Who owns the broadcasting archives?

Unravelling copyright ownership of broadcast content

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1 Introduction

The Netherlands Institute for Sound and Vision (NISV) is one of the largest audio-visual archives in the Netherlands. Its collections include a variety of different materials, ranging from images to audio-visual material. On one hand, NISV is the *bedrijfsarchief* (programme archive for the public broadcasting organisations) for the public service broadcasters (PSBs). In this role, it archives the programmes of the PSBs for their cultural value and to ensure the re-use of broadcasting material by media professionals.[1] On the other hand, NISV is also tasked with providing access to its material to the public. It is not only a cultural historical-archive with a museum, but also actively involved in education.[2] These two roles are increasingly linked in practice: broadcasts are part of the Dutch cultural heritage after all.

In the 2016-2020 multi-annual policy plan of the public broadcasting organisation (NPO) for the Ministry of Culture[3], a schedule was included that allowed NISV to make large sections of the broadcasting archive not only available to professionals but also the public at large. As a result and based on the Agreement, NISV is seeking to make parts of its broadcasting archive, especially broadcasts older than 25 years, accessible online on a large scale.

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1 The broadcasting archive as a bedrijfsarchief (programme archive for the public broadcasting organisations) is only a professional function. Providing broader access to the material collected this way however is deemed desirable under NISV's functions as a museum more broadly.

2 J. Breemen, V. Breemen and B. Hugenholtz, '*Digitalisering van audiovisueel erfgoed*: *Naar een wettelijke publieke taak – Onderzoek in opdracht van het Nederlands Instituut voor Beeld en Geluid*', 2012, (available at: http://www.ivir.nl/publicaties/download/Publieke_Taak_Beeld_en_Geluid.pdf, last accessed: 23/2/17), p. 16. NISV was created by the mergers of the Film- en Beelbandarchief (FBA), Nederlands Filmmuseum (NFM), Film- en Fotoarchief (FFA) as well as the Audio-Visueel Archief (AVA) – some of which had missions which included making works as widely accessible as possible and/ or stimulate research and education. These tasks have now been taken on by NISV. For a detailed analysis of these takes and their legal backing, please see Breemen et al.

3 NPO, '*Het publiek voorop – Concessiebeleidsplan 2016-2020*', 2016 (available at: https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/rapporten/2015/06/01/het-publiek-voorop-concessiebeleidsplan-2016-2020/het-publiek-voorop-concessiebeleidsplan-2016-2020.pdf, last accessed 23/2/17), p. 31. The content of the *Concessiebeleidsplan* is discussed in more detail below.

While the *Concessiebeleidsplan* is clear on which broadcasts are to be made available by the NISV, it does not provide a direct path to implement the agreement in practice. In particular, most of the material in question is still under copyright protection. This causes a set of specific issues that are not addressed by the framework agreement. This report seeks to facilitate the process by examining the copyright-relevant aspects of making broadcasts available online.

1.1 Copyright and making broadcasts accessible online

NISV aims to make its archival materials available online for the broader public, including educational establishments, researchers but also commercial users. At this stage, it has successfully digitised significant proportions of its analogue material; not least in the course of the mass digitisation project Images for the Future.[4] However, further digitisation is required. In addition, even when the material is available in digital format, it is often not possible make it accessible online. Copyright law in particular dictates that permissions from the right holders are required. This requirement is based on the exclusive rights granted to right holders and the absence of applicable exceptions.

Copyright protected works benefit from two relevant rights under EU law: the right to reproduction and the right to communicate a work to the public. Under article 2 of the Information Society Directive (InfoSoc Directive), right holders control the:

> *'direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part [...].'*[5]

In other words: if a third party wishes to copy a work, she needs permission from the right holder to do so. At the same time, the definition of reproduction as provided by EU law would cover technological uses of a work: every time a work is for example opened on a computer, a copy is stored in its RAM. However, this situation is specifically excluded from the coverage of the exclusive right. Temporary reproductions which are a result of technological processes are explicitly exempted,[6] though this exception does not extend to digitisation as such.

4 For more information, see: *Beelden voor de Toekomst* (http://www.beeldenvoordetoekomst.nl/, last accessed 23/2/17).

5 Article 2 Directive on the Harmonisation of Certain aspects of Copyright and Related Rights in the Information Society (Directive 2001/29/EC) (InfoSoc Directive).

6 Article 5(1) InfoSoc Directive.

Some digitisation efforts are permissible under a separate exception. Article 5(2 (c) InfoSoc Directive states that specific reproductions are permitted by

> *'publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage'.*[7]

NISV meets these requirements based on its role as an archive, educational public interest mission and its lack of commercial aim. The issue is however that the exception only applies to *specific* reproductions and therefore not large-scale digitisation projects. As a result, this exception cannot by itself be relied upon by NISV to digitise its material on a large scale. Therefore, using a work electronically does not require a permission from the right holder but large scale digitisation projects do.

In addition to the reproduction right, right holders are also granted the right to

> *'authorise or prohibit any communication to the public [...] 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 a time individually chosen by them.'*[8]

This means that making available already digitised works on the Internet in the way intended by NISV is also a restricted act under the law. EU law provides that member states can permit[9] libraries and archives to make the reproduction created under article 5(2)(c) available via dedicated terminals for the purpose of research or private study.[10] The main limitation here is not the purpose – it would be in line with NISV's aims – but the requirement for dedicated terminals. This condition means that works can only be made available on the Intranet at the premises of the institute, not the open Internet. It is therefore too narrow for what NISV aims to do.[11]

In summary, two permissions are required to digitise and make broadcasts accessible online: one for the reproduction of works, e.g. digitisation, and another one for the making available of the work to the public. In other words, while the *Concessiebeleidsplan* allows NISV to make its archival material available online, the lack of a copyright exception means that this can only be done by licensing the works the institute wants to provide online public access to. Acquiring a license is in

7 Article 5(2)(c) InfoSoc Directive.

8 Article 3(1) and art. 3(2) InfoSoc Directive.

9 This exception is not mandatory but optional.

10 Article 5(3)(n) InfoSoc Directive.

11 Technische Universität Darmstadt v Eugen Ulmer KG GRUR 1078 – *Elektronische Leseplätze*, at 1081; L. Guibault, 'Why Cherry-Picking Never Leads to Harmonisation: The Case of Limitations on Copyright under Directive 2001/29/EC', *JIPITEC*, 2010, Vol. 1, No. 2, p. 60.

practice a complicated process, given the nature and amount of material and right owners involved.

First, the archival material covered by this agreement contains both radio and TV broadcasts. While these seem like one work, they are not in the context of copyright law. From a copyright point of view, each one of them contains a range of distinct works and subject matter, each one with potentially different owners. Furthermore, the rights in works and other subject matter are commonly transferred, meaning that the ownership as defined by the law is only indicative of who owns the rights in practice. As a result, each broadcast is indeed highly complex to assess and license.

The analysis is further complicated by age of the broadcasts that are relevant here. The broadcasting archive covers material from 1920s until today.[12] During this time, neither the law nor industry practices have been static. As the law changes, so do ownership patterns. Finally, the amount of material NISV seeks to make available online means that any licensing solution has to be scalable.[13] It is not feasible that agreements are made with each right holder for each work as the cost of doing so would be prohibitive.

1.2 Aim of this Report

This report aims to provide the required background information to streamline the licensing process. To license material successfully, a series of questions has to be answered.

- What are the copyright and neighbouring right relevant aspects of a broadcast and how can these be identified?
- Has the protection already expired or is the permission of the right holder required?
- Who owns the rights in practice?

Answering these questions requires a combination of legal and empirical analysis. On one hand, what is protected, who owns it and for how long is dependent on copyright law as such. The analysis here has to be essentially doctrinal, evaluating the copyright provisions as they apply to material held by NISV. On the other hand, rights ownership is not a purely legal issue. Broadcasts are made in a commercial setting, aimed at allowing the final product to be commercially exploited efficiently.

12 Another factor is that copyright works and other subject matter protected under neighbouring rights need to be distinguished. However, this is explained in detail in section 2.2.

13 The size of the archive and the nature of the material is discussed in detail below, see section 2, in particular section 2.1. The Archive from a Concessiebeleidsplan Point of View.

As a result, the industry has developed common contractual practices over time which leads to the concentration of rights ownership in comparatively few hands. While the underlying rules depend on copyright law, identifying the nature and importance of industry practice necessitates an empirical analysis in addition to a doctrinal one.

1.3 Methodology

The scope of analysis and methodology used is shaped by the task set for NISV in the *Concessiebeleidsplan*. It essentially defines the type of material that is to be made available online in two distinct ways. First, the scope of law to be covered is limited to EU and especially Dutch law, including both legislation and case law. It is not necessary to look beyond these as they are the only ones governing the archival material and the actions of NISV in the context of this project. After all, only material of Dutch PSBs is covered by the plan. The legal context itself will be analysed relying on doctrinal research. For this purpose, the relevant copyright provisions and case law will be interpreted to provide guidance on the activities to be carried out.

Secondly, the analysis has to cover the full period in which copyright may be relevant. The *Concessiebeleidsplan* is based on intervals counted in years from the date of broadcasting. This means on one hand that it does not provide for a fixed starting point. While broadcasting only became a relevant technology in 1919, old broadcasts can draw on even older works. The analysis therefore will have to cover materials for their full term of protection. On the other hand, the agreement does also not provide a fixed endpoint for the analysis. The end date is moving forward as time moves on. Therefore, the analysis will have to cover current law as well.

A purely chronological approach is not viable from a legal perspective. In particular, some legal changes can be prospective while others are not. For example, the making available right is comparatively new. However, works created before its introduction also benefit from it prospectively, e.g. as of the date of adoption of the new right. This means in practice that the scope of protection has to be analysed using today's rules. However, contractual arrangements reflect the intention of the parties at the time of concluding the contract and therefore must be analysed based on the law as it was in effect at the time of the agreement. Changes in the law do not tend to be prospective in the same way. As a result, relying only on the modern interpretation of the law may cloud differences over time. To get a more realistic image, it is instead necessary to chronologically trace changes in the law and its interpretation as they relate to rights ownership and transfers. There therefore has to be a dual approach to the doctrinal analysis. While those aspects affecting the scope of copyright and neighbouring rights have to be interpreted according to

modern law, the rules on ownership and transfers have to be analysed using a historical perspective.

