

Reconstructing copyright: A welfare economic approach

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Reconstructing Rights Project

- Rethinking copyright's economic rights in a time of highly dynamic technological and economic change
- “This collaborative interdisciplinary research project re-examines the core economic rights protected under EU copyright law, with the aim of bringing these rights more in line with economic and technological realities.”
- Institute for Information Law in co-operation with CREATE
- Funded by a research grant from Microsoft Europe
- Book in Kluwer Information Law Series to be launched at EPIP, Bordeaux 2017
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Some thoughts on the history of copyright

1710 Statute of Anne: protecting printing, reprinting and sale of “books and other writing”

1777 and onwards: performance rights for plays, music, dramatico-musical, literary works

1908 Mechanical reproductions, cinematographic adaptations

1928 Radio broadcasting

1948 Transmission (by ‘theatrophone’, but generalized), television broadcasting, rebroadcasting, cable retransmission, wired & wireless

1967 “public performance by any means or process” [s.a. sound recordings, tapes]

1992/94 Rental

Some thoughts on the history of copyright

- Expansion of rights in all dimensions:
 - *Subject matter covered*: from books and other writings, to sheet music, plays, music recordings, audiovisual recordings
 - *Acts covered*: selling copies, public performance, playing recordings, cable transmission, broadcasting, rental...
 - *Duration*: from 14 years, to life + 70 years
 - *Geographical scope*: gradual reduction of 'national treatment' in treaties
- Bottom line: any business user that generates value while copyrighted works play a role, will eventually receive an invoice

How can this be justified?

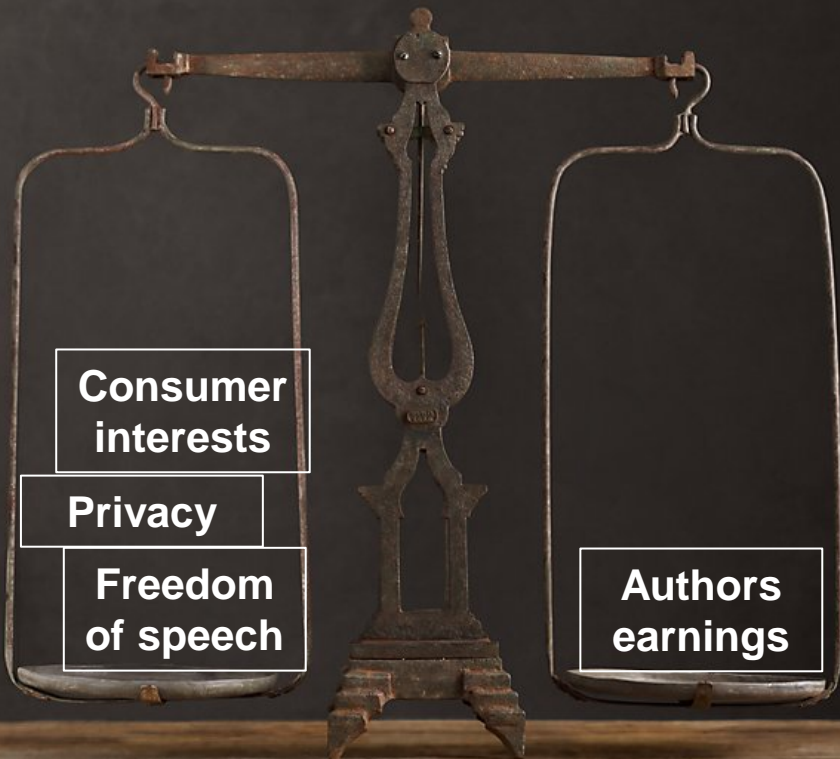
- Political economy: superb lobbying power of rights holders?
- Philosophical: Natural rights theories: labour-desert, personhood theories, abstraction of a work?
- Economic/utilitarian: copyright as an incentive system to create and exploit works?

