first place, but where they are provided, that rights are easily cleared for retransmission in individual national markets.

This therefore represents two possible forms of this policy solution – extending the mandatory collective licencing mechanism for online retransmissions – either with or without a corresponding extension of the country-of-origin principle.

Also both principles, while representing a further possible restriction on rights holders seem preferable, not only in terms of achieving the policy goal of promoting the creation of a free cross-border market, but also in terms of theoretical consistency. This consistency is particularly in terms of applying the principle-of-origin uniformly across different bodies of law (as the principle already applies to online retransmission service providers under the Audiovisual Media Services Directive). Such consistency becomes even more important as technological change blurs the boundaries between broadcasting and retransmission, as discussed in Chapter 10.

The following Sections of this chapter will now analyse the arguments put forward against fully extending the regulatory framework to online services.

[9]-2.4 Economic Relevance of Issue

As discussed in Chapter 8, the main motivation of European policymakers is to facilitate integration of broadcasting markets by promoting the cross-border provision of broadcasting services.

Without policy intervention, free markets for media services based on profit maximisation seems to lead to a large degree of market fragmentation and territorial licencing practices. However, in the view of the EU, this is an inefficient outcome because of the strong positive externalities associated with broadcasting services. More specifically, cross-border broadcasts are a mechanism for promotion of cultural diversity and building regional social linkages – a major theme of the entire European integration project. Therefore, policy intervention is needed to promote such services.

In terms of market characteristics, the legal uncertainties and high regulatory burden from the application of multiple legal rules (in the case of cross-border broadcasts), and high transaction costs (in the case of retransmissions) exacerbate the existing market failure of large positive externalities.

The goal of the European policymaker is to therefore consider legal rules which would reduce these uncertainties, regulatory burdens, and transaction costs. These legal rules would largely relate to the exercise of copyright and related rights – including the rights of broadcasting organisations. The country-of-origin principle and mandatory collective management for retransmissions are two such policies. However, with the evolution of these services, these rules no longer account for the full breadth of the cross-border broadcasting market.

More specifically, with an increased role and prominence of online media services, the issues of accumulation of multiple laws (as well as high transaction costs) now have even greater relevance. In the current framework, the non-application of the principle-of-origin and mandatory collective management to online services is therefore an obstacle to facilitating increased cross-border service provision.

The sections that follow critically analyse the arguments made against applying these principles to online services.

[9]-3 TERRITORIAL EXCLUSIVITY

One of the broader arguments against extending policy provisions to online services, is that it undermines the ability of rights holders to engage in exclusive territorial licencing, given that online transmissions are cross-border by nature. This argument is essentially legal in nature, and alludes to the tensions between market integration and the territorial nature of rights.

This argument is weak, as its applicability is not much different for a broadcaster's online ancillary services, which are included under the scope of the Proposed Regulation.

Furthermore, the country of origin principle does not preclude a rightsholder from entering into territorial licences with content distributions, including broadcasters. The essence of the Premier League Case was not that territorial licencing is not possible, but that such licencing cannot create the outcome of absolute territorial exclusivity.

In fact, a rights holder can still divide their intellectual property rights into any geographical coverage boundaries that they wish as a basis of contractual freedom – the country-of-origin principle merely clarifies a potential conflict of laws issue. An online broadcast therefore becomes – for the purpose of copyright law – a broadcast made from the specific Member State in which the webcaster is based. Hence, territorial licencing is still technically permitted, it is just that the concept of territorial fragmentation in an online context – an artificial construct to begin with - loses its significance.

Furthermore, in the shadow of the Premier League Case, there is the importance of what other practices a broadcaster or rights holder might choose to pursue desired territorial exclusivity. In the case of online broadcasts, this would be the practice of geo-blocking. As previously discussed, the recent Geo-blocking Regulation – at least for now - excludes from its scope broadcasting services. Hence, it is still currently possible for broadcasters and rights holders to enforce some sort of practical territorial exclusivity for some online broadcast content, even if the country of origin principle is applied on a technologically neutral basis.

[9]-4 REGULATORY COMPETITION

One of the most prevalent arguments against extending the country-of-origin principle to online services, stems from the fact that online service providers are not bound by a connection to capital infrastructure; as such, they are able to easily move between jurisdictions, and relocate their operations. As such, these service providers can take advantage of regulatory arbitrage, and relocate their service to

the jurisdiction which has the most favourable licencing environment.⁴⁵¹ For a broadcaster, the most favourable licencing environment is the one that minimises the costs they incur in rights acquisition and administration.

The core economic issue is therefore whether extending the country-of-origin principle to online services will result in socially harmful regulatory competition. If this is the case, any welfare gains from wider dissemination of services might be overshadowed by welfare losses due to erosion of the incentives of the intellectual property system itself.

For context, it is important to note that this debate is not new. The European Broadcasting Union, in its response to the European Commission's 2011 Green Paper on Online Audiovisual Distribution, notes that the regulatory competition argument was previously used by rights holders during the discussions which preceded adoption of the Information Society Directive. Ultimately, that Directive did not contain provisions which generalised the provisions of the Satellite-Cable Directive.⁴⁵²

The argument appears to be that such relocation can create legal uncertainty through regulatory arbitrage resulting from changes in national legal frameworks. National legal frameworks would change as individual States compete by trying to attract the establishment of online service providers. In an extreme case, this can lead to a 'race to the bottom', where this competition causes regulatory oversight to decrease across the internal market, to the detriment of prevailing policy goals. In the context of copyright law, the relevant regulatory and policy goal would be the protection of rights for communication to the public - via broadcasting - including retransmission rights.

This argument is superficial at best for a number of reasons. Primarily, it assumes that there is a spectrum of legal provisions, which can apply to copyright and related rights, which can be manipulated at the national level to affect the licensing environment for broadcasters.

This would be the case if the authorisation to communicate works were exercised on an involuntary basis. For example, if the Pan-European model were that Member States legislate statutory licences for the retransmission (or even primary broadcast) of protected works, then it would be possible to have differences between the statutorily defined compensation rates, which could lead to arbitrage. However, the existing framework is that licencing remains voluntary (even if exercised on a collective basis), and hence rates are determined through

⁴⁵¹ This possibility is alluded to in comments on page 12 of the 2011 Online Audiovisual Green Paper.

⁴⁵² It is worth noting that the Commission, in the context of the 2001 Copyright Directive, had tried to generalise the solution previously adopted for satellite communication but encountered fierce opposition from right holders, who feared losing control over the broadcasting of their works on the internet. The main argument put forward at the time by those opposed to localising the act of communication to the public in the broadcast's country of origin lay in the fact that a "race to the bottom" might ensue. (EBU, 2011; pg. 18)

private negotiations. Hence, there is no possibility for regulatory competition on this parameter.

An extreme example of regulatory competition might even be in the parameter of offering copyright protection in the first place. However, this is not possible, as substantive copyright law is harmonised at the European level through a series of Directives and instruments.⁴⁵³ It would not be possible to provide a more favourable licencing environment for broadcasters, as the current body of Union law firmly asserts that an exclusive right exists to authorise or prohibit communication to the public of a work, which included communication via broadcast. Furthermore, the existing body of law also asserts that a retransmission right also exists (for both primary rights holders, and broadcasters themselves), even if in some circumstances, the administration of this right is to be conducted on a collective basis.

In addition to the existence of the right of communication to the public, various other details of substantive copyright law are harmonised at the European level, and in most cases, this harmonisation takes the form of a minimum level of protection. For example, the length of protection is harmonised though the Term Directive, where Member States may offer longer terms than those prescribed, but shorter terms are impermissible. As such, there is no policy flexibility for an individual Member State to decrease the level of protection below the harmonised level, and create significant opportunities for regulatory arbitrage.

Even outside of Europe, international legal instruments on copyright law (in particular the WTO TRIPs Agreement) harmonises many aspects of substantive intellectual property law, to the extent that significant regulatory arbitrage possibilities based on differences in national law are generally low.

Even if individual countries were able to decrease the level of overall copyright protection to attract the establishment of content distributors, this would be at the cost of reducing incentives for content creators. In theory, there might hence be an overall decrease in cultural output, which could possibly be greater than the gains of attracting new investments from content distributors. In any case, as the content distributors being referred to are online, attracting such service providers is not even necessarily associated with any major gains in investments or local employment in the first place, due to the decentralized nature of online commercial activities.

[9]-4.1 Exceptions and Limitations to Exclusive Rights

This is however one area in which it is possible to have reductions in the scope of protection of rightsholders – the implementation of limitations and exemptions to exclusive copyright. This might perhaps be most relevant for broadcasting networks specialising in news reporting and current affairs coverage.

⁴⁵³ This harmonisation is acknowledged by Recital 5 of the Proposed Regulation.

Article 5(3) of the Information Society Directive provides for various exceptions and limitations to the exclusive rights of communication and making available to the public. In particular, Article 5(3)(c) allows for exemptions for “*reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character...*”

However, the provisions of Article (5)(3) are not mandatory, and hence implementation of these exemptions is at the discretion of Member States. Therefore, States that do have a strong exemption which benefits news broadcasting will be more favourable for news broadcasters (or retransmitters of news broadcasts). The general implications of this are well articulated by Renda et al (2015):

“The exceptions provided under Article 5(3)(c) have relevant cross-border effects in connection to the online provision of news via web. Also in this circumstance, according to the principle of territoriality, the national copyright law of both the country where the reporting of current events is made and the country where the news is received do matter. Diverging national implementations as well as discrepant interpretations by national courts may generate legal uncertainty and increase the risk for media providers to infringe copyright in certain Member States. This may discourage (or increase the cost of) both pan-European media services as well as the provision of news targeted to a national audience via the web to citizens based in different Member States. Obstacles generated by copyright law are proportionally more burdensome for private individuals (e.g. bloggers) and small and medium enterprises that can invest a limited amount of resources to be acquainted with 28 different national copyright regimes. This aspect is particularly worrisome as in some Member States, such as Italy, only professional media providers are beneficiaries of this exception.”⁴⁵⁴

Applying principles such as the principle-of-origin to all online media might therefore induce some online broadcasters to relocate to jurisdictions in that there is a strong new reporting exemption. However, such effects would only be limited to broadcasters with very specific news reporting formats.

In terms of regulatory competition, a technologically neutral approach (i.e. treating online broadcasting services similarly to traditional broadcasts), might therefore give individual jurisdictions an incentive to implement news reporting exemptions in order to attract media service providers seeking the most favourable legal environments.

Nevertheless, this is certainly not the kind of national copyright reforms that might amount to a ‘race to the bottom’. It would merely imply a more widespread implementation of a specific copyright limitation which is already firmly established in various jurisdictions, and whose legitimacy is very much acknowledged within the international intellectual property law system.

Additionally, any such limitation would still be bound by the test for limitations and exemptions which exist in international copyright law, and is stipulated in Article 5(5) of the Information Society Directive; i.e. that the limitation can only

⁴⁵⁴ Renda et al (2015), pg. 82

be applied “*in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder*”.

This test therefore provides a safeguard against the possibility that regulatory competition in exceptions and limitations induced by a technologically neutral principle-of-origin erodes the interests of copyright holders.

Hence, applying the country-of-origin principle to online services would not likely result in socially harmful regulatory competition, including in the area of limitations and exceptions.

[9]-4.2 General Inter-State Competition

For completeness of discussion, it is noted that the issue of regulatory competition is not restricted to intellectual property rights protection. In its 2016 Consultation Report on the Satellite-Cable Directive, the Commission noted that “*The Directive has facilitated cross-border access to satellite broadcasting services by reducing copyright-related barriers but has not been the only driver in facilitating cross-border access. Other considerations have had great influence on the decision to offer TV and radio programmes across a border, including the skills and infrastructure available in the country of origin, the potential for economies of scale and national regulatory regimes for broadcasts in general. Broadcasters’ decisions whether to target audiences across borders also depend on their perception of demand.*”⁴⁵⁵

Hence, there may indeed be certain possibilities of arbitrage by media content services providers (including online broadcasters) which may create regulatory competition between EU Member States. However, such competition would most likely be in areas such as tax incentives and other regulatory spaces outside of the copyright law system; in any instance, the important point is that such policies would exist irrespective of (and would not be specifically induced by) wider application of the country-of-origin principle.

[9]-5 COLLECTIVE MANAGEMENT OVERSIGHT

In terms of regulatory competition, this possibility is not only relevant to discussing the principle-of-origin, but also for mandatory collective licensing practices. If the mandatory collective management model were extended to online retransmissions (along with the country-of-origin principle), then such service providers would have the incentive to relocate their services to the jurisdiction with the most favourable CMO environment.

While the practice and structure of CMOs would differ between countries, the principles under which they operate within Europe would be subject to the provisions of the Collective Management Directive.

⁴⁵⁵ *Satellite-Cable Directive Consultation Report 2016*, pg. v

In principle, it is possible to have regulatory competition in terms of national oversight for CMOs. For example, CMOs, acting as market intermediaries and agents for rights holders, should be encouraged to be efficient; best practice guidelines should be followed for performance indicators such as the ratio of administrative costs to licencing revenue. The more efficient the organisation is in its operation processes, the less administrative costs are passed on to licensees. The application of the norms of competition law also affects the relationship between CMOs and licensees; where CMOs are subject to stricter standards in terms of prevention of possible anti-competitive conduct and discriminatory licensing, licensees have more certainty in the reasonableness and fairness of the terms and costs of licences.

While the practice and structure of CMOs would differ between countries, the principles under which they operate within Europe would be somewhat harmonised in accordance with national implementation of the Collective Management Directive. Hence, the existence of this Directive (assuming successful transposition of its provisions at the national levels) mitigates to possibility of significant regulatory competition in this area.

Even if national competition was possible in terms of CMOs oversight, this is not the type of regulation that would result in a race to the bottom in pursuit of attracting the establishment of online service providers.⁴⁵⁶ The effect is actually the opposite – it is the type of competition that would put upwards pressure on regulation, ultimately driving the subjects of regulation towards greater efficiency and accountability, which ultimately is more favourable for all licensees.

This is because licensees would be attracted to the most efficient CMOs which offer the best service. If jurisdictional arbitrage is possible on the grounds of CMO oversight, Member States would have the incentive to tighten oversight in order to make CMOs more efficient, and hence attract relocating online service providers as licensees.

Therefore, the argument that ‘applying the country-of-origin principle to online services may lead to an erosion of intellectual property protection through regulatory arbitrage’, is unfounded; in fact, it is even possible that the effects of such an application would cause regulatory competition which strengthens market institutions though stronger CMO oversight.

[9]-5.1 Collective Management Competition

In terms of a possible ‘race to the bottom’, a more complicated issue is competition between CMOs themselves. The argument here is that applying the country-of-origin principle to online retransmissions (along with mandatory collective

⁴⁵⁶ According to Recital 9 of the Collective Management Directive, Member States are able to impose more stringent standards than those laid down in the Directive. The standards in the Directive are therefore designed to be minimum standards.

management) would result in harmful competition between CMOs. Service providers would relocate to jurisdictions, where the national CMO offers the most attractive licencing fee; hence in order to attract licensees, CMOs would reduce their licencing fees resulting in an erosion of compensation to rights holders. In order to assess this claim, it is necessary to consider the incentives and competitive context of CMOs in the first place.

As a fundamental principle of economics, the price mechanism of a free-market is predicated on the profit-maximising motive of private firms. However, CMOs are generally not profit-maximisers in the traditional sense. They are market intermediaries - agents of the rights holders that they represent. In fact the Collective Management Directive defines CMOs as being 'organised on a not-for-profit' basis.⁴⁵⁷

However, individual rights holders themselves may be profit-maximisers, and wish to extract the maximum possible rent from the exploitation of their rights. Hence, the CMO as an agent of rights holders wishes to extract maximum rent.

By themselves, individual CMOs would generally represent different repertoires of works, especially where exclusive representation is practiced. Hence, a licence from one CMO is not a substitute for the licence from another – they cover rights for different sets of works; a licence will always be needed from the CMO whose works are being used.

However, CMOs generally have reciprocal agreements with each other, where they represent their partnering organisation's members in licencing transactions. This means that different CMOs could ultimately represent the same repertoire for a given licencing transaction. In this case, licences from different organisations would be substitutes for one another, assuming that a licensee is free to choose which CMO to negotiate with. This is particularly true where extended collective management is practice, as is the case for mandatory collective licencing for retransmission activities.

[9]-5.1.1 Simple Theoretical Example

For analysis, consider two hypothetical CMOs – Organisation A, and Organisation B, each with their own membership, and reciprocal agreements with each other. Since the two organisations have a reciprocal agreement, a user (potential licensee) is indifferent between licences from either organisation.

⁴⁵⁷ Article 3(a) of the Collective Management Directive defines 'Collective Management Organisation' to mean "any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which fulfils one or both of the following criteria: (i) it is owned or controlled by its members; (ii) it is organised on a not-for-profit basis;"

For completeness, note that Article 3 also defines that an 'independent management entity' is an entity which carries out licencing on behalf of rights holders, but is not controlled by rights holders, and is organised on a for-profit basis.

If Organisation A decreases its licencing rate below that of Organisation B, then all users would negotiate a licence with A (to pay the lower rate). Organisation A would see an increase in revenue, and Organisation B would have no revenue.

If the CMOs operated on a for-profit basis, then the organisation who granted the licence would keep some proportion of that revenue, and then remit the remaining income to rights holders (after making deductions to offset administrative costs). This might result in competition which drives down licencing fees through the following chain of events.

Firstly, A reduces its licencing rate. In this case, A would make some profit, B would make no profit, but still the members of both A and B would earn their respective royalty receipts.

Next, as a profit maximiser, B would then have the incentive to further decrease the licence rate to attract the user licence, and earn some profit; A would then earn no profit. Members of both A and B still earn royalties, but the level of numeration is less as the initial licence revenue (before deduction of CMO) is less.

A will then have the incentive to again reduce licencing revenue below that of B, creating a cycle of competition which pushes licencing prices down to marginal cost, and ultimately eroding away the rents of rightsholders.

Hence, for-profit CMOs have the incentive to compete on licencing fees, which reduces the rent accrued to rights holders. This is an outcome of the competitive market that results from reciprocal agreements which transform the licences from each organisation into perfect substitutes. Naturally, CMOs as profit-maximisers would wish to charge monopoly prices, which would mean reducing the extent to which licences from different organisations are substitutable – an outcome achieved by moving away from reciprocal agreement arrangements. Once there is a system of reciprocal representation in place (or a regime of extended collective management), then there is misalignment between the incentives of a profit-maximising CMO and its members.

In contrast, if the CMO operates on a non-profit basis, there is no misalignment between the incentives of the organisation and its members; neither the CMO, nor the members have an incentive to pursue a decrease in licencing rates.⁴⁵⁸ In fact, both parties are – in principle – indifferent regarding the organisation from which the user obtains the licence.

The above example illustrates that the concept of a for-profit CMO is theoretically not compatible with the concept of extended representation; if the two were to exist simultaneously, there would be a fundamental conflict of incentives between rights holders and their management organisations. Hence, given the nature of

⁴⁵⁸ This is of course assuming that whatever the prevailing licence rate is, it is above the user's willingness to pay. If the fees are too high and are above the user's willingness to pay, then no licence will be executed – in such a case rights holders will of course have the incentive to drop licencing fees to the maximum amount that a user would actually pay.

assumed non-profit CMO operation, there is no theoretical basis for a possible 'race to the bottom' resulting from competition between CMOs induced by an extension of the country-of-origin principle.

[9]-5.1.2 Discrimination Between Local and Foreign Rights Holders

This above dynamic of CMO competition is however made more complex by factoring in the relationship between reciprocal agreements and administrative costs.⁴⁵⁹ Intuitively, one can imagine that rights management costs are different for managing works under a representation agreement, compared to works of the CMO's own members.

Administrative costs are incurred in preparing, negotiating, monitoring, and enforcing licences, as well as in collecting, allocating and distributing licencing revenues.

For revenues remitted through representation agreements, separate income allocation statements and payments must be made for the partner CMO. On one hand, the fixed costs might be higher for extended-members (compared to own-members), as the rights management information provided by the represented CMO must be made compatible with the systems of the representing CMO. On the other hand, the allocation statements and payments may be more efficient as they are a single large transfer to the partner CMO, rather than a series of individual allocations and payments to individual rights holders. However, there are likely also other costs differences associated with the different reporting requirements for individual own-members and partner CMOs, especially when cross-border remittances are made.

No matter the case, the relative burden on own-members and extended-representation members depends on how administrative costs are allocated, and how management costs are deducted. If the result is that deductions from rights holders represented through representation agreements (or foreign rights holders where there is a statutory extension of the repertoire) are different (presumably higher), then the incentives of rights holders change.

Consider that Organisation A administers a licence that covers the works of both A's members and B's members. However, the administrative deductions are higher for foreign remittances than they are for local distributions. Therefore, B's members' end up with a lower level of per-work/per-use net income.

In such a case, B's members would have a preference for managing their rights through their own Organisation B, as the net income would be higher due to lower administrative deductions. Therefore, B's direct members would have an incentive to have B's licencing fee lowered, so that the user obtains the licence from Organisation B instead of Organisation A. However, the amount that the licencing rate would be decreased would be - at most - the margin between the

⁴⁵⁹ Article 12 of the Collective Management Directive deals with deduction of management fees generally, while Article 15 deals with deductions in representation agreements.

deductions made by A for local, and foreign rights holders; further decreasing licencing fees beyond this amount would result in less net revenue for B's members than if the licence was given through Organisation A at the existing fee level.

Despite the limit of this margin for fee reduction, licencing prices can still be driven down. In the above example, the situation has merely flipped – A's members now end up with lower remuneration, and have some incentive to make A lower its fee. The process can therefore continue until fees are driven down to marginal cost – even though the marginal costs are different for the two sets of members. This is indeed a legitimate concern, as this results even in the absence of profit-maximising motives of the CMOs themselves.

However, this theoretical situation is unlikely to be a major issue for multiple reasons. Firstly, because CMOs are not allowed to discriminate with respect to the terms on which they grant licences, a reduction in licencing rates affects all revenue streams. The increases in revenue from granting some licences locally (and being subject to less administrative deductions) would also be associated with decreases in revenue from other licence sources (even those which were initially already granted locally).

Furthermore, pressures by rightsholders for their CMO to decrease licencing rates pursuant to this logic would mainly be for licensees who use mostly use works from that CMO only. If a user mostly uses works from A's repertoire, then the losses to B's membership from high deductions is minimal, as that revenue stream is small in the first place. If however, a user mostly uses works from B's repertoire, then B's membership would be more concerned, and have a greater incentive to drive Organisation B to instead administer the licence though a marginal reduction in the licence fee.

In this regard, broadcasters (and by extension retransmitters) might be such users, given that broadcasting schedules tend to be primarily driven by the demands of individual national markets. Furthermore, CMO membership tends to be highly localised - meaning that Organisation B's members tend to be rights holders from territory B, who have rights in works which are at least partially marketed for the domestic market of B. Hence, broadcasters primarily operating in market B would be driven to obtain a licence from Organisation B. Although the divergence of incentives between local and foreign rights holders does marginally create a reduction in the licencing fee rate, the result was not that of true regulatory arbitrage. Regulatory arbitrage is of concern, as it causes market distortions due to shifting the forum for licencing negotiations to some arbitrary secondary jurisdiction. In this case, the chosen forum is not arbitrary – quite the opposite in fact, as the country-of-origin principle causes the licencing jurisdiction to revert to the jurisdiction of principle operation.

In any case, the above case of diverging incentives of local members and foreign rights holders would only materially arise if a CMO is able to discriminate between local rights holders and extended-representation rightsholders at all. In fact, such discrimination is expressly prohibited by Article 14 of the Collective Management

Directive.⁴⁶⁰ As such, proper oversight of CMOs would preclude the possibility of foreign rights holders having different incentives than that of local members.

Interestingly, differences in net income due to different deductions might actually occur in the opposite direction. Sometimes, in addition to deductions to cover administrative and managerial costs, CMOs make deductions to fund social, cultural and educational services at the national level.⁴⁶¹ However, deductions from rights revenues derived from rights managed under representation agreements are limited to what is agreed upon in the representation agreement.⁴⁶² Therefore it is possible to have situations where total deduction proportions are higher for local members than for represented foreign rights holders. Interestingly, this would not result in any downward pressures on licensing fees.

Consider again that Organisation A administers a licence both on behalf of its members, and the members of Organisation B. A makes deductions for cultural outreach initiatives, but the agreement between A and B does not allow for deductions to fund such initiatives. Hence, while managerial costs are deducted from both A's members' and B's members' share of rights revenue, A's members' share is also subject to cultural service deductions. Therefore, the local members (A's members) end up with a lower per-work/per-use net revenue than the foreign members (B's members). If A's members are self-interested profit-maximisers (i.e. they perceive that they get no direct gain from the cultural initiatives), then they would prefer for the licence to be administered through Organisation B. However, A's members have no say in the operations of Organisation B (as they are not direct members), and hence cannot induce B to lower the licencing rate to attract the licensee. A's members' recourse is therefore only to – if possible – mandate that their organisation cease such cultural initiatives.

[9]-5.2 Existing Price Differentials

It is noted that in reality, there are indeed differences in the licencing rates charged by different CMOs.⁴⁶³ Presumably, the rates for copyright licences would depend on the market demand conditions of a specific market. Application of the country-of-origin principle to online broadcasts would create a single demand function, as authorisation

⁴⁶⁰ Article 14 of the Collective Management Directive states *"Member States shall ensure that a collective management organisation does not discriminate against any rightholder whose rights it manages under a representation agreement, in particular with respect to applicable tariffs, management fees, and the conditions for the collection of the rights revenue and distribution of amounts due to rightholders."*

⁴⁶¹ Such deductions are allowed for under Article 12(4) of the Collective Management Directive. However, Article 13(6) allows for Member States to place restrictions on how such deductions are used.

⁴⁶² This is provided for in Article 15(1) of the Collective Management Directive.

⁴⁶³ See the example given on pg. 37 of the Impact Assessment.

to communicate copyright protected works in any one Member State would imply authorization in all other states. Therefore, the application of the principle should result in an integrated online marketplace on the demand side.

On the supply side, it should be stressed that part of the existing mandatory collective licencing regime are the policies to extended repertoires though the practice of rules that assume extension of representation, and encouragement of cross-border reciprocal agreements.

Hence, with proper oversight, the ‘market’ for competing CMOs should become one in which fees are generally uniform, as the market-specific conditions which give rise to price differentials across markets fade away in a properly integrated market environment.

In conclusion, the risks of a ‘race to the bottom’, as induced by extending the country-of-origin principle and mandatory collective licencing to online services, is somewhat unfounded, at least on a theoretical basis. Any such possibility of licence competition between CMOs is mitigating by the combined effect of various principles. These principles are the principles of non-discrimination, non-profit operation, and extended representation. Consequently, within this framework, CMOs have no incentive to engage in such destructive competition that erodes remuneration to rights holders. However, this is predicted on a strong regulatory framework for CMO oversight across jurisdictions.

In fact, in terms of pricing behaviour, CMOs have an incentive to collude by inflating licencing fees, abusing their de facto monopolistic positions, which though harmful to users, might actually increase remuneration to rights holders. This is of a major concern as unlike traditional firms that attempt to collude, the non-competitive nature of CMOs means that they do not have any unilateral incentive to defect from the collusion agreement (even if such agreement is neither explicit nor premeditated). This further underscores the need to have strong oversight over CMOs, including strong competition regulation.⁴⁶⁴

[9]-6 DISAGGREGATION OF REPERTOIRE

One of the prevalent fears of expanding the country-of-origin principle to all online services is that it would result in a disaggregation of CMOs’ repertoires. This might occur because rightsholders choose to exercise their rights through individual licencing rather than through CMOs, due to the perceived loss of control associated with multi-territory collective licencing for online broadcasters. Such an outcome would directly undermine the objectives of the Collective Management Directive, to encourage the aggregation of repertoire.

⁴⁶⁴ The issue of possible competition violations by CMOs, though very interesting, is not relevant in a major way for the objectives of this paper. For a discussion on this, see *Drexl (2009), Ch 11*

This scenario will only occur where rightsholders exercise their rights differently in different jurisdictions. Consider that a rights holder uses individual licencing for broadcasts in State A, but licences through the national CMO in State B. If the country of origin principle is applied, then an online transmission from a webcaster based in State B would be legitimate also in State A; the rights holders hence lost their ability to individually licence in State A. The fear is that the rights holder will now voluntarily withdraw from the CMO in State B, and pursue individual licencing in both States.

This will therefore result in a contraction of the repertoire of the CMO, and the webcaster must not conclude licences with the CMO, as well as individual rights holders who have withdrawn. The sum effect is that although the country-of-origin principle decreased transaction costs for the webcaster in terms of the obtaining licences relating to a larger number of jurisdictions, total transaction costs might actually increase as the webcaster must now obtain licences from a larger number of individual rights holders in addition to the applicable CMO.