Another difference between the scope of protection and ownership is the existence of competing norms. The scope of protection relies on one set of rules.[14] There is only one set of rules to assess the nature of a work and its term of protection for instance. On the other hand, there are several alternative mechanisms which shape the rights ownership. For example, a copyright work is by default owned by its author. However, the copyright act alone contains four distinct rules on authorship, depending on the circumstances in which the work was made. Determining which one is relevant at a particular point in time within a specific sector cannot be achieved by a doctrinal analysis alone. Practical relevance in this context can only be established empirically. In other words, while the scope of protection can be analysed using only doctrinal research, the practical ownership necessitates an empirical component in addition to the doctrinal one. The approach adopted here is to use a method called process-tracing to link the doctrinal analysis to empirical evidence.

1.3.1 The Theory of Process-Tracing

This report will use process-tracing to examine the relevance of legal mechanisms on the ownership of rights for the material held by NISV. Process-tracing relies on the detailed analysis of a phenomenon over time, linking the description to expected observable patterns. It is therefore presumed that the legal environment will be reflected in the practical copyright ownership, for example the details of the contractual relationship but also in the treatment of copyright contributors. In other words, this report is based on the assumption that creators and commercial intermediaries are aware of the legal environment in which they operate and that their activities are actively shaped by it.

In process-tracing, several alternative explanations are examined at the same time. The aim is to identify which one is the most likely explanation in the light of the available empirical evidence. To illustrate the logic of process-tracing, consider the example of a puddle on the floor. It is not definitely known what has caused the puddle but there are two rival explanations it: 1) somebody spilled their drink and 2) it has rained. Using process-tracing, it is possible to identify the most likely cause. To do this, the different hypotheses are tested against the empirical evidence but the value of the empirical evidence is not static: it depends on the context. In particular, process-tracing conceptualises the link between an indicator and its relevance for testing a hypothesis according to the strength of the test.

14 These rules very between the type of work, e.g. copyright works or neighbouring rights.

	Type of Test			
	Straw-in-the-Wind Test	**Hoop Test**	**Smoking-Gun Test**	**Double Decisive**
Effect of passed test on hypothesis	Affirmation	Affirmation	Confirmation	Confirmation
Effect of failed test on hypothesis	Weakened	Elimination	Weakened	Elimination
Effect of passed test on rival hypothesis	Minor Weakening	Weakening	Significantly Weakened	Elimination
Effect of failed test on rival hypothesis	Minor Strengthening	strengthening	Significantly Strengthened	Significantly Strengthened

Figure 1: Summary of the process-tracing tests for causal inference.[15]

Process-tracing distinguishes between four types of tests that can be conducted. The first one is the weakest possible test, a so-called 'straw in the wind' test. In our example, one possible straw test would be the presence of people. If the puddle is an area where few people walk by, then the puddle is less likely to be caused by a person spilling their drink. In this situation, observing the expected empirical pattern makes a hypothesis more likely to be correct. The fewer people there are, the less likely it is that one has spilled a drink. In other words, the test affirms the hypothesis but does not confirm it. On the other hand, when the test is failed, then the hypothesis is weakened but not disproven. The test is not decisive: after all, a single person is enough to actually cause a spill. In addition, failing a test does not make an alternative explanation less likely. It is not more likely to have rained just because the area is frequented by few people.

A stronger version of a 'straw in the wind' test is the 'smoking gun' test. Going back to our example, finding an open and empty water bottle next to the puddle would count as a smoking gun. It is highly likely that dropping the bottle has caused the puddle. The hypothesis is confirmed when the test is passed. In addition, it weakens the explanation that rain has caused the puddle. This does not mean that rain did not play a role as such but its relevance is significantly less likely. Passing the smoking gun test substantially weakens alternative explanations even though

15 Based on D. Collier, 'Understanding Process Tracing, *PS – Political Science and Politics*', 2011, Vol. 44, No. 04, 2011, p. 825.

they are not ruled out as such. Failing a smoking gun test only weakens the hypothesis rather than actually disprove it. The absence of a bottle makes the explanation of a spilled drink less likely but not impossible.

The third test is the 'hoop' test. Here, the evidence tests a necessary condition and therefore the empirical pattern has to be present: the hypothesis has to jump through this hoop. Let us look at the location of the puddle. For rain to be an explanation, the puddle has to be outside rather than inside of a building. After all, it does not rain indoors. Passing a hoop test therefore affirms a hypothesis but does again not confirm it. Other explanations can still lead to the same result although this is less likely. After all, a bottle of water can be dropped inside and outside a building. Failing a hoop test has significant implications for the hypothesis because failing to 'jump through this hoop' means that the hypothesised mechanisms cannot be an explanation. If the puddle is inside, then rain cannot be an explanation. In other words, the hoop test can eliminate a hypothesis but cannot prove it.

The strongest possible test is a double decisive test. Here, passing the test confirms the hypothesis while at the same time eliminates alternatives. In most cases, this type of test is actually a combination of tests. For example, finding a bottle next to the puddle and the rest of the pavement being dry would be a double decisive test. The bottle confirms the hypothesis of the spilled drink while the dry pavement excludes our alternative explanation of rain. At the same time, failing a double decisive significantly weakens the hypothesis and strengthens the alternative explanations. A wet pavement makes rain a more likely explanation than a spilled drink.

In the case of this report, the phenomena to be examined are the legal mechanisms that affect the rights ownership of the material held by NISV. The method requires first a detailed doctrinal analysis which traces how the mechanisms have evolved over time, in particular paying attention to major turning points. In addition, the doctrinal analysis is used to identify empirical indicators that can be expected to show changes if the particular mechanisms did have an influence in practice. In other words, the doctrinal analysis will generate hypotheses on both the available data points that can act as a proxy as well as how likely and in which way the indicator would be expected to change at any given point in time.

1.3.2 The datasets[16]

This project relies on two distinct empirical datasets. The first one is the metadata of the full public service broadcasting archive. This dataset provides the information held in the NISV catalogue on each item in its public service broadcasting archive. This includes not only the nature of the broadcast or the broadcasting year but also copyright relevant aspects such as information on the different categories of contributors, for example the producer, composers, text writers and other authors.

In addition to the catalogue data, the analysis will also draw on the Schoon Schip dataset. The Schoon Schip project aimed to get an insight into who owns the rights in broadcasting material. The information was collected by researchers who went to the broadcasters' production archives and analysed the rights ownership information following a standardised pattern.

The dataset includes information in three areas. First, it identifies the production in question, namely the season, as well the broadcaster. The name of the broadcaster is the broadcaster who has actually done the first broadcast rather than all broadcasters involved in the production process. Secondly, the dataset contains information on the involved partners. It distinguishes between different categories of partners, in particular producer, co-producer[17], maker[18], commissioner and financier. Thirdly, the data provides information on who owns the rights or can license specific uses. The scope of rights is defined by four interrelated data points: the type of use, the purpose of the use, the territory covered, as well as the timeframe. For each of them, the specific right holder or person able to provide the required license[19] is listed.

It should be noted that the Schoon Schip dataset focuses entirely on TV productions. The dataset does not cover radio broadcasts and therefore omits a significant proportion of the material under examination here.

To summarise, the following specific indicators are currently available and will be used in this report:

16 The datasets are available on request from the author.

17 Co-producers are named when more than one production companies have a similar position.

18 The original dataset does include individual authors if they are considered right holders with an ID letter to characterise their role in the production, for example 'r' for director.

19 It should be noted here that in terms of rights, the field 'licentiegever' is not necessarily the right holder but simply the person who can provide permission. This includes those authorised to exercise the rights in representation of the actual right holder and split the remuneration following the use.

Table 1: The available indicators, based on the Schoon Schip and Catalogue metadata datasets.

Schoon Schip	Catalogue Metadata
Data level: one case = one season	Data Level: one case = one individual item
Type of Broadcast: radio or TV	
Year of the Broadcast	
Name of the Broadcaster(s)	
Presence of a Contract	NPO classification of the broadcast
Right Holders[a]	Type of contributor role filled at season level
Role of the Right Holder	Type of contributor role filled at item level
Division of rights[b] – Economic rights – Purpose of use – Jurisdiction – Term of assignment	Digital Status

a It is a small number of cases, this also includes the licensor.

b This refers to exclusive rights granted under copyright law. It does refer to remuneration rights which may have been agreed in addition to the copyright provisions. The difference between the two is the addresses. The provisions on the exclusive rights give the broadcaster/ producer the exclusive right to license a particular behaviour restricted by copyright law vis-à-vis a third party. Remuneration rights are focused on the relationship between the broadcaster/ producer and the author. They are not relevant for third parties seeking to license a use restricted by copyright law. They do not legally affect the ownership of the exclusive right as such. However, these are nonetheless discussed below in the context of transfer-based copyright ownership.

1.3.3 Process Tracing and the Value of Empirical Evidence

As outlined above, process-tracing requires that hypotheses are directly related to the empirical evidence. In the context of this report though, the doctrinal analysis cannot be directly translated into the indicators identified above. The main difficulty is that the expectations generated by the doctrinal analysis do not map directly onto the available empirical evidence. In particular, it cannot be guaranteed that other unrelated factors have not influenced the datasets.

In respect to the catalogue data, the issues are mainly related to the imperfect nature of metadata. On one hand, it is not possible to verify that there have not been any data entry errors. On the other hand, technological changes can also have an effect. First, NISV has over the years incorporated a number of different catalogues into their centralized collection management system. This can give rise to

mapping issues. While extensive verification efforts have been carried out at the time and now, the data is unlikely to be without error. It should be noted that known issues of this kind were actively taken into account and remedied when the dataset was extracted for the purpose of this research. Secondly, the quality amount of data can be affected by automatization. NISV is since 2007 directly linked to the broadcasters' production infrastructure and all items are automatically ingested into the digital archive of the institute. The lack of manual intervention is likely to make the available information on contributors more reliable by reducing the potential for individual data entry errors. In summary, the metadata is not perfect.