Welfare economics

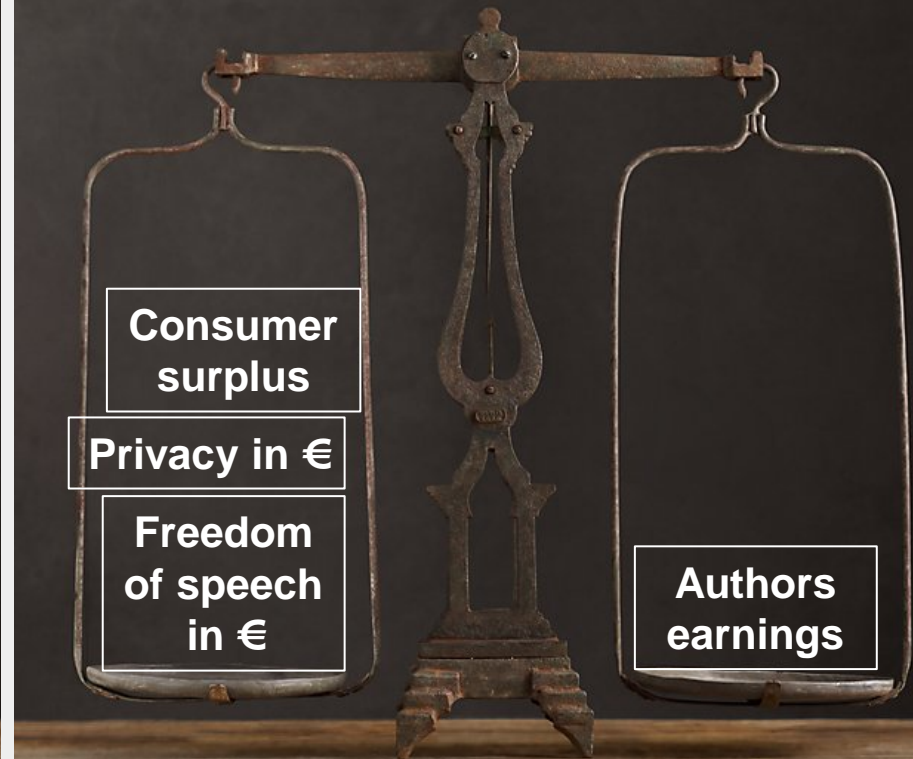
- Normative welfare economics is a 'monotheistic' doctrine, aimed at maximizing a broad concept of social welfare, incorporating other norms except distribution
 - In theory, it encompasses the value attributed to freedom of speech, privacy, cultural diversity all in the same 'currency'
 - In practice: amend outcome of more narrow-minded but still fairly broad welfare economic analysis
- Optimum defined by maximum welfare: discounted future consumer + producer surplus. No preferred status for producer (right holder) or consumer
- *Without market failure*, unrestricted market forces create maximum total welfare
 - Legislative/policy intervention justified by market failure, distributional concerns or paternalism

Welfare economics: balancing the commensurable

Law



Economics



Welfare economic analysis of copyright I

Economic rights as an incentive system for authors:

- Without intervention, the rents of creation and exploitation are insufficiently *excludable*
- Such rents would be *positive externalities*: Anyone can copy and distribute the work without permission once the costs of creation are made
- This reduces revenues for the creators and publishers, damages incentives and can lead to a loss of welfare in the long run
- From a welfare economic perspective, copyright should be ***aimed at and limited to optimally resolving*** this market failure
- In addition, there may be other market failures at play, e.g. abuse of market power. However, this is not an issue for copyright but for competition law

