A welfare economic analysis
of online platforms and intermediaries in copyright law

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Welfare economics

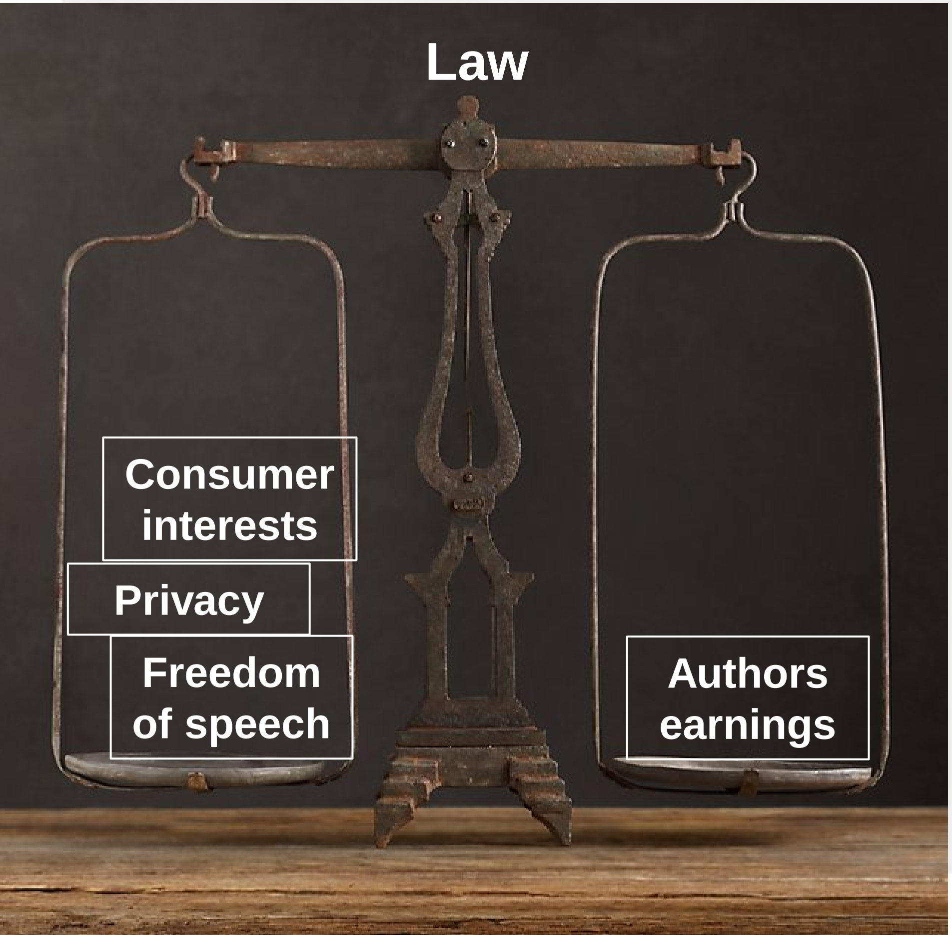
- Normative welfare economics is a ‘monotheistic’ doctrine, aimed at maximizing social welfare instead of balancing incommensurable interests or fundamental rights