Two data irregularities have to be noted in particular. First, there are some items which are not classified as radio or TV broadcasts. Overall, this issue affects 4 932 productions, 4 921 of which also do not have a broadcasting year. While this may seem a lot, it is in fact only 0.53% of the total number of productions in the catalogue (929 982 productions). It is therefore not going to bias the analysis significantly and these items were removed from the dataset.

The second specific data issue relates to the broadcasting year. On one hand, not all items have a valid broadcasting year. In these cases, the information is not provided at all. On the other hand, there are productions for which the broadcasting year cannot be correct. Public service broadcasting has been available in the Netherlands from 1924 for radio and 1951 in the case of TV. Nonetheless, there are a small number of items which have a broadcasting year listed prior to these dates. It is not possible in practice to correct the error by adding the correct broadcasting date. As a result, these items were reclassified into the category of unknown broadcasting dates.

In the case of the Schoon Schip project, difficulties arise from the data collection itself. First of all, not all public service broadcasters have participated in the project. As a result, while the dataset can give indications of right ownership patterns, these cannot be definitive. It is especially not possible to determine to what extent the broadcasters are actually representative for all broadcasters over time. Nonetheless, the dataset does include large and small PSBs and therefore is not biased in this way.

Secondly, as is the case with any project involving data collection, the Schoon Schip project had to make a number of methodological choices driven by practical needs which affect how the data has to be interpreted. The Schoon Schip project in particular aimed to collect as much information as possible. As a result, the conscious decision was made to focus on quantity, meaning that those highly complex contracts were set aside for later analysis.[20] These are therefore identified but not analysed and therefore do not form part of the dataset.

20 Nederlands Instituut voor Beeld en Geluid, '*Handleiding behorend bij invoertemplate betreffende Auteursrechteninventarisatie in het kader van het project Schoon Schip*', 2008, (unpublished), p. 2.

Finally, while the information in this dataset is based on the analysis of production contracts collected in the broadcasters' archives, it was supplemented with interviews to cover a broader range of broadcasts. For example, a contract was determined as present even if someone involved in the production process only remembered how the rights were assigned.[21] In practice, this affects older works for which no physical contract exists but it is clear to the broadcaster from the date of production that no external party was involved and therefore all rights have to lie with the broadcaster.

The issues relating to the two available datasets have an effect on the available tests under the process-tracing methodology. In particular, none of the tests will be decisive: rather than confirming or eliminating hypotheses, the evidence here will only be able to affirm or weaken them. In other words, the data is examined for the identified characteristics and the hypothesised changes. If they are not found, this weakens the relevant hypothesis. However, it does not disprove it as such, because none of the available indicators is a direct proxy of the characteristics examined here. At the same time, finding the expected pattern does make a hypothesis more likely but again does not prove it. Instead, it is the accumulation of different independent indicators which provides the overall assessment of a hypothesis. A hypothesis for which the individual expected patterns are evident is more likely to be correct than one for which only part could be verified. It is still a question of probability though and not a definite statement. None of the tests is decisive by itself.

1.4 Outline

This report is divided into 6 distinct parts. The next section examines the scope of protection of the broadcasting archive. It lays the foundations for the rest of the report because it analyses how a broadcast breaks down in terms of copyright works and subject matter protected by neighbouring rights. In addition, the section also identifies the term of protection as well as the likely right holder – assuming that the works were made independently.[22] Overall, this section provides the picture of what needs to be licensed for how long and who will own the rights if no other ownership mechanism has played a role.

Section 3 then examines to what extent it is likely that only the default copyright rules played a role. By doing so, it draws on the ownership information in the

21 Nederlands Instituut voor Beeld en Geluid, '*Handleiding behorend bij invoertemplate betreffende Auteursrechteninventarisatie in het kader van het project Schoon Schip*', p. 5.

22 'Independently' refers to the absence of special circumstances accounted for copyright law. In particular, this means that the creators carried the responsibility for making the work.

Schoon Schip project to show that copyright ownership is crucially dependant on either alternative ownership rules in the law or that rights have been transferred on a large scale. It therefore establishes the need to focus on the mechanisms of rights concentration.

In the following part 4 then, the available mechanisms are examined doctrinally in preparation of the process-tracing. In particular, all mechanisms are examined in detail across time, identifying potential indicators and the observable pattern they should show if the mechanism was relevant. The empirical analysis in section 5 focuses on the process-tracing and concludes with the likelihood that a specific mechanism has been relevant according to the decade under examination. The conclusion at the end will answer the question of which broadcasts can be licensed in a scalable process and which ones are more problematic.

2 The NISV Archive

This section examines the nature of the NISV archive in more detail. Overall, the NISV's broadcasting archive includes 925,050 individual productions, divided into 426,923 radio productions[23] and 498,127 TV productions.[24] While NISV holds the largest collection of broadcasts in the Netherlands, its archive does not include all broadcasts ever made. As a result, the number of productions varies significantly across time. This effect is amplified by the lack of a defined broadcasting year for some productions. For radio broadcasts, this phenomenon affects 47,607 individual productions and therefore 11% of the radio archive. The issue is less pronounced for TV broadcasts where 13,741 (3%) of productions do not have a known data. Nonetheless, the long-term trend is clear: the number of broadcasts increases over time as Figure 2 shows.[25]

2.1 The Archive from a Concessiebeleidsplan Point of View

More important than the overall number of broadcasts is, however, how the content relates to the framework contained in the *Concessiebeleidsplan*. According to this agreement, NISV mainly focuses on TV and radio broadcasts which are older than 25 years. In addition, making younger broadcasts available crucially depends on their categorisation as Figure 3 shows.

23 The first public service radio broadcasts started in 1919.

24 Public service broadcasting on the TV started in 1951.

25 Given this uncertainty, it is more appropriate to rely on statistical methods to reduce the impact of these accidental rather than systemic fluctuations. In this report, the choice was made to trace the overall distribution across time relying on rolling medians based on a 5 year interval instead. While this approach strengthens the overall trend and reduces the impact of incidental variations, the disadvantage is that the first and final two years are lost due to the methodology. C. Feinstein and M. Thomas, Making History Count – A primer in quantitative methods for historians (Cambridge: Cambridge University Press, 2002), p. 22-25.

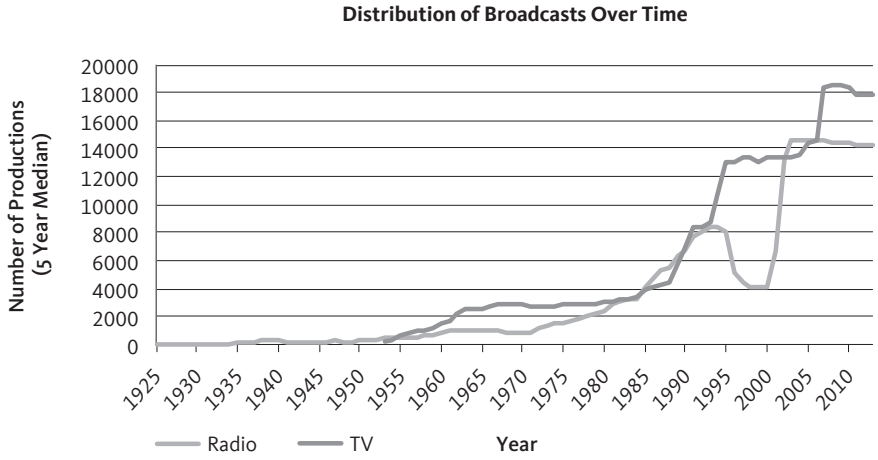


Figure 2: The distribution of TV and radio broadcasts across time.[26]

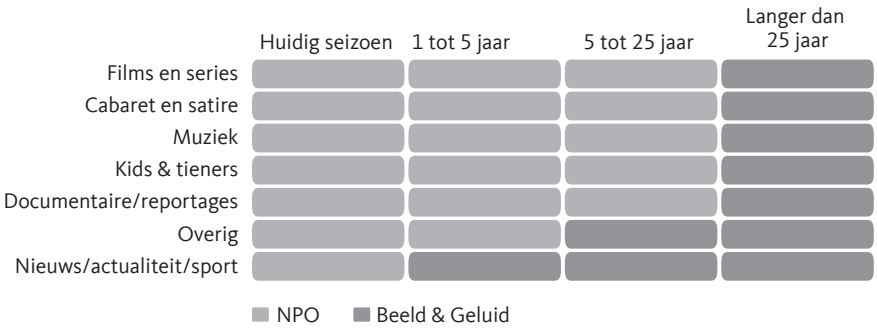


Figure 3: Agreement between NPO and NISV on making broadcasts available online.[27]

To assess the scope of broadcasts falling within the remit of NISV, the catalogue data has been grouped according to the NPO genre appearing in the *Concessie-beleidsplan*. Most of these genres match the catalogue metadata terminology directly. Only two categories needed amendments. First, the category 'other' includes items which could not be classified ('unknown'), advertisements and radio

26 In this method, the timeframe is divided into rolling 5 year intervals (for example: 1920-1925, 1921-1916, 1922-1927). For each of these intervals, the median is calculated and tracked. The choice was made to rely on the median and not the mean because of the sensitivity of the latter to outliers which has the potential to unduly impact on the results. In the absence of outliers, the mean and median are identical or at least close.

27 NPO, '*Het publiek voorop – Concessiebeleidsplan 2016-2020*', p. 31.

plays in addition to what the metadata already classified in this group. Secondly, while the terms 'news', 'current events' and 'sports' are all used as these in the catalogue, they were grouped together into one category to reflect the NPO-NISV framework.