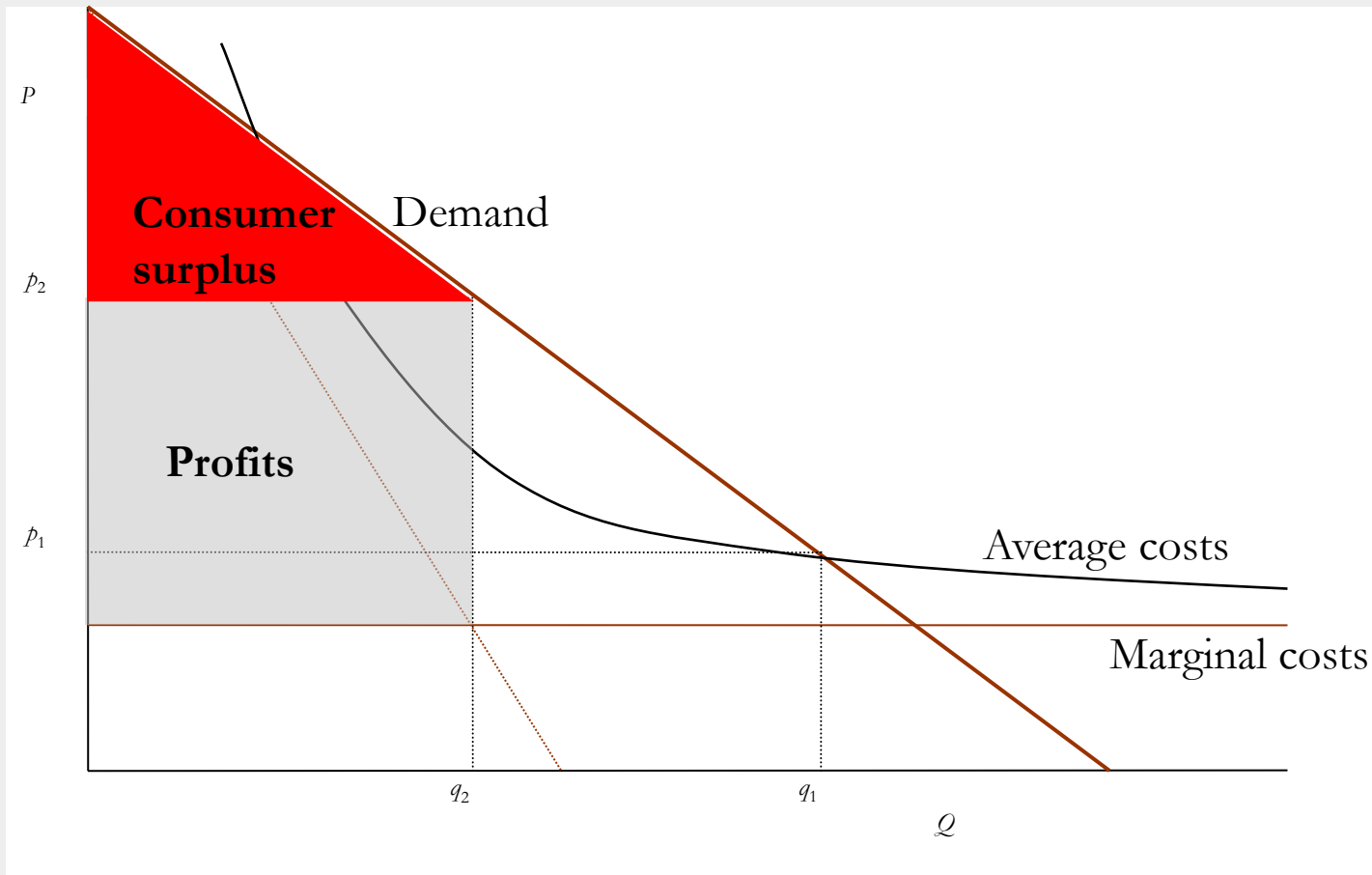
Welfare economic analysis of copyright II

- Next to potential benefits, there are social costs of copyright:
 - Transaction costs
 - Dead weight losses (unserved demand)
 - Dynamic losses (chilling effects)
- Defining optimum scope of copyright often an empirical question
 - Optimal copyright \neq maximum copyright
 - \neq copyright which maximized creative output