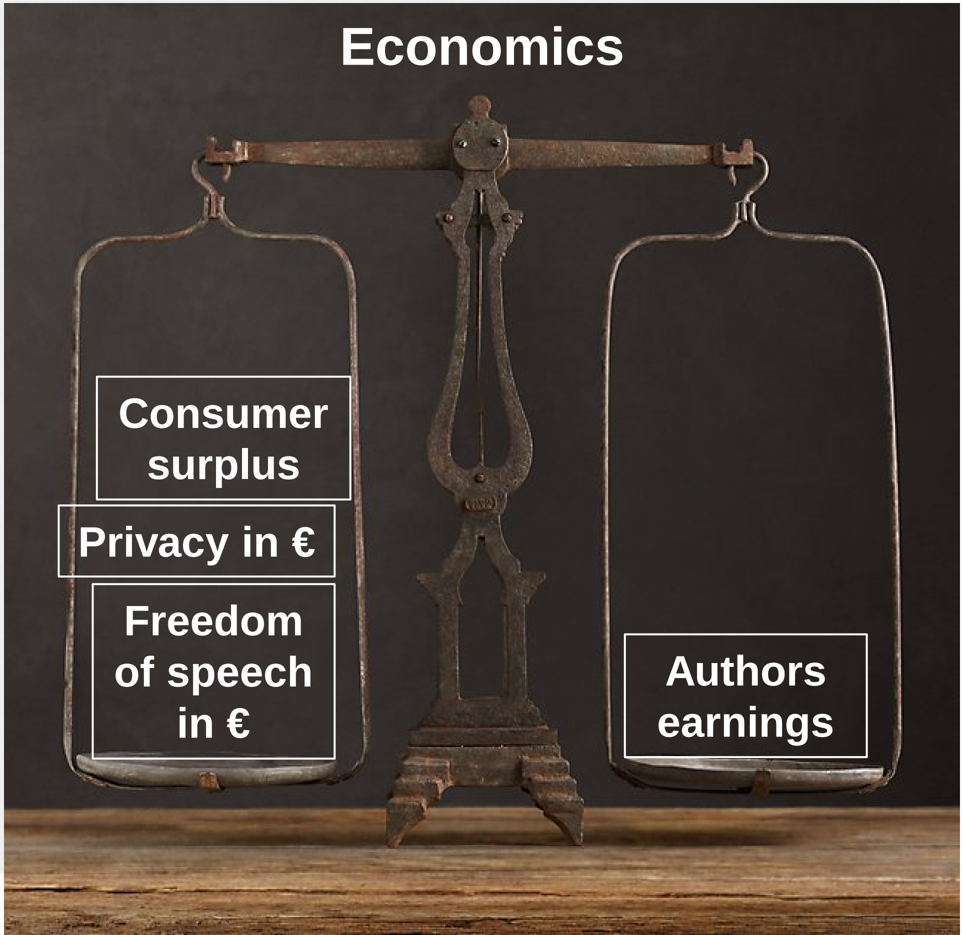
- Broad concept of social welfare, incorporating other norms except distribution
  - → In theory, it encompasses the value attributed to freedom of speech, privacy, all in the same ‘currency’
  - → In practice: amend outcome of more narrow-minded but still fairly broad welfare economic analysis
  - → Distribution of welfare separate from standard 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 my market failure, distributional concerns or paternalism

Welfare economics: balancing the commensurable





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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 <u>optimally</u> 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)

- In practice, the need for copyright also depends on:
  - Substitutability of originals by copies
  - Cost advantage for creator to make copies
  - Opportunities for private ordering (enforceability, transaction costs)

    → Digitisation affected all three factors significantly

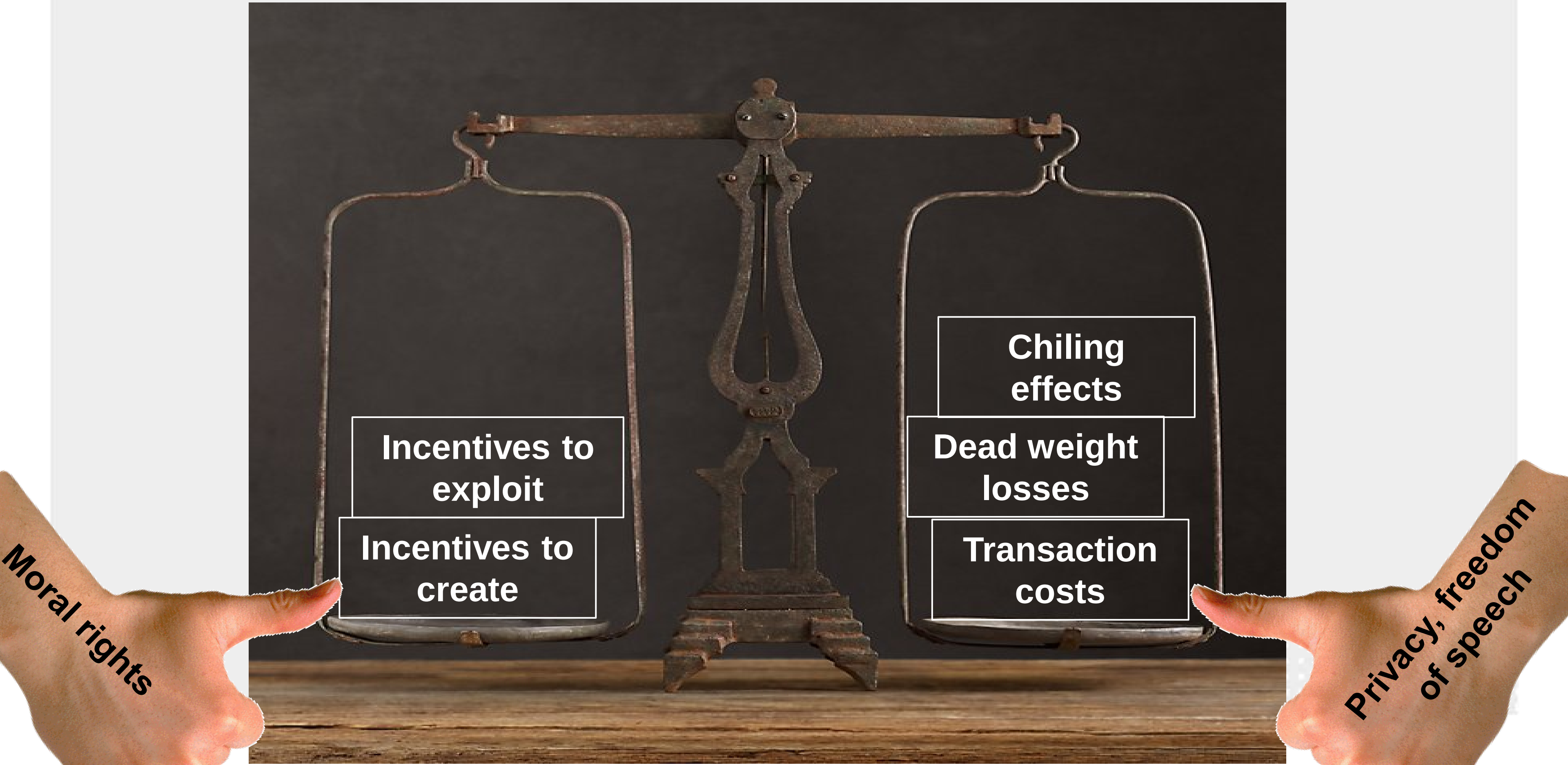
→ Defining optimum scope of copyright often an empirical question
Optimal copyright ≠ maximum copyright
≠ copyright which maximized creative output