While there is indeed validity to this concern, this perspective only represents a part of the situation. In fact, transaction costs will now also increase for the rights holder, as they must now negotiate and administer contracts which had previously been handled by the CMO. Essentially, what happens is that there is a move from a situation where rights holders pursue mixed practices (i.e. collective licencing in some territories, and individual licencing in others), to one in which only one practice is operable (i.e. collective licencing under the country-of-origin principle, or individual licencing in all countries).

The question as to whether the rights holder will truly have any incentive to withdraw from a CMO hence depends on whether the margin between rents from individual licencing in all States and rents from a single collective licence is greater than the increase in transaction costs associated with handling all licencing activities on an individual basis. This is likely to only be the case for very large rights holders who control high commercial valued works, which are likely to attract greater rents if exploited through individual licences; indeed, it is generally true that the commercial value of works is sometime 'averaged out' when collective licencing is practiced, meaning that high valued works effectively subsidise lower valued works. However, these large rights holders (e.g. US film companies) are likely to have chosen individual licencing approaches in the first place across all jurisdictions - even before applying the country of origin principle, as these entities already have the incentive and administrative capacity to administer their own individual licences.

Given that the country-of-origin principle for broadcasts is not associated with mandatory collective management (as in the case of retransmissions), it is the possibility of massive repertoire disaggregation from a technologically neutral approach to broadcast transmissions (and the country-of-origin principle) is likely very overstated.

[9]-7 ONLINE EXCLUSIVITY

Another argument put forward against extending the collective management model to online retransmissions is that “*it would also entail risks of undermining right holders’ exclusive online rights and distribution strategies, leading to a reduction of licensing revenues*”.⁴⁶⁵

It is noted here that there is no distinct legal concept called ‘exclusive online rights’. In determining what exactly this terms means as a copyright law concept, a cue can be taken from the Collective Management Directive. In this Directive, ‘*online rights in musical works*’ are defined as the rights of an author of music works, which are provided for in Articles 2 and 3 of the Information Society Directive, and which are needed for the provision of an online service.⁴⁶⁶ Hence, this refers to the reproduction and ‘communication to the public’ rights of authors. The term ‘exclusive online rights’ for audiovisual media, can hence be inferred to mean the equivalent rights aforementioned.

This argument does not hold against theoretical scrutiny for various reasons. First of all, applying mandatory collective licences to online retransmissions would not have the effect of undermining online distribution exclusivity, any more than applying the country-of-origin principle to broadcasters’ ancillary services would.

The argument here appears to be that rights holders may wish to licence content for broadcast distribution, but not online distribution, and therefore wish to keep these distribution channels independent of each other. Therefore, allowing for the collective licencing for online retransmission of a broadcast would bypass the rights holders’ possibility for individual licencing discretion. The result would be that a work, which was individually licenced for terrestrial broadcast, ends up being collectively licenced for distribution through online retransmission. The logic of the argument is that the exclusive right to control retransmission online should hence be maintained.

This argument loses coherence when it is analysed along with the proposal to allow for the country or original principle to apply to broadcasters’ ancillary services. Under this application, a broadcaster’s online simulcast is deemed to take place, for the purposes of copyright law, in the jurisdiction where that broadcaster is based; in fact, this would be deemed as the same jurisdiction in which the original terrestrial broadcast is occurring. As the broadcaster clears the rights to communicate the work in that local jurisdiction, the authorisation to communicate the work to the public can therefore also cover its online simulcast. Therefore, unless the broadcast is able to licence the work for broadcast, subject to a restriction that the work cannot be simulcast, a terrestrial broadcast automatically implies a possible simultaneous online communication. This scenario underscores the notion that a simulcast is essentially an online retransmission of a broadcaster’s own primary transmission. In summation, the policy positions of (i) rejecting the application of mandatory collective licencing

⁴⁶⁵ Proposed Regulation pg. 7

⁴⁶⁶ Article 3(n) of the Collective Management Directive

for online retransmissions, and (ii) applying the country-of-origin principle for broadcasters' online ancillary services, are incompatible in terms of attempting to avoid the undermining of exclusive online rights and distribution strategies.

[9]-7.1 Media Chronology

Notwithstanding the above discussion, it is useful to address the argument that undermining online elusive rights might disrupt prevailing commercial practices, and the profitability of a work in the first place.

To do this, it is necessary to recall that rights holders seek to maximise the returns made from a given work through strategising its distribution in different markets and across different platforms. For the former, the practice traditionally involved territorial licencing, and for the latter, it means staggering licencing across different platforms. For example, the marketing of an audiovisual work such as a film often involves first focussing on the most profitable national markets before distributing the work in other secondary markets (where modifications may have to be made such as overdubbing for another language). This national market segmentation is done in parallel with exploiting the work through different media platforms in a phased approach; for example, films are normally always released in theatres before being released in physical form or distributed via broadcast.

On the issue of national market segmentation, it is important to recall the goal of the entire European framework for broadcasting rights and retransmission regulation, which started with the original Television Without Frontiers Directive. This goal was to create a truly Pan-European internal market for audiovisual services – a concept generally at odds with the practice of national market segmentation. Furthermore, the position taken by the European Court of Justice in the *Premiere League Case* was that in determining the reasonable remuneration for a work that has already been legitimately broadcast, considerations should not be made for the inclusion of a premium arising from territorial market fragmentation⁴⁶⁷ Therefore, the current jurisprudence suggests that policy instruments, which undermine the possibilities for rights holders to price-discriminate amongst national markets, are not necessarily inconsistent with the objective of protecting intellectual property rights.

On the issue of chronology in distribution across platforms, the question thus arises as to whether online retransmissions would harm rights holders' interests by disrupting media chronology practices. To answer this question, it is useful to first have some discussion on the nature of media chronology. In this context, a commercial audiovisual film will be used as the example going forward. Generally, the matter of how an audiovisual work is exploited across different distribution platforms is up to the contractual agreements between the authors of films, and potential distributors. As such, the exact chronology employed by right holders, is that sequence that is deemed to maximise profits, and is thus subject to market

⁴⁶⁷ ECJ Judgment *Premier League Case* (*Judgment of 4. 10. 2011 - Joined Cases C-403/08 AND C-429/08*) paragraphs 114-116

forces. It would however appear that for audiovisual works, the traditional model is distribution in the following sequence: (i) theatrical release, (ii) physical release (e.g. DVD), (iii) Video on Demand (near to physical release), (iv) pay television, and finally (v) free television.⁴⁶⁸

The default state of the market is that release windows are left up to negotiations between rights holders and service providers. This is confirmed in the Audiovisual Media Service Directive which states that:

“It is important to ensure that cinematographic works are transmitted within periods agreed between right holders and media service providers.

The question of specific time scales for each type of showing of cinematographic works is primarily a matter to be settled by means of agreements between the interested parties or professionals concerned.”

– Recitals 76-77

Furthermore, Article 8 of that Directive states that *“Member States shall ensure that media service providers under their jurisdiction do not transmit cinematographic works outside periods agreed with the rights holders.”*

However, it is that there are a few jurisdictions in which there are explicit statutory provisions on media chronology.⁴⁶⁹ For example, audiovisual distributions in France are subject to ‘statutory windows’, which dictate the delays between different forms of release, as set out in the relevant legal decree. These rules provide that a film that is released in theatres cannot be release through physical means or video-on-demand until four months have elapsed since theatrical release; the minimum windows for other distribution platforms are no release via pay television before ten months, free television before twenty-two months, and subscription video on demand services before thirty-six months. Additionally, there are also jurisdictions that link the provision of film subsidies to mandatory release windows.⁴⁷⁰ However, the cases of Member States having explicit legal provisions on media chronology appears to be exceptions to the general trend where release windows are a matter of private contractual agreements.⁴⁷¹

It is also relevant to note here that European Court of Justice jurisprudence does not take issue with national legislation on media chronology windows. In the *Cinéthèque* case, the ECJ ruled that such national laws were not incompatible with the relevant EEC Treaty Article on the free movement of goods, where such laws

⁴⁶⁸ IRIS (2008) at pg. 2

⁴⁶⁹ According (Ranaivoson et al, 2014), three EU Member States have statutory provisions on release windows – France, Bulgaria, and Portugal.

⁴⁷⁰ Four EU Member States have such rules linking film support to release windows - Germany, Austria, Latvia, and Spain (Ranaivoson et al, 2014)

⁴⁷¹ IRIS (2008) at page 5.

prohibit the importation of distributions of the work outside of the prescribed windows.⁴⁷²

The purpose of the above discussion is to demonstrate that media chronology windows – whether an outcome of market-based negotiations or statutory provisions – generally have a standard sequence; in this sequence, distribution via the broadcast media almost always occurs near the end of the product life cycle of an audiovisual work. Furthermore, national market segmentation tends to be concentrated at the earlier stages of this cycle.

In terms of the notion of an ‘exclusive online right’ – this ostensibly refers to the right to authorise and prohibit communication to the public or distribution of a work, online, such a right would most logically be related to making a work available on an ‘on demand basis’, which corresponds to the ‘video on demand’ element of the media chronology sequence. This form of exploitation comes before terrestrial broadcasting in the traditional media chronology sequence. Even in the expected case that new innovative forms of online exploitation are developed, such modes of exploitation are still likely to occur before terrestrial broadcasting. Therefore, online retransmissions of traditional broadcasts are very unlikely to have any disrupting effect on the media chronology and licencing practices of rights holders. Extending the tools of mandatory collective licencing to online retransmissions is therefore not likely to entail any major risk of undermining the online exclusive rights and distribution strategies of rights holders.

For completeness, it is however noted that the above counter-argument is strongest for the case of collective management for online retransmissions. It is however also applicable for the country-of-origin principle for webcasts, given that broadcasting in foreign markets tends to be at the end of the media chronology window.

However, the counter-argument does not apply well in terms of applying the country-of-origin principle to non-linear online services. This is a result of the national market segmentation aspect of media chronology (as opposed to the platform release window aspects). In fact, it is admitted that online on-demand services would relate to an earlier stage of the established platform release windows, and hence coordinating this part of the release window across all jurisdictions (which would inevitably result from applying a country-of-origin principle to non-linear online services) could undermine the legitimate business strategies of rights holders; this is because when the work might be in the video-on-demand phase in one market, it might still be in the theatrical release phase in another.

Hence, the argument that a country-of-origin principle might undermine business practices is certainly more valid for non-linear services, than it is for online broadcasting. A truly technology neutral application of the principle-of-origin

⁴⁷² However, according to IRIS (2008, at pg. 7), the ECJ came to this decision based on evidence provided by France which supported the economic significance of cinema distribution, as was the case at the time of judgement (1985); this evidence would likely no longer apply today, and hence the context of the judgement has changed considerably.

would hence trigger a move away from the market separation (but not platform separation) aspect of media chronology practices. However, such a move would be indeed in line with the concept of free cross-border flows of services, and a truly integrated market for media services and intellectual property. Nevertheless - for the time being at least - the possibility of applying geo-blocking for online content services (given the copyright services exemption in the Geo-Blocking Regulation) provides a mechanism to maintain the status quo of media chronology market segmentation.

[9]-8 INDUSTRIAL POLICY

The discussions and analysis in this chapter focus on principles of copyright law and practice; it does not take an industrial policy perspective, nor does it take a broad look at the competitive landscape of the copyright or communications industries. Such would certainly be outside of the scope of this manuscript. However, it is useful to still make a few brief remarks on the significance of technology neutral copyright policy for industrial policy.

In this regard, one further criticism of not extending policy considerations to online services is that it still creates market distortions. The country-of-origin principle and mandatory collective licencing greatly reduce the transaction costs associated with cross-border broadcasting and retransmission services. However, the beneficiaries of these principles (under the current framework, including the new Proposed Regulation) are only undertakings that operate on traditional or closed networks. These are either service providers who own closed domestic networks, or lease the capacity from another network operator.

There is both great competition for the use of existing infrastructure, and large capital costs associated with investing in new networks, which essentially create high barriers to entry in this market. Online broadcasting and service provision is therefore a formidable competitor to what has traditionally been an oligopolistic market. Not extending policy provisions that reduce operational costs to online broadcasters, therefore amounts to a policy of favouring incumbent providers, and restricting the competitive potential of a technologically neutral marketplace. It would therefore be in the interest of economic efficiency to adopt a policy of true technological neutrality, which embraces the competitive possibilities of online service provision, rather than protecting incumbent business models based on natural monopolies.

A concerted effort to update the Satellite-Cable Directive for the modern technological landscape should hence adopt a technologically neutral approach. On this point, it should be noted that even the original 1993 Directive was based on an understanding that provisions designed for cable systems should be more broadly applied to microwave retransmission systems (Article 1(3)), given that the market failures being addressed are associated with economic functions rather than technical characteristics.

Not only is it relevant to consider the competitive landscape in the downstream distribution (and infrastructure) part of the content value chain, but also that in upstream content production itself. There exists an extremely wide range in terms of the commercial positions of authors and performers, for both musical and audiovisual works. More established authors and performers are more likely to have the bargaining power and resources to administer individual licencing agreements themselves. For small less established content-creators, the transactions costs alone associated with contracting may be too high to access commercial distribution on broadcasting and new media platforms.⁴⁷³ Hence, simplifying the licencing environment and reducing these transaction costs in a technology neutral way creates a more competitive environment for media content more generally. Without such an approach, there is a risk of consolidation of market power in media production markets, and a crowding out of less-commercially oriented works (which are normally associated with higher positive externalities); this ultimately undermines the public policy goals of the broadcasting sector, such as the promotion of artistic diversity, plurality of opinions, and preservation of cultural heritage.

Lastly, it should be noted that a technologically neutral policy approach would provide a more conducive environment for innovation, and would result in more consumer choice. The online environment indeed provides the possibility for many new services which cannot be anticipated, and the specific issues associated with those services cannot be predicted; however, policy-makers should at least create an environment in which innovation can take place. While the alternative is indeed the status quo of waiting for new services to arise and then attempt at assessing the relevant legal and policy questions, it should be noted that existing legal uncertainties could lead to many innovative services and new business models not coming to market in the first place.

[9]-8.1 Technological Neutrality as Proactive

On a very general note, consistency in policy making should be regarded as desirable. In an environment where technology and culture are rapidly evolving – certainly at a faster rate than legal rules can – it is difficult and often ineffective to rely on reactive regulation. As such, policymakers should opt for a general approach of proactive regulation. Such a proactive approach should be based on high level principles and standards that are assumed to have general applicability, unless a very specific set of circumstances necessitates more specifically tailored legal rules. Indeed, legal certainty is an important institution for market efficiency.

In the context of the issues analysed in this chapter, one example of such a high-level policy would be to apply the country-of-origin principle to all media services – irrespective of platform and content type; this is of course assuming a federal jurisdiction model such as the EU, where internal market integration is a central

⁴⁷³ Interestingly, this point draws a strong parallel to similar arguments that are often put forward in favour of Net Neutrality. Indeed, technology neutral regulation of distribution platforms is in many ways a complimentary policy to net neutrality.

overall policy objective. Where the particular market context of a service is such that a specific and unique market failure is identified, only then should an exception or alternative to this high-level policy position be considered.

For example, Chapter 8 noted that the context of online music streaming services justified a unique sub-sector-specific approach; indeed, such a unique approach is taken in the Collective Management Directive. However, the market circumstances which create this unique problem are contextual. As technology evolves, this context changes, and it is even likely that the situation of the online music market would no longer be one of a unique problem. The licencing passport model envisioned by that Directive is hence not necessary to serve as a permanent solution. The purpose of that model – and that particular legal instrument – is to serve as a catalyst for development of the administrative infrastructure needed for that market to work efficiently. The need for a unique regime is therefore not necessarily a permanent state. Once that infrastructure is developed, the legal regime can easily move towards one where there is greater consistency in the policy approach taken across different markets.

The core point is that specific policies to address specific market failures are only necessary so as long as the contexts which give rise to those specific issues exist. Should those context cease to exist, a move towards more general and broadly applicable policy principles is desirable, as it reduces the extent to which legal rules need to play catch-up with changing technological trends.

Furthermore the more general issues that define the sector are the transaction costs intensive environments of broadcasting and retransmission activities, and legal uncertainty from accumulated jurisdiction for cross-border service provision. There is no reason to believe that these market failures are technology-specific, and hence there is no reason to maintain policy solutions to these market failures which are technology-specific.

On the point of legal catch-up, the history of the European legal framework for the application of copyright law to retransmission activities is evidence of this technology-law lag. The Coditel I Case was ruled on in 1980, and largely foresaw issues related to copyright administration for retransmission activities. However, the Satellite-Cable Directive was not adopted until 1993. This was notably also four years after the Television Without Frontiers Directives of 1989, although both Directives share the same roots in terms of their initial policy proposal origins. Furthermore, while the provisions of the Television Without Frontiers Directive were updated for the digital age in 2010 with Audiovisual Media Services Directive, a corresponding proposal to update the Satellite-Cable Directive did not come until 2016. Indeed, it would appear that intellectual property laws – at least as applied to the broadcasting sector – are subject to an ever greater lag behind technology than other areas of law.

Therefore, as technological change in the media sector occurs even more rapidly, it would be wise for European lawmakers to take larger strides towards more consistent policy approaches for the media sector based on broad default principles such as technological neutrality – so as to avoid continuing losing the

race between evolving technologies and adapting regulations, and creating undesirable market distortions from patchwork legal frameworks.

As a final point, it is critical to understand one particular defining characteristic of technological changes in the media and convergence sector – convergence. Convergence is the phenomenon in which the traditional boundaries between services, distribution platforms, and user devices disappear. In this environment, defining services based on technological grounds is becoming increasingly arbitrary and even unnecessary; the modern digital environment is one in which user experiences in entertainment, communications, and media consumptions are integrated. Therefore, adhering to frameworks that are based on regulating services based on their enabling technology platforms is unsustainable, and even undesirable. These frameworks not only create legislative lags, but they may result in market distortions and regulatory failures that merely supplant the market failures that they were designed to address in the first place.

As such, it is critical that in an environment of convergence, modern copyright law seeks to find a basis in technological neutrality.

[9]-9 CONCLUSION

Chapter 8 analysed the copyright law concept of communication to the public, as it takes the form of broadcasting and retransmission rights. This was done in the specific context of the existing European Union legal framework that deals with these rights. Two key policy features of this framework were identified and discussed – the country-of-origin principle, and the approach of mandatory collective management. While the core focus was on the application of these principles in the context of broadcast retransmissions, it was also necessary to take a wider look at the legal rules that apply to the media sector.

Against a backdrop of the existing legal framework, this chapter then focussed on analysing the new European Commission Proposal for a Regulation on Online Transmissions, and how this proposed legal instrument applies these policy features. It was argued that the Proposal's scope is insufficient in that it excludes application of these key policy tools to online services. In this context, this chapter attempted to refute some of the arguments against such application, while advocating for a technologically neutral approach to copyright law in the context of broadcasting and retransmission services.

If European policymakers truly believe in the importance of promoting cross-border broadcasting services, particularly due to the presence of strong positive externalities, then the current Proposal is deficient. The existing tools of the principle-of-origin and mandatory collective management should be extended to online services. This would also have the additional benefit of bring greater coherence to the overall legal system.

Such would be welfare-enhancing, particularly because the claimed social costs of such an extension are likely overestimated. It is very unlikely there will be any

resulting regulatory competition, erosion of existing economic rights, pressures on royalty rates, disaggregation of repertoire, or undermining of 'exclusive online rights'.

The only likely major disruption might be specifically in the application of the country-of-origin principle to online on-demand audiovisual services. This is because of current media chronology and market segmentation practices, which also has implications for other digital legal rules (such as the Geo-Blocking Regulation discussed in Chapter 8). At the core of this potential disruption is a fundamental issue unique to the European case – the tension between market integration and the territorial nature of intellectual property rights. This tension however goes far beyond just the broadcasting sector alone.

Looking at the bigger picture, the analysis of the European case study in Chapters 8 and 9 do have certain relevance for the overarching research question on this manuscript. Firstly, where broadcasting services are provided across borders, some jurisdiction rule is need to settle potential conflict of law issues. If the positive externalities from broadcasting services are very strong, then a legal fiction such as the principle-of-origin can be used to reduce legal uncertainty and transaction costs. This would relate to the exercise of public communication rights of all classes of rightsholders, including broadcasters exercising retransmission rights over their own signals (which is in itself a subset of the act of public communication via broadcasting).

Furthermore, the discussions in this chapter argue that where interventions are made regarding the exercise of public communications rights (including broadcasters' retransmission rights), rules should ideally be applied on a technologically-neutral basis. This should however not be conflated as an argument for a technologically-neutral definition of the beneficiaries of broadcasters rights themselves, which is a separate issue (comments on this are made in Chapter 11).

Using the insights gained in Chapters 8 and 9, the next chapter shall focus on the relationship between the retransmission rights of different classes of rightsholders.

CHAPTER 10: THEORIES OF RETRANSMISSION RIGHTS

This Chapter is the third chapter in Part IV of this manuscript, which focuses on retransmission rights. It is also the final chapter before the final conclusion chapter. While Chapters 8 and 9 focused on the case study of the European Union, this chapter attempts to take a more general approach in understanding retransmission rights. In this regard, the core research question of this chapter is “*What are the theoretical bases and economic mechanisms of retransmission rights?*”

[10]-1 INTRODUCTION

The evolution of retransmission rights is complex, involving a history of accumulated case law, legislative reforms, and interpretations of international copyright law in various jurisdictions. As stated by Gendreau (1990), “*The evolution of the retransmission right can only be described as chaotic. It has lived through multiple periods of expansion and retrenchment as it has progressed from the relatively inconsequential wire retransmission of radio broadcasts to hotel rooms to large scale international cable retransmissions of television broadcasts*”.⁴⁷⁴

This chapter builds on the lessons learnt from the European case study in Chapters 8 and 9, and takes a step back to attempt to construct a simple understanding for the theoretical and doctrinal basis of retransmission rights. Since the various approaches to regulating broadcast retransmissions are understood as a deviation from the standard case of exclusive copyright, it is useful to therefore frame such policies as limitations and exceptions to copyright, and understand them from a Law and Economics perspective.

This chapter has three main sections. First is a section on retransmission approaches as limitations and exceptions to copyright. Based on the case studies of the previous chapters, this section develops a taxonomy for policy approaches to regulating retransmission rights. Second is a section which attempts to apply various Law and Economics perspectives to understand the nature of these rights. Finally, an analysis is undertaken of the relationship between the retransmission rights of copyright holders and broadcasters from a legal and technical perspective, with a particular focus on the concept of ‘communication to the public’.

[10]-2 LIMITATIONS TO RETRANSMISSION RIGHTS

The first broad objective of this chapter is to draw from the previous discussions in Chapters 8 and 9 to catalogue the various approaches to the administration of retransmission rights. In order to do this, it is necessary to first establish the basis

⁴⁷⁴ Gendreau, Y. (1990) – *The Retransmission Right: Copyright and the Rediffusion of Works by Cable*, Intellectual Property Law Monographs, ESC Publishing Ltd., Oxford; at pg 57. More generally, for a history of the evolution of retransmission rights, see this monograph.

of these rights. *Annex 4* presents a detailed account of the legal bases for these rights. However, the key points are here summarised.

Retransmission rights are presented in international law in two ways. Firstly, they are explicitly provided for in the Berne Convention. Secondly, they can be considered as a fragment of the broader 'right to public communication' in the WCT. Performers and producers also have similar rights, though these might be weaker and often restricted to a mere right to remuneration.

In terms of limitations and exceptions to these rights, the Berne Convention allows for implementing parties to determine the conditions under which these rights are exercised. Hence, limitations to retransmission rights are possible, once the rightsholder maintains a right to equitable remuneration. Through various cross-references in international provisions on copyright and related right law (and the principle of 'equivalency'), the implied permissibility of limitations on retransmission rights also applies to the rights of performers and producers. However, international copyright law also stipites that limitations and exceptions must pass the so-called 'three-step-test'. Any policy interventions which amount to limitations on the retransmission rights must hence past this test.

[10]-2.1 Justifying Special Cases

The sub-sections below analyse how the unique market activities analysed in Chapters 8 and 9 relate to this notion of copyright limitations.⁴⁷⁵

[10]-2.1.1 Retransmission as a Special Case

The three-step-test requires that the limitation be in '*certain special cases which do not conflict with a normal exploitation of the work/performance/recording and do not unreasonably prejudice the legitimate interests of the rights holder*'. The requirement of Berne Article 11bis(2) that the rightsholder be afforded a right to obtain equitable remuneration assures that the legitimate interests of the rightsholder is not unreasonable prejudiced (third step). Furthermore, the nature of retransmission activities, and the fact that retransmitted works by definition have already been legitimately broadcast means that limitations to exclusive rights to facilitate retransmission do not conflict with normal exploitation (second step).

What remains to be asserted is that retransmission activities indeed constitute a 'certain special case' (first step). As discussed in detail in Chapter 8, broadcast retransmission is a highly transaction cost intensive activity, and without some mechanism to mitigate these costs, the activity itself would not be viable.

⁴⁷⁵ For clarity, it should be understood that while Chapter 6 already discussed limitations and exemptions, this was in reference to the related rights of broadcasters themselves. The discussions in this chapter focus on limitations and exceptions to copyright, particularly when works are communicated via broadcasts and subsequent retransmissions.

Retransmitters, no matter the technological platform used, do not have the information, time, or negotiating capacity to conclude authorisation agreements with every rights holder who holds interest in the content being retransmitted. As this problem is unique to this activity, it can indeed be said that retransmission constitutes a 'certain special case' for copyright and related rights exploitation.

Furthermore, there is inherently some level of legal uncertainty involved with all broadcasting – including retransmission activities. Broadcast signals typically contain a large number of works (audio and audiovisual programming), and hence involve a massive number of rightsholders (authors, performers, and producers). Operating on such a large scale, there will always be some level of uncertainty as to whether all relevant authorisations have been acquired even where best efforts have been used for good faith negotiations. This legal uncertainty is also linked to more transactions costs, as there are often high search costs in identifying rightsholders in the first place. A simple example might be a news broadcast of a public event where music is played, or where public art appears in the scene. While there are generally *di minimums* standards and specific limitations and exceptions for such 'incidental use', there will always be some level of uncertainty as to whether these apply and what relevant authorisations are needed.

[10]-2.1.2 Cross-Border Broadcasts as a Special Case

As the country-of-origin principle (discussed in detail in Chapter 8), is a specific doctrinal legal fiction, its proper analysis should be seen as a matter of relating to the core concepts of copyright law, specifically the interpretation of 'communication to the public'. However, its signification can also be explained through the lenses of limitations and exceptions to core copyright principles.

The country-of-origin principle does not 'unreasonably prejudice the legitimate interests of the rights holder' because presumably, if it is known *a priori* that the communication will be deemed as authorised in every country of reception, then the value of such dispersed reception would be internalised in the costs of acquiring authorisation for transmission in the country of origin. While this reduces the bargaining power of a rightsholder, it increases the assumed captive audience and hence increases the compensation that the rightsholder can request. Therefore, the bargaining power of the broadcaster is actually also reduced, as authorisation for transmission in one jurisdiction is the same as that for all jurisdictions in the integrated market and hence such authorisation is associated with a high price. If any party's legitimate interests were unduly limited, it would therefore be that of small local broadcasters whose commercial interests are only intra-jurisdictional.

The principle also does not conflict with normal exploitation of the work/performance, as the work has already been authorised for broadcast in the country of origin. The extent that further simultaneous broadcasts in other jurisdictions represents 'normal exploitation' is hinged on the trade-off between the practice of territorial licencing and the policy goal of market integration. Hence, as discussed in Chapter 8, it is critical to have a clear policy framework (and enabling case law) to clarify this context. In any case, as discussed in Chapter 9,

for many types of works, broadcast distribution is near the end of the value-chain, and hence disruptions to 'normal exploitation' are minimal (though admittedly greater for a broadcast than for a retransmission).

Lastly, the case of broadcasting (in the context of an integrated regional market) certainly qualifies as a 'special case'. As discussed in Chapter 8, this is due to fact that cross-border broadcasts are a market in which there are significant information asymmetries (between broadcasters, rightsholders, users, and regulators) in terms of the applicable legal framework. The possible cumulative application of multiple national laws not only creates a significant regulatory burden, but legal uncertainties that amount to a unique market failure. On these grounds, the country-of-origin principle can be interpreted as a policy tool to address this 'special case' of market failure.

[10]-2.2 Taxonomy of Policy Options

The above argued that the act of retransmission constitutes a special case that justifies limitations and exceptions to exclusive public communication rights. Using the discussions from Chapters 8 and 9 as a basis, it is possible to now catalogue the various possible approaches to implementing such limitations. However, those discussions did not contain a working example of one important policy tool – the compulsory licence. Therefore, the European case study is complemented by a short case study of the US 'Retransmission Consent' system, presented at *Annex 5*.

Building on those case studies, this section builds a taxonomy of the policy options for regulating retransmission rights.