2.1.1 The Radio Archive in relation to the NPO-NISV Framework

In the case of radio broadcasts, it is clear that by far the largest NPO category is 'other'. It covers more than half of the radio broadcasts in the archive (55%). This is followed by documentaries (21%) and music (20%). The remaining categories only play a minor role, all of which are 2% or lower.

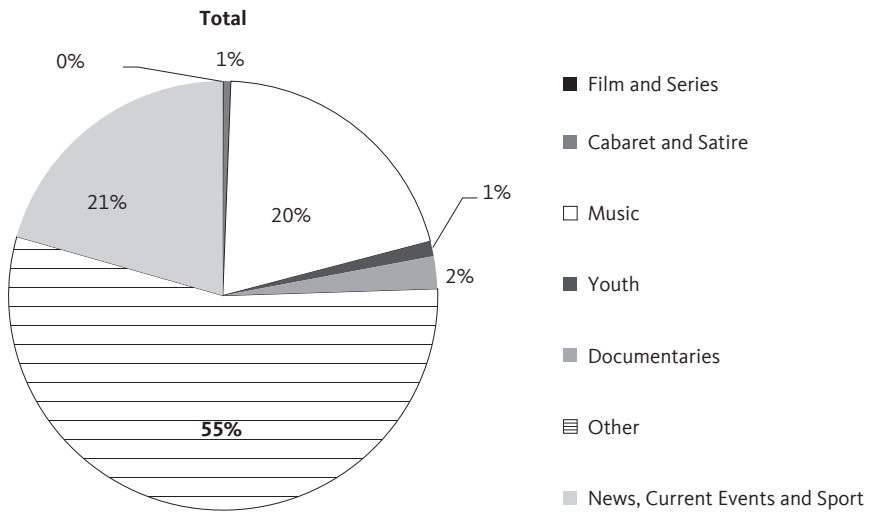


Figure 4: The share of NPO categories for radio broadcasts.

The second insight relates to the timeframes into which the different types of radio broadcasts fall.

Table 2: The number of radio broadcasts according to the Concessiebeleidsplan's scheme.

NPO Category	less than 1 year old	1-5 years old	6-25 years old	older than 25 years	Year Unknown	Total
Film and Series[a]	0	0	4	100	3	107
Cabaret and Satire	89	164	932	793	473	2451
Music	25680	23218	34376	2541	956	86771
Youth	0	0	3326	1130	369	4825
Documentaries	208	552	5999	2765	892	10416
Other	7004	22730	107887	64151	32769	234541
News, Current Events and Sport	6063	14838	47573	7193	12145	87812

a In practice, this category only refers to radio broadcasts that were aired in instalments.

First, it needs to be noticed that a significant number of broadcasts do not have a broadcasting year attached to them (11% of the total number of radio broadcasts). This means they cannot be readily classified according to the framework and will have to be either individually discussed or be presumed to belong into one particular category.

Secondly, 36% of all radio broadcasts currently in the archive fall into the remit of the NPO and therefore the broadcasters. Most of these relate to music which is not surprising given the emphasis that radio places on it. It is interesting though that the impact of the other categories deemed to have the longest commercial relevance (namely 'Film/ Series', 'Cabaret/ Satire', 'Music', 'Youth' and 'Documentaries') only make up 22% of the total number of broadcasts in the archive. This number is only marginally higher (25%) when only those broadcasts are considered for which the year is known. In addition, the music related broadcasts make up 82% of these commercially important works (23% of all radio broadcasts for which the year is known) and therefore the overwhelming majority.

On the other hand, a majority of 58% of all radio broadcasts within the archive fall within the remit of NISV. This rises to 66% when only those broadcasts for which the broadcasting year is known are considered. The largest proportion of these fall into the category 'other'. This is followed by 'News/ Current Events and Sport' which

have a short commercial life and therefore fall into NISV's remit already one year after the broadcasting. In other words, NISV is permitted to make a large majority of the radio broadcasts in its archive accessible online under the agreed framework in the *Concessiebeleidsplan*.

2.1.2 The TV Archive in relation to the NPO-NISV Framework

As with radio broadcasts, the largest NPO category represented in the TV broadcasting archive is 'other' with 45% of the total number of broadcasts. This is followed by 'News/ Current Events and Sport' (30%). This means that the most common categories are the same ones as for radio broadcasts. However, the real difference is status of music. While music plays a major role for radio broadcasts, it only constitutes 2% of the TV broadcasts. Only 'Film and Series' as well as 'Cabaret/ Satire' are smaller (1% each). Instead, a larger proportion of the archive is relevant for 'Youth' (11%).

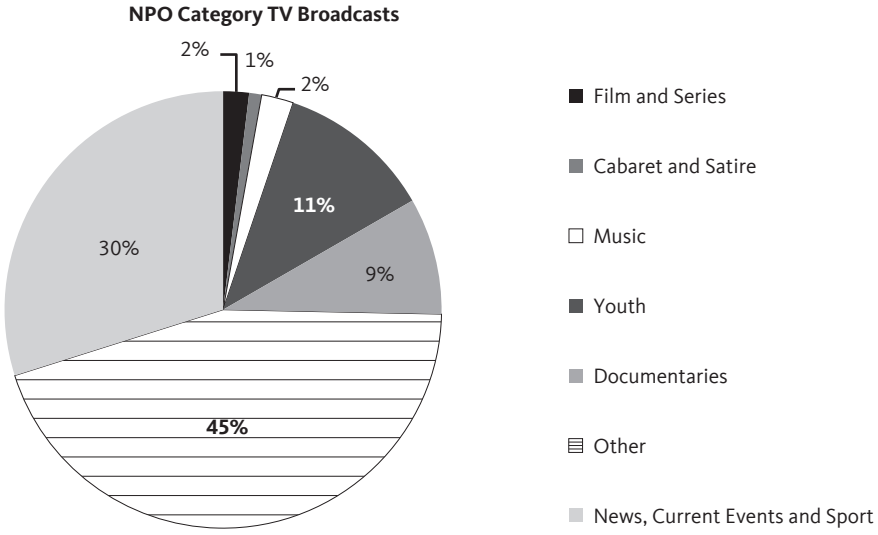


Figure 5: The share NPO categories for TV broadcasts.

The structure of the TV archive differs from the radio one when the age of the material is also taken into consideration. First of all, the number of broadcasts for which no year is known is only 3% and therefore significantly smaller than for radio broadcasts. This means that the overwhelming majority of TV broadcasts can be analysed in the context of the NPO framework.

Table 3: The number of TV broadcasts according to the Concessiebeleidsplan's scheme.

NPO Category	less than 1 year old	1-5 years old	6-25 years old	older than 25 years	Year Unknown	Total
Film and Series	468	974	5451	2525	105	9523
Cabaret and Satire	204	576	3082	707	25	4594
Music	733	1761	5919	3153	207	11773
Youth	5682	12136	28698	9385	1290	57191
Documentaries	3388	6898	24243	8131	389	43049
Other	6534	18068	139497	52422	6656	223177
News, Current Events and Sport	15919	31331	67269	29232	5068	148819
Total	32928	71744	274159	105555	13740	498126

Secondly, 31% of the overall TV broadcasting archive is subject to the NPO prerogative to make them accessible online. Within this group, the most important category is TV broadcasts aimed at young people ('Young') which by itself already accounts for 11% of the TV broadcasts. The second largest category is 'Documentaries' with 9%. Most notably, these two categories alone already cover 80% of the relevant broadcasts.

Nonetheless, the majority of TV broadcasts do fall into the remit of NISV: 69% of the total and 71% of the TV broadcasts for which the year is known. This is a larger share of the archive than for radio broadcasts, explained mainly by the smaller proportion of unclassified broadcasts as well as the higher percentage of older ones (21% are older than 25 years old). As with radio broadcasts, most of these are within the categories not deemed commercially important by the NPO, namely the categories 'other' and well as 'News/ Current Events and Sports'.

2.2 Archive from a copyright point of view

To license broadcasts successfully, it is first necessary to identify what needs to be licensed. This forms the focus of this section: it discusses NISV's archival materials from a copyright point of view. In the framework agreement, a broadcast is treated as a unitary work: a TV drama, for example, is one item to be classified according to

its rule. However, this is not how copyright law conceptualises it. Instead, a TV drama is essentially a combination of distinct copyright-relevant items, each subject to its own rules. Given this complexity, it is necessary to take a step back.

Let us take the example of feature length drama which is aired on TV, a copy of which is held in the archive. When we look at it, we can see that several distinct processes have to be completed before it has reached the archive. First, the program itself has to be made, meaning that its content – here the storyline, script, costumes, etc. – have to be written and made. In essence, the idea is turned into the materials required to make it real. After this underlying work is done, someone has to perform the work in a way that the cameras can capture it. Thirdly, the performances are being recorded (or fixed) on some kind of medium. This can be any storage device, for example a DVD or a hard drive. Finally, the recording is broadcast to the audience all across the country. In practice, each of these stages creates its own layer of protection, however, their nature varies significantly.

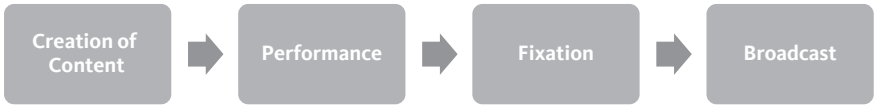


Figure 6: The four stages of producing a broadcast.

In general, copyright contains two sets of distinct groups of works, each with its own rationale. The first group are the original expressions of an author, such as a novel or a film work. These are created at stage one of the production process and are protected by copyright as defined in the 1912 Auteurswet. Separate from this are the so-called neighbouring rights. These include performances, phonograms (sound recordings) and broadcasts which are protected by the 1993 Wet op de Naburige Rechten. They are made at the later stages of the production process. While copyright works are protected for their originality in the sense that they are the author's own expression, neighbouring rights gain protection to facilitate the financial investment they require.