Welfare economic analysis of copyright III

- Exclusive rights justified to control acts that – *as a result of market failure* – 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

- 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

Welfare economic analysis of copyright: a pragmatic approach



Platforms and intermediaries facilitating access to authorised content

Platforms and intermediaries that use hyperlinking & embedding

- Svensson (CJEU C-466/12): ‘Yes, we can!’

Economic perspective:

- ***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

Platforms and intermediaries that use hyperlinking & 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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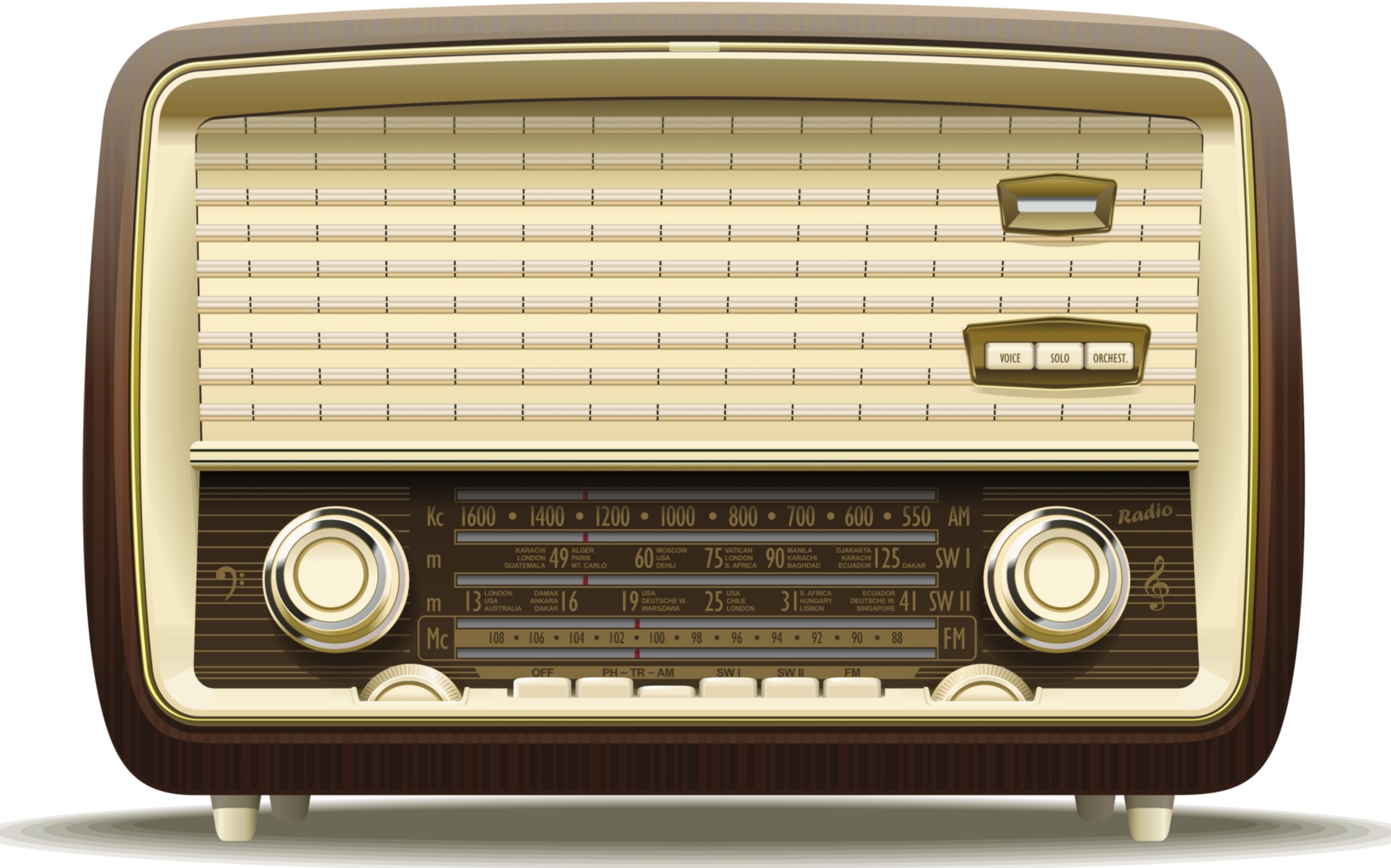
SLAM!
SLAM! NONSTOP
SLAM! THE BOOM ROOM
SLAM! JUIZE
SLAM! HARDSTYLE
ARROW CAZ YOUR HITS, MORE MUSIC
Efteling KIDS RADIO
Nederland.TV
Cookie verklaring
Mobiele versies & apps
Mail ons
Over ons
Volg ons op Facebook
Volg ons op Twitter