[10]-2.2.1 Trade-off Between Freedom of Contract and Legal Certainty

There are various policy approaches that can be used to mitigate the problems of high transaction costs and legal uncertainty associated with the exploitation of retransmission rights. The various tools therefore have different effects on the prevailing level uncertainty and transaction costs, and a comparison of these tools suggests that the policymaker faces a trade-off between legal certainty and freedom of contract. The greater the limits placed on the exercise of a right, the greater the level of legal certainty for users of those rights, but the lower the level of freedom of contract of the rights holder. The figure below summarises this relationship as it relates to different possible approaches to the exercise of copyrights.

Freedom of Contract and Transaction Costs ↑	<ul style="list-style-type: none"> A. Exclusive Rights – Individual Licencing B. Voluntary Collective Management (non-exclusive) C. Voluntary Collective Management (exclusive) D. Extended Collective Management E. Mandatory Collective Management (assignment possible) F. Mandatory Collective Management (no assignment) G. Compulsory Licence H. Statutory Licence I. Exhaustion 	Legal Certainty ↓
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Table 10.1: Retransmission Policy Options

[10]-2.2.2 Individual Licencing

The ‘default’ position would be *Regime A* - one of exclusive rights practiced through voluntary individual licencing. Indeed, this is the case that describes the vast majority of the intellectual property system. In such a system, there is maximum contractual freedom for the rightsholder, but minimal legal certainty for the user. While there is no uncertainty in the legal rules that apply, the legal certainty stems from the transaction costs associated with identifying every single rightsholder who has interest in a given broadcast or retransmission, as there is no institutional ‘safeguard’ to protect the broadcaster from unintentional infringement. This is also the most transaction cost intensive case.

[10]-2.2.3 Collective Licencing

The next case is *Regime B* – non-exclusive voluntary collective management. This tends to be the default case when transaction costs are high for rightsholders (as opposed to users) for the administration of their rights, and where usage involves a large repertoire of works (for example in the management of performance rights for musical works). The restriction on the freedom of contract of the rightsholder comes in the form of delegating the task of concluding agreements to the CMO. The greater the tendency for rightsholders to voluntarily administer their rights through collective management organisations (CMOs), the larger the repertoires of these CMOs, and the greater the legal certainty for users such as broadcasters who have licences from those organisations. Transaction costs are also very low for both users and rightsholders, as the broadcaster mainly contracts with the CMO rather than with a large number of individual rightsholders.

However, some rightsholders may – in certain cases or for certain uses – still assert their rights on an individual basis; this might be the case for owners of very

high-valued rights who have significant bargaining power. In this way, the rightsholders still retain a strong degree of freedom of contract. Of course, these rightsholders might also choose to always licence on an individual basis, as collective management is voluntary. Any insistence of individual licencing decreases legal certainty for the broadcaster, and increases transaction costs. This system might also be a useful policy tool where CMOs do not engage in certain licencing practices that the policy-maker wishes to encourage, and hence some freedom of contract needs to be returned to rightsholders. As discussed in Chapter 8, and example is the European Commission's consideration of 'Parallel Direct Licencing' for multi-territory licencing for the online use of musical works.

In *Regime C*, collective licencing is still voluntary, but rightsholders that choose to administer their rights through collective management do so on an exclusive basis. This means that rightsholders are not able to switch between the systems of individual and collective licencing, and must make a discrete choice; there is hence a restriction on the freedom of contract of the rightsholder. In such a case, there would be greater legal certainty and less transaction costs for licensees. Of course, the issue of non-exclusive versus exclusive CMO representation is an issue that is depends to how CMOs are regulated. However, as a general note, a greater degree of CMO oversight implies a greater extent of resulting legal certainty.

In *Regime D*, there is 'extended collective management', meaning that CMOs not only represent their direct members, but also other rightsholders in the same class who have not explicitly opted out of such representation in order to administer their rights on an individual basis. This therefore represents a sort of middle ground between voluntary collective licencing (*Regimes B and C*) and mandatory collective licencing (*Regimes E and F*). In such a situation, there is much greater legal certainty (and less transaction costs) than *Regimes B and C*, because there a greater coverage of the collective licence provided by the CMO, and hence a lower degree of liability for the broadcaster licensee. However, since the rightsholder must actively assert their desire to engage in individual licencing activities, there is a restriction of the freedom of contract, particularly where the rightsholder fails to actively make such an assertion.

The next case is *Regime E*, in which there is mandatory collective licencing (with possible assignment). The restriction on freedom of contract here is significant as rightsholders are stripped of the possibility of engaging in individual licencing. However, they may still choose to assign their rights to some other intermediary instead of the CMO. An example of this system would be the provisions of Article 10 of the EU Satellite-Cable Directive, as discussed in Chapter 8. Under that Directive, rightsholders can only administer their rights for broadcast retransmissions through a CMO. However, under Article 10, they may alternatively choose to transfer those retransmission rights to the broadcaster whose initial broadcast is to be retransmitted. In this way, the rightsholders still maintain some degree of freedom of contract. A user would therefore have to negotiate these rights though the original broadcaster.

Such a provision does not necessarily have a major effect on legal certainty, as there is no uncertainty about the mechanism through which rights must be

cleared. All rights not cleared though CMOs would have to be cleared through broadcasters who have been assigned such rights. There is only marginally more uncertainty as to which rights need to be cleared through which mechanism, which is easily cleared up during negotiations with the original broadcaster. There are however notable effects on transaction costs. Assuming that a broadcasters' retransmission right is exists and is administered on an individual basis, the retransmitting party must negotiate a retransmission agreement with the original broadcaster. In addition to the broadcaster's retransmission right, there will also be negotiations for the content retransmission rights assigned to the broadcaster by other rightsholders. There is no increase in search costs, as the retransmitting party is already negotiating with the broadcaster irrespective of Article 10 assignments by other rightsholders. However, there might be greater negotiating costs as there is a larger bundle of rights being negotiated for.

In *Regime F*, collective management is mandatory, but exclusive assignments such as those under Satellite-Cable Directive Article 10 are not possible. This represents a further restriction of the freedom of contract of the rightsholder, whose only active decision is to choose the CMO to which they belong. However, often there is no such choice, as the rightsholder might be restricted to the CMOs within their jurisdiction, which might be statutory or natural monopolies. Furthermore, as discussed in Chapter 9, where there is strong harmonised oversight over CMOs, their services are almost perfectly substitutable, and there is no major incentive to practice arbitrage regarding membership between different organisations. The only effective aspect of freedom of contract that is maintained is the rightsholder's ability to influence the licencing decisions of the CMO, given that the CMO is an agent of its members. However again, if there are strong regulatory requirements of non-discrimination in licencing practices, the CMO is quite limited to its ability to make licencing decisions in the first place.

In this Regime, transaction costs are lower than in *Regime E*, because negotiations with the original broadcaster are simpler and less costly. Furthermore, in the absence of broadcasters' rights (or where there is a strong limitation or exemption to broadcasters' rights such as a compulsory licence or must-carry status), there may be no negotiating costs with the broadcaster at all.

[10]-2.2.4 Non-voluntary Licencing

The next case is *Regime G*, in which there is compulsory licencing. A compulsory licence is where the rightsholders have a duty to deal with users, and hence do not have the freedom of contract to deny a licencing request. Legal rules therefore mandate that rightsholders execute licences with broadcasters. In addition, regulations may also provide for some mechanism to collect and distribute the fees associated with compulsory licences, akin to the role of a CMO.

A compulsory licence is a mechanism that is mandated by a given competent authority – including courts, regulators, arbitration panels, or law-makers. In addition, the compulsory licence technically has to be asserted by the user – the restriction on the freedom of contract for the rightsholder is that they cannot deny the licence (i.e. authorisation is compulsory). Since the inability to deny a licence

causes a collapse of the price mechanism, the compulsory licence is also normally associated with a regulated royalty rate, or at least strict terms for how such a rate is calculated.

Regime H, is the case of the statutory licence, which is a special case of a compulsory licence; the difference is somewhat pedantic. The statutory licence is explicitly provided for in legislation (or regulations), and hence a request for authorisation does not need to be initiated by a user. Authorisation is given by virtue of the applicable legal rules themselves. Hence, a licencing contract is conceptually in place even if the user does not actually undertake the particular activity in question. Furthermore, under a statutory licence the actual royalty rate is typically defined in the legal rule itself.

The rightsholder has almost no freedom of contract in either regime, as they have no control over authorising usage. However, under a compulsory licence, the rightsholder might still be able to make representations before the competent authority (court, regulator, or arbitration panel) regarding the factors that should be taken into consideration in determining licencing terms, including royalty rates. Furthermore, such competent authorities play a more active role in the market and have a greater ability to modify rules based on changing market circumstances as compared to legislators. It can therefore be said that in this regard, the freedoms of rightsholders are even more restricted under a statutory licence than under other forms of compulsory licences.

In both regimes, transaction costs are eliminated, at least in terms of negotiating costs. There are however still search costs, as the broadcaster may have to assert the authorisation, or even distribute the regulated payments to rightsholders. These regimes therefore only truly minimise transaction costs if they are complimented by an institutional mechanism to collect and redistribute royalty payments. In both cases, legal certainty is extremely high as there is certainty that authorisation from all relevant rightsholders has been facilitated.

The last case, *Regime I*, is exhaustion. Exhaustion is where exclusive rights can no longer be exercised after initially being exercised. In this case, it is to say that once the right to communicate a work to the public has been exercised, the right to influence any further distribution (i.e. retransmission) no longer exists. The concept of exhaustion is discussed in detail later in this chapter. Nevertheless, for the sake of completeness, it is noted that exhaustion represents a regime that completely eliminates all freedom of contract of the rightsholder, as there is no longer any right or entitlement on which a contract can be based. Similarly, legal certainty is maximised as the absence of rights implies the absence of liability for retransmitters, and transaction costs are zero as there is no transaction to be performed. However, such a system would not be permissible under international copyright as a limitation and exception, as it would deny the rightsholder the right to equitable remuneration.

[10]-3 RETRANSMISSION THROUGH ANALYTICAL LENSES

The above section aimed at establishing a taxonomy of policy tools for limiting retransmission rights. With this established, the section below aims at analysing these tools using the lenses of three different perspectives: (i) default rules, (ii) property and liability rules, and (iii) the doctrine of copyright exhaustion.

[10]-3.1 Default Contractual Rules

When contracting, parties draft a contract so as to provide for terms for various circumstances, many of which might be changing due to external factors. However, as parties seek more detailed contractual terms to account for different situations, transaction costs (particularly in the form of negotiating costs) increase. Therefore, there are often various situations that parties do not explicitly contract terms to accommodate, because to do so might be too costly. In such cases, the legal system filling in these gaps through 'default rules'.⁴⁷⁶ One of the purposes for such rules is to attempt to substitute for the actual terms that the parties would have contracted into in the absence of transactions costs.

However, there may be circumstances where transactions costs are so high that they prevent parties from contracting in the first place. In such cases, the legal system might adopt an approach of 'regulation which mimics the market', by imposing default rules that parties would have contracted into had the costs of contracting not been prohibitive.

Framing limitations to retransmission rights as default rules therefore bears great similarity to the transaction cost perspective of limitations and exceptions discussed in Chapter 6; i.e. that the role of limitations such as Fair Use is to facilitate uses that have been excluded due to prohibitive transaction costs. However, an important difference is that a justification of Fair Use amounts to an exception to copyright, and hence a bypassing of the exclusive right altogether. On the other hand, application of a default rule facilitates mutual contractual exchange, and hence leaves the right to equitable remuneration intact.

Furthermore, in terms of trying to explain retransmission agreements (and the rights that underpin them), it should be noted that there are four relevant contracting parties: rightsholders, the initial broadcaster, the retransmitter, and CMO intermediaries. However, the retransmission is subject to a series of agreements between different sets of two of these parties, namely (i) the rightsholder and the broadcaster, and (ii) the retransmitter and the broadcaster. There are no explicit voluntary agreements between rightsholders and retransmitters, which speaks to the core issue of prohibitive transaction costs (and inherent unpredictability) in retransmission activities.

⁴⁷⁶ Parisi, F. (2013) – *The Language of Law and Economics*, Cambridge Press; entry for 'default rules'

As property rights can also be a tool for minimising transaction costs associated with voluntary contracting, broadcasters' rights can be seen as such a mechanism. However, as discussed in Chapter 7, there are various conceptual problems with this justification of moving from contracts to property rights in this case, particularly in the context of enforcement against infringements.

Policy tools used to limit rightsholders' retransmission rights can however still be understood through the lens of default rules, particularly in terms of the use of CMOs. Extended Collective Management is the regime best explained using such a perspective. In this case, regulations provide that in the absence of an explicit agreement between rightsholders and certain users (namely retransmitters), a default rule of CMO representation is applied, whereby the CMO has a presumed capacity to represent the rightsholder. While the rightsholder has contracted with the initial broadcaster, in the absence of a provision to the contrary, the retransmission right is assumed to be administered through the CMO.

Generally, this might be seen as a 'majoritarian default rule', as it would be the arrangement that most rightsholders would choose in any case in the absence of transaction costs. However, for owners of high-value works that might attract remuneration greater if licenced individually, this may also be seen in some ways as a 'penalty default rule'. This is because extended CMO representation provides an incentive to either explicitly contract or not, and mitigate the inefficiencies involved with legal uncertainty of not having a declared position. In both cases, the important thing to note is that rightsholders are still free to explicitly contract an alternative arrangement to the default rule, by either transferring retransmission rights to the broadcaster, or executing a separate contract with the retransmitter.

Another explanation of extended collective management is that it equates to a shift in the presumption of CMO representation, and hence the presumption of authorisation once a broadcaster does indeed hold a CMO licence. Hence, the default mechanism through which the rightsholder's exclusive rights are exercised shifts from one of 'authorisation' to one of 'prohibition'; i.e. the broadcaster is presumed to be authorised to use the work (in its capacity as a CMO licensee) unless expressly prohibited by the rightsholder. As discussed in Chapter 6, this shift is in itself a mechanism to limit the breadth of intellectual property rights.

To a less extent, default rules might also explain the model of mandatory collective management where assignment is possible. In this case, the contractual choice is between authorising retransmission through CMO representation, and an exclusive assignment to the initial broadcaster. The default rule in this case is that representation is through a CMO, which is the relatively more efficient alternative, as assignment can result in increased negotiating and contracting costs as discussed above.

[10]-3.2 Property and Liability Rules

The notion of 'Property Rules versus Liability Rules' is a central theme in the field of law and economics, and is a very powerful tool for engaging in the economic analysis of intellectual property law. Calabresi and Melamed (1972)⁴⁷⁷ provide the foundations of this area and discuss how these two mechanisms for protecting legal entitlements differ.

Property rules allow the entitlement holder alone to determine the market exchange price for use of the entitlement. The legal system supports this property rule through injunctive relief; i.e. users cannot use the entitlement unless explicitly authorised to do so. In contrast, liability rules allow a user to use the entitlement without explicit authorisation of the entitlement holder, once adequate compensation is paid. The legal system supports these liability rules through awarding damages to entitlement holders, rather than injunctive relief.

The standard case is generally that copyright takes the form of a property rule. However, while related rights are constructed to generally take the form of exclusive rights, in many cases – such as in broadcasting – they are reduced to a mere 'right to equitable remuneration', which is a form of a liability rule.

Generally speaking, the law and economics of property and liability rules finds that when transaction costs are low, property rules are more efficient, as parties can freely negotiate for the use of an entitlement. In contrast, when transaction costs are high, liability rules have a comparative advantage, as prevailing transaction costs reduce the ability of parties to efficiently bargain.

The standard case of individual licencing of retransmission rights is clearly a property right. Regimes of voluntary collective management (both exclusive of non-exclusive) are also property rules, just that the rightsholder choose to use the CMO as an intermediary for administration of the right; the CMO merely acts as a repository of accumulated and consolidated individual rights which reduces the transaction costs associated with individual licencing.

In the case of compulsory or statutory licencing, the regime is clearly one of a liability rule. Rightsholders do not have the ability to bargain for use of their rights or determine the price of authorisation. Their rights have been reduced to an entitlement to compensation, and such compensation is determined by a competent authority. Given the transaction costs intensive environment of retransmission activities, it is therefore obvious why liability rule regimes are a prevalent policy choice for such secondary broadcasts.

Where collective management is mandatory however, such regimes are an interesting middle-ground between property and liability rule regimes. While CMOs act as consolidated administrators of individual property rules, the fact that individual rightsholders do not have direct influence over the licencing terms for

⁴⁷⁷ Calabresi, G. and Melamed, A. A. (1972) - *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harvard Law Review 1089

the use of their works (i.e. no possibility for direct licencing) makes this scenario resemble a liability regime. However – in principle – individual rightsholders have some say in the activities of their representing CMOs who act as their agents; therefore, some semblance of a property rule system is maintained.

In *de jure* terms the CMO still make active licencing decisions based on property rules. In *de facto* terms however, their ability to make such decisions might be limited. As argued in Chapter 9, strong oversight over CMOs reduced the scope for individual organisations to determine licencing conditions, inclusive of prevailing royalty rates. Therefore, while mandatory collective management model remains at its core a property rule regime, the greater the degree of market integration and regulatory supervision, the more that such a system resembles a liability rule regime. It can even be said that mandatory collective management converges to a compulsory licencing regime, albeit where the ‘competent authority’ for determining compensation are market conditions themselves.

On this point, one common criticism of liability rules is that it is difficult (and costly) to determine the exact level of damages that should be awarded. Furthermore, there are administrative costs associated with liability rules. In the case of retransmission however, liability rules would apply equally to a large group of interested parties. There would hence be significant economies of scale in determining and administering remuneration rates, unlike court-ordered tort damages, which are determined on a case-by-case basis.

Furthermore, such rules would tend to average out the compensation offered to rightsholders. The consequence here is that some rights holders might be overcompensated (relative to the actual market value for the exploitation of their works), while some are undercompensated. Essentially, a single remuneration rate – whether administered through a CMO or a compulsory licence – would effectively create a subsidy for lower-valued works, funded by rights holders of higher-valued works.

Given the tendency for content production and distribution markets to be oligopolistic, higher-valued works might tend to be high budget works targeted for larger audiences. Hence, such a subsidy would consistent with the public policy dimensions of broadcasting (discussed in Chapter 4), such as promoting localism and pluralism.

Furthermore, another major advantage of liability rules over property rules is their ability to mitigate holdout problems when entitlements must be sought from a large number of rightsholders. Such problems are briefly discussed in the subsection below.

[10]-3.2.1 Liability Rules and Holdout Problems

As discussed in Chapter 4, one of the key features of a broadcasting schedule is its function in bundling individual programmes that have complimentary characteristics.

Where multiple property rights are involved for complimentary goods, there are however strong possibilities for holdout problems. Holdout problems occur where authorisation is needed from multiple owners of a fragmented property right, and hence each owner creates an externality on the others. The result is that each owner has an incentive to withhold authorisation in order to extract the maximum surplus possible from the buyer, hence leading to negotiating failures, and the inability to reach a Parato-optimal resource allocation.

Annex 6 explains how these problems might arise in the context of a bundle of complimentary goods.

In such cases, liability rules might be a useful tool for correcting the market failures associated with holdout problems induced by property rules. This is because no individual rightsholder would have the unilateral capacity to holdup the assembly of a bundle of programming content. Interestingly, this perspective suggests that liability rules may be useful, not only for clearing rights for retransmissions, but even for clearing the rights contained in initial broadcasts, where such are bundles of complimentary programmes sourced from different rightsholders.

[10]-3.3 Copyright Exhaustion

The concept of copyright exhaustion is not only one of the possible regimes for retransmission described in the taxonomy above, but it is in itself another possible lens through which such rights can be analysed. Exhaustion refers to the circumstances in which intellectual property rights are no longer enforceable after some extent of exploitation.

In terms of copyright law, exhaustion is normally used in the context of the right of distribution of some physical carrier in which some copyright protected work is embedded (e.g. a book or compact disk). Exhaustion can either take place at the national, regional, or international level. National exhaustion would mean that once a copyright holder authorises the sale of a book, that right of distribution is no longer applicable within the jurisdiction in which that book was sold; the result is that the copyright owner has no control over further distribution of the book (such as a second-hand sale) within the jurisdiction, but may exert control outside of the jurisdiction (e.g. over imports). If exhaustion were international, such control is not possible at all after the initial sale.

In terms of international intellectual property law, individual jurisdictions are able to determine the exhaustion regime they wish to apply.⁴⁷⁸ In the European Union, a regime of regional exhaustion is followed. Article 4(2) of the Information Society Directive provides that an author's distribution right is exhausted only

⁴⁷⁸ Article 5 of the TRIPs Agreement states that *"For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 [National Treatment and Most-Favoured-Nation Treatment] nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights."*

after the first sale or transfer of a work (or copies thereof) is made with the consent of the rightsholder.⁴⁷⁹ However, such exhaustion applies to only distribution rights. The right of public communication – the right exploited in the act of broadcasting – is explicitly not subject to exhaustion; this is hence an indirect affirmation that the right of public communication includes a retransmission right in addition to a broadcasting right.⁴⁸⁰ Nevertheless, it is still worth giving some attention to how exhaustion doctrines might inform a theoretical understanding of retransmission rights.

Exhaustion doctrines have several positive spillover effects.⁴⁸¹ Firstly, they create secondary markets, which increases overall access to works and gives creators incentives to improve their offerings to compete with such markets. Secondly, it promotes cultural preservation and access to controversial works whose distribution might be otherwise limited in politically repressive environments. Thirdly, and of most relevance to the analysis at hand, they reduce transaction costs between rightsholders and users, particularly in terms of information costs for users who must ascertain what restrictions on use may apply, and possible hold-up problems. Additionally, exhaustion also facilitates the decentralisation of innovation, as it allows users to adapt and modify products pursuant to their own preferences and interests. Lastly, exhaustion facilitates competition between technological platforms, as there is a reduced scope for consumers to be locked-in to specific platforms, and content can be ported between competing platforms.

In the context of retransmission, exhaustion – as a structural limit on copyright and related rights – therefore has relevance as a mechanism to reduce the transaction costs between rightsholders and retransmitters. However, it also has relevance as a means of promoting competition between different technological platforms for distributing audiovisual content, such as online distribution. As argued in Chapter 9, a technologically neutral model of regulating retransmission would provide for an enabling environment for technological innovation.

Despite these possible welfare-enhancing aspects, there might also be welfare decreasing effects if exhaustion greatly diminishes the production incentives that copyright is supposed to provide in the first place. In this regard, it is useful to make distinctions between after-market uses by individual consumers and uses by other commercial entities. Where uses are productive in nature and interact with other products and services to generate some personal gain (as opposed to unproductive, such as use by individual consumers), it may be reasonable and

⁴⁷⁹ Information Society Directive Article 4(2) states as follows: “*The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the right-holder or with his consent.*”

⁴⁸⁰ Information Society Directive Article 3(3) states as follows: “*The rights referred to in paragraphs 1 and 2 [communication to the public, and making available rights] shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.*”

⁴⁸¹ Puig, A. R. (2013) – *Copyright Exhaustion Rationales and Used Software: A Law and Economics Approach to Oracle v. UsedSoft*, JUPITEC 3, 159

socially desirable to allow copyright holders to extend some control on a product even after it has left their (initial) commercial sphere.⁴⁸²

In the case of retransmissions, the specific users (retransmitters) are not individual consumers, but commercial entities using broadcast content for profit. Therefore, complete exhaustion – while reducing transaction costs and facilitating innovation – might not be the best solution. It is possible that full exhaustion might result in dilution of the initial incentives provided by the copyright system. As such, an intermediary solution, such as that of mandatory collective management or a compulsory licence might be optimal.

[10]-3.3.1 Exhaustion and Pro-Competitive Restraints

While exhaustion may have various spillover effects, it may also create an obstacle to certain pro-competitive practices. The ability to control distribution even after an initial distribution is a major area for competition regulation. Such control may take the form of either vertical or horizontal constraints. Law and Economics has increasingly highlighted the possible pro-competitive effects of vertical restraints in certain settings.⁴⁸³ In contrast, horizontal constraints are still generally seen as anti-competitive in nature.

It is difficult to classify the relationship between a broadcaster and a retransmitter as categorically 'horizontal' or 'vertical'. The relationship is vertical as the retransmitter operates further down the value chain, and 're-distributes' the signal of the original broadcaster, and possibly even operates in a distant market. However, where the two operate in the same local market, they may have a somewhat horizontal relationship in that they compete for audience reach. The nature of the horizontal relationship between a broadcaster and a retransmitter depends on the relationship between their audiences; this is discussed in the section on 'A New Public' below.

In terms of vertical restraints, the idea is that distributors are provided with incentives to make specific investments in the context of long-term contracts.⁴⁸⁴ These investments create efficient distribution networks by providing for services like localised advertising, pre-sale promotion, and after-sale support. However, such investments do not form a major part of broadcasting services. Firstly, since broadcasting is only one means of distributing a work (and the distribution platform closer to the end of the value chain), it is not necessarily associated with major advertising or pre-sale activities. However, local broadcasters may indeed make investments in advertising a given work to increase its potential viewership, which can be undermined by parallel imports of a broadcast distribution; this very specific case is discussed below. Additionally, since the value of a broadcast is by definition instantaneous, the issue of investments in areas like post-sale and support services do not arise.

⁴⁸² Puig (2013); Paragraph 26

⁴⁸³ For a discussion on this issue, see Hovenkamp (2011)

⁴⁸⁴ Puig (2013); Paragraph 39

Another economic argument against exhaustion is that it limits the ability of rightsholders to engage in price discrimination.⁴⁸⁵ Price discrimination is the ability of a supplier to charge the maximum price to individual consumers, according to their respective reservation price and willingness to pay. In some circumstances, price discrimination can be welfare enhancing, as it minimises the deadweight losses that result from a single monopoly price that may be associated with a property right. However, the concept of price discrimination simply does not apply – and cannot apply – to the case of any broadcasting service for the simple reason that such services are by definition provided to multiple-users simultaneously.

Therefore, arguments for limited application of exhaustion doctrine, based on supposed pro-competitive effects of vertical constraints and price discrimination, simply do not apply in the case of broadcast retransmissions.

[10]-3.3.2 Exhaustion and Parallel Importation

As discussed in Chapter 6, one of the major implications of exhaustion policy in other areas of intellectual property (namely in patents), is to regulate parallel importation. However, due to the nature of broadcast transmissions, the issue of parallel importation generally does not arise in a major way for broadcasters' rights. They may however arise in the case of copyright protected works.

For example, a work may be licenced for exclusive broadcast to broadcaster A in country A, and to broadcaster B in country B. However, another entity C (also in country A) may retransmit the foreign signal of broadcaster B in country in A. Both C and A therefore transmit the same work in country A, and compete for the same fixed audience; this would be to the commercial detriment of broadcaster A who would have otherwise had exclusive distribution in territory A. This is indeed a situation that is a form of parallel importation. If the rightsholder's right to authorise public communication via broadcast is fully exhausted, then they cannot prohibit the 'importation' of the content via C's retransmission of B's signal. With full exhaustion, the initial incentives of the copyright system might actually result in the content own having a disincentive to pursue broadcast licensees at all, and instead pursue other more profitable horizontal modes of distribution.

However, if the property right is limited to a compensatory liability rule, the rightsholder will still receive remuneration from C to compensate for the revenues potentially lost due to undermining A's exclusivity. Broadcaster A however – as the local licensee – loses revenue, as some viewers might switch to C's retransmission of B's signal instead.

In situations like this communications regulators may use policy tools outside of the property rights system to accommodate the commercial interests of the local broadcaster. In this scenario, a 'local substitution' rule might be used. Such a rule requires that when there is simultaneously a local and foreign broadcast of the same content, all platforms must – for the duration of the simultaneously aired

⁴⁸⁵ Puig (2013); Paragraph 55

programme – substitute the foreign signal with the local signal. Therefore, any cable or other subscription networks retransmitting foreign signals essentially ‘redirect’ local consumers to the local signal. The effect is that the local broadcaster is able to maintain their exclusivity for the specific programme and maximise its audience reach (and hence advertising revenue), while retransmissions of foreign signals are still permitted.

Similar to the US case study in *Annex 5*, this is an example of how regulatory rules in the communications sector can be used to solve the issues specific to retransmission markets, without relying on expanding the exclusive rights of private parties.

[10]-4 THE LINKS BETWEEN DIFFERENT RETRANSMISSION RIGHTS

The previous two sections focussed on the retransmission rights of copyright owners. To build an understanding of the retransmission rights of broadcasters, it is necessary to understand the relationship between this two sets of rights.

Copyright owners (and to an extent, producers and performers) have certain public communication rights which are the basis on which works are included in broadcast communications. When those work are broadcast, the related right of the broadcasting organisation also comes into existence.

Any transmission would then be based on the retransmission right of the first broadcaster, as well as the retransmission right of the copyright owners (which its itself another manifestation of the broader public communication right).