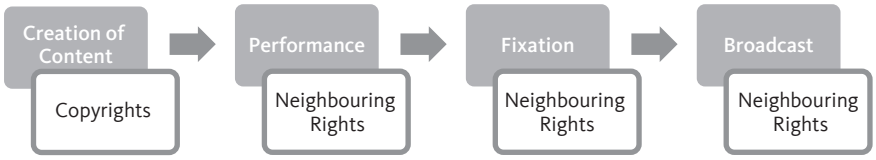


Figure 7: The four stages of producing a broadcast, including the type of work and subject matter produced.

The following section examines each of the four stages and how they relate to the materials in question here. In the first part, the focus is on the actual content. The second part analyses the performances incorporated in the work. The third layer focuses on the fixation of the work. Finally, the transmission and its protection is discussed. The

doctrinal analysis in this part focuses on current law because it determines the scope of protection on all still protected works and other subject matter, as mentioned before.

2.2.1 Layer 1: The Content as Copyright Works

Both radio and TV broadcasts are based on some kind of preparation. Content will be protected by copyright rather than neighbouring rights. Copyright law protects the creative work of authors rather than the financial investment which underlies the protection of neighbouring rights. The protection focuses on the expression of the author: copyright protects the expression of the author as long as the work is his own intellectual creation. In other words, copyright only protects an author's expression, but not ideas as such. As Spoor et al point out, no matter how innovative an idea is, it is not protected by copyright.[28] Where the line between idea and expression has to be drawn is defined by the originality threshold.

The Originality Threshold

To benefit from copyright protection, a work has to meet the minimum originality threshold. This is important because not all of the material held in the archives will necessarily meet this requirement in practice, as the following discussions will demonstrate. In these cases, licenses for online are not required.

The originality threshold has been harmonised in recent years at EU level by the CJEU. It applies to all copyright works covered in the InfoSoc Directive[29] and therefore also all of the copyright works discussed below. The court has interpreted the term originality in Infopaq (explicitly confirmed later on, for example in *Softwarová*.[30]):

> *'it is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve as a result an intellectual creation.'*[31]

This means in practice that a work has to reflect the creative choices made by the author when he created the work. However, applying the standard in practice remains up to the member states.

28 J. Spoor, D. Verkade and D. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer, 2005, p. 70. This is also referred to as the idea-expression dichotomy.

29 *Infopaq International A/S v Danske Dagblades Forening* (Case-05/08) [2009] OJ C 220/7; *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury* (Case C-393/09) [2010] OJ C 63/8, para. 36.

30 *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury* (Case C-393/09) [2010] OJ C 63/8, para. 45.

31 *Infopaq International A/S v Danske Dagblades Forening* (Case-05/08), para. 45.

While the Auteurswet does not include an explicit originality criterion, the standard has been developed in the case law. The threshold is the same as at EU level, although the terminology varies.[32] In general, a work under copyright has to reflect the own, original imprint of the author.[33] This means in practice that the work has to reflect creative choices made by the author.[34] This is the case when own ideas are combined with pre-existing things, such as information, theories or styles.[35] The minimum standard was further defined in the *Endstra* case which held that it essentially excludes works which are so common as to not show any creative work.[36] One way to think about it is to follow Spoor et al's assertion that courts distinguish between objective and subjective characteristics. Objective characteristics are facts and features which are determined by the context rather than the choice of the author. Subjective features on the other hand reflect the preference of the author. Hugenholtz[37] labels this the 'creative space'.[38] It is in these subjective facts that the originality can be found. The required level of originality is comparatively low in practice.[39] In the context of films, examples which are likely to not meet this standard of originality include for example CCTV footage.[40]

The rights in the original work protected by copyright law are owned by the author.[41] If more than one author has created a work together, then they are co-authors and share the copyright. In this context, the importance of style has been increasingly recognised. A ghost-writer writing in his own style but telling the story of someone else in a way to incorporate the special nature is a joint work.[42] In other words, right ownership is based on the creative contribution of the author – whatever form this takes.

32 M. van Eechoud, 'Netherlands', §2[1][b] in P. Geller (ed.), *International copyright law and practice* (New York: Matthew Bender, updated ed.).

33 'Eigen, oorspronkelijk karakter'. Established in HR 29 november 1985, NJ 1987, nr. 12544, paragraph 6; confirmed for example in HR 4 januari 1991, *AMI* 1991, p. 177 (*Van Dale/Romme*),

34 HR 30 mei 2008, ECLI:NL:HR:2008:BC2153 (*Endstra/Nieuw Amsterdam*).

35 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 65.

36 'Daarbuiten valt in elk geval al hetgeen een vorm heeft die zo banaal of triviaal is, dat daarachter geen creatieve arbeid van welke aard ook valt te aan te wijzen.' HR 30 mei 2008, ECLI:NL:HR:2008:BC2153 (*Endstra/Nieuw Amsterdam*), para. 4.5.1.

37 Professor for Intellectual Property at the Institute for Information Law (University of Amsterdam).

38 B. Hugenholtz, 'Works of literature, arts and science' in: B. Hugenholtz, A. Quaedvlieg, D. Visser and M. van Eechoud (eds.), *A century of Dutch copyright law: Auteurswet 1912-2012*, Amsterdam: deLex 2012, p. 43.

39 B. Hugenholtz, 'Works of literature, arts and science', Amsterdam: deLex 2012, p. 44.

40 'Daarnaast worden onder deze term ook begrepen producenten van films die niet oorspronkelijk zijn in de zin van het auteursrecht': MvA II, *Kamerstukken II* 1993/94, 23 247, nr. 5, p. 27; 'Auteurswet', § 7a, para. 2b in P. Geerts and D. Visser (eds.), *Tekst & Commentaar Intellectuele Eigendom* (Wolters Kluwer, 2016, 5th ed.).

41 Deviations from this rule are discussed below, in particular part 4. Ownership by Third Parties: Doctrinal Analysis and Process-Tracing.

42 S. Gerbrandy, *Kort commentaar op de Auteurswet 1912 – Commentaire de la loi néerlandaise sur le droit d'auteur*, Arnhem: Gouda Quint 1988, p. 335.

The content of radio and TV broadcasts often includes the creative input of a large number of authors in a many different ways. Each one of these can give rise to its own or shared copyrights, depending on the contribution that was made. To untangle this complexity, the following section will analyse the broadcasting content from a copyright angle.

Content and Copyright

Overall, the content on the broadcast can be divided into up to six sub-groups: recurring features, pre-existing works, news, spoken words, music and, in the case of TV broadcasts, the moving images. Each of these can take a variety of different shapes, each with its own or overlapping authors. Which particular categories are relevant for a particular broadcast depends on the production in question: the assessment has to be case-specific. The analysis will now focus on these areas separately.

The first layer which needs to be examined for copyright protection is the underlying idea or narrative. A narrative or storyline often has elements which are common within a certain genre, such as the poor worker coming into wealth or even the story of Romeo and Juliette. These underlying storyline ideas tend to be very general and do not benefit from copyright protection. Copyright only protects the expression of the author: facts or ideas as such are not protected.[43] However, there are some limits to this. As detail is added, the storyline moves away from being a mere idea towards the expression of the author. The detailed storylines can be protected if they are specific enough and therefore meet the originality threshold described above. In these cases, it is the combination of (common) features which is protected rather than the individual components as such.[44] The line between an idea and an expression cannot be fixed though – it is case dependant.

Following the same reasoning, television formats have been found in the past to be copyrightable as long as their content is elaborated in detail, making it essentially an expression of the author, not merely an idea.[45] Literary[46] and cartoon characters[47] can also be subject to copyright protection. As with plots, copyright protects the combination of features which in their sum make the character recognisable and therefore original as the expression of the author. This includes for example their characteristic posing and stand[48] or their characteristic expression (found in the clothing, body stand, hairdo,

43 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 4-5.

44 Hoge Raad, 16 april 2004, ECLI:NL:HR:2004:AO3162, JOL 2004 (*Verenigd Koninkrijk Castaway Television Productions Limited et al v John de Mol Produkties et al*), para. 8.

45 B. Hugenholtz, 'Works of literature, arts and science', Amsterdam: deLex 2012, p. 45.

46 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 121-122.

47 M. van Eechoud, 'Netherlands', §2[4][b].

48 Rechtbank Almelo 5 oktober 1966, NJ 1967, 385 (*Bambi*).

etc).[49] In other words, it is not the general idea of the character or the type of adventures they experience. In both of these cases, formats and characters, the authors and therefore rights holders are those who have made a creative contribution to the final product.

	Protected under Copyright
Recurring features	Detailed storyline as combination of common themes
	Specific description of a format
	Recognisable, detailed characters which are made up of a combination of specific features

The second set of contributions which can benefit from copyright protection are underlying works. In many cases, the content is based on a pre-existing script, novel, poem or anything similar to that. Now, let us assume that a novel is adapted into a script that actors can then use to bring it to life as part of a radio play. In this case, the item of protection is in the first instance the novel, any adaption of which is copyright infringement without a license.[50] In addition, the script also meets the originality threshold as it is the original expression of its author, here the script writer. In terms of copyright, both the novel and the script are considered two distinct literary works under article 10(1) Aw.[51] Article 10(1) Aw protects all kinds of written works, including novels or poems.[52] It should be noted though that since the script is an adaptation of the novel, the permissions from both authors are required to license the radio play.[53] The same reasoning applies if the final production is an audio-visual work rather than a radio play: the underlying novel and script are subject to copyright and both have to be licensed.

It should be noted here that radio broadcasts were regulated in the 1920s by requiring that all the text had to be published before it could be broadcast, including the news.[54] Even after this, broadcasters were required to submit their programs before the actual broadcast to the regulator to ensure that they followed the policy.[55]

49 HR 13 april 1984, NJ 1984, p. 524.

50 Article 10(2) Aw refers to reproductions in modified form.

51 Article 10(1) Aw.

52 It should be noted here that another protection was available for non-original written works until 1st January 2015, called *geschriftenbescherming*. However, in the context of this report, it is unlikely that this would be relevant.

53 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 132.