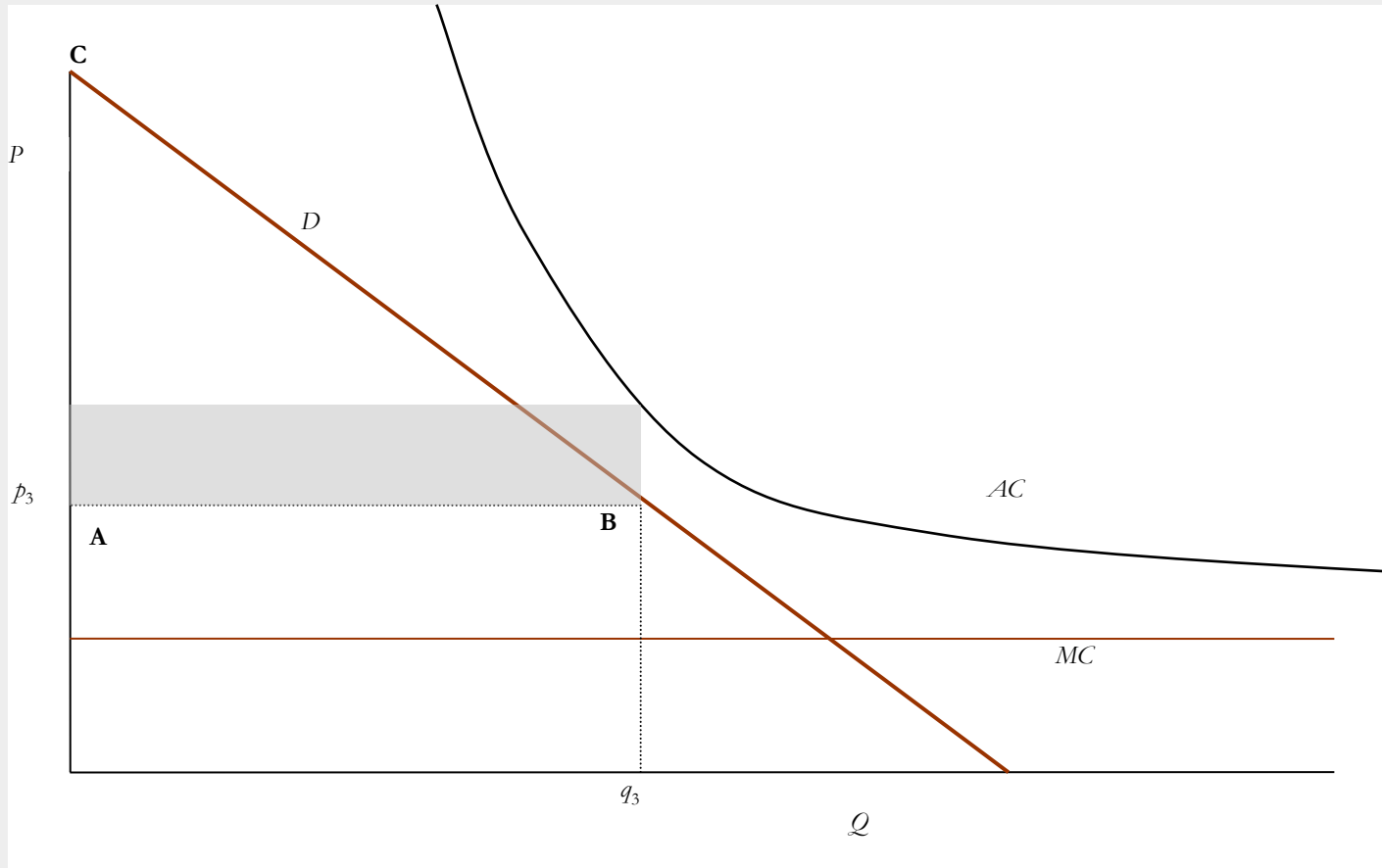
Welfare economic analysis of copyright III

- Exclusive rights justified over acts that – *as a result of market failure* – effect the *control* of a creator to exchange access to a work for something which has direct or indirect commercial value for him
- And by doing so negatively and significantly affect current or future exploitation opportunities (i.e. interfere with incentives to create or to exploit)
 - Broad concept of exploitation (including advertising, reputation building, cross-selling, even data harvesting)
 - Balancing with welfare costs of protection (transaction costs, dead-weight losses, chilling effects)
- Copyright should not generate new market failures by generating more (or less) rights than one would have in an ordinary market
 - No automatic control over downstream markets or claim to value generated in such markets (unless market failure re-emerges in downstream market)
 - Neither a ban on nor protection of price discrimination
 - Leave market power abuse to competition law

Profits and consumer surplus



Value gap?