In this process, the activation of the related right of the broadcasting organisation is inseparable from the activation of the retransmission rights of the copyright owners. The question as to whether the broadcasters’ rights have been triggered therefore depends on a determination as to whether the public communication right has been triggered a second time.

At its core, the issue relates the boundaries between the activities of broadcasting and retransmission. Understanding these boundaries is therefore central to understanding the scope of nature of broadcasters’ rights themselves. Conveniently, because of the concurrence of activation of the rights, such an understanding can indirectly come from an analysis and interpretation of copyright without the need to directly consider related rights.

Accordingly, this section focusses on the relationship between the activities of broadcasting and retransmission from legal and technical perspectives.

[10]-4.1 Relevance of Boundaries

There are virtually infinite possible scenarios that might involve the use of a work embedded in a broadcast, as there are limitless possible combinations of places, times, and context in which a broadcast - like any other subject matter - may be used. In each such case, the balance of economic interests between rightsholders, the user, and society would be different.

However, the legal system cannot be expected to consider this balance of interests on a case-by-case basis in terms making determinations on copyright exploitation.⁴⁸⁶ Firstly, such a case-by-case analysis would be disproportionately and prohibitively costly to administer given the global frequency of use of copyright-protected works. Secondly, such a case-by-case analysis would imply that there would be little *a priori* certainty as to whether a given use is permissible, and hence many possible socially beneficial uses might not be undertaken in the first place. As a result, legal rules regarding property rights should provide some optimal level of certainty and delineate the conditions of copyright exploitation. This is the purpose of defining and interpreting the concept of 'communication to the public'.

A finding that a communication to the public has occurred triggers the property right, and the ability of the rightsholder to capitalize on their economic interests by capturing a portion of the generated welfare. This is not to say that rightsholders have no economic interest where a given use is not deemed as a 'communication to the public', but rather that the overall balance of interests does not lead to their rights being triggered.

When the communication in question is a secondary use (i.e. a retransmission or public use of a transmission), the situation is a bit more complicated. If the rights of both the broadcaster and copyright owners are triggered, then the value captured through the use of private property rights would be shared between the parties.

The question of interpreting the notion of 'communication to the public' therefore not only conditions the ability of rightsholders to capture value-added, but also dictates the parties amongst who that value is distributed.

Defining the boundaries between broadcasting and retransmission – within the larger context of communication to the public – therefore directly conditions the effective scope of the rights of the broadcasting organisation. Conceptually, it might be possible to grant broadcasters a retransmission right, but if retransmission is defined so narrowly that this right is never triggered, then right has no practical effect.

⁴⁸⁶ On this issue, the Law and Economics literature on 'Rules vs Standards' stresses that there is a trade off in terms of the specificity of a legal rules and how effectively they are administered.

[10]-4.2 The Notion of a New Public

The question of retransmitting a broadcast signal is inseparable from the question of public communication of the content embedded in that signal. Therefore, it is useful to pay attention of the matter of how the concept of 'communication to the public' is interpreted.

This section analyses selected case law on the concept of 'communication to the public', with a thematic focus on the concept of 'a new public'. It will highlight the apparent inconsistencies of the court in this regard, and the effect this has on the boundaries of retransmission rights themselves. This will then be used to make some commentary on the theoretical composition of broadcasters' related rights.

[10]-4.2.1 The New Public in the US

As noted in *Annex 5*, much of the early stages of the US retransmission regime focussed on interpreting the notion of 'public communication' of works. An important component of this interpretation is term 'public' which gives rise to a very critical question – *should copyright law apply differently when a retransmission (or any 'secondary' communication) is made to the same audience as the initial communication, as opposed to being made to a 'new public'?*

In the '*Fortnightly*' case, SCOTUS ruled that no communication to the public was made, as the 'retransmission' was made to a public group already included within the intended reception area of the initial broadcast. The act of retransmission hence amounted to a technical assistance for better reception.

In the '*Teleprompter Case*', SCOTUS also ruled that the 'retransmission' did not amount to a public communication of protected works, even though the secondary communication was essentially to a new audience. In that case, the court considered the business model used by the initial broadcaster. Since the initial broadcast was funded through advertising revenue (some of which would be remitted to copyright owners), retransmissions expanded audience reach and hence the value of advertising. It was therefore in the commercial interests of both the broadcaster and rightsholders to permit retransmissions.

Since those judgments, the US system has of course become considerably more refined. However, the notion of communication to the public – and how limitations to such may apply – are strongly linked to the features of the broader communications sector regulatory regime. Since broadcasters are licenced on a territorial basis, there is complete and certain information on the audience scope of a given broadcaster, and definitive determinations can be made about the locality of a broadcast. Therefore, there can be great certainty about the rules that apply for retransmissions, including how to apply the provisions of the compulsory licence, retransmission consent, and distant signal importation rules.

In the US system, there is hence considerable certainty with the interpretation of the notion of a new public, and how it relates to triggering retransmission rules.

[10]-4.2.2 A New Public and Public Communication in the EU

In the European Union, there is much less legal certainty about how the right of public communication applies for 'secondary communications'. In fact, interpreting the notion of 'communication to the public' is one of the most notoriously challenging aspects of EU copyright law. There are several cases from the European Court of Justice on the matter of interpreting the public communication right under Article 3 of the Information Society Directive.

One of the challenges in this regard is that – as discussed in a previous section of this chapter – European Copyright law constructs a very broad concept of public communication. This broad conception subsumes all three rights outlined in Article 11bis(1) of the Berne Convention under Article 3(1) of the Information Society Directive: (i) the broadcast right, (ii) the retransmission right, and (iii) the right of public communication of a broadcast.⁴⁸⁷

The interpretive guide to the Berne Convention does however give some support to this approach, mainly by noting that the three rights under Article 11bis are not mutually exclusive but should be understood as cumulative.⁴⁸⁸ Consolidating them into a broader right hence might even create more legal certainty by avoiding possible doctrinal loopholes in attempting to apply discretely defined sub-rights.

The core question of defining a communication to the public for a secondary transmission is whether a rightsholder's authorisation to communicate a work in a broadcast covers subsequent uses of that broadcast. According the Guide to the Berne Convention – the answer is explicitly "no".⁴⁸⁹ This is because, both public communication of broadcast containing a work (e.g. via loudspeaker) and retransmission of a broadcast create a situation where '*an additional section of the public is enabled to enjoy the work and it ceases to be merely a matter of broadcasting*'.⁴⁹⁰ Interpreting the concept of 'an additional section of the public', or rather the notion of 'new public', is therefore critical.

⁴⁸⁷ Recital 23 of the Information Society supports such a broad interpretation of the public communication right, and states as follows: "*This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broad-casting. This right should not cover any other acts.*"

⁴⁸⁸ WIPO Guide to the Berne Convention; page 69 (paragraph 11bis.14)

⁴⁸⁹ WIPO Guide to the Berne Convention; page 68 (paragraph 11bis.11/12)

⁴⁹⁰ "*Just as, in the case of a relay of a broadcast by wire, an additional audience is created (paragraph (1) (ii)), so, in this case too, the work is made perceptible to listeners (and perhaps viewers) other than those contemplated by the author when his permission was given. Although, by definition, the number of people receiving a broadcast cannot be ascertained with any certainty, the author thinks of his licence to broadcast as covering only the direct audience receiving the signal within the family circle. Once this reception is done in order to entertain a wider circle, often for profit, an additional section of the public is enabled to enjoy the work and it ceases to be merely a matter of broadcasting. The author is given control over this new public performance of his work.*" - WIPO Guide to the Berne Convention; page 68 (paragraph 11bis.12)

The purpose of the above discussion is to provide some context for the section below on selected European Court of Justice (ECJ) cases on interpretation of Article 3(1) of the Information Society Directive. While some of these cases may not explicitly relate to broadcast retransmissions (at least in the traditional sense), clarifications on ‘public communication’ would be a pre-requisite for understanding whether certain acts are deemed as retransmissions in the meaning of copyright law, and hence whether the question of broadcasting rights presumably arises at all.

[10]-4.2.3 Communication in Public Places

The first case for discussion is known as the *Hoteles Case*, ruled on in 2006.⁴⁹¹ This case involved a hotel owner who provided television sets in hotel rooms, resulting in a dispute with the relevant national collective management society representing authors of musical works in Spain. As an interesting historical note, the use of broadcasts in hotels has specifically always been a key driver of the evolution of case law on the retransmission right in several jurisdictions.⁴⁹²

In this case, the ECJ ruled that “*While the mere provision of physical facilities does not as such amount to communication [...], the distribution of a signal by means of television sets by a hotel to customers staying in its rooms, whatever technique is used to transmit the signal, constitutes communication to the public within the meaning of Article 3(1) of [The Information Society Directive]*”. Furthermore, the Court ruled that “*The private nature of hotel rooms does not preclude the communication of a work by means of television sets from constituting communication to the public*”.⁴⁹³

In arriving at this determination, the Court considered the fact that the presence of television sets (and the ability to receive broadcasts) resulted in some implied commercial benefit to the hotel⁴⁹⁴, and that the although reception of broadcasts might be by individual room occupants, there is a cumulative effect of multiple rooms with successive turnover;⁴⁹⁵ hence, hotel clientele constitute a new public.⁴⁹⁶

These factors are significant as the ruling in *Hoteles* contrasts with the 2012 ECJ Judgement on the *Del Corso Case*.⁴⁹⁷ The latter case involved a dentist who played protected phonograms in his dental office while treating patients. However, in that case – and unlike in the *Hoteles Case* – the ECJ ruled that such use of protected

⁴⁹¹ European Court of Justice Case C-306/05 - Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA; Judgement decided on 7 December 2006

⁴⁹² For an overview of such history, generally see Gendreau (1990)

⁴⁹³ ECJ Judgment on Case C-306/05; Final Ruling

⁴⁹⁴ ECJ *Hoteles* Judgement; Paragraph 44

⁴⁹⁵ ECJ *Hoteles* Judgement; Paragraph 38/39

⁴⁹⁶ ECJ *Hoteles* Judgement; Paragraph 42

⁴⁹⁷ European Court of Justice Case C-135/10, SCF v Del Corso (C-135/10) - Società Consortile Fonografici (SCF) v Marco Del Corso; Judgement decided on 15 March 2012

works did not amount to public communication. One of the factors in that case seemed to be that patients were not active in the choice of whether to enjoy listening to the protected works, and that these patients are at the office solely to receive dental treatment, which is unaffected by the 'broadcast' of musical works.⁴⁹⁸ Similar issues were then again analysed in the *Osa*⁴⁹⁹ and *Reha Training*⁵⁰⁰ Cases, which involved the use of works at a spa and at a rehabilitation centre respectively. In both cases, the ECJ ruled that there was some competitive or commercial benefit to use of protected works, and hence such use does constitute a public communication.

The purpose of comparing these two cases – none of which involve retransmission – is that in interpreting public communication, the logic of the ECJ is that clearly those contextual factors must be taken in to consideration. However, commercial and competitive context appears to be one important factor.

[10]-4.2.4 TV-Catch-Up I Case

The next case to be discussed explicitly involves the concept of broadcast retransmission – the *TV-Catch-Up I* Case.⁵⁰¹ This case involved a dispute between commercial broadcasters (who enjoyed both broadcasters' rights in their signals and copyright in some of the content being broadcast), and an 'internet broadcasting service' which allowed users to view live streams of free-to-air television broadcasts. In this case, the ECJ ruled that:

1. *The concept of 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, must be interpreted as meaning that it covers a retransmission of the works included in a terrestrial television broadcast*

- *where the retransmission is made by an organisation other than the original broadcaster,*
- *by means of an internet stream made available to the subscribers of that other organisation who may receive that retransmission by logging on to its server,*

⁴⁹⁸ Paragraph 98 of the Judgment reads as follows: "*The patients of a dentist visit a dental practice with the sole objective of receiving treatment, as the broadcasting of phonograms is in no way a part of dental treatment. They have access to certain phonograms by chance and without any active choice on their part, according to the time of their arrival at the practice and the length of time they wait and the nature of the treatment they undergo. Accordingly, it cannot be presumed that the usual customers of a dentist are receptive as regards the broadcast in question.*"

⁴⁹⁹ European Court of Justice Case C-351/12 - Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.; Judgement decided on 27 February 2014

⁵⁰⁰ European Court of Justice Case C-117/15 - Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA); Judgement decided on 31 May 2016

⁵⁰¹ European Court of Justice Case C-607/11 - ITV Broadcasting Ltd, ITV 2 Ltd, ITV Digital Channels Ltd, Channel 4 Television Corporation, 4 Ventures Ltd, Channel 5 Broadcasting Ltd, ITV Studios Ltd v TVCatchup Ltd; Judgement decided on 7 March 2013

- *even though those subscribers are within the area of reception of that terrestrial television broadcast and may lawfully receive the broadcast on a television receiver.*

2. *The answer to Question 1 is not influenced by the fact that a retransmission, such as that at issue in the main proceedings, is funded by advertising and is therefore of a profit-making nature.*

3. *The answer to Question 1 is not influenced by the fact that a retransmission, such as that at issue in the main proceedings, is made by an organisation which is acting in direct competition with the original broadcaster.*

This ruling is extremely interesting for various reasons. Besides confirming that a retransmission is indeed a sub-set of the broader right to public communication, the ECJ ruled that a retransmission occurs even if the audience of the retransmission is the same as that of the initial broadcast. This hence seems to divert away from the concept of determining the notion of 'a new public'. Furthermore, the Court ruled that the business model of the original broadcaster and the retransmitter – and their competitive relationship – was inconsequential. Hence the Court did not find any relevance in the argument that an advertising-funded broadcaster would have some commercial gain from retransmissions to a new public, or that the retransmitter themselves also stands to commercial benefit. Unlike the previous cases discussed above, commercial context here seemed irrelevant to the Court's findings.

Interestingly, the ruling of the court seemed to be based on the logic that following from the non-exhaustion of the public communication right, a retransmission by a technical means different from that of an initial broadcast is automatically a retransmission.⁵⁰² Furthermore, this logic is not undermined by claims that the retransmission is made merely to improve technical reception.⁵⁰³ Essentially, the tradition of the Court has always been to interpret the issue in two steps: (i) the existence of a 'communication', and (ii) the existence of a 'public'. In this case, the Court ruled that transmissions of a different technical means constitute a communication (as opposed to merely aiding technical reception of a pre-existing signal)⁵⁰⁴. Since this communication is of a different technical means and represents a new transmission, authorisation from copyright owners is required as the communication right is not exhausted.⁵⁰⁵ The court also found that the audience of an internet broadcast does constitute a public. However, the most significant aspect of the Court's judgement is that upon establishing that both a 'communication' and a 'public' exists, it was irrelevant to determine whether this public is indeed a 'new public'.⁵⁰⁶

It is difficult to draw lessons from this case in terms of broadcasters' related rights alone, as retransmission conflicts such as this involve both the copyright of

⁵⁰² ECJ TV-Catch-Up I Judgement; Paragraphs 23-26

⁵⁰³ ECJ TV-Catch-Up I Judgement; Paragraph 27

⁵⁰⁴ ECJ TV-Catch-Up I Judgement; Paragraph 29

⁵⁰⁵ ECJ TV-Catch-Up I Judgement; Paragraph 26

⁵⁰⁶ ECJ TV-Catch-Up I Judgement; Paragraph 39

content owners and the related rights of broadcasting organisations. While the courts did recognize that broadcasters' retransmission rights do come into play⁵⁰⁷, the questions posed to the ECJ by the referring court focused on copyright rather than related rights.

Nevertheless, the implications of this case on understanding the relationship between the two sets of retransmission rights (i.e. authors and broadcasters) are significant. Unlike other forms of public communication, a retransmission necessarily involves the transmission of a new signal – albeit one derived from some initial signal. There is hence generally always communication via a new technical means. In such cases, the Court suggests that considering contextual factors – including the existence of a 'new public' is irrelevant to a determination on public communication. This is a totally different approach for other (non-retransmission) forms of communication, even those that are based on 'secondary uses' such as airing broadcasts in public places. Consequently, this implies that in the eyes of the Court, the 'retransmission' aspect of the public communication right is stronger than the 'public communication of a pre-existing broadcast' aspect, as the legal benchmark for determining a communication to the public is lower for the former (i.e. it does not require the determination of 'a new public').

This is troubling, as such acts also necessarily correlate the materialisation of certain separate and independent rights – the related rights of broadcastings organisations, which also includes a retransmission component. The act of broadcasting and subsequent retransmission can hence result in a strengthening of the overall level of protection, as compared to other analogous non-broadcasting acts. Furthermore, there is the implication that the court's interpretation effectively fragments the right of public communication through different legal standards, rather than consolidating it as envisioned by the Information Society Directive.

[10]-4.2.5 *TV-Catch-Up II and Zürs.net Cases*

Further to the *TV-Catch-Up I Case* discussed above, the same internet retransmitter was also involved in the subsequent 2017 *TV-Catch-Up II Case*.⁵⁰⁸

In this Case, the internet broadcaster – upon being found liable to copyright infringement under the *TV-Catch-Up I Judgement* – sought to rely on a defence under certain exemptions provided by the applicable national legislation of England. The exemptions in this case included that there is no copyright liability where the immediate cable retransmission is made in the same reception area as the initial broadcast.⁵⁰⁹ The essence of this exception was that a 'new public'

⁵⁰⁷ ECJ *TV-Catch-Up I Judgement*; Paragraph 25

⁵⁰⁸ European Court of Justice Case C-275/15 - *ITV Broadcasting Limited, ITV2 Limited, ITV Digital Channels Limited, Channel Four Television Corporation, 4 Ventures Limited, Channel 5 Broadcasting Limited, ITV Studios Limited v TVCatchup Limited (in administration), TVCatchup (UK) Limited, Media Resources Limited*; Judgement decided on 1 March 2017.

⁵⁰⁹ ECJ *TV-Catch-Up II Judgement*; Paragraph 9

would have to exist in order for copyright and related rights provisions on retransmission to be triggered.

In its ruling, the ECJ found that not only were the provision of the Satellite-Cable Directive irrelevant for the case⁵¹⁰ (as the retransmissions were not cross-border in nature), but also that such a limitation in national law was outside of the permitted limitations and exceptions of the Information Society Directive⁵¹¹.

As such, the fact that the broadcasts in questions were subject to certain public service obligations in the national jurisdiction was irrelevant to the finding of infringement.⁵¹² The ruling of the case hence reinforced the strong interpretation of the public communication right – and how it relates to retransmission activities – under the *TV-Catch-Up I* Judgement.

The last case to be discussed is the 2017 *Zürs.net Case*,⁵¹³ involving retransmissions using communal antenna installations. In this case, a cable installation network relied on an exception under the Austrian national legislation that suggested that a transmission by a community installation to less than 500 subscribers does not constitute a ‘new broadcast’. Additionally, simultaneous and unaltered (re)transmissions of the national public broadcaster are understood as part of the initial broadcast.⁵¹⁴

In the spirit of the ruling in the *TV-Catch-Up I Case*, the Court found that the facts ‘permit’ a finding of a communication to the public, as the transmission is made by a new technical means.⁵¹⁵ However, in diverging from that precedent, the Court then went on to consider whether this communication was to a ‘new public’.⁵¹⁶ The Court ultimately found that there was no communication to the public in the meaning of copyright law. This finding was based on the fact that “*the persons concerned have therefore been taken into account by the rightholders when they granted the original authorisation for the national broadcaster to broadcast those works*”, and hence “*the public to which Zürs.net distributes those works cannot be regarded as a new public*”.⁵¹⁷

Despite this finding, the Court also ruled that the exception for community installation with less than 500 subscribers did not fall with the limitations and exceptions permitted by the Information Society Directive.⁵¹⁸ In making this

⁵¹⁰ ECJ *TV-Catch-Up II* Judgement; Paragraph 21

⁵¹¹ ECJ *TV-Catch-Up II* Judgement; Paragraph 24

⁵¹² ECJ *TV-Catch-Up II* Judgement; Paragraph 28

⁵¹³ European Court of Justice – Case C-138/16 - Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger registrierte Genossenschaft mbH (AKM) v Zürs.net Betriebs GmbH; Judgement decided on 16 March 2017

⁵¹⁴ ECJ *Zürs.net* Judgement; Paragraph 9

⁵¹⁵ ECJ *Zürs.net* Judgement; Paragraph 26

⁵¹⁶ ECJ *Zürs.net* Judgement; Paragraph 27

⁵¹⁷ ECJ *Zürs.net* Judgement; Paragraph 29/30

⁵¹⁸ ECJ *Zürs.net* Judgement; Paragraph 42

determination, the Court did not apply the three-step-test for copyright exceptions, but rather considered the undesirable economic incentives created. The Court believed that such an exception could result in the entire national territory being services in parallel by individual installations subject to the 'under 500 subscribers' exception.

It should be noted that both the *TV-Catch-Up II* and *Zürs.net* Cases discussed above resulted in the invalidation of national limitations and exceptions for copyright. However, these exceptions took the form of no liability at all for the retransmitting parties. The rulings of the ECJ merely establish that copyright liability does exist, and does not negatively impact on the possible application of limitations on how those rights are administered (e.g. through compulsory licencing or mandatory collective management).

Comparison of the *TV-Catch-Up I* and The *Zürs.net* Cases however provides for a much more serious implication. These two cases show that in determining whether a communication to the public has occurred – particularly in the context of broadcast retransmission – the ECJ seems to apply inconstant logic, or at least diverging legal tests. In the former case, the existence of a communication to the public was assumed based on use of a new technical means, without the need to determine whether 'a new public' existed. In the latter case however, the Court not only reverted back to the question of 'a new public', but also introduced a new test for this notion – the question of whether rightsholders would have internalised the presumption of a given public when making their initial licencing decisions.

[10]-4.2.6 Overall Comments on Case-law

The assessment of the case-law above shows that it is not a trivial task to define the relationship between the concepts of broadcasting and retransmission as different forms of communication to the public.

In fact, it appears that it is difficult to even gain a clear understanding of the legal tests used – at least in the case of the EU – for determining when a communication to the public exists, and hence when retransmission rights come into play. In different cases, the courts have considered different factors including commercial context, technical means, the existence of a new public, geographical considerations, and the initial licencing assumption of rightsholders.

It is therefore very difficult to draw strict boundaries between the acts of broadcasting and retransmission in legal application. It is consequently difficult to implement a predictable and coherent system to regulate retransmissions – even through a technologically neutral system – where there is legal uncertainty over whether a communication to the public (and hence a retransmission) exists in the first place. If retransmission rules are meant to create legal certainty, this can only be achieved if there is also certainty in interpretation of the fundamental public communication right.

In commenting on the history of the evolution of the retransmission right, Gendreau (1990) noted that “*An unchecked growth of multiple interpretations on the notion of public performance represented a risk of confusion as articulated policies were in the process of elaboration*”.⁵¹⁹ This comment was made almost three decades ago, and of course, the landscape of broadcasting and retransmission has gotten considerably more complex since then, particularly in technical terms as discussed later in this chapter. The patchwork of ECJ case law in this area (which incidentally co-exists with an apparent overall policy patchwork as discussed in Chapter 8) might hence represent a re-emergence of the interpretive confusion that existed in the early stages of the evolution of retransmission activities.

[10]-4.3 Implications for Broadcasters’ Rights

The above discussion is useful for analysing the composition of the related rights of broadcasting organisation themselves. In particular, the opposing forces of unification and fragmentation at play in interpreting the public communication right, has implications for understanding broadcasters’ rights.

Firstly, while the broadcasting and retransmission rights of copyright holders are components of a broader public communication right, the retransmission right of the broadcaster is a more discrete and compartmentalized right. However, the application of different legal tests to determine public communication can effectively fragment the public communication right into discrete components with different scopes. In particular, application of the ‘new technical means’ criterion results in a retransmission right which is stronger in scope of protection than other components of the public communication right.

This fragmentation affects the scope of protection for the broadcaster. If public communication via technical means is assumed to trigger the copyright owner’s retransmission fragment (and hence also the broadcasters’ retransmission right), then lowering the standard for public communication via retransmission increases the scope and domain of the broadcaster’s related right.

Additionally, review of the case law shows that there are certainly situations where the public communication right is triggered for a secondary use without triggering the retransmission right. This is an outcome of the broadness of public communication rights, and is a factor in favour of that rights’ unification (as opposed to its fragmentation). For example, in the *Osa* and *Reha Training* Cases, there was a finding of a new public communication although the context was not one of retransmission.

This however, is not to say that in such cases, the rights of the broadcaster are not triggered. Indeed, under the Rome Convention (and the EU Rental Directive), the broadcaster has a right regarding communication of their broadcast. Again, this is a discrete and compartmentalized right as it only applies, where the

⁵¹⁹ Gendreau (1990); at page 57

communication 'is made in places accessible to the public against payments of an entrance fee'. It can thus be seen that there is potential tension between unification (on the copyright side) and compartmentalisation (on the related rights side), in terms of public communication via broadcast.

To represent this conceptually, consider that among the range of possible uses of a broadcast, there is some distribution of the value created by users. For simplicity, consider three loose categories of users: (i) personal users, (ii) commercial users, and (iii) retransmitters. Personal users are users who create a value too low to justify contracting into voluntary agreements with rightsholders. From a transaction cost perspective, such uses would qualify for limitations and exemptions. In terms of defining the boundaries between communications, these uses are considered to be within the scope of the initial public communication.⁵²⁰

Commercial users generate enough value-added from the use of a broadcast to justify possible contracting. Copyright owners would wish to capture this value, and hence in these cases, the boundaries of the initial communication would be contested. However, these uses do not necessarily trigger the broadcasters' related right.⁵²¹

The third category is retransmitters whose activities trigger both the broadcaster's related right, and the public communication right of the copyright owner. Any value captured would have to be shared between the broadcaster and the copyright owners. Additionally, because of the triggering of the retransmission process, the special case limitations on the rightsholders would apply.

A major issue here is that applying a 'new technical means' criterion to determine retransmissions disrupts this categorisation. For example, there might be high-value commercial uses which resemble retransmission activities in all but technical terms.⁵²² In such cases, neither would the broadcaster have a means to capture value along with copyright holders, nor would the market correcting limitations on retransmission rights be triggered. In other cases, there might be low-value retransmission activities which resemble low-scale commercial activities, particularly where the services are not offered to a new public. In such cases, there would be liability for both copyright and broadcasters' rights, even though value-added is low.⁵²³

⁵²⁰ The *Del Corso* Case discussed above would be an example.

⁵²¹ The *Osa* and *Reha Training* Cases discussed above would be examples.

⁵²² The *Hoteles* Case discussed above would be an example.

⁵²³ The *zürs.net* Case is an example of this. However, it is noted that in that case, the court did use the 'new public' creation in addition to the 'new technical means' criterion in making a determination on communication to the public.

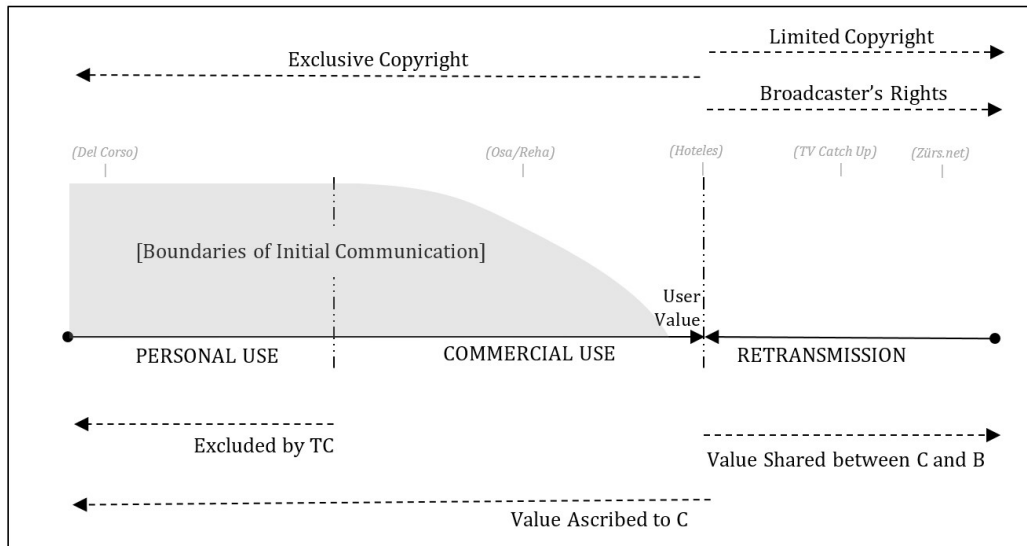


Figure 10.1: The Boundaries of Public Communication

Between the boundaries of the initial communication and activities of retransmission, there is a grey area of commercial use. These uses may require authorisation from copyright holders but not necessarily broadcasters. Copyright owners would wish to curtail the boundaries of the initial communication so as to increase their ability to capture value from these secondary uses. Broadcasters might want to expand the definition of retransmission so as to also expand the scope of their rights and capture more value. This can also be done through expanding other components of the broadcasters' related rights – for example by removing the 'made in places accessible to the public against payments of an entrance fee' limitation on the right of public use of transmissions.