54 H. Wijfjes, *Radio onder Restrictie – Overheidsbemoeiing met radioprogramma's 1919-1941*, Amsterdam: Stichting beheer IISG 1988, p. 15.

55 H. Wijfjes, *Radio onder Restrictie – Overheidsbemoeiing met radioprogramma's 1919-1941*, Amsterdam: Stichting beheer IISG 1988, p. 20.

In other words, pre-WWII radio broadcasts do always have an underlying script that needs to be considered.

	Protected under Copyright
Recurring features	Detailed storyline as combination of common themes
	Specific description of a format
	Recognisable, detailed characters which are made up of a combination of specific features
Pre-existing works	Underlying novel etc
	Script, representing the adaptation of the pre-existing work

Another common feature of broadcasts is news reporting. In general, facts are like ideas not subject to copyright protection. News reports can be copyrightable material due to the editing and corrections that go into their production. The program as a whole is also copyrighted based on its structure, carefully selected formulations, and the balanced assembly and grouping of reports. All of these features mean that the work under article 10(2) is original in the sense of copyright – both the individual components and the program as a whole. In this context, it should be noted that NISV cannot rely on the news exception in copyright law. Under article 15 Aw, portions of articles over current economic, political, religious or societal topics can be used by another media outlet. However, this media outlet has to publish news in periodical intervals[56] which NISV does not do. It therefore does not apply to an archive such as NISV and requires a license.

	Protected under Copyright
Recurring features	Detailed storyline as combination of common themes
	Specific description of a format
	Recognisable, detailed characters which are made up of a combination of specific features
Pre-existing works	Underlying novel etc
	Script, representing the adaptation of the pre-existing work
News	Edited and corrected news statements
	News programs as a whole

56 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 227.

While many productions rely on a pre-determined script, this is not always the case. When the spoken words are not based on a script or pre-existing work, then the spoken word here itself is the expression of the author, giving rise to copyright protection.[57] These will be considered a recitation (*mondelinge voordrachten*) under article 10(3) Aw as long as they are original.[58] This category covers all kinds of speeches, ranging from lectures to conference presentations to pleas. Most notably, it can also include news bulletins.[59] This means that even a non-scripted and therefore edited version of news can be subject to protection.[60]

Special attention needs to be paid if the spoken words are in fact conversations, in particular two or more persons talking to each other. In principle, a conversation can be copyright protected if it is original. In this context, original requires that it reflects the conscious and therefore creative choices made by the author.[61] This means in practice that a normal conversation will not be protected. However, more structured ones such as interviews can be. The question of the authorship of interviews deserves particular attention in the context of radio and television broadcasts. Determining who the author is can be difficult as it strongly depends on the facts of the case. Spoor et al point out that both the interviewer and the interviewee should usually be considered joint authors. However, if the interviewer is well prepared, does the editing/adjustment and things to reflect the atmosphere and the interviewee only gives answers which are limited to the objective topic, then only the interviewer should be considered the author. On the other hand, if a well-prepared interviewee gives answers which are reflected word by word in the final product, then the interviewee (and not the interviewer) is the author.[62]

	Protected under Copyright
Recurring features	Detailed storyline as combination of common themes
	Specific description of a format
	Recognisable, detailed characters which are made up of a combination of specific features

57 Nonetheless, when a production is based on a pre-existing script, the actor does not acquire a copyright in his performance but instead a neighbouring right. See section 2.2.2 Performances.

58 Article 10(3) Aw.

59 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 90.

60 Performances are a neighbouring right, see section 2.2.2 Performances.

61 HR 30 mei 2008, ECLI:NL:HR:2008:BC2153 (*Endstra/Nieuw Amsterdam*), para. 4.4 and 4.5.1.

62 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 99.

	Protected under Copyright
Pre-existing works	Underlying novel etc
	Script, representing the adaptation of the pre-existing work
News	Edited and corrected news statements
	News programs as a whole
Spoken Words	Non-script based, spoken communication by an individual
	Structured interviews

Broadcasts do not only contain spoken words but are often combined with music. The musical composition itself is the expression of the composer and the lyrics that of the lyricist/ text writer. Musical works, the combination of the musical composition and the lyrics, are protected by article 10(5).[63] It is irrelevant if the music is electrical, made with a new instrument or technology as long as it can be considered original as defined above.[64] Therefore, if music is included in the broadcast, then these have to be considered for the licensing process.

	Protected under Copyright
Recurring features	Detailed storyline as combination of common themes
	Specific description of a format
	Recognisable, detailed characters which are made up of a combination of specific features
Pre-existing works	Underlying novel etc
	Script, representing the adaptation of the pre-existing work
News	Edited and corrected news statements
	News programs as a whole
Spoken Words	Non-script based, spoken communication by an individual
	Structured interviews
Music	Musical composition and lyrics

63 Article 10(5) Aw.

64 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 101.

All of the copyright works discussed so far apply equally to radio and TV broadcasts. However, a TV broadcast differs from radio broadcasts in that it combines images with sound, in other words it is an audio-visual work. Subject to the originality threshold as it applies to all copyright works, audio-visual works are protected as film works under article 10(10) Aw.

The meaning of this term is further defined under article 45a(1) Aw:

> *'Onder filmwerk wordt verstaan een werk dat bestaat uit een reeks beelden met of zonder geluid, ongeacht de wijze van vastlegging van het werk, indien het is vastgelegd.'*[65]

This definition is technologically neutral and includes any series of images. There is no requirement that a film work has been fixated in a tangible form.[66] It is therefore broad, including for example also a live broadcast,[67] and should be interpreted as such. This definition as a result includes everything from professional films to amateur ones, including feature films, documentaries and cartoon.

	Protected under Copyright
Recurring features	Detailed storyline as combination of common themes
	Specific description of a format
	Recognisable, detailed characters which are made up of a combination of specific features
Pre-existing works	Underlying novel etc
	Script, representing the adaptation of the pre-existing work
News	Edited and corrected news statements
	News programs as a whole
Spoken Words	Non-script based, spoken communication by an individual
	Structured interviews
Music	Musical composition and lyrics
Moving Images (film work)	Audio-visual work, meaning moving images with or without sound

65 Article 45a(1) Aw.

66 'Auteurswet', §45a, para. 1a in P. Geerts and D. Visser (eds.), *Tekst & Commentaar Intellectuele Eigendom*.

67 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 568.

It is clear from this discussion that there are many authors which have contributed to a broadcast. However, permissions for online use are only required if the copyright in these contributions has not expired yet. As a general rule, copyright protection lasts for 70 years from the death of the author. To simplify the calculation, the start date is always the 1 January following the death. This means that if an author has died in March 1921, the term of protection would be calculated from 1922. The copyright would therefore have expired in 1992. As mentioned before, it is possible that any work has more than one author. In these cases, it is the death of the last surviving author that matters. In this context, it should be noted that musical works are joint works and so both the lyricist and the composer have to be considered.[68]

A more limited version of the joint author rule applies to film works. The term is 70 years from the death of last surviving author(s) in these categories: the principal director, the scriptwriter, the author of the dialogues or the composer of the film music (as long as the music was written for the film).[69] In the case of film works made before 29 December 1995 and therefore most of the archive, the term of protection may have to be calculated according to older rules. Article 51(2) states that the term of protection cannot be shorter than under the previous rules, so a direct comparison between the two terms is necessary. Under the older rules, film works were conceptualised as a normal joint work. The term of protection was 50 years from the last surviving joint author.[70] In practice that means that the old rules need to be applied if at least one author from the open list lived at least 20 years longer than the authors who are relevant for the calculation today (closed list).[71] This is relevant because the group of authors to be considered is larger than under the rules, despite the shorter term of protection.

68 Directive 2006/116/EC of the European Parliament And Of The Council of 12 December 2006 on the term of protection of copyright and certain related rights, *L 372/12*, 27.12.2006; J J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 101.

69 Article 40 Aw.

70 Older version of art. 37(2) Aw (until 1995).

71 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 560.

	Focus of Protection	First Owner	Term of Protection	
Recurring features	Detailed storyline as combination of common themes	Author(s)	Death in 1945	Last surviving author died in 1945
	Specific description of a format			
	Recognisable, detailed characters which are made up of a combination of specific features			
Pre-existing works	Underlying novel etc			
	Script, representing the adaptation of the pre-existing work			
News	Edited and corrected news statements			
	News programs as a whole			
Spoken Words	Non-script based, spoken communication by an individual			
	Structured interviews			
Music	Musical composition and lyrics		Last surviving author died in 1945	
Moving Images (film work)	Audio-visual work, meaning moving images with or without sound		Last surviving author died in 1945: principal director, scriptwriter, author of the dialogue, composer of film music – If work was made before 1996+ joint author, who is not one of those named above, has lived longer than 1975: 50 years post mortem of last surviving author	

Figure 8: Summary of Layer 1 (copyright content), including the nature of the work, authorship and the term of protection.

2.2.2 Layer 2: The Performance

The original works discussed above are not the only copyright materials to consider. In 1994, the Netherlands introduced a new set of rights: the neighbouring rights protecting performances, broadcasts, phonograms and the fixation of a film. Neighbouring rights are protected for their economic importance and as a result do not fall under the copyright originality requirement.

The first layer to consider in this respect is the performance of copyright works by performing artists. Under article 2 WNR, a performer has the right to control the fixations of performance and what is done with them.[72] The term performer is further defined by using examples. Explicitly named are for example actors, singers, musicians, puppeteers and circus actors.[73] However, not any performance is protected. Rather, the interpretation has to relate to a work as defined by copyright law although it does not need to be still under protection.[74] Most notably for NISV's licensing effort, it includes any interpretation of a copyright work or a piece of folklore. The performance, meaning the activity of a performer as such,[75] also has to be artistic: a purely technological performance is not sufficient for this. Instead, it has to be of a personal character.[76] In other words, whenever an original work is performed, for example presented on stage or for a musical work is sung, then the performer owns the rights in the performance.