- Now imagine **selling** a **technical device**
- Using **preinstalled links**
- **Without any attribution**

- Surely that would create an obvious value gap?

Looks familiar?



Platforms and intermediaries that use hyperlinking & embedding

- Linking may increase demand for the linked source, the linking source or both

- No welfare economic grounds for intervention: no ‘jealousy tax’

- Embedding may be different but:
  - Most embedding probably okay → transaction costs of licensing prohibitive
  - Opt-out or technical solution?

- Same argument would apply to retransmission of free-to-air broadcast within reception area (or in hotel!)
  - Different if combined with systematic time shifting & skipping ads
  - Abolishing retransmission fees would affect the financial agreements upstream

Platforms and intermediaries facilitating access to <u>un</u>authorised content

Platforms and intermediaries facilitating access to <u>un</u>authorised content

- A plethora of culprits: Internet Service Providers, websites, website hosts, search engines, software, end users…
- …and a plethora of interventions: taking down sites, blocking access to sites, disconnecting internet users, removing apps, prosecuting end users, prosecuting sites, filtering search results, …

- In case of linking/embedding, Bestwater (C-348/13), GS Media (C-160/15):

  It depends on who you are and what you know
- Proposal DSM Directive (593, Art. 13/1): Information society service providers (…) shall, (…) take measures to ensure the functioning of agreements concluded with rightholders (…). Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate.

What can economics say about all this?

Platforms and intermediaries facilitating access to unauthorised content

- ‘Liability’ is not an economic concept, but ‘externality’ is: if a party benefits from facilitating infringement, this may be construed as a *positive externality*, and internalization may enhance welfare: ‘make them stop, or grab them by the value’.

- However:
  - After 17 years of online piracy, the effects are still ambiguous, in particular the dynamic effects
  - Effectiveness of many enforcement measures highly doubtful
  - Collateral damage of enforcement potentially large: chilling effects on consumers and platforms, false positives, consumers moving underground or loosing interest
  - Obligation to install ‘measures’ may unevenly burden small intermediaries
  - Transactions costs of blocking, filtering, prosecution
  - Detrimental effects on other norms, such as privacy, freedom of expression and freedom to conduct a business (thumbing the scale)

To conclude

- From a welfare economic perspective, copyright in general and intermediary liability 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 jealousy tax
  - → No competition policy through copyright
- Linking to authorized content or transmission of it gives no economic grounds for intervention, embedding might in some cases
- Enabling access to unauthorized material may be cause for intervention/ liability/ internalizing externalities, but empirical evidence has a role to play here: what are the wider costs and benefits of infringement vs. enforcement? Is enforcement effective? What are the chilling effects?

Thank you for your attention

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