What is clear is that there is a gap between the rights of the two beneficiaries, created by the specificity of the broadcaster's related rights and the broadness of the copyright holder's public communication right.

However, it is critical to note that this gap does not necessarily raise any welfare issue. If the use is deemed as a new communication, authorisation is needed from the copyright holders who are able to capture the entire value-added of the user. Furthermore, if these uses can be predicted, then they can be accounted for *a priori* during negotiations between the broadcaster and the copyright owners. Any value generated for the broadcaster (from increased audience penetration) can hence be internalised by the licensors, meaning that the copyright owners can end up capturing the full value-added from the activity. The issue is therefore purely one of distribution.

If the gap was closed by expanding the broadcasters' rights, then the situation is more complex. Both the broadcaster and the copyright own would wish to capture the value from the user. In theory, a holdout problem can arise, especially since there is no legal guarantee for a special case limitation (as would be the case if the activity were deemed a retransmission). If the licensor had already internalised the value-added from the broadcaster, then the broadcaster can actually come out

with a net loss. This might also arise if for some reason, the use generates a high value for the broadcaster, but a low potential value for the copyright owners not justified by transaction costs. In practice, such problems are very unlikely to occur, and the scale of transactions for public communication of signals are generally much smaller than for traditional retransmission. Furthermore, even though limitations to retransmission rights are not guaranteed, in practice CMOs often manage public communication rights analogously. However, the point remains that the situation theoretically looks a lot like a retransmission – expanding the rights of the broadcaster is only viable with a corresponding limitation of the freedom of the copyright holder.

In any case, concurrent rights would still just mean that the value of the use is captured, but just distributed differently. The gap in the scope of rights is therefore a purely distributional issue. However, given the social costs associated with property rights, and the positive externalities associated with broadcast signal distribution, the optimal solution might be to have a very wide boundary for interpreting the initial communication to the public. In such a case, the value is still created, but just not captured by rightsholders. The only way a welfare issue arises is if a public good problem arises, which is almost uncertain given the relative insignificance of such uses in terms of overall revenue-generation from broadcast works.

The true problem is that the gap itself is hard to justify and seems arbitrary in doctrinal terms. There seems to be no basis for permitting different welfare distributions based on a technical definition alone, especially for a term like ‘retransmission’ whose interpretation is becoming more opaque. The ‘new technical means’ criterion thus seems to bear little grounding in economic rationale.

The traditional rationale might have been that broadcasters’ retransmission rights are necessary because of the commercial scale of such activities, and hence the possibility of public good problems. From an efficiency perspective, rights regarding other activities may not have been necessary as they are purely distributional concerns.

However, with the dilution of the concept of retransmission – from legal, technical and commercial points of view – it would appear that an argument can be made that it is necessary to move towards a ‘unified’ broadcasters’ right (akin to the broad public communication right). However, this would imply a massive expansion of the scope of those related rights, with high corresponding social costs which are unlikely to be necessary as the public good problem which once justified them itself erodes.

To support this argument, the following section discusses some of the issues in interpreting retransmission activities as a technical and commercial concept, and hence underscores the arbitrariness of delineating between different activities.

[10]-4.4 Convergence and Subordination of Communications

The above sub-sections discussed the practical legal uncertainty surrounding communication to the public, and hence the very notion of broadcast retransmissions. To add to this, there might also be some uncertainty in terms of the technical and commercial relationships between initial broadcasts and retransmissions. The following sub-section makes some brief comments on these relationships. The purpose of this is to stress the risks associated with maintaining discretely defined broadcasters' rights, and the inevitably futility of defining the concept of retransmission itself.

[10]-4.4.1 Convergence and Innovation

The ECJ Ruling on *TV Catch-Up I* case was based on the idea that retransmission activities are copyright liable by virtue of the technical means of transmission. If this legal standard is applied without consideration of the conception of a 'public', this can have negative effects on innovation and consumer choice.

Through the phenomenon of convergence, the lines between traditional forms of communication become more blurred. This technological change is also associated with a corresponding cultural change where consumers expect the ability to be able to easily and costlessly move between different technological platforms (e.g. by watching traditional broadcasts on the internet or a mobile device, rather than on a traditional television set).

Strong interpretations of public communication rights that restrict limitations and exceptions and trigger retransmission rights on the basis of technical means (even where there is no 'new public') are hence antagonistic to convergence and its effects on broadcasting markets. Such interpretations stifle new innovative distribution technologies, which ultimately undermines consumer choice, facilitates technological lock-in, and favours incumbent distributors operating through old technologies.

This notion of encouraging inter-platform competition and innovation was one of the arguments raised on Chapter 9 in favour of a technologically neutral approach to regulating retransmission activities.

What is even more concerning however, is that such interpretations are not limited to the EU. In the US, the *Aereo Case* provides another good example of the trend in judicial interpretations of copyright retransmission provisions that undermine enabling environments for innovation and cultural change.⁵²⁴ The dissenting opinion that accompanied the opinion of the SCOTUS in that case even made comments that the Court should not serve a role that amounts to that of a technology regulator, and that "*a decision in the Networks' favor will stifle technological innovation*". The essence of that dissenting opinion was that the copyright legislation should be interpreted as applied as is, rather than being

⁵²⁴ American Broadcasting Cos. v Aereo Inc, was a 2014 ruling by the Supreme Court of the United States (SCOTUS) regarding an innovative service which 'retransmitted' broadcasting signals.

'twisted' to accommodate new developments, as the court cannot 'foresee the path of future technological development'; the role of updating legal rules for new technologies is that of the legislator.⁵²⁵

[10]-4.4.2 Technical Definitions of Broadcasting

Before even considering the technical relationship between a broadcast and a retransmission, it should be understood the technology specific definition of an initial broadcast itself might be quite problematic.

As discussed in Chapter 1, central to the concept and definition of broadcasting are certain concepts such as a 'point-to-multi-point' communication. Furthermore, as discussed in Chapter 2, the traditional legal definitions make an explicit distinction between 'wireless' and 'wired' transmissions. The introduction of satellite broadcasting and more recently internet broadcasting has made such definitions more difficult. Before the WIPO Internet Treaties, there were debates as to whether satellite broadcasts should be considered 'wireless' and as seen in debates over the Proposed WIPO Broadcasting Treaty, internet broadcasting ('webcasting') is largely considered as a category of its own.

Internet transmissions, while in principle simultaneously available to several dispersed users, are not a point-to-multipoint communication in the same that that traditional broadcasts are. In the technical sense, internet communications are multiple parallel point-to-point communications.⁵²⁶

Furthermore, central to the concept of traditional broadcasting is the one-directional nature of communication. Modern broadcasting services now increasingly have elements of 'interactivity', where the consumer is not a purely passive recipient of content, but also transmits some information back to the broadcaster (e.g. in accessing 'value-added' services such as replaying content or accessing programme guides). In the case of the internet, streaming is also bi-directional in nature as the user initiates a request for content to a host. Furthermore, the use of servers between hosts and users is also a factor that might complicate how internet streaming fits into the legal definition of broadcasting.⁵²⁷

⁵²⁵ For a detailed analysis of this case, see Bridy (2015) or Fraser (2014).

⁵²⁶ "Internet originated streaming is a "point to point" technical process. Even though the same program is transmitted to multiple recipients, it is transmitted via a point to point bi-directional communication, instigated by the user. In other words, there is an individual connection between each user and the source of the streamed content (a host) and such point to point streaming to multiple individual users takes place in parallel." - WIPO - SCCR/8/INF/1, Paragraph 17

⁵²⁷ The role of servers in this regard is well described by WIPO SCCR 7/8 (paragraphs 49-52), which state the following:

"Another scenario that might develop in the future is the involvement of a multitude of servers in order to reduce the distance between the source and the recipient. This may either be managed by the sender or by the network infrastructure through a process called "multicasting," where Internet routers receive single streams and then serve them individually to one or more recipients. Though the signal has to be sent from the initial source to the multitude of intermediate servers or routers it will not generally be present, but be issued from a source only upon individual demand. Once demanded, the transmission occurs in a one-to-one communication channel to the specific IP address, but from

Even in terms of currently well-defined technologies, it is misleading to assume that the act of broadcasting can easily be described in individual technical terms. For example, while copyright law acknowledges the differences between traditional wireless broadcasting, satellite communication, and cable transmission, all of these technologies might be involved in a single broadcast.

As a broadcast is the act of transmitting a communication across some geographical distance, the most efficient means of communication would depend on several factors. One example, can be found in the debates over protection of pre-broadcasting signals (discussed in Chapter 2), which might be sent to a broadcaster via microwave transmissions, before being sent to an affiliate via wired cable, and then communicated to users via direct satellite broadcasting. The substitutability and complementarity between different technical transmissions⁵²⁸ at different points of the communication chain implies that defining a broadcast based on one specific point on that chain might be quite arbitrary, and also distort incentives to seek the most efficient technical solution.

In addition to difficulties in adopting technology-specific definitions of broadcasting, the complexity of communication chains also has possible implications for defining retransmission activities. For example, if a given chain of technical communication is long and complicated enough, it might be conceptually possible to delineate some point at which after which an initial broadcast becomes a retransmission. The debate over the treatment of ‘direct injection’ is an example of this concept.

Direct injection broadcasting refers to the act in which a broadcasting organisation transmits its signals to signal distributors directly, without those signals being available to the public. In the *SBS Case*, the ECJ ruled that this act is not a ‘communication to the public’, and hence the broadcasting organisation in question is not liable for paying remuneration to copyright holders.⁵²⁹ The Court in this case considered that the limited number of distributors (who are effectively technical intermediaries between the broadcaster and the public) themselves did

an intermediary source rather than the originator. As the user terminates his demand, the provider (or intermediate server) stops the transmission.

In this respect, webcasting is a “point to point” technical process. Even though the same program is transmitted to multiple recipients, it is transmitted via a point to point bi-directional communication, instigated by the user. In other words, there is an individual virtual connection per user, over which parallel point to point streaming to each of the individual subscribers take place.

At least one national copyright law distinguishes traditional broadcasting from webcasting, based on whether or not the consumer needs access to a server. In the case of broadcasting, people can simply access the broadcast by switching on the receiver as the signal transmitted by the broadcasting station is direct and present, whereas, in webcasting, people must access a server and incite its facilities to transmit back the information.”

⁵²⁸ This substitutability and complementarity is even somewhat recognized in existing legal frameworks. For example, the Satellite-Cable Directive, while designed to have a technology-specific focus (i.e. satellite broadcasts and cable retransmissions), also included provisions to cover transmissions made via microwaves.

⁵²⁹ European Court of Justice Case C-325/14 - *SBS Belgium NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM)*; Judgement decided on 19 November 2015

not constitute a public. The implication is therefore that the distributors are the sole party with copyright liability in this case. The inference can hence be drawn that in the eyes of the Court, the entire distribution chain (including the broadcaster and the distributors) is cumulatively seen as the act of broadcasting.

However, the Court did note that it might be possible for the distributors to be considered as 'a public' if it is that the distributors undertake some intervention (which amounts to an autonomous service) rather than just passively facilitating the technical means of reception to end-users. In such a case, the broadcaster would in fact be undertaking a communication to the public. The implication here is that copyright liability would exist for both the broadcaster and the distributor, indicating that the broadcaster undertakes a 'broadcast' while the distributor undertakes a 'retransmission' in the meaning of copyright and related rights law.

While in the *SBS Case* the ECJ did adopt an approach generally sensitive to the complexities of distribution technologies, the mere existence of such a debate is cause for concern. As new forms of communication technology evolve and networks used mixed modes of communication that involve multiple parties in the distribution chain, new uncertainties regarding application of copyright law are sure to arise. In particular, technical interventions along the communication chain by parties such as distributors might provide for more efficient engineering solutions, and it would be undesirable for copyright law to create arbitrary disincentives for such innovation.

In summary, the points in this sub-section are presented to show that in practical terms, it very difficult to construct a coherent technical relationship between retransmissions and broadcasts. This is especially true when the definition of broadcasting itself in copyright law is based on notions that are becoming obsolete, as the concept of modern broadcasting becomes more technologically fluid. Furthermore, over-reliance on technical definitions by courts can create market distortions and disincentives for innovation.

[10]-4.4.3 Service Innovation

Consider the hypothetical situation that follows. A cable network acquires retransmission licences from several different broadcasters, and pays other rightsholders through the applicable regime (i.e. through collective management organisations or a compulsory licence). The network then develops a 'hybrid channel', which is essentially a bundle of content from other broadcasting channels for which authorisation has been achieved; this is done without any time-shifting (i.e. fixation of broadcasts for deferred retransmission). What this channel represents is therefore an algorithm that automatically switches between different channels at different points in time. This might be similar to a user who uses an interactive programming guide to pre-programme switching between different broadcasts at different time; however, the important distinction is that the process and selection of content is initiated by the cable network and not the user.

The above situation, while very specific and hypothetical is interesting as it totally pushes to boundaries of interpreting the act of retransmission. While a retransmission is a secondary exploitation (i.e. secondary transmission of content), the hybrid channel is essentially a retransmission of a retransmission (i.e. a tertiary transmission of content). Whether this act would constitute a retransmission in itself – separate from the standard authorised retransmission – is a very interesting question. Presumably, such would depend on the interpretation of the right of public communication. If this interpretation based on the notion of a new public, then the act is likely not an additional retransmission as it is made to the same subscriber base as the standard retransmission. However, if communication to the public is judged on technical intervention, then this would indeed likely constitute a ‘secondary retransmission’, and hence an additional layer of copyright liability would be incurred.

In addition to the above, the broadcaster’s retransmission right might also be violated (even though authorisation has been attained), as the retransmission right is understood as relating to ‘simultaneous and unaltered retransmissions’. Dissecting multiple broadcasts into their individual programming elements and then re-assembling a new content bundle schedule is certainly a significant form of alteration. Furthermore, if such an activity is deemed as retransmission, then the cable network is able to bypass the exclusive rights of copyright holders though the applicable limitations to their retransmission rights. In reality however this would obviously not be a practical way to create a new cablecast. Nevertheless, it raises the point that content distribution can – at least in theory – undergo multiple iterations of broadcasts, retransmission, and further subsequent broadcast or retransmission. As with technological progress, there is no way to predict future service innovation. Hence it is possible that such innovation might even further put pressure on defining the very concept of the activity of signal retransmission and hence the notion of retransmission rights.

While Part IV of this manuscript did give much attention to the topic of retransmission rights, this discussion was admittedly limited to ‘simultaneous, unaltered’ retransmissions. While the above example on creating a hybrid channel is an extreme hypothetical case, alterations can also come in the form of more minor activities. The most minor activity might be simple technical alterations to facilitate communication. A more significant activity might be ‘ad-insertion’, i.e. the act of replacing the advertising segments in a broadcast with different advertising space sold by the retransmitter. In both cases, discussions on the general concept of public communication might be relevant. If public communication is interpreted as occurring when any technical intervention takes place, then retransmission rights are much stronger in scope. If however, the court takes into account the commercial effects of retransmission – particularly in terms of the distribution of the gains associated with advertising – then acts such as ad-insertion might be considered differently.

The overall point is that retransmission itself can refer to a vast range of activities with different characteristics. Not only is strain on this definition created by technological innovation, but also service innovation even under current technology.

[10]-4.4.4 *The Boundaries of Deferred Retransmission*

As discussed in Chapter 9, modern approaches to broadcasting recognise a role for online services, even if online broadcasters and retransmitters do not benefit from the policy tools applied to their traditional counterparts. One such example is that of ‘ancillary services’ – online services that are construed as value-added compliments to offline broadcasts (e.g. such as access to short clips and replays).

In the Proposed EU Regulation on Online Transmissions, ancillary services are subject to the benefits of the country-of-origin principle (just as their associated offline broadcasts are), even though online-only broadcasts do not enjoy the same treatment. The result is that offline broadcasters have a clear regulatory competitive advantage in the online market, by virtue of their offline operations. An online media service provider who does not operate an offline broadcasting service would have to clear the rights for the hosted content in multiple-jurisdictions, unlike the consolidated service provider who benefits from the country-of-origin principle in providing both an offline and online service.

Similar issues have arisen in the context of debates over the scope of the Proposed WIPO Broadcasting Treaty discussed in Chapter 2. Specifically, one proposal provides for special broadcasters’ rights concerning the treatment of deferred online retransmission.⁵³⁰ In the online environment, retransmission is not just simply simultaneous or deferred using a fixation of an initial broadcast. New services like ancillary services not only provide for a secondary broadcast of content that was already broadcast, but for access to some sub-set of that content (e.g. highlights for sports shows), or some new (but related) set of content (e.g. extra content such as additional footage, or different camera angles, etc.).

⁵³⁰ SCCR/36/5/CORR. – *Note on the Draft Treaty to Protect Broadcasting Organizations - Document submitted by the Delegation of Argentina*; Standing Committee on Copyright and Related Rights Thirty-Sixth Session Geneva, May 28 to June 1, 2018.

The proposal considers a new taxonomy of deferred retransmission as follows: (i) Equivalent deferred transmission - the deferred transmission that corresponds to the live linear broadcasts of the broadcasting organization and is available for up to a limited number of weeks or months after such linear broadcasts, such as online repeats, on-demand catch-up services and highlights of sport events; (ii) Closely-related deferred transmission - the deferred transmission that is broadcast only online, ancillary to the live linear broadcasts of the broadcasting organization and available for up to a limited number of weeks or months, such as parallel sport events, extra footage on news or programs, previews, additional interviews and behind-the-scenes programs; (iii) Unrelated deferred transmission - means a deferred transmission that is broadcast only online, but which is not ancillary to the live linear broadcasts of the broadcasting organization, such as pure on-demand streaming channels, or which may be accessed by members of the public without limitation as to time, such as on-demand catalogues that are available after the expiration of the term for online repeats and on-demand catch-up services.

The proposal covers broadcasters’ rights protection for ‘simultaneous transmissions, near simultaneous transmissions, and equivalent deferred transmissions’. For ‘closely-related deferred transmissions’, the proposed protection is limited to ‘adequate and effective protection’, which is understood as more flexible than an actual broadcaster’s right in terms of implementation. Protection for ‘unrelated deferred transmissions’ is optional, and contracting parties are given the option of limiting such protection for foreign broadcasters only where that broadcasters’ jurisdiction offers comparable protection.

This proposal is very concerning for several reasons. Firstly, it clearly goes beyond the signal-based approach that the Treaty is to be supposedly based on. It also creates a new taxonomy of activities that stretches way beyond the current understanding of ‘retransmission’, and encroaches on the space currently covered by the ‘making available to the public right’ (as opposed to the ‘public communication via broadcast’ right). By blurring the boundaries of what constitutes a ‘retransmission’, such a proposal would also dilute the strong basis for limitations and exceptions to copyright due to the unique characteristics of retransmission activities.

Most problematically however, such a proposal gives a significant advantage to entities that operate both in traditional broadcasting and online content markets. Essentially, by virtue of operating a single offline broadcasting channel, the media service provider is granted very broad and significant rights, that it otherwise would not have. Unlike the EU Regulation however, there is no necessarily ‘subordinate’ relationship between the online ancillary service and the offline broadcast. Therefore, this proposal comes with major risks of creating market distortions the favour incumbent service providers, and of facilitating the consolidation of market power.

On this issue, NGO stakeholders have noted that while the Treaty is perceived as a tool to support local broadcasters, the proposal above on online content would likely mainly benefit large technology companies based in the US that already have significant market power in the communications sector, and control major online content platforms. Such companies would gain new rights over online content by operating just a single traditional broadcasting station.⁵³¹

[10]-4.5 The Special Case of Must-Carry

The above sub-section aimed at outlining the conceptual difficulties – both legal and technical – in constructing a relationship between broadcasting and retransmission activities. This section will briefly discuss a special case of this relationship – where so-called ‘must-carry obligations’ exist, which are obligations on a communications network to carry the signal of certain broadcasters.

As discussed in Chapter 4, broadcasting services are associated with a very wide range of positive externalities. Hence, for certain public policy reasons such as promoting pluralism, democratic participation, and cultural diversity, it may be important for regulators to ensure that certain broadcast channels are always available to the public. Such availability can be ensured through an obligation for communication networks to retransmit these broadcasts – particularly the transmissions of public service broadcasters.

In the case of the US, this obligation relates to the carriage of local broadcasting networks that choose between must-carry status and a market-based quasi-

⁵³¹ *Joint NGO letter on the proposed WIPO treaty on broadcasting (May 28th 2018); Item 7*

property right under the retransmission consent regime previously discussed in this chapter.

In the case of the EU, must-carry obligations are provided for by Article 31 of the Universal Service Directive.⁵³² Under this Article, Member States can impose must-carry obligations on networks “*where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts.*” Furthermore, the obligations must be imposed only where ‘they are necessary to meet clearly defined general interest objectives’ and must be proportionate and transparent.

Such provisions are interesting as they represent a situation in which retransmission is deemed as obligatory. In the normal case of a retransmission, mechanisms such as a compulsory licence or mandatory collective management might be in place in order to administer the communication to the public (retransmission) rights of copyright and related rights holders; however, market-based negotiations would still exist between the retransmitter and the initial broadcaster in terms of exploitation of the broadcaster’s related right. If a must-carry obligation makes retransmission obligatory, it hence essentially acts akin to a compulsory licence for the broadcaster’s related rights in their signal.

Once a signal is retransmitted pursuant to must-carry obligations, rightsholders in the embedded works might presumably be compensated just as they would be for a market-based retransmission, i.e. through a mechanism such as mandatory collective management. This is however not necessarily the case, as that retransmission might not necessarily constitute a public communication in the first place. Indeed, this was the situation in the *Zürs.net Case* discussed above where the ECJ found that retransmissions of the national public broadcaster did not amount to communication to a new public.

Following the logic of the ECJ in that case, copyright liability might not exist in retransmissions pursuant to must-carry obligations, as unlike other forms of retransmission, must-carry carriage is predictable and known a priori, and it can be internalised by rightsholders when negotiating their licences with initial broadcasters.

The matter of compensation to the initial broadcaster is however more complex. On one hand, broadcasters might be seen as entitled to some form of compensation for retransmission of their signals, even if such was done according to a regulatory obligation. This line of thinking might follow from the idea that a must-carry obligation is partially a compulsory licence on the broadcaster’s retransmission right, and as such a limitation to that right – under the principles of copyright and related right law – should still entitle the broadcaster to equitable remuneration.

⁵³² Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive); Official Journal of the European Communities L 108/51

On the other hand, information capacity on communication networks is a scarce resource, and must-carry obligations place a burden on carrying networks. This burden is the opportunity cost of retransmitting the must-carry signal instead of some other possibly more profitable commercial broadcast signal, or in the case of converged telecommunications networks, allocating data capacity to some other service. From this perspective, the must-carry rule is an inalienable entitlement enjoyed by the broadcaster, and one that is particularly significant if the broadcast is advertising-based. Hence, it is possible to consider that remuneration should be given to the communication network from the broadcaster for this carriage, as exercise of this entitlement should be balanced by compensation for the obligation placed on the network operator.

It appears however that in the case of Europe, the general trend is that no compensation is made either way for retransmissions pursuant to must-carry obligations.⁵³³

Compensation rules are a regulatory matter for the domestic regulators, those it seems that in most instances, the terms of retransmission are determined through market negotiations between broadcasters and networks.⁵³⁴ Nevertheless, there is the general requirement under the Universal Service Directive that compensation is to be determined in a transparent and proportional manner, and hence where disputes arise, there might be jurisdiction for the regulator to determine carriage terms (as is often done in interconnection disputes in telecommunications). However, there are cases in which disputes do arise, and retransmission arrangements are stalled due to negotiating failures.⁵³⁵

As a general note, market-based negotiations for compensation are not compatible with must-carry obligations, as price dynamics require an ability of the buyer to refuse to buy. By threatening to disallow carriage (and hence putting the network in breach of its must-carry obligations), a broadcaster can in theory attempt to extract excessive compensation, especially if it is a popular station. In this regard, some jurisdictions also have so-called 'must-offer obligations', which require broadcasters to at least offer their carriage to retransmitting networks. Such an obligation is essentially a 'duty to deal', which prevents an individual broadcaster with significant market power from abusing a presumed dominant position.

Once again, the special case of must-carry provisions demonstrate that the overall public policy goals of the broadcasting sector provide the critical boundaries for how intellectual property rights in this sector are exploited, not only for copyright holders, but even for the related rights of broadcasting organisations.

⁵³³ EAO (2015) – *Access to TV platforms: must-carry rules, and access to free-DTT*, Report by the European Audiovisual Observatory for the European Commission - December 2015; page 30

⁵³⁴ Cullen International (2006): *CI Broadcasting Study: Database of regulatory information for the broadcasting sector*. Data collection by country December 22, 2006.

⁵³⁵ For a discussion on such tensions in retransmission agreements in the EU and the US, including discussions on the notable German case, see Evans and Donders (2018)

[10]-4.6 The Tapering Principle

The above sub-sections aimed at analysing the relationship between initial broadcasts and retransmissions. It was noted that there are various doctrinal difficulties in determining whether a specific secondary use qualifies as a retransmission in terms of the public communication right, as well as the technical difficulties in defining different transmissions in the first place. However, despite these challenges, there still exist a fundamental relationship between retransmission and broadcasting in which the former is necessarily subsequent to the latter. Furthermore, as discussed earlier in this chapter through different theoretical perspectives, the nature of retransmission is defined by certain inherent transaction costs.

Against this background of all of the above discussions, this section concludes this chapter with a very basic theoretical contribution, hereby referred to as the 'tapering principle'.

Traditional conceptions of copyright and related rights view exclusive rights as bundles with different elements controlling different activities and uses. Within a given use, these rights might be considered as horizontally consistent – i.e. applying in the same manner for comparable uses. In the case of distribution rights, there is some chain of possible activity where at some discrete point, the right is considered as exhausted.

However, broadcasting markets provide for an interesting case in which comparable uses at different distribution point justify a need to have rights which gradually reduce in scope. The level of control a copyright holder has over their content is – and should be – be less for a retransmission as it is for an initial broadcast.

As discussed in Chapter 9, broadcasts tend to appear in the later stages of the cycle of exploitation of an audiovisual work, and a retransmission – by definition – appears even later. At each successive stage of exploitation, the value generated by the work activity diminishes, and hence the role of exclusive rights in capturing and internalising this value diminishes.

Additionally, as exploitation moves further down the distribution chain (e.g. from a broadcast to a retransmission), the 'distance' between the rightsholder and the user increases, meaning that transaction costs to conclude a market-based authorisation increases. This concurrent decrease in value-added and increase in transactions costs means that many activities at the end of value and distribution chains – such as retransmissions – might not even happen if left up to a system of market exchange based on exclusive rights.

As discussed in Chapter 6 as well as previously in this chapter, one of the theoretical 'tests' for limitations and exemptions is to consider whether a given activity would be authorised on a voluntary basis in an environment devoid of transaction costs. As transaction costs increase, the justification for limiting rights increases. Furthermore, given that broadcasting is associated with such wide

positive externalities, there is an even greater justification for limiting broadcasting and retransmission rights. In particular, since retransmission is closer to the 'end' of the distribution and value chain, the social cost of increasing these positive externalities through promoting increased distribution (through reducing the ability of rightsholders to internalise private value-added) is lower than at any other point.

As such, activities further down value and distribution chains more and more constitute 'special cases' in the context of limitations to intellectual property rights. In other words, the further down these chains a work progresses, the greater the basis for limiting exclusive rights; in more direct language, the optimal scope of rights reduces as one progresses down the value and distribution chain – i.e. the rights should become 'tapered'. This concept of 'tapering' is conceptually different from exhaustion, as it is a continuous function rather than a discrete discontinuity.

In reality, we find that indeed public communication rights do reduce in scope as value and communication chains progress. Various policy tools – through mechanisms akin to exhaustion, default contractual rules, and converting property rules to liability rules – are indeed used to 'taper' exclusive copyright and related rights as they move from initial broadcast distribution to retransmission.

However, while these rights are 'tapered', a new right is created – the exclusive retransmission right of the broadcasting organisation. The creation of the broadcasters' right therefore correlates to a tapering of underlying content copyright. One doctrinal example of this is the principle of ephemeral fixation – a firmly established limitation and exception to the reproduction right element of copyright, which enables broadcasting activities, and hence permits the creation of broadcasters' rights.

Pursuant to the logic of the tapering principle articulated above, the creation of such broadcasters' related right seems counter-productive. At the least, this right undoes the effect of reducing the scope of the rights in the broadcast content, and redistributes some of the value-added that might have otherwise been captured by authors, performers, and producers in the form of equitable remuneration. At the worst, it actually increases the total level of protection at the end of the distribution chain, and attempts to capture even more value-added than that which would otherwise be captured, and hence reduces overall distribution and accessibility. An example of such a failure to the rights to 'taper' might be interpreting that an act of public communication has occurred even if there is no notion of a 'new public'. In any case, the coming into existence of the broadcaster's retransmission right actually increases transaction costs, and even creates possible anti-commons problems.