The term of protection crucially varies, depending on the type of fixation and its exploitation. In general, a performance is protected for 50 years from the date of performance. As with copyright works, the calculation starts from the 1 January of the year following this event.[77] However, if the performance has been recorded as anything other than a phonogram, and has been published or communicated to the public, then 50 years are calculated from this date – whichever one is earlier.[78] In other words, as long as the recording is not limited to sounds and it has been published or communicated to the public, the start of protection is shifted to that secondary event. In practice, this means that all performance rights in audio-visual works have expired if the fixation was made before 1965.

Special rules apply to performances fixed on a phonogram and therefore are limited to sounds. If the performance is recorded as a phonogram and this phonogram

72 Article 2 WNR.
73 Article 1(a) WNR.
74 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 650.
75 Article 1(l) WNR.
76 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 650.
77 Article 12(1) WNR.
78 Article 12(2) WNR.

has been published or communicated to the public, then the protection expires after 70 years from whichever event was earlier.[79] As mentioned before, broadcasting a work is essentially a communication to the public. This means in practice that the phonograms in question here do fulfil these requirements and that the most likely start date has to be calculated from the year following the year of the broadcast. In other words, all radio broadcasts made prior to 1945 are not subject to performers' right anymore, even if they were published at a later date. For all later ones, licenses have to be sought.

Table 4: Summary of Layer 2 (performances), including the nature of the work, authorship and the term of protection.

	Focus of Protection	First Owner	Term of Protection
Performance	Performance of a copyright work, with a minimum degree of personality	Performer(s)	Fixation occurred after 1965 – If fixation on phonogram communicated to the public: fixation occurred after 1945

2.2.3 Layer 3: The Fixation of a Work

The materials held by NISV represent the permanent fixation of copyright works and performances. In this respect, it is not relevant if the recording is digital or analogue. The law distinguishes between two types of fixations relevant here: first, there is the phonogram (sound recording) and secondly, the first fixation of an audio-visual work. These will now be discussed in term.

Phonograms

In the case of a radio broadcast, the fixation is classified as a phonogram or sound recording – a neighbouring right. A phonogram is defined as *'iedere opname van uitsluitend geluiden van een uitvoering of andere geluiden.'*[80] It also includes new recordings, such as the editing of existing material.[81] In other words, the protection centres on the fixation of sounds and therefore the recording in its abstract form. The specific medium is only a copy of this fixation but not the focus of protection. The

79 Article 12(3) WNR.

80 Article 1(c) WNR.

81 'Wet op de naburige Rechten', §1, para. 4.in P. Geerts and D. Visser (eds.), *Tekst & Commentaar Intellectuele Eigendom*, §1, para. 4.

neighbouring right in the phonogram is separate from the possible protection of the content under copyright law, for example the musical work, and the performance.

The phonogram rights belong to its producer, defined as the natural or legal person that makes the fixation. In practice, this is the person that had the financial responsibility for making the phonogram rather than the employee who actually carries out the work.[82] In other words, if a record label hires an independent producer to make the recording, it is still the record label that holds the rights under the law. It should be noted though that it is the person carrying the risk and investment for the fixation of sounds and not the bringing of the phonogram onto the market.[83] If a label for example bought the master from a third party but was not involved in its production, it would not be considered the producer under the WNR.

The term of protection for phonograms is by default for 70 years from the date of its fixation, calculated from the 1 January of the following year. The calculation starting point can change in two distinct circumstances. If the work has been distributed to the public (for example as CDs), then the date of publication starts the term of protection. However, if no publication has occurred but the work has been communicated to the public, then the date of this first communication is relevant.[84] In practice, radio broadcasts have nearly all been communicated to the public as broadcasting falls into this category. Therefore, phonograms containing broadcasts which have not been distributed will have expired if they were made before 1945.

	Focus of Protection	First Owner	Term of Protection
Performance	Performance of a copyright work, with a minimum degree of personality	Performer(s)	Fixation occurred after 1965 – If fixation on phonogram: fixation occurred after 1945
Phonogram	Recording of sound	Phonogram Producer	Recording was made after 1965 – If communicated to the public: fixation occurred after 1945

82 NJK 2000, 75: Rechtbank Amsterdam, 14-06-2000, nr. H983392, para. 5.2, Rechtbank Dordrecht 11 augustus 1999, *AMI* 1999 nr 10, p. 160-161.

83 A. Rechtbank Haarlem 21 mei 2003, *AMI* 2003 nr 6, 223, p. 224, confirmed in noot by Visser (p. 226).

84 Article 12(4) WNR.

First Fixation of a Film

While a radio broadcast is limited to sound and therefore recordings of it are essentially phonograms, TV broadcasts are a mixture of sound and images. As already mentioned, the audio-visual work itself is protected as a film work under copyright law, if it is original. In addition though, the fixation of the moving images onto a medium itself is also protected but as a neighbouring right.

Since 1993, the producer of a film owns the rights in the first fixation of a film under article 7a WNR.[85] It should first be noted that this fixation is not the same as a film work under copyright law. In particular, the originality requirement does not apply. This is important because it means that even if a work does not meet the requirements of a film work as defined above, in particular the relevant originality threshold, there is still protection attached to it. This is for example the case if the material is from satellites or CCTV.[86] The rights are owned by the film producer. The producer in this context is the same person as defined in the Copyright Act.[87] In this respect, article 45a(3) Aw explains:

> *'Producent van het filmwerk is de natuurlijke of rechtspersoon die verantwoordelijk is voor de totstandbrenging van het filmwerk met het oog op de exploitatie daarvan.'*

This refers to acquiring the financial resources to make the film, carrying the economic risks as well as hiring the relevant performers.[88]

The term of protection is 50 years from the first fixation of the film. However, if the work has been published or communicated to the public within these 50 years, then the protection expires 50 years from that event – whichever one was earlier.[89] The calculation again is calculated from the 1 January of the year following the event.

85 Article 7a WNR. Although the openbaar making right is limited to beschikbaar stelling, this does include the right to make it available online (J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 669).

86 'Daarnaast worden onder deze term ook begrepen producenten van films die niet oorspronkelijk zijn in de zin van het auteursrecht ': MvA II, *Kamerstukken II* 1993/94, 23 247, nr. 5, p. 27. 'Auteurswet', § 7a para. 2b in P. Geerts and D. Visser (eds.), *Tekst & Commentaar Intellectuele Eigendom*.

87 'Wet op de naburige Rechten', §1, para. 5 in P. Geerts and D. Visser (eds.), *Tekst & Commentaar Intellectuele Eigendom*.

88 'Auteurswet', § 45a, para. in P. Geerts and D. Visser (eds.), *Tekst & Commentaar Intellectuele Eigendom*.

89 Article 12(6) WNR.

Table 5: Summary of Layer 3 (the fixation of a work), including the nature of the work, ownership and the term of protection.

	Focus of Protection	First Owner	Term of Protection
Performance	Performance of a copyright work, with a minimum degree of personality	Performer	Fixation occurred after 1965 – If fixation on phonogram: fixation occurred after 1945
Phonogram	Recording of sound	Phonogram Producer	Recording was made after 1965 – If communicated to the public: fixation occurred after 1945
Fixation of Film	Recording of moving images, with or without sound	Film producer	Recording was made after 1965 – If distributed or communicated to the public: 50 years from that date

2.2.4 Layer 4: The Transmission of the Work (Broadcast)

This report focuses on NISV's broadcasting archive. By their very nature, most of the items will therefore have been transmitted as either TV or radio broadcasts. This act of broadcasting forms the final layer of protection from a copyright and related rights point of view. It should be noted that this neighbouring right is only created the moment the transmission is made, meaning that a finished program which has not been broadcast, does not benefit from this type of protection.[90] In other words, the broadcasting right is not a concern for archival material which has never been broadcast.

To qualify as a broadcast, both copyright and media law are relevant. On one hand, the content has to fall under the term program (programma).[91] This termino-

90 'Wet op de naburige Rechten', §8, para. 1b in P. Geerts and D. Visser (eds.), *Tekst & Commentaar Intellectuele Eigendom*.

91 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 670.

logy was consciously chosen to align to protection with the media law.[92] The term is today defined as 'een afgebakend onderdeel van het programma-aanbod met een eigen titel zoals 'Het Journaal', 'Opsporing verzocht' of 'Lingo'.'[93] On the other hand, the protection is created when the program is actually broadcasted (uitzenden). In practice, this refers to any distribution of electronic sound and/or images via a broadcaster.[94] It therefore includes both TV and radio broadcasts. However, the definition only covers the first broadcast, not relays for example via satellite or cable.[95] It does not include internet webcasts.[96]

As the definition clarifies, this refers to 'het verspreiden van programma's door middel van een omroepzender als bedoeld in artikel 1.1 van de Mediawet 2008 of een omroepnetwerk als bedoeld in artikel 1.1 van de Mediawet 2008'.[97] Under article 1.1 Mediawet, a broadcaster is defined as a:

> *'mediadienst die betrekking heeft op het verzorgen van media-aanbod dat op basis van een chronologisch schema dat is vastgesteld door de instelling die verantwoordelijk is voor het media-aanbod, al dan niet gecodeerd door middel van een omroepzender of een omroepnetwerk wordt verspreid voor gelijktijdige ontvangst door het algemene publiek of een deel daarvan'*

The right is therefore owned by the broadcasting organisation, and therefore the organisation which is in charge of the program (verzorgen) and which carries the responsibility of the broadcast.[98]

The term of protection is 50 years from the date of the first broadcast, calculated from the 1 January of the following year.[99] It is irrelevant how the broadcast occurs in terms of technology, meaning that cable-, satellite- and Ethernet broadcasts can all be relevant.[100] It has to be noted that if part of a public domain broadcast is included in a newer program, the protection term starts with the new broad-

92 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 670.

93 Kamerstukken *II* 2007/08, 31 356, nr. 3, p. 23 (MvT).

94 Definitions are based on Mediawet 2008, Article 1(1); 'Mediawet', art. 1.1 in P. Knoll and G, Zwenne, *Telecommunicatie- en privacyrecht* (Kluwers, Online, 2015).