Hyperlinking to & embedding of *authorized* content

- **Linking** to authorized sources on the www does not affect right holder's control over availability and exploitation environment of a work → copyright irrelevant
- **Embedding** may be different, there is still control over availability, but the work is cut loose from its exploitation environment → embedding can be a substitute to visiting the linked page and negatively affect exploitation

→ So should there be a licence to embed? Not so fast!

A controversial case of embedding

Nederland.fm case

- Web portal offering 'buttons' embedding music streams from Dutch radio channels
- Advertising revenues for Nederland.fm
- 2011: CMO Buma/Stemra starts sending bills
- 2012: The Hague Court of Appeal: licence required
- 2014: Svensson: Buma/Stemra & SENA stop their procedures
- 2015: SENA demands licence payment for neighboring rights
- 2017: Nederland.fm wins at The Hague district court

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- Now imagine **selling** a **technical device**
- Using **preinstalled links**
- **Without any attribution**
- Surely that would create an obvious value gap?

Looks familiar?



Hyperlinking to & embedding of *authorized* content

- **Linking** to authorized sources on the www does not affect right holder's control over availability and exploitation environment of a work → copyright irrelevant
- **Embedding** may be different, there is still control over availability, but the work is cut loose from its exploitation environment → embedding can be a substitute to visiting the linked page and negatively affect exploitation
 - Economic scale (and presumed benefits) of linking & embedding enormous
 - Most embedding probably okay → transaction costs of licensing prohibitive
 - Opt-out or technical solution?

Platforms and intermediaries facilitating access to unauthorised content

- Affects control and likely to have negative effect on exploitation opportunities for right holder
- If a party benefits from facilitating infringement, this may be construed as a *positive externality*, and internalizing or prohibiting this may enhance welfare
- But
 - Except in cases of *obvious* illegality – liability without prior warning would generate large transaction costs or chilling effects on consumers and platforms (false positives, consumers moving underground or losing interest)
 - Effectiveness of many enforcement measures highly doubtful
 - Obligation to install ‘measures’ may unevenly burden small intermediaries
 - Detrimental effects on other norms, such as privacy, freedom of expression and freedom to conduct a business

Digital resale

- Economic scale limited but not negligible
- Market failure with respect to sold copies has been resolved
 - no downstream protection needed or justified, any more than for other private goods
 - as long as some monitoring is possible to ensure resale \neq reproduction
- Digital content different because no degradation? NO:
 - Value from resale can be appropriated in initial sale
 - Commercial depreciation is enormous (+ windowing, versioning)
 - Information asymmetries & transaction costs hamper secondary market
- Private ordering may override general argument, but subject to general rules w.r.t. fair business practices and antitrust: no privilege for copyrighted works

Private copying

- Economic scale declining because of streaming, but still highly significant.
- Levies in EU €582 in 2015
- The value of most copies can largely be *appropriated indirectly* in first sale
 - no negative & significant effect on exploitation opportunities
 - most private copying is copyright irrelevant
 - Less so for systematic time shifting combined with skipping ads
- Private copying that leads to market extension can be different, in particular sharing such copies ad infinitum over the Internet will negatively affect exploitation opportunities

Retransmission

- Retransmission of free-to-air broadcast within reception area (or in hotel!) has strong resemblance with hyperlinking
 - Live retransmission without breaking access restriction does not affect control over availability nor the exploitation environment (ads, public funding)
 - Different if combined with systematic time shifting & skipping ads
- Abolishing retransmission fees will affect the financial agreements upstream
- In case of direct injection, downstream value can be part of initial contract (private ordering)

To conclude

- The history of copyright and related rights suggests that any business user that generates value while copyrighted works play a role, will eventually receive an invoice
- With private copying levies and prevention of digital resale, consumers risk same fate
- This is hard to reconcile with a welfare economic perspective of copyright, which suggests it should be aimed at and limited to optimally resolving the public good market failure associated with content creation, ...
- ...while taking account of the social costs of protection, such as transaction costs, unserved demand (DWL) and chilling effects.
- Only acts that – *as a result of market failure* – negatively and significantly affect current or future exploitation opportunities might be controlled
 - No automatic control over downstream markets or claim to value generated in such markets
 - No competition policy through copyright
- Application to borderline cases suggest curtailing over-expansive rights



Thank you for your attention
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