From this perspective, if broadcast signals are to be given protection in retransmission markets, it seems counter-productive to do so using exclusive rights. Following the conclusions of Chapter 5, the scope of rights for broadcasters should optimally set lower than that for copyright holders. Such logic is consistent with the principle of equivalency for limitations and exceptions to related rights –

including the related rights of broadcasting organisations. Therefore, if mandatory collective management or compulsory licencing is used for administering copyright for broadcast retransmissions, statutory or compulsory licences should most certainly be permitted for broadcasters' retransmission rights.

Furthermore, this perspective of the 'tapering principle' also casts doubt on the concept of 'post-fixation' rights. When a work is broadcast, then that broadcast is fixed, then some use of that fixation made by a user, each of these steps moves further and further down the distribution and value-chain. However, at the point of fixation of the broadcast, both the copyright owner's reproduction right, and the broadcaster's fixation right is triggered. Subsequent use of that fixation then possibly involves the rights of the copyright holder in addition to potential post-fixation rights of the broadcaster. Hence, later down the chain, there is actually cumulatively stronger protection than at the earlier stages of the chain – the exact opposite of what the tapering principle suggests should be the case.

In rebuttal to this perspective, it can be said that once a fixation of a broadcast is made, the right involved in subsequent distributions of fixations is the right of reproduction. Therefore, this is the beginning of a new value chain rather than continuation of the 'public communication via broadcast' value chain. In this case, the start of this new value chain is still a subset of the wider value-chain; i.e. 'reproduction of a work via distribution of a fixation of broadcast containing that work' is a subset of the 'reproduction of a work' distribution and value chain. However, that subset still exhibits a greater scope of protection (through authors' copyright and broadcasters' post-fixation rights) than the parent set (which is only protected by authors' copyright). Proposals for broadcasters' post-fixation can hence still be seen as inconsistent with the 'tapering principle'.

[10]-5 CONCLUSION

This chapter aimed at building a theoretical understanding of retransmissions rights, in terms of authors' copyright, broadcasters' related rights, and their relationship. In order to do this, a discussion was first presented on limitation and exceptions to copyright and related rights, and how the case of retransmission may qualify as a special case for application of limitations to exclusive rights.

Next, based on case studies of the EU and the US, the chapter then presented a taxonomy of policy options for implementing limitations and exceptions to the retransmission elements of copyright and related rights. This taxonomy showed that in choosing a policy option, there is a trade-off between the freedom of contract of rightsholders, and the resulting legal certainty and reduction of transaction costs in retransmission markets.

This taxonomy was then analysed in terms of various theoretical perspectives, namely the concepts of default rules, property rules and liability rules, and copyright exhaustion. At the centre of this taxonomy was the recurrent theme of transaction costs, and mechanisms to solve the issues created by transaction costs and legal uncertainty. However, in practical terms, limitations to copyright at most

require at least some concept of a right to equitable remuneration, as opposed to a complete abdication of the right of public communication itself. For this reason, one can understand why the policy options for dealing with online retransmissions considered by the EU in Chapter 9 were limited to cases where audience measurement was possible, and hence equitable remuneration could be facilitated.

The last section of this chapter aimed at contextualising the relationship between the retransmission components of copyright and broadcasters' rights. It was shown that there are various challenges in understanding how the right of public communication should be construed and applied for retransmissions, and that the prevailing case law in this regard does not offer a coherent line of thought. Difference in the scope of protection also arise from the unitary nature of the author's public communication right (of which their retransmission right is a fragment), and the compartmentalised retransmission right of the broadcaster. This different in scope has implications for how the gains from secondary uses of work (including but not limited to retransmissions) are distributed. Furthermore, due to convergence and technological change, constructing definitions of broadcasts and retransmissions themselves are a difficult task.

The chapter also discussed must-carry obligations, as an example of how the public policy dimensions of broadcasting are critical in contextualising how intellectual property rights in this sector are administered. Lastly, the chapter concluded with a basic idea of a 'Tapering Principle', where rights should narrow in scope as activities progress down the value and distribution chain. In this regard, the existence of strong rights for broadcasting organisations appears to be counter-intuitive at the least.

To give a conclusive answer to the core research question of this chapter, the theoretical basis of the author's retransmission right is that it is a fragment of the 'broadcasting right', which itself is a subset of the broad 'communication to the public' right. Given the transaction cost intensive environment of exploiting the retransmission right, such activities constitute a special case for limitations and exceptions to exclusive rights. Such limitations can be implemented through various means, such as compulsory licencing or mandatory collective management, or more generally through conversion of the property rule into a liability rule. However, ambiguities in legal doctrines for interpreting the public communication right make it difficult to ascertain with certainty when the retransmission right is indeed being exploited. More generally, the concept of a unified public communication right also creates tension with the compartmentalised nature of the retransmission right. Furthermore, when it is exploited, definitions based on changing technological landscape may pose challenges to defining and administering these rights. In any case, it should be understood that retransmission activities are a subset of the broadcasting sector, and hence are subject to a wide range of public policy goals. Lastly and generally speaking, retransmission rights should be administered in such a way that the overall level of protection decreases (or 'tapers') as the exploitation chain progresses, which raises concerns with the very notion of exclusive broadcasters' related rights.

PART V: CONCLUSION

CHAPTER 11: FINAL CONCLUSIONS

This chapter is the last substantive chapter of this manuscript. It summarises the main conclusions of this manuscript, and makes some final comments on the topic of the intellectual property rights of broadcasting organisations.

[11]-1 RESEARCH FINDINGS

The title of this dissertation manuscript is *“An Economic Analysis of the Intellectual Property Rights of Broadcasting Organisations”*. The main research question in this regard was *“What are the theoretical bases and economic mechanisms of the related rights of broadcasting organisations?”*

Each chapter in this manuscript made some contribution to answering this overarching question. Part I largely provides contextual and introductory discussions. Chapter 1 provided a general introduction as to why this question is of academic relevance, and sets out the general context and motivation for its study. Chapter 2 then provided a background as to why this question is of policy relevance, particularly in terms of the network of existing international agreements on intellectual property law.

Part II, rather than directly analysing at the ‘Law and Economics’ of the topic (i.e. the economic analysis of the legal concept of broadcasters’ rights), separately considered how various aspects of legal and economic theories apply to the topic in two separate chapters. This part contributes to answering the overall research question as Chapter 3 concludes that understanding the theoretical bases of broadcasters’ rights cannot be accomplished by deference to existing analyses of other branches of intellectual property; Chapter 4 builds on this conclusion by noting the unique context of broadcasting markets, and hence why broadcasters’ rights are indeed a specific case for the intellectual property system.

Chapter 3 found that while there are various theories that underpin the intellectual property rights system, none of these theories provides an adequate justification for the existence of exclusive related rights for broadcasting organisations. The best explanation is that such rights are awarded in order to incentivise distribution of works, while the production of works is a matter for the ‘primary’ copyright system.

Chapter 4 then sets out to analyse the key features of broadcasting markets. The conclusion of this analysis is that there is a very wide range of public policy objectives that characterises the broadcasting sector, and hence traditional concerns about ‘economic efficiency’ must be contextualised by these broader policy goals. Not only is the broadcasting sector a mechanism to facilitate the distribution of works produced (in part) through the copyright system, but it is also an important tool for democratic participation, cultural diversity, education, and various other social dimensions associated with the positive externalities of

information goods. Intellectual property rights for broadcasting organisations must hence be understood as one aspect of a larger set of policy tools in this sector. However, it is necessary to be critical of these rights as their associated social costs are considerable, and the public good problems that they seek to solve are likely overstated.

Part III then sought to use a modelling approach to answer questions about the scope of broadcasters' rights, and was the main part of this manuscript in terms of Law and Economics methodology. This part contributes to answering the overall research question by concluding that even though broadcasters' rights are a legally and theoretically independent concept from copyright, understanding the theoretical relationship between the two is necessary to understand the theoretical bases of broadcaster's rights. More specifically, in addressing the question of scope of protection, the process of designing optimal protection for broadcasting organisations requires some consideration of the scope of protection given to authors of copyright protected works.

Chapter 5 undertook a Law and Economics approach by analysing how existing literature on modelling the 'optimal scope' of intellectual property (both for patents and copyrights) can be adapted to analyse broadcaster's rights. This chapter adapted an 'Incentive-Access' model of copyright protection to the case of broadcasters' related rights. The main conclusion of this chapter was that the socially optimal level of protection for broadcasting signals is a level that is lower than that set for copyright owners. An important interpretation of this result is in its application to technological protection measures and the application of anti-circumvention provisions. In this regard, it was argued that regulators should avoid implementing digital broadcasting standards with strong technical protection abilities, as this can result in a significant reduction in the consumer freedoms that might otherwise be permissible under 'standard' copyright law.

In essence, the principle of 'scope of protection' is understood as having two components – length of protection and breadth of protection. However, the concept of length of protection has little relevance to broadcasters' rights, as broadcasting signals are transient in nature. Hence, manipulating the 'scope' of protection in abstract terms means focussing on the breadth of protection. In this regard, Chapter 6 discusses the various policy aspects of intellectual property policy – namely for patents and copyright – and how they apply in the case of broadcast signals. This chapter finds that the most effective breadth element for manipulating the scope of broadcasters' rights is the application of limitation and exemptions. This theme of limitations and exceptions again arises in a significant way later in Chapter 10, although in that case the focus is on limitations to the rights of copyright owners.

Chapter 6 also noted that reframing positive rights as negative rights might also be a useful policy level. However, this might increase legal uncertainty about the permissible activity and hence focus should remain on limitations and exceptions. Furthermore, it was also noted that strategic considerations of the potential beneficiaries of broadcasters' rights are also a useful mechanism to affect the

overall scope of protection. Later in this Conclusion Chapter it is argued that indeed beneficiaries of protection should be limited.

Chapter 7 continues the modelling theme of Chapter 5, but focuses specifically on the issue of enforcement. This chapter aims at understanding enforcement dynamics in broadcasting markets. The central concept is that certain unauthorised uses, such as retransmissions or distribution of fixations, can amount to infringements of both the rights of the copyright owner and of the broadcaster. Hence, enforcement can be modelled as a 'game' where both parties make an enforcement decision, and the outcomes depend on prevailing market characteristics. This chapter argues that one possible novel policy approach is to give broadcasters the standing to enforce on behalf of their copyright licensors. This result is a particularly attractive policy alternative to fixation (and post-fixation) rights, as it mitigates the social costs of anti-commons problems and public domain enclosure associated with such rights. Furthermore, this indirectly corresponds to the conclusion of Chapter 5; the notion of giving the broadcaster enforcement standing on behalf of copyright holders results in constructing a scope of protection from the broadcaster that is less than that for the copyright holder.

Part IV of this manuscript moved away from general discussions on broadcasters' rights, and focuses specifically on retransmission rights. It contributes to answering the overall research question by building some theoretical understanding of the retransmission rights of broadcasters, and how these relate to the retransmission rights of copyright-holders.

Chapters 8 and 9 are interconnected, as they both specifically analyse the European Union legal framework as a case study. Chapter 8 concludes that the EU regime for retransmission regulation is one based on mandatory collective management, although analysing the system cumulatively shows various incongruities such as diverging bases for application of the country-of-origin principle. Chapter 9 specifically focuses on analysing a recent EU Proposal for a Regulation on Online Transmissions, and how the arguments that underpin this proposal are possibly misplaced. While the conclusions of Chapter 8 show that there are various gaps in the existing framework, which are supposedly addressed by the Proposal, Chapter 9 argues that the recent EU Proposal is insufficient to update the regulatory framework for retransmissions. The fundamental conclusion of Chapter 9 is that a technologically neutral approach to retransmission should ideally be adopted.

Building on the EU case study in Chapters 8 and 9, Chapter 10 also focuses on retransmission rights, but in more general terms. Specifically, it analyses how various policy approaches to limit retransmission rights can be explained as mechanisms to reduce transaction costs and legal uncertainty. Building on this analysis, Chapter 10 also analyses the relationship between the retransmission rights of copyright owners, and that of broadcasters themselves. It concludes that there are various doctrinal and technical complexities in deriving a deterministic relationship between the activities of broadcasting and retransmission. Furthermore, these complexities are likely to become more pronounced as

technology progresses. Hence, what is important is to adopt doctrinal interpretations that create a favourable environment for consumer choice, access to services, and innovation.

Part V of this manuscript is simply the concluding Part, including this Conclusion Chapter. Also included in this part are a Bibliography and Reference List for the entire research project, as well as four Annexes to the substantive chapters.

Cumulatively, the entire manuscript provides for a very broad answer into the overarching research question. The theoretical bases and economic mechanisms of the intellectual property rights of broadcasting organisations are murky at best. While these rights attempt to create unique and independent legal entitlements, their mechanisms are inseparable from that of underlying copyright in audiovisual and musical works, which makes their understanding even more complex. Their supposed purpose in solving public good problems in content distribution are likely overstated, especially in the modern technological environment of decentralised low-cost distribution. Furthermore, they risk creating various social costs such as anti-commons problems, increases in transaction costs, consolidation of market power, reduced consumer choice, disincentives for innovation, and possible enclosure of the public domain. Hence, despite the niche nature of this field, policymakers should be careful not to underestimate the implications of broadcasters' rights.

[11]-2 SHIFTING GLOBAL CONTEXT

It is useful to take a step back and understand the scepticism expressed above about broadcasters' rights from a wider view of the overall intellectual property system.

Intellectual property has always been – and continues to be – one of the central areas for debate in modern global economic and legal policy. Globalised trade and harmonisation of rules applicable to goods and services are relatively well-established realms. However, in an environment of accelerated technological progress, the future of global trade and economic growth is strongly linked to trade in information goods. While there is a large degree of international harmonisation in intellectual property through the TRIPs Agreement, the effects of this Agreement still remain controversial. Increasingly, more attention is being paid in international policy circles on development issues such as public health, access to information, and technology transfer.

This increased attention can be seen as part of a larger reaction of the global community to multilateral approaches to global trade rules and economic policy, including intellectual property policy. The failure of the Doha Round of World Trade Organisation negotiations can be seen as evidence of this shifting attitude.

This shift at the international level has also manifested in ways more directly related to the issue of intellectual property rights and broadcasting. One example is the adoption of 2005 *UNESCO Convention on the Protection and Promotion of the*

Diversity of Cultural Expressions. This Convention represents a major landmark in global cultural policy as it acknowledges the importance of the social and cultural aspects of information goods, rather than viewing them through purely economic lenses. The mere fact that as discussed in Chapter 2, the Working Document for the Proposed WIPO Broadcasting Treaty contains an Article explicitly acknowledging the importance of this Convention is very significant. If that Article were included in an eventual international legal instrument on broadcasters' rights, it would hence represent a dramatic shift in how international intellectual property law is framed.

At the specific level of intellectual property policy, the global shift can also be seen at the World Intellectual Property Organisation itself. Most certainly, there does indeed appear to be a trend of expansion of intellectual property rights in the national legislation of more developed jurisdictions, which is largely exported through bilateral agreements. However, review of the agenda of the WIPO Standing Committee on Copyright and Related Rights shows strong attention being paid at the international level to movements in the other direction; i.e. restriction of intellectual property rights. More specifically, the Committee continues to dedicate a lot of attention to the matter of limitations and exceptions to copyright for various contexts, including access for disabled-persons, libraries and archiving, and education and research purposes. This is however not to say the WIPO itself is not part of the mechanism of expanding intellectual property rights; the debates over the Proposed Broadcasting Treaty, and its apparent shift away from its intended signals-based approach is evidence of this.

The purpose of these comments is to stress that the context in which intellectual property policy is now made is changing. In the case of broadcasting, this context is particularly important, given the social and cultural dimensions of the sector. Broadcasting is not just an economic mechanism for content distribution; it is also cultural, social, democratic, and educational in nature.

[11]-3 CHALLENGES OF TECHNOLOGICAL CHANGE

Throughout this manuscript, particularly in Part IV on retransmission, there has been a recurrent theme of technological change. Indeed, if new legal rules on broadcasters' related rights are asserted as a response to changing technology, then it must be understood how changes in technology feed into their fundamental bases in the first place.

It would appear that the main justification of broadcaster's rights is to preserve incentives for the large capital investments needed to deploy broadcasting networks. However, in the era of digital technology, information is increasingly democratised, and distribution is decentralised.

While operation of a point-to-multipoint communication service (such as a broadcasting network) once involved massive capital expenditures, use of scarce spectrum resources, and large-scale logistical and commercial coordination, now anyone with a home computer and the enabling technical knowledge can

essentially do this very same task. The concept of internet broadcasting hence represents a complete erosion of the 'investment' rationale for even having broadcasters' related rights. Even in traditional terms, broadcasting has typically been funded through commercial advertising, providing a mechanism to solve public good problems without exclusive property rights. Furthermore, it seems that models of advertising-funded services are not fading away anytime soon, as this model has been well adapted to digital communication and media services.

In the modern decentralised environment, content creators are more easily and directly able to internalise the incentives of the copyright framework, without the need for intermediaries. This even changes the incentives for the types of content produced, as there is no longer the need to appeal to the 'lowest common denominator' in terms of consumer preferences, which is an issue typically associated with traditional broadcast programming. In this environment, content producers can better align their output with actual consumer preferences.

It would therefore seem more critical to focus on ensuring that the digital distribution environment remains open and consumer-oriented, rather than captured by large data monopolies. The importance of net neutrality in this regard cannot be overstated. Furthermore, more attention needs to be placed on competition controls over large technology companies who hold dominant positions over both sides of the double-sided content distribution-advertising market, through the commercialisation of user data. Nevertheless, it seems that industry stakeholders still maintain a strong focus on implementing exclusive property rights for market failures – market failures which seem to be overstated, have non-property rights market-based solutions, and are naturally being eroded by technological progress.

This technological progress will only continue, and all evidence suggests that the rate of progress will only accelerate in the near future. In this regard, it would seem more productive to focus attention on facilitating technological progress rather than on preserving the commercial viability of outmoded technologies such as traditional broadcasting.

Chapter 10 discussed some of the difficulties in using technical means to define broadcasting, and even differentiate between broadcasting and retransmission activities. In this regard, the broad consolidated conception of the right to public communication does indeed seem like a logical doctrinal approach to copyright law. On an even broader level however current copyright law still differentiates between this 'communication to the public' right (triggered in acts of broadcasting) and the 'making available to the public' right (triggered in the provision of 'on-demand' services). However, even this seemingly well-defined distinction between 'push' and 'pull' services is being increasingly eroded by innovation in service provision.

For example, digital music streaming services allow a user to select certain works from a large repertoire. As the user engages with this service, data is collected on the user's preferences. When preference data is collected across a larger number of users, this data can be analysed for correlations in order to predict which works

an individual user is likely to select next. An individual user's usage and preferences can hence be said to have externalities and network effects on other users. A common example of this is the existence of user-specific 'recommended list' in audio and video streaming platforms, and after a selected work is finished, these recommendations are often played automatically. The result is essentially a user-specific broadcasting channel, curated by preference analysis algorithms. Such a channel necessarily blurs the boundaries between 'push' and 'pull' services, and hence the distinction between exploitation of the public communication and making available rights.

The very commercial basis of broadcasting services is therefore under threat, as the technical restrictions which necessitated large scale simultaneous audience reach no longer apply. Point-to-multipoint communications are being replaced by correlated point-to-point communications. The result is that soon enough, traditional broadcasting services may simply cease to be relevant in modern media and communications markets.

[11]-4 DECONSTRUCTING BROADCASTERS' RIGHTS

Notwithstanding the above, comments on the changing policy and technological context, the fact remains that broadcasters still enjoy related rights protection under the current international intellectual property system. The main elements of this protection are the right of fixation, the right of communication in public places, and the right of retransmission. The right of fixation is also generally accompanied by the right of distribution of fixations.

In terms of the rights of fixation the research in this manuscript stresses that these rights generally seem problematic. Post-fixation rights in particular, increase transaction costs, cause possible anti-commons problems, and restrict access to information. Following from the conclusions of Chapter 5 regarding the optimal scope of protection, such rights should be subject to strong limitations and exceptions pursuant to Chapter 6, or even be limited to a transfer of enforcement standing pursuant to Chapter 7.

Furthermore, as discussed in Chapter 3, the central concept of related (or neighbouring) rights is captured in their very name. Their significance is derived from how they relate (or are 'neighbouring' to) copyright protection – in the case of broadcasting, this significance is as an incentive to encourage distribution of works. Neighbouring rights should not be construed as a mechanism to incentivise the production of works, as this is the role of the 'primary' copyright system itself.

However, as discussed in Chapter 4, there are some types of audiovisual content that are not generally protected by copyright, and hence broadcasters' rights step in to fill these incentive gaps. The primary examples of this are news and sports broadcasts. Therefore, while broadcasters' rights are framed as an incentive system for distribution, the strongest arguments for their existence might actually be an incentive for production of these specific copyright-ineligible content types. Such protection is however a contortion of the fundamental premise of related

rights, which are supposedly designed to give expression to works that have already been produced. This function is therefore based on a conflation of the dichotomy between content production and distribution.

In a scenario without broadcasters' related rights, the most significant loss is therefore likely to be a lack of incentives for such content. However as discussed in Chapter 4, there are mechanisms used by some jurisdictions to solve this issue, namely *sui generis* intellectual property rights for sports performances. Such a system could be specifically tailored to solve the unique market characteristics of this field, without applying overbroad broadcasters' rights which apply to all broadcast content, and hence might result in various social costs due to multiple layers of property rights.

These comments should however not be interpreted as advocating for such rights. Such would require an in depth analysis of its own as a totally separate and unique subject matter for the intellectual property system, a task which is outside of the scope of this manuscript.

The main point however is that more nuanced incentives for sports and news broadcasts can be created without the need for strong broadcasters' related rights. For example, this may take the form of a compensatory liability rule, accompanied by communications regulations relating to signal importation and substitution.

As a general note, it should again be underscored that related rights are to be – almost counter-intuitively – understood as simultaneously subordinate but independent to copyright. In fact, the necessarily subordinate role of broadcasters' rights to that of copyright is well acknowledged. For example, in the TRIPs Agreement provisions on protection of broadcasting, which allows for adequate copyright protection to serve as a substitute for explicit broadcaster's rights. In terms of independence, the key is to understand that related rights should facilitate the expression and distribution of works, rather than the production of creative output *per se*. Just as a consumer product may be protected independently by a patent and by a trademark, a distributed work may be separately protected by copyright and related rights, where these different forms of protection address different perceived market failures and policy goals.

From a totally different perspective, broadcasters' rights can also be seen as having other possible unintended benefits. For example, such rights might give broadcasters an incentive to digitize and distribute archived content that might otherwise be lost.

Consider that somewhere in the world, old 8mm film reels of early twentieth century wartime footage exist, and if this material is not soon digitised and archived, the physical film will continue to deteriorate and this important historical content might be lost. Given that any copyright in this content is also presumably expired, no individual has the commercial incentive to incur the costs of searching for the film, processing and digitising the content, and archiving it accordingly. Permitting entities such as broadcasters to assume some rights over

distributing this content (such as allowing for control over fixation and reproductions thereof) would give the broadcaster a mechanism to be remunerated for the costs associated with digitising the content.

However, such rights would create a market-based mechanism for these activities, and hence incentives would be effective only where the content distribution is commercially viable. This would hence be inconsistent with the general purpose of archiving, which is to preserve and document aspects of culture, heritage, and history that might otherwise be lost if left solely up the market. Furthermore, such a justification for broadcasters' rights would seem diametrically opposed to the increased attention being paid to limitations and exceptions to copyright for libraries and archives.

Notwithstanding these comments on fixation and post-fixation rights, the policy core of broadcasters' related rights largely remains the retransmission right. Indeed, this manuscript gave a substantial amount of attention to issues relating to retransmission.

Once again, the significance of innovation – both in terms of technology and service provision – cannot be understated. Chapter 10 discussed the difficulties in clearly delineating between broadcasting and retransmission, and discussed the process of 'direct injection' as an example of this. However, the concept of retransmission is challenged not only by technical innovation, but also by the provision of new services.

Just as innovation in online streaming services blurs the boundaries between broadcasting and on-demand services (and hence the public communication and making available rights), the traditional boundaries between broadcasting and retransmission can also become opaque. In this regard, it becomes even more difficult to create a coherent property rights system to cover such activities.

As discussed in Chapter 10, the concept of 'retransmission' is losing its meaning and significance in of legal doctrine, technical, and commercial terms. As a result, a revival of this right would mean greatly expanding its scope by subsuming it into a broader 'unified' right. This however, would be a major deviation away from the idea that the broadcasters' related right is merely a technical solution to a technical problem, and would involve an extensive amplification of the social costs associated with such property rights. The logical alternative would therefore seem to allow the right to wilt away as it has outlived its purpose of solving public good problems.

[11]-5 INFORMING THE INTERNATIONAL DEBATE

A final natural question is to consider how the research findings in this manuscript might inform the international debates discussed in Chapter 2. In this regard, as noted above, this manuscript takes a sceptical view of post-fixation rights, and suggests that any protection should be limited to a signals-based approach, if protection is to be extended at all. Furthermore, it is critical for any proposed

international legal instrument to take a very wide permissive approach to limitations and exceptions to the rights of broadcasting organisations. Specifically, under the principle of equivalency and keeping the scope of protection of related rights under that of copyright, compulsory licencing schemes should be expressly permitted for broadcasters' rights.

To take an even more narrow approach, it might be noted that if the copyright system itself is properly calibrated, there might not even be a need for intellectual property rights of broadcasting organisations at all. As noted by Balganesch (2007), a system of liability based on the principles of unfair competition and unjust enrichment may be a preferable solution to avoiding the social costs of property rights in broadcast signals.

Even within the intellectual property system, there are examples of non-rights based solutions to facilitate the problems of related rights activities. One obvious example is the flexibilities in the Rome Convention for the protection of performers, which does not necessarily have to take the form of property rights. Similarly, the approach used in the Brussels Satellite Convention is that property rights are just one possible option to achieve protection objectives. Furthermore, specific regulatory rules in the communications sector can be more finely attuned to achieve the public policy objectives of the broadcasting sector, including provisions on the use of signals.

In terms of the beneficiaries of protection, the discussions earlier in this chapter noted that there is no need for major incentives for online content distribution. Hence, it is not necessary, nor desirable to extend any related rights protection offered to traditional broadcasters to online webcasters. Such protection would likely only create the social costs and deadweight losses associated with property rights without any corresponding real change in incentive structures.

The avid reader might observe at this point that the summation of ideas in this manuscript proposes a technologically neutral approach to retransmission activities, but not one to broadcasters' rights themselves. Such an observation is indeed a valid concern, though one that is easily addressed.

In essence, a technological neutral approach to retransmission proposes an expansion of limitations and exceptions to the rights of rightsholders – both copyright and related rights holders. This is to say that if limitations in the form of compulsory licencing or mandatory collective management are permitted in offline markets, then they should also be permitted in online markets. The result is therefore a contraction of the intellectual property system. In terms of granting related rights to broadcasters however, the situation is quite different. If property rights are granted to traditional offline broadcasters and such rights are then extended to online broadcasters, this represents an expansion of the intellectual property system.

As such, advocating for a technologically neutral approach to retransmission provisions, but not for broadcasters' intellectual property rights, is logically consistent as the two approaches can be seen as complimentary policy positions.

[11]-6 FINAL THOUGHTS

As stressed above, technological change may be making the issues associated with traditional broadcasting obsolete. It may therefore seem odd to dedicate so much effort into analysing a topic such as broadcasters' rights. However, evolution of intellectual property law shows that the legal system often tends to have significant path dependencies, and hence developing legal rules in the future is limited by the ability to understand the legal rules of the past. Furthermore, even as traditional broadcasting slowly fades away in more developed jurisdictions, it is still a critical means of access to information in much of the less technologically and economically developed parts of the world.

In this regard it is hoped that this dissertation manuscript made some modest contribution to the discourse on the intellectual property rights of broadcasting organisations. Even if its practical lessons and policy relevance are limited, at least this analysis demonstrates why issues of the related rights system should not be relegated to mere footnotes, or dismissed through the use of the term 'copyright' as a synecdoche in discussion on intellectual property law.

As a concluding point, even if the premise is accepted that broadcasters need incentives to invest in content distribution, and that the least costly way to do this is through related rights, the fact remains that empirically, there is no proof that the absence of such incentives has even resulted in an under-provision of such services. Nothing about the history of broadcasting itself suggests that a lack of strong intellectual property rights was a major hindrance to the economic and technological development of the sector. This is now even more convincing as distribution becomes less costly and more decentralised, and hence the need for market intermediaries diminishes.

Central to the arguments put forward by proponents of broadcasters' rights is that a lack of protection leads to significant income losses. However, the reality is that loss of revenue should never be assumed to mean a loss of social welfare. This is especially true for information goods that have zero marginal cost, and where these losses do not amount to a public good problem due to a complete failure of the market to provide these services.

Simply put, there are indeed welfare-enhancing effects of 'piracy' – a modest observation that would seem obvious to a Law and Economics scholar, but a reality that most intellectual property maximalists refuse to admit.

For this reason, it is critical to continuously study the theoretical bases of the intellectual property system, and ensure that academic analysis is able to objectively inform policy debates.

CHAPTER 12: BIBLIOGRAPHY

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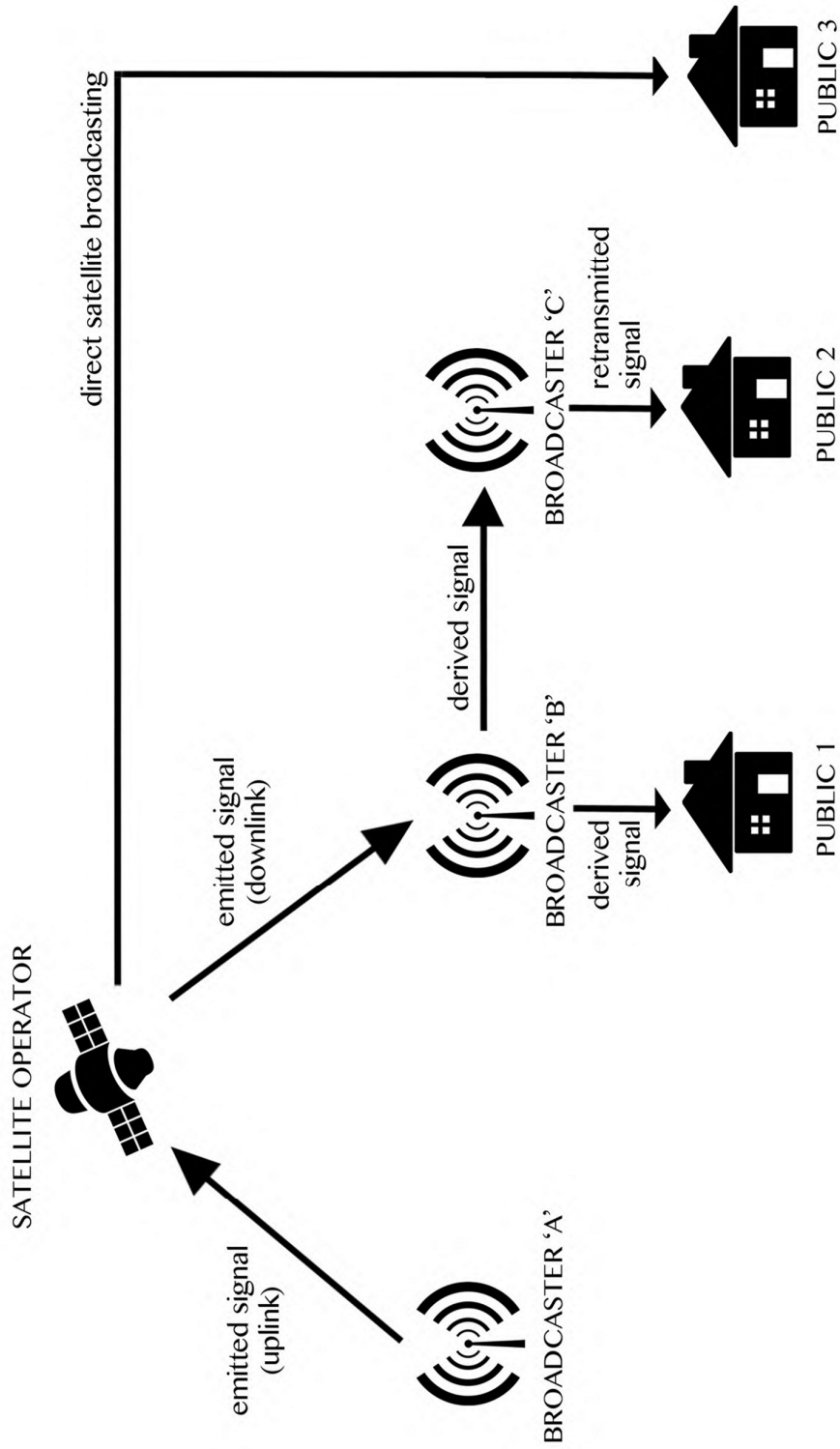
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ANNEX 1: Scope of the Brussels Satellite Convention



IN THE ABOVE ILLUSTRATION, 'BROADCASTER A' TRANSMITS A SIGNAL (EMITTED SIGNAL) FOR RECEPTION BY 'BROADCASTER B'. 'BROADCASTER B' THEN DOES SOME TECHNICAL ADJUSTMENT AND TRANSMITS A 'DERIVED SIGNAL'. THE DERIVED SIGNAL IS THEN EITHER RECEIVED BY 'PUBLIC 1', OR PICKED UP BY A THIRD BROADCASTER 'V' AND THEN RETRANSMITTED TO 'PUBLIC 2'. ANOTHER SCENARIO IS THAT THE SATELLITE ENGAGED IN DIRECT BROADCASTING TO 'PUBLIC 3'. UNDER THE BRUSSELS CONVENTION, THE EMITTED SIGNALS OF A AND THE DERIVED SIGNALS OF B (RECEIVED BY PUBLIC 1) ARE PROTECTED. ARTICLE 2(3) EXCLUDES PROTECTION FOR THE (RE)TRANSMISSIONS BY C WHICH ARE RECEIVED BY PUBLIC 2. FURTHERMORE, ARTICLE 2(1) STATES THAT THERE IS NO PROTECTION FOR THE DIRECT SATELLITE BROADCASTING (DSB) SIGNAL RECEIVED BY PUBLIC 3.

ANNEX 2: Meetings of the WIPO SCCR

Meeting		Agenda Topics									
Date	Session	Broadcasting	AV Performers	Exceptions and Limitations	Databases	Visually Impaired	Libraries and Archives	Education and Research	Recordation Systems	Resale Rights	
Nov-1998	1 st	X	X		X						
May-1999	2 nd	X	X		X						
Nov-1999	3 rd	X	X		X						
Apr-2000	4 th		X								
Dec-2000	Dip. Conf.		X								
May-2001	5 th	X			X						
Nov-2001	6 th	X			X						
May-2002	7 th	X			X						
Nov-2002	8 th	X			X						
Jun-2003	9 th	X			X						
Nov-2003	10 th	X			X						
Jun-2004	11 th	X			X						
Nov-2004	12 th	X									
Nov-2005	13 th	X		X	X				X		
May-2006	14 th	X									
Sep-2006	15 th	X									
Jan-2007	1 st Special	X									

Meeting		Agenda Topics									
Date	Session	Broadcasting	AV Performers	Exceptions and Limitations	Databases	Visually Impaired	Libraries and Archives	Education and Research	Recreation Systems	Resale Rights	
Jun-2007	2 nd Special	X									
Jun-2007	Prep for Dip (cancelled)	X									
Mar-2008	16 th	X	X	X							
Nov-2008	17 th	X	X	X							
May-2009	Informational Meeting	X									
May-2009	18 th	X	X	X							
Dec-2009	19 th	X	X	X							
Jun-2010	20 th	X	X	X							
Nov-2010	21 st	X	X	X							
Jun-2011	22 nd	X	X	X		X					
Nov-2011	23 rd	X		X			X				
Jun-2012	Dip. Conf.		X								
Jul-2012	24 th	X		X				X			
Oct-2012	Inter-sessional					X					
Nov-2012	25 th	X				X	X	X			
Feb-2013	Special Session					X					
Apr-2013	Inter-sessional	X									
Apr-2013	Informal Session					X					
Jun-2013	Dip. Conf.					X					

Meeting		Agenda Topics									
Date	Session	Broadcasting	AV Performers	Exceptions and Limitations	Databases	Visually Impaired	Libraries and Archives	Education and Research	Recordation Systems	Resale Rights	
Dec-2013	26 th	X					X	X			
May-2014	27 th	X					X	X			
Jul-2014	28 th	X					X	X			
Dec-2014	29 th	X					X	X			
Jun-2015	30 th	X					X	X			
Dec-2015	31 st	X					X	X			
May-2016	32 nd	X					X	X			
Nov-2016	33 rd	X					X	X			
Apr-2017	International Conf.									X	
May-2017	34 th	X					X	X			
Nov-2017	35 th	X					X	X			
May-2018	36 th	X					X	X			

Sources: WIPO Documents: SCCR/1/1, SCCR/2/1, SCCR/3/1, SCCR/4/1, SCCR/5/1, SCCR/6/1, SCCR/7/1, SCCR/8/1, SCCR/9/1, SCCR/10/1, SCCR/11/1, SCCR/12/1, SCCR/13/1, SCCR/14/1, SCCR/15/1, SCCR/16/1, SCCR/17/1, SCCR/18/1, SCCR/19/1, SCCR/20/1, SCCR/21/1, SCCR/22/1, SCCR/23/1, SCCR/24/1, WIPO/IS/WIP-PPD/GE/12/1, SCCR/25/1, SCCR/26/1, SCCR/27/1, SCCR/28/1, SCCR/29/1, SCCR/30/1, SCCR/31/1, SCCR/32/1, SCCR/33/1, WIPO/SCCR/RR/GE/17/1, SCCR/34/1, SCCR/35/1, SCCR/36/1

ANNEX 3: Competition between Fragmented and Non-Fragmented Rights

The following section provides a simple analysis for the pricing behaviour of the related rights holder. However, it certainly deviates from the standard models of fragmented rights (anti-commons effects) in two ways. Firstly, for simplicity analysis is carried out regarding the pricing behaviour of only one rights holder (the broadcaster who owns the related right). Therefore, it is implicitly assumed that the royalty rate charged by the other rights holder (the copyright holder) is fixed (exogenously determined). Secondly, the typical mechanics of anti-commons may not even necessarily arise, since the consumer (user) must choose between two scenarios: (i) go directly to the copyright holder to obtain authorisation, or (ii) obtain authorisation from both the copyright holder and the broadcaster (related rights holder). In the second case, it is assumed that the user approaches the broadcasting organisation first. Furthermore, given that the property right under consideration is over an audiovisual work, cost functions are negligible under the premise of zero marginal costs for information goods.

Scenario 1: The user goes directly to the copyright owner to obtain authorisation to use the work. The cost incurred by the user is a sum of (i) the transaction and search costs to find and negotiate with the copyright holder (T_C), and (ii) the actual licence fee or royalty rate paid (R_C).

$$\text{Hence, } P_1 = T_C + R_C$$

Scenario 2: The user wishes to obtain the work through the broadcaster's transmission, and must hence attain authorisation from both parties. The user must therefore still incur the transaction and search costs, and licencing cost to the copyright holder (T_C and R_C respectively, as per Scenario 1). Additionally, the user incurs the transaction and search costs for negotiating with the broadcaster (T_B) and a licencing fee to the broadcaster (R_B).

However, while total transaction costs are higher in this Scenario 2, the transaction cost component for negotiations with the copyright owner are smaller than in Scenario 1, by a scalar factor ($0 \leq \alpha \leq 1$). This is because the consumer has already overcome the inertia of initial transaction costs by paying T_B , and hence only the search cost component of T_C remains. This is to say, that there exist increasing returns to scale to the consumer from engaging in transaction and search activities (or that there are decreasing marginal transaction costs). Furthermore, search costs arise due to difficulties in identifying and finding the relevant rightsholder. Since the copyright owner is known by the broadcaster, the broadcaster may in some circumstances have an incentive to assist the user in locating the copyright-holder (hence reducing the search costs associated with T_C). This may be the case because the broadcaster wants the consumer to opt for Scenario 2, in order to obtain a positive revenue (R_B), and hence the user needs to simultaneously execute a licence with both rightsholders.

Additionally, since the broadcaster is known with certainty to the user, transaction and search costs to negotiate with the broadcaster are intuitively lower than those associated with the copyright holder; i.e. $T_B < T_C$. Therefore, let $T_B/T_C = \beta$ (where $0 < \beta \leq 1$; and $T_B = \beta T_C$).

$$\text{Hence, } P_2 = \alpha T_C + R_C + \beta T_C + R_B$$

Pricing Strategy

For the Broadcaster to earn a positive income (R_B), it must set $P_2 < P_1$

$$\begin{aligned} P_2 &< P_1 \\ \alpha T_C + R_C + \beta T_C + R_B &< T_C + R_C \\ R_B &< (1 - \alpha - \beta)(T_C) \end{aligned}$$

$$\begin{aligned} \text{Since } (\alpha + \beta) &> 0, \\ (1 - \alpha - \beta) &< 1 \\ \text{and hence: } (1 - \alpha - \beta)(T_C) &< (T_C) \end{aligned}$$

Therefore, T_C is a strict upper boundary when setting R_B .

In other words, the broadcasting organisation must always set the royalty rate for the related right lower than the transaction cost incurred by the consumer to locate and negotiate with the original copyright holder, even if only marginally.

Furthermore, if $(\alpha + \beta) > 1$, then $R_B < 0$. Hence, if the values of α and β are sufficiently high, the broadcaster cannot earn positive revenue at all, and the user will be forced to opt for Scenario 1 (i.e. bypassing the broadcaster, and going directly to the original copyright holder to obtain authorization for use of the work).

If we consider the special case where transaction costs for the broadcaster and copyright holder are the same (i.e. $T_B = T_C$ and hence $\beta = 1$), and the parameter $\alpha = 0$, then $P_2 = P_1$, and the user is indifferent between Scenarios 1 and 2. When $\beta = 1$, α hence needs to only be marginally positive in order for the consumer to opt for Scenario 1, where the broadcaster will not earn any royalty revenue. Conversely, as $(\alpha + \beta)$ tends to zero, the rate the broadcaster is able to charge tends to T_C .

It is interesting to further investigate the incentives of the broadcaster. Since the upper limit for R_B is $(1 - \alpha - \beta)(T_C)$, the broadcaster has the incentive to minimise the values of α and β , of course only to the extent that these parameters are endogenous at all. Firstly, the broadcaster may wish to reduce the value of T_B (and hence the ratio $T_B/T_C = \beta$). This means that broadcasting organizations would have the incentive to make it as easy as possible for users to negotiate and execute licensing agreements. The broadcaster will also have the incentive to reduce the value of α by providing strong assistance to the user to identify, negotiate and execute a licence with copyright holders (with whom the broadcaster already has an established relationship). In fact, this suggests that there are natural market incentives for copyright holders and related rights holders to work together, perhaps by 'licensing through' agreements between the parties, which allow the broadcaster to execute a licensing agreement on the copyright holder's behalf. However, to determine whether an anti-commons effect prevails, it is necessary to compare social welfare under the two scenarios.

Welfare Effects

Let V represent the value to the user of licensing property, and U represent the Utility Function of user. Additionally, let Π_C and Π_B represent the profit functions of the copyright owner and the broadcaster respectively. W represents the total welfare function.

For completeness, it is duly noted here, that the market transaction only takes place at all if the value of V is greater than either P_1 or P_2 .

Scenario 1	Scenario 2
$U_1 = V - T_C - R_C$ $\Pi_{C1} = R_C$ $\Pi_{B1} = 0$ $W_1 = U_1 + \Pi_{C1} + \Pi_{B1}$ $= V - T_C - R_C + R_C$ $= V - T_C$	$U_2 = V - \alpha T_C - T_B - R_C - R_B$ $= V - (\alpha + \beta)(T_C) - (R_C + R_B)$ $\Pi_{C2} = R_C$ $\Pi_{B2} = R_B$ $W_2 = U_2 + \Pi_{C2} + \Pi_{B2}$ $= V - (\alpha + \beta)(T_C) - (R_C + R_B) + R_C + R_B$ $= V - (\alpha + \beta)(T_C)$

Difference in Welfare between Scenarios 1 and 2:

$$\begin{aligned} \Delta W &= W_1 - W_2 \\ &= [V - T_C] - [V - (\alpha + \beta)(T_C)] \\ &= (\alpha + \beta - 1)(T_C) \end{aligned}$$

Therefore, social welfare is higher under Scenario 1, only when $(\alpha + \beta) > 1$. However, when $(\alpha + \beta) > 1$, $R_B < 0$ meaning that the broadcaster makes a loss, and does not participate in the market transaction, leaving the user to opt for Scenario 1.

When $(\alpha + \beta) < 1$, Scenario 2 is more socially desirable. Furthermore, $R_B > 0$ and the broadcaster is able to charge a rate marginally below the threshold $(1 - \alpha - \beta)(T_C)$, causing the user to opt for Scenario 2.

Interpretation of Results

This analysis is rudimentary certainly does not yield any surprising results. However, it does confirm an important fact – that competition between a ‘fragmented rights’ authorization scheme, and traditional ‘single owner’ scheme will facilitate and efficient market outcome. Any claims that multiple rights may lead to anti-commons effects must be limited to cases where there is no possible alternative to obtain rights directly from the primary copyright holder. However, it is noted that these results may only hold under the over-simplifying assumptions that the licencing rate for the primary copyright is fixed, and that there is hence no sequential pricing.

ANNEX 4: Legal Basis for Limitations and Exceptions

This Annex give an analysis of the international legal basis for limitations and exceptions to copyright and related rights. It is an input into the analysis in Chapter 10.

Copyright: Berne Convention and WCT

As usual, the natural starting point for any discussion on the international framework for copyright law is the Berne Convention for the Protection of Literary and Artistic Works ('Berne Convention'). In terms of exploiting protected works via the broadcast media, the relevant provision of the Berne Convention is Article 11bis, which states as follows:

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorising:

- (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;*
- (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organisation other than the original one;*

Article 11bis(1)(i) hence establishes that an exclusive broadcasting right exists, and (1)(ii) establishes that an exclusive retransmission right exists.⁵³⁶ However, it is noted that scope of the broadcast right is limited to 'wireless diffusion', while the retransmission right explicitly includes wire transmission. As discussed in Chapter 2, this is a reflection of the prevailing technological realities at the time when this Convention was concluded.

These provisions are subsequently further integrated into international law via the WTO TRIPs Agreement Article 9, which incorporates certain provisions from the Berne Convention.

As technology evolved and new forms of exploiting works emerged, the provisions of the Berne Convention were largely updated to cover possible loopholes created by new technologies through the WIPO Copyright Treaty ('WCT'). In this regard, the provision of the WCT relevant to broadcasting is Article 8 ('Right of Communication to the Public'), which states as follows:

"Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, 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."

Notably, Article 6 of the WCT consolidates several separate rights such that of public performance and broadcasting, into a single right covering 'communication to the public'. As such, it does not explicitly reference a retransmission right, but is understood as providing for such. Furthermore, this right explicitly covers communication by both wired and wireless means, and making available via on-demand type services.

The discussions will hence generally refer to the concept of a 'broadcasting right' and a 'retransmission right', acknowledging that both are understood as fragments of the wider right of

⁵³⁶ It is noted that Article 11 states that "Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorising: (i) the public performance of their works, including such public performance by any means or process; (ii) any communication to the public of the performance of their works." Article 11 hence provides for a wider scope than Article 11bis as it covers any means of public performance or communication, but is however limited to certain classes of works (while Article 11bis applies to all literary and artistic works).

public communication. Furthermore, it is acknowledged here that a retransmission right is really a fragment of the broadcasting right. A retransmission rights asserts that a rightsholder still has some rights in relation to the secondary re-broadcast of an initial broadcast. Therefore, its existence assumes that the broadcast right is not exhausted after the initial broadcast.

Related Rights: Rome Convention and WPPT

As usual, the starting point for discussions on related rights is the Rome Convention. For performers (which includes performers of both musical and audiovisual works), Article 7 of the Rome Convention provides for protections which includes the possibility of preventing “*the broadcasting and the communication to the public, without their consent, of their performance,...*”. Article 7(2)(1) states that “*If broadcasting was consented to by the performers, it shall be a matter for the domestic law of the Contracting State where protection is claimed to regulate the protection against rebroadcasting, fixation for broadcasting purposes and the reproduction of such fixation for broadcasting purposes*”. This implies that the existence of a retransmission right is not assumed, but where it does exist, its regulation is deferred to a matter of national policy.

In terms of the use of musical works in broadcasts, Article 12 states that “*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....*”. Therefore, a producer of a phonogram does not necessarily have an exclusive broadcasting right, but rather a right to equitable remuneration. Furthermore, in administering this right to remuneration, the producer’s right is mingled with the rights of performers. Furthermore, the existence of a retransmission right is not explicitly asserted.

Lastly, Article 13 of the Rome Convention establishes that broadcasting organisations have a retransmission right. This is an explicit property right, as it is the right to ‘authorize or prohibit the rebroadcasting of their broadcasts’.

Unlike the major copyright provisions of the Berne Convention, the related rights provisions of the Rome Convention are not explicitly incorporated in to the TRIPs Agreement. Hence, the framework for related rights has a much lower degree of international harmonisation as compared to that for copyright. The related rights provisions of the TRIPs Agreement are set out in Article 14.

TRIPs Article 14(1) provides that performers have the possibility of preventing unauthorised broadcasts of their live performances. However, this is limited to broadcasting by wireless means. Article 14(2) asserts that phonogram producers have a reproduction right, but is silent on a possible broadcasting right. Article 14(3) asserts the possible existence of a broadcaster’s retransmission right, though this is limited to retransmission via wireless means.

In terms of modernising the international framework for related rights, the WCT is complemented by the WIPO Performances and Phonograms Treaty (‘WPPT’). Article 6 of the WPPT asserts the economic rights of performers; it provides for an exclusive right of authorising the broadcast or communication of an unfixed performance (except where the performance is already a broadcast performance), and the fixation of unfixed performances.

Article 10 of the WPPT provides that performers have an exclusive right over the ‘making available of their fixed performances’, which explicitly covers on-demand type services – both provided through wired and wireless means. However, the scope of this Article is restricted to performers whose works are fixed in phonograms, and hence only relates to musical works and not audiovisual works. Article 14 provides that producers of phonograms also have such a similar ‘making available’ right. Article 15, then sets out a provision to Article 12 of the Rome Convention, which provides for a right to equitable remuneration for both performers and producers (administered together) for uses in broadcasts or communications to the public.

As discussed in detail in Chapter 2, the WPPT does not cover the rights of broadcasting organisations. As mentioned above, the WPPT covers rights for performers whose performances

are fixed in phonograms. In practical terms, this limits the provisions to musical works. A separate later international agreement was concluded to address the rights of performers in audiovisual works – the Beijing Treaty on Audiovisual Performances ('Beijing treaty').

Article 10 of the Beijing Treaty provides for a 'making available right' similar to Article 10 of the WPPT. Article 11 then deals with rights related to broadcasting and making available to the public. Article 11(1) provides for an exclusive right of authorising broadcasting and communication to the public of performances fixed in audiovisual works. However, Article 11(2) provides that as an alternative, Contracting Parties can deposit a declaration that they will alternatively provide for a right to equitable remuneration, instead of the exclusive authorisation right.

The key conclusions from analysis of the above provisions is that the retransmission right of copyright holders is stronger than that for performers and producers. In fact, in many cases, performers and producers may not actually have a retransmission right, but a mere right to equitable remuneration.

Limitations and Exceptions

As noted above, both the broadcasting right and the retransmission right are embodiments of the more general right to control public communication. However, the retransmission right – by virtue of the context in which it is exploited – may be restricted in the way in which it is exercised. Restriction on the exercise of exclusive rights are dealt with under the concept of 'limitations and exemptions' in copyright and related rights law. By default, a copyright owner has certain exclusive rights; however, international agreements on copyright law set out certain criteria under which limitations may be placed on these rights.

Limitations: Berne Convention, TRIPs and WCT

While Berne Article 11bis(1) provides the basis for broadcasting and retransmission rights, Article 11bis(2) provides for possible limitations to these rights, stating as follows:

"It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority."

This provision has often been used as the basis for implementing limitations to copyright applicable to broadcast retransmissions. The language "*determine the conditions under which the rights mentioned in the preceding paragraph may be exercised*" implies a possibility to mandate that rights be exercised for example, only through collective management, as discussed in Chapter 8. Furthermore, the requirement that these conditions not prejudice the author's right to obtain equitable remuneration implies that the exclusive property right can possibly be reduced to a right to remuneration. The language "*in the absence of agreement, shall be fixed by competent authority*" further implies that this right of remuneration can take the form of a statutory or compulsory licence, where the relevant royalty rate is determined through a legal instrument (statute or regulation), or by some adjudicating body (court or royalty tribunal).

As noted in Chapter 2, the so called 'three-step-test' is the established standard for evaluating limitations and exceptions. While this test does originate in Article 9(2) of the Berne Convention, its application is limited to the reproduction right (as opposed to public communication or broadcasting rights). Nevertheless, the three-step-test is more generally codified in TRIPs Agreement Article 13, which states that "*Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.*"

The three-step-test is also reproduced in Article 10 of the WCT. However, this Article goes even further by constructing a relationship between the test and application of limitations permitted by the Berne Convention. It states as follows:

“(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.”

This Article is further contextualised by the ‘*Agreed Statement Concerning Article 10*’, which is also contained in the Treaty itself. The Statement states as follows:

It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment. It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.

This language is significant as it explicitly confirms that the limitations implied by Berne Article 11bis(2) are indeed compliant with the three-step-test, and can be similarly applied for new technologies.

Limitations: Rome Convention, WPPT and Beijing Treaty

As noted in Chapter 2, there are three possible approaches to constructing provisions on limitations and exceptions for related rights in international legal instruments: (i) enumerated lists, (ii) the three-step test, and (iii) the equivalency principle. The equivalency principle is where exceptions and limitations to related rights are permitted for the same scenarios that are subject to exceptions and limitations under copyright.

Rome Convention Article 15(1) sets out an enumerated list of permitted limitations. While “*ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts*” is one such permitted use, this is a limitation to the reproduction right; there is no explicitly listed limitation to broadcasting or retransmission rights. Article 15(1) does however provide for the equivalency principle, with the caveat that “*compulsory licences may be provided for only to the extent to which they are compatible with this Convention.*” An overall assessment of the Rome Convention suggests that there is nothing in the Convention that would disallow compulsory licencing for related rights holders’ broadcasting and retransmission rights.

Limitations and exceptions in the WPPT are provided for by Article 16. Article 16(1) sets out the equivalency principle, while Article 16(2) sets out the three-step-test. Furthermore, there is an ‘*Agreed Statement Concerning Article 16*’, which states that the ‘*Agreed Statement Concerning Article 10*’ of the WCT also applies to Article 16 of the WPPT. As such, there is again a positive affirmation that the limitations to broadcasting and retransmission rights under the Berne Convention pass the three-step-test and can be extended to the digital environment.

Article 13 of the Beijing Treaty (on the related rights of audiovisual performers) follows the same structure as WPPT Article 16. It contains both the equivalency principle and the three-step-test, along with an ‘*Agreed Statement*’ paralleling that in WCT Article 10.

ANNEX 5: The US Retransmission Consent Regime

This Annex provides a brief analysis of the ‘Retransmission Consent’ system of the United States of America.⁵³⁷ It complements the EU case study in Chapters 8 and 9 as an input into the analysis in Chapter 10. As noted in Chapter 2, the US system is a particularly unique case that is difficult to generalise to other jurisdictions. In order to fully understand this system however, it necessary to understand the various phases through which the system evolved and was implemented.

Advent of Retransmission and SCOTUS Cases

When cable television was introduced in the US market, various disputes regarding the application of copyright law to retransmission arose. On this matter, two important cases were decided by the US Supreme Court (SCOTUS), as to how the 1906 Copyright Act should apply to the issue.

In the first case, *United Artists Television vs. Fortnightly Corporation (1968)*, SCOTUS overturned the decision of the lower courts, and found that the transmitting cable company was not engaging in a ‘performance’ as construed under then current copyright law.⁵³⁸ As an important note, the cable company in this case was retransmitting the programming from a nearby station, and their actions allowed for some consumers in that local area to receive better reception of that station, which was previously encumbered due to geographic topology.

At that point, it would have hence not been clear as to whether copyright liability would be incurred where the retransmission is over a significant geographical distance, or in the language of US copyright law, where the retransmission is of a ‘distant signal’. This was the exact issue under contention in the second case, *Columbia Broadcasting Systems Inc. vs. Teleprompter Corp. (1974)*. In this case, SCOTUS again ruled that the cable service provider was not engaged in a performance under applicable copyright law. An interesting note on this case is that the Court considered the economics of content distribution in its judgement; it noted that retransmitting activities would not diminish the copyright owner’s means of extracting recompense for their creative labour, as economic value was created through advertising revenues, and that since cable retransmission expanded the audience, the initial broadcaster would receive greater advertising revenue and hence have a greater willingness to pay for copyright licences to programme suppliers. Despite this ruling for the Court, the general perception existed within the industry that more refined rules on copyright liability for retransmissions were needed.

The Compulsory Licensing System

The next major phase of retransmission regulation came with the major reforms under the 1976 Copyright Act. The new system introduced a regime of compulsory licensing for some cases of retransmitted signals, but differentiated between the applicable rules in different possible retransmission scenarios. The first scenario was a reiteration of the precedent of the *Fortnightly*

⁵³⁷ The US System was chosen as it has a several unique features while no other system has. Unlike the EU which uses mandatory collective management for transmissions as discussed in Chapter 8, the US uses a compulsory licencing system. However, it is not the only jurisdiction to use such a system. For example, Canada also uses a compulsory licensing system. In fact, the judicial evolution of retransmission rights in the US did have an influence in Canada; for an overview of this historical relationship, see Gendreau (1990). What is unique about the use system is that it also provides for an interesting must-carry regime, which sets the stage for the discussion on such provisions in a later section of this chapter. Furthermore, as noted in Chapter 2, the US is not a contracting party to the Rome Convention, and does not provide for explicit broadcasters’ related rights.

⁵³⁸ According to Eisenach (2009), central to this dispute was a 1959 interpretation of the Communications Act by the FCC that Section 325 banned wireless, but not wired retransmission of broadcast signals, and the FCC ruled that cable systems did not need broadcasters’ consent to retransmit their signals.

Case; where a retransmission takes place within the same market (within the limits of the area normally encompassed by the primary transmission), there would be no copyright liability.⁵³⁹ Secondly, where retransmission takes place in a new market (outside of the original signal transmission area), copyright liability depends on whether there is an existing local broadcaster in that area who carries some of the same programmes as the distant signal to be retransmitted. Whether there are no such competing local stations (i.e. there is no 'programme duplication'), the retransmitter incurs full copyright liability. However, where there is a local station carrying some of the same programming (i.e. there is some level of 'programme duplication'), a compulsory licence would apply. Furthermore, the compulsory licence would also apply when the retransmission is bringing services into an area in which there otherwise would be no local transmitting stations. Here, it is clear that the applicable rules are inextricably linked to the wider goals of communications policy, such as promoting service accessibility and coverage.

Where the compulsory licence applies, the cable operator was to pay 'a reasonable licence fee' for the programming contained within retransmitted signals. At this point, various institutional players would facilitate administration of the system. The fees would be collected and distributed by the Registrar of Copyright to copyright owners whose content was retransmitted, and where there is some dispute regarding fee collection or distribution, the copyright royalty tribunal would adjudicate.

Most importantly, the entire system would exist subject to the Federal Communication Commission's (FCC) administrative rules on various related matters, including signal retransmission authorisation. These rules would define the number and type of distant signals which could be imported for retransmission, and the applicable rules for situations where one party (such as a local broadcaster in the secondary transmission area) has exclusive rights for certain programming content.

As a result, the compulsory licensing regime operated in practice not as a high level legal framework, but rather as a very specific regulatory tool. This is an interesting observation, as it demonstrates a shift from the forum of intellectual property law towards media regulation, as public policy objectives regarding media and communications were the guidance force of administrative guidelines of the FCC (whose mandate is derived from the body of Communications law).⁵⁴⁰

The compulsory licensing rule is however not universally accepted in policy circles and academic literature. Beson and Manning (1978) argue against the compulsory licensing system, and find that "*where contracting costs are unimportant, the liability of cable systems for copyright will have no*

⁵³⁹ It is important to consider that under FCC carriage rules, cable service providers were required to carry all local stations on their networks (i.e. local stations automatically had 'must-carry' status on subscription networks in their area). It is also useful to note that the concept of 'service areas' are also specifically defined through the FCC's licensing schemes, particularly as it relates to spectrum allocation.

According to Eisenach (2009), the advent of distant signal retransmissions raised concerns about the impact on local broadcasters. As such in 1963 the FCC made carriage of all local broadcasting stations a condition of the microwave licence necessary for offering cable services, and extended this obligation to all cable operators in 1966. However, these must-carry rules were invalidated by the courts in 1985. Hence between 1985 and 1992, must-carry obligations did not exist, until they were reinstated by the Cable Act of 1992 (and upheld by the Supreme Court in 1997 in *Turner Broadcasting System Inc., et al vs FCC et al*).

⁵⁴⁰ Another particular driving element in this regard are issues of competition regulation in media markets, which concerns not only the promotion of competitive markets, but also the prevention of socially harmful media consolidation. This is made more complex by the specific market structure of broadcasting markets in the US, where local broadcasters may either be independent or local affiliates of one of the large national networks, and where operations are also tied into the syndication market. However, while this is important to note, it is not critical for the discourse in this chapter. For an economic analysis of affiliation agreements in US broadcasting, as it existed at the time, see Beson and Soligo (1973).

effect on either the importation of a program or the nature of the program that is produced". This is essentially an application of Coase Theorem, as an allocative efficient outcome is reached irrespective of the initial allocation of rights/liability. As such, in simple cases, full copyright liability and zero liability for retransmissions will result in the same outcomes, although the distribution of welfare would be different. However, in more complex cases, free rider problems and public good market failures may arise. Building on this, the authors argue that implementing a compulsory licensing system rather than a system of full liability will aggravate the problems of distant signal importation. The authors go on to state that full liability is preferred to compulsory licencing for the following reasons: (i) the fixed fees do not reflect prices negotiated in a free market, (ii) the formula for fee re-assessments is inflexible as economic conditions change, (iii) the system needs a mechanism for distributing royalties based on agreement between all copyright owners, and (iv) the long run effect will be detrimental to the supply of programming.

The Birth of Retransmission Consent

The next major reforms in retransmission regulation in the US came with the 1992 Cable Act. Before this legislation, cable systems were allowed to carry signals of broadcasters without compensating those broadcasters, although individual broadcast stations were not allowed to retransmit another broadcast station without consent. Furthermore, up until that time, although the compulsory licence system would regulate liability for the programming within retransmitted systems, there was no requirement to negotiate or compensate with the original broadcaster themselves for the use of the signal.⁵⁴¹

Against this background, and the growing perception amongst policy-makers that the competitive playing field was disproportionately favouring the cable operators over broadcasters, the 1992 Cable Act was passed, introducing the Retransmission Consent regime.⁵⁴² Under the Retransmission Consent regime, broadcasters are faced with a choice every three years. They can either choose to opt for:

- (i) 'Must-carry Status' – meaning that they are guaranteed carriage on all cable systems within their original broadcast footprint. However, such carriage would be without any form of compensation; *or*
- (ii) 'Retransmission Consent' – meaning that they have the right to negotiate in good faith with cable operators, over the terms of carriage of their signals.⁵⁴³ However, such carriage would not be guaranteed.

⁵⁴¹ Note that due to the invalidation of must-carry rules in 1985, not only were cable operators allowed to retransmit local broadcasts (where programming was subject to the compulsory licence, and no authorization was needed from the broadcaster), but they were also free to choose which local broadcasts to carry.

⁵⁴² According to Eisenach (2009), *"In passing the Cable Act, Congress recognized that satellite operators were treated differently from cable operators in the 1976 Copyright Act, and thus did not impose retransmission consent on DBS (direct broadcasting satellite). It extended retransmission consent to DBS operators in 1999 in the Satellite Home Viewer Improvement Act (SHVIA), while at the same time permitting DBS operators to carry local broadcast signals even to households that were not "unserved." DBS operators are not subject to the must carry requirement. However, if they choose to carry any local broadcast stations, they are required to carry all stations that have elected must carry (the "carry one, carry all" rule)."*

⁵⁴³ Eisenach (2009) notes that in practice, retransmission consent has been typically granted in exchange for 'in-kind' compensation. This means that instead of being given cash compensation, broadcasters are given 'free' advertising on cable networks, or an agreement that the network would also carry some other non-broadcasting networks affiliated with the retransmitted broadcaster. On this point, it becomes clear how retransmission rules are closely linked with prevailing market structures in the US media sector, where there are complex relationships between local broadcasters, national networks, non-broadcast affiliates, subscription networks,

Since the introduction of the retransmission consent regime, there has been heated debate over the policy's effectiveness and efficiency. On one side, the regime is generally welcome by broadcasters who are put in a more preferable situation by having more bargaining power and control over retransmissions. However, the regime is generally opposed by MPVDs (Multi-Programme Video Distributors, such as cable networks), who see the regime as giving too much market power to broadcasters. The main contention of MPVDs is that the regime results in an increase in programming costs, which is ultimately passed on to consumers. A common criticism of the regime is also that it can result in periodical impasses due to stalled negotiations, which results in consumers not having access to certain broadcast transmissions.⁵⁴⁴

In terms of theoretical modelling, Chae (1998) sets out a bargaining model of the retransmission consent regime. The author concludes that a broadcaster's choice of retransmission status depends on the additional benefits of network carriage; broadcasters with higher additional benefits from carriage on cable system networks will tend to opt for retransmission consent – a finding that appears to be consistent with the available empirical data. In terms of the welfare impact of the regime, the author notes that broadcasters tend to be financed through advertising revenues, which is in itself imperfect (from a market mechanism perspective), and so it is often assumed that the broadcasters' programming quality is sub-optimal. As such, redefining property rights over the signal, and allowing the broadcaster to bargain over compensation for the carriage of their signals, will give broadcasters an incentive to improve their programming. However, the actual extent of this incentive would depend on market structure, and in any case, any benefits would of course be net of the deadweight losses of bargaining costs.

In terms of the must-carry aspect of the regime, it was noted that that rule essentially serves as a subsidy to local broadcasters. While this may be economically inefficient from a pure market perspective (and also in terms of the allocation of network capacity and spectrum resources), it reflects the historical policy goal of promoting local programming.

Concluding Comments on US System

The general purpose of this chapter is to take a more theoretical perspective on the nature of retransmission rights, and how they might be subject to certain limitations and exceptions. The above section on the US retransmission system may hence seem misplaced; however, this discussion does provide for a very different case study than the case of the European framework discussed in Chapter 8.

The essence of the US system is that the retransmission rights of copyright and related rights holders are limited via a compulsory licence. This is in comparison to the case of the European system in which mandatory collective management is used.

For broadcasters themselves, an explicit related right does not exist. What exists is a special regime that provides for a choice between two differently structured entitlements. On one hand, there is a 'must-carry' status, which is an entitlement for carriage on retransmitting networks; such provisions are discussed later on in this chapter. The alternative is an entitlement to a quasi-property right, which can then be the basis of market negotiations for retransmission. This system however only applies for 'local' retransmissions. For retransmissions of distant signals, a separate set of regulatory rules on signal importation applies.

and advertisers. For an overview of the economic structure of the US broadcasting industry, see Caves (2005).

⁵⁴⁴ While this claim is widely put forward by service providers, the effects on consumer welfare are not necessarily so clear. Elsenach (2009) finds that the regime is not responsible for any significant increase in monthly subscription fees, and that concerns about negotiation impasses are likely misplaced.

As noted in Chapter 2, the US does not actually provide for a broadcaster's related right. The quasi-property right facilitate by the retransmission consent rule hence provides only for authorisation for retransmission. The issues of authorisation for fixations of broadcasts, and reproductions thereof, are relegated to the copyright system.

In any case, what is interesting is that the system – particularly for broadcasters – is constructed as a regime under communications law, rather than intellectual property law. As such, this entire system is strongly linked to the broad public policy goals of the communications sector, and its unique market structure.

ANNEX 6: The Bundled Compliments Holdout Problem

Assume a bundle of N goods, where the utility of these goods exhibits increasing returns due to strong complimentary effects. In reality, there may be increasing returns at first, and then decreasing returns afterwards, but the existence of increasing returns for at least the first units is what is relevant.

Each good (X_n) has an associated market value if it were subject to a transaction on its basis alone. However, with each successive good, there is a complimentary effect whereby the good's market value is scaled upward at a decreasing rate (α_1).

Work	Individual Value	Complimentary Value	Average Value
X_1	P_1	$\alpha_1 P_1$	$(1/1) \sum_{n=1}^{n=1} (\alpha_n P_n)$
X_2	P_2	$\alpha_2 P_2$	$(1/2) \sum_{n=1}^{n=2} (\alpha_n P_n)$
...
X_a	P_a	$\alpha_a P_a$	$(1/a) \sum_{n=1}^{n=a} (\alpha_n P_n)$
...
X_N	P_N	$\alpha_N P_N$	$(1/N) \sum_{n=1}^{n=N} (\alpha_n P_n)$

In order to create a bundle of goods, it is necessary to achieve authorisation from all of the individual rightsholders whose works are contained in that bundle. As, each rightsholder is a profit-maximiser, they seek to extract the maximum possible rent in exchange for their authorisation. However, the maximum extractable rent is determined by the position in the negotiation (i.e. the second rightsholder is able to extract more rent due to the positive effect on individual value from complementarity). Therefore, every rightsholder will be hesitant to negotiate, as they hold out for a later spot in the negotiating process. Sequential negotiation would therefore not be possible due to hold-out effects.

To work around this problem, the user may seek to offer one single equitable payment to the entire group of rightsholders in order to gain authorisations simultaneously. If this payment offer were the individual market values (P_n), then only the first work would be authorised, as each successive work would again hold-out in an attempt to extract a greater payment of ($\alpha_n P_n$).

The user may then have to offer a payment based on the total collection works' actual cumulative market value ($\sum_{n=1}^{n=N} (\alpha_n P_n)$), meaning that rightsholders as a group extract the full value-added in the form of rent. The offer would be average value of works $[(1/N) \sum_{n=1}^{n=N} (\alpha_n P_n)]$, and would be the same to each rightsholder.

In principle this should work if all negotiations are simultaneous. With a single offer and a single decision to accept or reject the offer, each rightsholder would not know a priori their position in the bundle. Furthermore, in a non-sequentially (instantaneously) assembled bundle, that position is necessarily arbitrary. There is a uniform probability of appearing anywhere in the bundle ($1/N$), and the rights holder might appear either below the threshold ' a ' with a probability (a/N), or above that threshold (with the associated incentive to hold-out) with a probability of $((N-a)/N)$. If the rightsholders are all risk neutral, then they choose to accept the payment based on the expected value of their work (given the probability distribution of bundle positions and the associated value-added); this expected value is the same as the average value, which was the basis of the offer made $[(1/N) \sum_{n=1}^{n=N} (\alpha_n P_n)]$.

Furthermore, since ‘complimentary value’ is an increasing function, there are more observations below the average (i.e. at ‘ a ’) rather than above it. There is therefore a higher probability that a given work which is randomly assigned a position in the bundle appears below ‘ a ’ (and is ‘overpaid’ for its value-added contribution), rather than above it (where it is ‘underpaid’). Hence, under risk-neutrality and the possibility of truly simultaneous (and one-shot) negotiations, no single rightsholder would hold-out on authorisation.

However, in practice such simultaneous negotiations are nearly impossible. There would be different transaction costs associated with negotiating with each rightsholder meaning that some authorisations would be concluded earlier than others (for example, content acquired through the network affiliate system). Only if the user is able to maintain information symmetries with the rightsholder, whereby the rightsholder does not know their potential position in the bundle, can the simultaneous offer work. It is therefore very much possible for the scenario to revert to one of sequential negotiations, especially where rightsholder are risk-seeking.

Once negotiations are sequential, there will be incentives for rightsholders to holdout. Again, if the offer is based on average value $[(1/N) \sum_{n=1}^{n=N} (\alpha_n P_n)]$, in the first instance, not all rightsholders will accept this offer. Since complimentary value is an increasing function, and the average value is a fixed quantum, there will obviously be two sets of rightsholders: (i) those whose work’s added value is less than the average, and (ii) those whose work’s value added is more than the average. The result is that only those rightsholders for whom the offer is greater than their average value would accept [where $\alpha_n P_n \leq (1/N) \sum_{n=1}^{n=N} (\alpha_n P_n)$].

This will only be the case for a certain number of rights holders (a rightsholders, where $1 < a < N$). Once payment is made to ‘ a ’ number of rightsholders, each further rightsholder notes that their actual value added would be greater than the offer made; these rightsholders would then have an incentive to hold-out in an attempt to extract greater rent.

Based on this incentive structure, through backward induction, the user would then realise that such an offer would result in the bundle being limited to ‘ a ’ authorised works. Hence, a new offer would have to be made based on this smaller bundle and associated average cumulative value. The new offer becomes $[(1/a) \sum_{n=1}^{n=a} (\alpha_n P_n)]$, and rightsholders only accept where $[\alpha_n P_n \leq (1/a) \sum_{n=1}^{n=a} (\alpha_n P_n)]$. Again, only some sub-set of rightsholders accept, and those whose actual value-added are above the average hold out.

This expectation is again internalised by the user, and through iterative backward induction, the process continues until the expectation is that only the first rightsholder accepts the offer ($a \rightarrow 1$), and every other holds-out.

Hence, hold-out problems persist, even if negotiations are not necessarily sequential, once authorisation regarding an exclusive right is required. On this basis, compensatory liability rules would be a preferable system to exclusive rights, as such would ensure that the welfare-enhancing act of bundling is able to occur, while rightsholders do not engage in welfare-reducing holdout actions, while still being afforded equitable remuneration.

The following simple numerical example provides further illustration. There are 10 works for which authorisation is needed, each with an individual market value of \$10, but when bundled the complimentary value increases.

Work	Individual Value	Complimentary Value	Average Value
1	10	10	10.00
2	10	12	11.00
3	10	13	11.67
4	10	15	12.50
5	10	17	13.40
6	10	18	14.17
7	10	20	15.00
8	10	22	15.88
9	10	23	16.67
10	10	25	17.50

If the user were to offer rightsholders \$10, only the first work would be authorised. The user therefore offers all rightsholders the average value of the entire bundle of ten works - \$17.50. However, only the first five rightsholders accept this offer; rightsholder number six knows that their value added is greater than the prevailing offer, and hence holdout in an attempt to extract more rent. Anticipating this, the user realises that only five works may be authorised, and instead makes an offer of \$13.40 based on a bundle of five works; only the first three works are authorised and others again hold out. A bundle of three works then results in an offer of \$11.67 – an offer that only the first rightsholder would accept; however, one work by itself without any complimentary works is only associated with the individual value of \$10, and hence the user would make a loss. The end result is that the user only makes an offer of \$10 for which one work might be licenced.

Summary

Intellectual Property (IP) is one of the most contentious areas in international economic law, and an area naturally conducive to the methodologies of Law and Economics. This thesis analyses the niche IP area of ‘Broadcasters’ Rights’ - a form of ‘Related Rights’. The relevance of this analysis to wider field of Law and Economics is its treatment of property rights in media distribution, particularly where the result is an overlapping system of different rights.

Part I of the thesis outlines the motivation for this research project, and the fact that the topic has attracted little attention from academia compared to the attention given at the international policy level (particularly at the World Intellectual Property Organisation). It argues that the very notion of ‘related rights’ is often erroneously subsumed into wider discussions on copyright, making meaningful debate difficult.

Part II goes on to find that the concept of broadcasters’ rights – a mechanism to incentivise content distribution rather than content production – has a generally uneasy fit within the wider framework of the theoretical foundations of the intellectual property system. This part argues that the public good problems of broadcast content distribution are likely overstated. Furthermore, given the unique socio-cultural characteristics of broadcasting markets, such rights must be understood as one element of a dynamic set of policy tools for regulating the sector.

Much of the thesis analyses the relationship between ‘primary’ copyright and broadcasters’ rights. In this regard, Part III attempts at modelling the ‘optimal scope’ of protection, and finds that broadcasting organisations should be offered a scope of protection below that which is offered for authors of copyright-protected works. However, due to the specific nature of the protected subject matter, there is a more restricted range of policy levers to affect the scope of protection for broadcast transmissions, as compared to other areas of intellectual property. In this regard, the thesis argues that liberal limitations and exceptions are critical in constructing an appropriate scope of protection for signal transmissions. This Part also models the relationship between the enforcement actions of copyright holders and broadcasters. It argues that the existence of broadcasters’ rights can create social costs such as anti-commons effects and public domain enclosure. Hence, a possible alternative policy strategy might be to grant broadcasters the standing to enforce against infringement on behalf of their copyright licensees.

Part IV, dedicates a large portion of the thesis to analysing the notion of ‘retransmission rights’. These are the intellectual property rights invoked when a broadcast signal is re-broadcast by a second broadcaster. During this activity, the rights of both copyright holders and initial broadcasters are invoked. This Part analyses the framework of the European Union for regulating retransmission activities, and finds that it is characterised by a patchwork of various legal instruments. As a response to the deficiencies of existing policies, a new EU Regulation has been proposed for online transmissions. However, the thesis argues that this Proposal still fails to bring overall coherence to the broader framework. In this regard, the thesis argues that the regulation of broadcast transmission should be based on a technologically-neutral policy approach. The final substantive chapter then attempts to draw lessons from the European case study and formulate a basic understanding of the theoretical relationship between the related rights of broadcasters, and that of copyright holders. The main finding is that limitations to retransmission rights are justified due to the transaction cost-intensive nature of such activities.

The thesis concludes with Part V, which attempts to generalise the discussions and findings of the entire research project, and considers how they can inform the current international policy debate on the topic.

Samenvatting

Intellectuele Eigendom (IE) is een van de meest controversiële terreinen van het internationaal economisch recht en een terrein dat van nature bijdraagt aan de methodologieën van Law and Economics. In dit onderzoek wordt het niche IE-terrein van de rechten van omroeporganisaties die behoren tot de ‘naburige rechten’ geanalyseerd. De relevantie van deze analyse voor het bredere terrein van Law and Economics ligt in de behandeling van eigendomsrechten in media distributie, met name waar dit resulteert in een overlappend system van verschillende rechten.

Deel I beschrijft de motivatie voor dit onderzoeksproject en het feit dat het onderwerp weinig aandacht heeft gekregen van de academische wereld vergeleken met de aandacht op het internationale beleidsniveau (met name bij de Wereldorganisatie voor de Intellectuele Eigendom). Gesteld wordt dat het begrip ‘naburige rechten’ vaak ten onrechte wordt ondergebracht bij de bredere discussies over auteursrecht, wat een zinvol debat bemoeilijkt.

Deel II vervolgt met de bevinding dat het concept van exclusieve rechten van omroeporganisaties – een mechanisme dat eerder de distributie van inhoud dan de productie van inhoud stimuleert – doorgaans niet goed aansluit bij het bredere kader van de theoretische basis van het intellectuele eigendomssysteem. Dit deel betoogt dat de collectiefgoedproblemen bij distributie van omroepinhoud waarschijnlijk overdreven worden. Gelet op de unieke sociaal-culturele kenmerken van omroepmarkten moeten die rechten bovendien worden gezien als één element van een dynamische set beleidsinstrumenten om de sector te reguleren.

Een groot deel van de dissertatie analyseert de relatie tussen ‘primair’ auteursrecht en de rechten van omroeporganisaties. In dit verband probeert deel III vorm te geven aan de ‘optimale omvang’ van bescherming en concludeert dat omroeporganisaties een beschermingsomvang moet worden geboden die lager is dan die geboden wordt aan auteurs van auteursrechtelijk beschermde werken. Vanwege de specifieke aard van de beschermde inhoud is er echter een beperkter scala aan beleidsinstrumenten beschikbaar om de beschermingsomvang van uitzendingen te beïnvloeden, vergeleken met andere terreinen van intellectuele eigendom. In dit verband wordt gesteld dat relatief ruime beperkingen en uitzonderingen cruciaal zijn voor het tot stand brengen van een toepasselijke beschermingsomvang voor signaaloverdracht. Dit deel geeft ook vorm aan de relatie tussen de handhavingsacties van auteursrechthebbenden en omroeporganisaties. Gesteld wordt dat het bestaan van rechten van omroeporganisaties maatschappelijke kosten kan creëren zoals anti-commons effecten en afsluiting van het publiek domein. Een mogelijke alternatieve beleidsstrategie zou daarom kunnen zijn om omroeporganisaties het recht te verlenen om namens hun licentiegevers op te treden tegen inbreuken.

Deel IV is grotendeels gericht op het analyseren van het begrip ‘heruitzendingsrechten’. Dit zijn de intellectuele eigendomsrechten die van toepassing zijn wanneer een uitzendingsignaal wordt doorgegeven door een tweede omroeporganisatie. Tijdens deze activiteit zijn de rechten van zowel de auteursrechthebbenden als die van de oorspronkelijke omroeporganisaties in het geding. Dit deel analyseert het kader van de Europese Unie voor het reguleren van heruitzendingsactiviteiten en concludeert dat het wordt gekenmerkt door een lappendeken van verschillende juridische instrumenten. Als reactie op de tekortkomingen van het bestaande beleid is een nieuwe EU-Verordening voorgesteld voor online-uitzendingen. Gesteld wordt echter dat dit voorstel er nog steeds niet in slaagt om een allesomvattende samenhang te brengen in het bredere kader. De regulering van uitzendingen zou gebaseerd moeten zijn op een technologie-neutrale beleidsaanpak. Het laatste inhoudelijke hoofdstuk probeert vervolgens lessen te trekken uit de Europese casestudy en een basisbegrip te formuleren van de theoretische relatie tussen de naburige rechten van omroeporganisaties en de rechten van de auteursrechthebbenden. De belangrijkste bevinding is dat restricties op heruitzendingsrechten gerechtvaardigd zijn vanwege de transactiekosten-intensieve aard van zulke activiteiten.

Ten slotte wordt in deel V getracht om de discussies en bevindingen van het gehele onderzoeksproject te veralgemeniseren en na te gaan hoe deze een bijdrage kunnen leveren aan de actuele internationale beleidsdiscussie over het onderwerp.

Curriculum Vitae

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Short bio	
<p>Bryan is a dual citizen of Canada and Trinidad and Tobago. Before joining the EDLE program, he studied Economics at the University of the West Indies, and Intellectual Property Law at the University of Torino. He also has several years of work experience in the field of telecommunications regulation and policy. His research interests are mainly in international trade, intellectual property, and cultural economics, with a particular focus on economic development in the Caribbean Region. Aside from his professional and academic life, he is an artist involved in music production.</p>	
Education	
Bachelor of Science in Economics, University of the West Indies	2007
Master of Science in Economics, University of the West Indies	2009
Master of Laws in Intellectual Property Law, University of Torino	2012
Work experience	
Tutor, Researcher, Part-time Lecturer, University of the West Indies	2008-2013
Economist, Telecommunications Authority of Trinidad and Tobago	2009-2013
Prizes and awards	
National Scholarship, Government of Trinidad and Tobago	2004
Publications	
-	
Others	
-	

EDLE PhD Portfolio

Name PhD student : Bryan Khan
 PhD-period : 2013-2018
 Promoters : Prof.dr. Hans-Heinrich Trute and
 Prof.mr.dr. Louis Visscher
 Co-promoter : Dr. Kees van Noortwijk

PhD training

<i>Bologna courses</i>	<i>year</i>
Fundamentals of Statistics	2013/14
Intro to Italian Law	
Game Theory and Law	
Econ Analysis of Law	
Behavioural L&E 1: Game Theory	
Behavioural L&E 2: Enforcement	
Experimental L&E: Topics	
Econ of Innovation	
<i>Specific courses</i>	<i>year</i>
Academic Writing Skills for PhD students (Rotterdam)	2014
Copyright-X (Harvard X course on US Copyright law)	2014
Hamburg Summer School in Law and Economics	2014
Geneva Summer School in Internet Law	2014
Competition Law and Economics (EMLE)	2014
EU Law in Overseas Territories	2015
Economic Analysis of Private Law (Bologna)	2015
Seminar Series 'Empirical Legal Studies'	2015
<i>Seminars and workshops</i>	<i>year</i>
Bologna November seminar (attendance)	2013
BACT seminar series (attendance)	2014
EGSL lunch seminars (attendance)	2014
Rotterdam Fall seminar series (peer feedback)	2014
ICANN seminar on internet governance (attendance)	2014
Rotterdam Winter seminar series (peer feedback)	2015
Joint Seminar 'The Future of Law and Economics' (attendance)	2015
<i>Presentations</i>	<i>year</i>
Bologna March seminar	2014
Hamburg June seminar	2014
Rotterdam Fall seminar series	2014
Rotterdam Winter seminar series	2015
Bologna November seminar	2015

Joint Seminar 'The Future of Law and Economics' (Rotterdam)	2016
Italian Society of Law and Economics (Turin)	2016
Conference on the Economy (Trinidad)	2017
Attendance (international) conferences	year
Conference on Sports and IP (Turin)	2014
Symposium on Big Data and Digital Rights (Rotterdam)	2015
IP and Free Trade Agreements (Turin)	2015
Future of Law and Economics (Paris)	2015
EMLE Midterm Conference	2015
WIPO/UNITO Annual IP Conference	2016
European Association of Law and Economics, Bologna	2016
Teaching	year
Research Paper Advisor (WIPO-Turin IP-LLM)	2013
Research Paper Advisor (WIPO-Turin IP-LLM)	2014
Research Paper Advisor (WIPO-Turin IP-LLM)	2015
Research Paper Advisor (WIPO-Turin IP-LLM)	2016
Research Paper Advisor (WIPO-Turin IP-LLM)	2017