95 'Wet op de naburige Rechten', §8, para. 3 in P. Geerts and D. Visser (eds.), *Tekst & Commentaar Intellectuele Eigendom*.

96 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 669.

97 Article 1(g) WNR.

98 Neighbouring rights, article 8(1) and 'Wet op de naburige Rechten', §8, para. 1a in P. Geerts and D. Visser (eds.), *Tekst & Commentaar Intellectuele Eigendom*.

99 Article 12(5) WNR.

100 'Ongeacht welke technische hulpmiddelen daarbij worden gebruikt' (art. 12(5) WNR).

cast. As a result, someone wanting to use the older fragment has to use it via the original source, not the newer broadcast which incorporates it.[101]

Table 6: Summary of Layer 4 (transmission of a work), including the nature of the work, ownership and the term of protection.

	Focus of Protection	First Owner	Term of Protection
Performance	Performance of a copyright work, with a minimum degree of personality	Performer	Fixation occurred after 1965 – If fixation on phonogram: fixation occurred after 1945
Phonogram	Recording of sound	Phonogram Producer	Recording was made after 1965 – If communicated to the public: fixation occurred after 1945
Fixation of Film	Recording of moving images, with or without sound	Film producer	Recording was made after 1965 – If distributed or communicated to the public: 50 years from that date
Broadcast	Transmission of work as a broadcast, both radio and TV	Broadcaster	Transmission was made after 1965

2.2.5 Summary

Any broadcast is in essence made up of series of copyrightable works and other subject matter, depending on the specific broadcast in question. Each work has its own right holder(s) and term of protection under the law. For each copyright protected work, there is at least one author – in cases like a film work this number is likely to be significantly higher, though. Similarly, a performance can often include many individuals – each with their own right. As a result, from this angle, it looks like using

101 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 677.

a final product such as a TV broadcast would require the permission by all right holders and therefore pose a significant hurdle on its own. In particular, authors who benefit from copyright protection and performers are likely to be numerous. The following table summarises all of this. The analysis also leads to the following conclusion when it is assumed that works are created independently: the rights are held by a large number of right holders.

		Focus of Protection	First Owner	Term of Protection
Copyright	**Recurring features**	Detailed storyline as combination of common themes	Author(s)	Death in 1945[a] – Last surviving author died in 1945
		Specific description of a format		
		Recognisable, detailed characters which are made up of a combination of specific features		
	Pre-existing works	Underlying novel etc		
		Script, representing the adaptation of the pre-existing work		
	News	Edited and corrected news statements		
		News programs as a whole		
	Spoken Words	Non-script based, spoken communication by an individual		
		Structured interviews		
	Music	Musical composition and lyrics		Last surviving author died in 1945

		Focus of Protection	First Owner	Term of Protection
Copyright (continued)	**Moving Images (film work)**	Audio-visual work, meaning moving images with or without sound	Author(s)	Last surviving author died in 1945: principal director, scriptwriter, author of the dialogue, composer of film music – If work was made before 1996+ joint author, who is not one of those named above, has lived longer than 1975: 50 years post mortem of last surviving author
Neighbouring Right	**Performance**	Performance of a copyright work, with a minimum degree of personality	Performer	Fixation occurred after 1965 – If fixation on phonogram: fixation occurred after 1945
	Phonogram	Recording of sound	Phonogram Producer	Recording was made after 1965 – If communicated to the public: fixation occurred after 1945
	Fixation of Film	Recording of moving images, with or without sound	Film producer	Recording was made after 1965 – If distributed or communicated to the public: 50 years from that date
	Broadcast	Transmission of work as a broadcast, both radio and TV	Broadcaster	Transmission was made after 1965

a Based on 70 years after the death of the author.

Figure 9: Summary of a broadcast from a copyright and neighbouring rights perspective, including the nature of the works, authorship and the term of protection.

3 Rights Concentration in TV Productions

In the previous sections, NISV's broadcasting archive was analysed from a copyright angle. The aim was to clarify what is protected, for how long and who is the default owner of the rights. The analysis shows that the material held by NISV has a potentially very large number of right holders, both in terms of copyright and neighbouring rights. This section will now empirically test this expectation.

Empirical data on rights ownership is very rare and incomplete. Nonetheless, the Schoon Schip project provides information on the rights ownership for some broadcasts in the archive. Most importantly, it covers TV broadcasts and therefore film works. This is exactly the type of work most likely to have a lot of contributors and therefore potential right holders.

The expectation raised by section 2 was that film works include multiple layers of copyright and neighbouring rights, each with their own right holder. As a result, the rights in the final product should be shared between a large number of authors as well as performers, the broadcaster and the producer.

Table 7: The types of right holders listed in the Schoon Schip dataset.

Decade	Category of Right Holder			Total
	Foreign Broadcaster	Independent Producer	Public Service Broadcaster	
1950s	0	5	180	185
1960s	2	20	1111	1133
1970s	8	41	783	832
1980s	7	217	910	1134
1990s	76	893	1993	2962
2000s	48	1223	2283	3554

However, as Table 7 shows, the Schoon Schip dataset does not list a single author as the right holder or even as a contract partner. Instead, only three types of entities are represented: 1) the national broadcaster; 2) a foreign broadcaster and 3) an independent production company. In other words, these three actors control the individual components of a broadcast. Most notably, there is not a single case where the creators hold the rights as section 2 had suggested.[102] In other words, the rights must have moved from the creator to the legal entity.

In theory, there are two main ways in which the rights in the broadcasts could be concentrated in the hands of (a group of) companies. In the context of copyright works, the first option is based on the special provisions in the copyright law. In particular, the law explicitly recognizes a series of situations in which not the original author but a third party is considered the author. This is for example the case if a work was made in the course of employment. On the other hand, the rights in copyright works as well as neighbouring rights are transferable by contract. This means that a producer could for example buy out all the authors involved in a script and gain control over the final product this way. The characteristics and evolution of these will be examined in the following chapter.

102 There are a small proportion of contracts which define remuneration rights for authors. However, these do not affect the ownership of the exclusive right in question. These are owned by the broadcaster or producer but not by the author. See also footnote 21.

4 Ownership by Third Parties: Doctrinal analysis and Process-Tracing

The previous part has shown that there has been some significant concentration of rights ownership in the case of TV broadcasts. Creators do not act as right holders in the final product. Instead, the rights are held by broadcasters, the independent producer or shared between them. In other words, the ownership of broadcasts is in practice significantly different than the doctrinal analysis in section 2 indicated. Instead, more emphasis has to be placed on how rights can be owned by a third party. This section now examines how these shifts are possible and identifies the likely indicators which will reflect such a change.

The focus of this section is on the legal provisions and rules which enable a legal entity to acquire the rights in a broadcast. In general, there are two categories of mechanism. The first one is that the legal entity itself is the first owner of the rights. These will be discussed in the first part and discuss both the rules on employment (article 7 Aw) as well as the first communication to the public by a public entity (article 8 Aw).

The second set of mechanisms is based on the contractual transfer of rights. These will be discussed in the second part. Section 1 of part 2 will focus on the general rules applicable to contractual transfers of copyrights. As a result, section 1 is applicable to both TV and radio broadcasts. Section 2 will discuss the rules on rights transfer as they relate to neighbouring rights. In principle, these are applicable to both TV and radio broadcasts as well. The next part will then expand the discussion on transfers by focusing on the special rules which apply only to film works and therefore TV broadcasts in addition to the standard transfer rules.

This chapter concludes with a summary of the different ownership mechanisms and the relevant indicators. They are discussed in terms of the area they are likely to affect and the relevant indicators to assess this. In addition, the strength of the tests is clarified.

4.1 Deviations from the creator doctrine

As section 2 of this report has shown, any broadcast is likely to involve a large number of different subject matter, both copyright and neighbouring rights. This in turn would make the exploitation of the final product highly complex, given the large number of permissions that would be required. This issue however is not new and copyright law, as distinct from the law on neighbouring rights, has responded by providing exceptions to the 'creator doctrine', according to which the initial owner of the rights on a work is the physical person who created it.

Dutch copyright law knows two exceptions to the creator doctrine which can result in a legal entity being considered the author. These are: works created in employment (article 7 Aw) and works communicated to the public by an entity (article 8 Aw).[103] This section will discuss each of the relevant provisions in turn. It should be noted here that the legal provisions themselves have not been subject to major changes over time. However, their interpretation by the courts has evolved significantly since their introduction in 1912. This is important because changes to the law do not usually disown a right holder: changes here are not prospective by default. This has the effect that the rights ownership of broadcasts under the rules discussed here needs to be determined according to the date when it was made. To facilitate this, the analysis in this section is chronological by tracing changes over time.

4.1.1 Works disclosed by legal entities

The first route by which a legal entity can acquire copyright is article 8 Aw. It states:

> *'Indien eene openbare instelling, eene vereeniging, stichting of vennootschap, een werk als van haar afkomstig openbaar maakt, zonder daarbij eenig natuurlijk persoon als maker van te vermelden, wordt zij, tenzij bewezen wordt, dat de openbaarmaking onder de bedoelde omstandigheden onrechtmatig was, als de maker van dat werk aangemerkt.'*

This provision has not been revised since 1912. As a result, its core meaning has been stable over time. It means that if a work was made available to the public under the name of a public institution, association, foundation or legal entity, but without

103 There is a third provision which provides authorship to a third person: art. 6 Aw. It is not discussed here because it not likely that any legal entity shown in section 3 to hold the rights in practice meets the requirements of this article: a very high degree of supervision.

naming its author, then the legal entity is considered the author.[104] It is the first communication to the public which is relevant here, not later ones.[105] It is not sufficient if a work has only been made available to a narrow circle of friends and relatives – a broader audience needs to be included.[106]

From the beginning, the applicability of article 8 was subject to two conditions. First, the work must have been communicated in a legal manner. This means that not naming the author was just and therefore reasonable.[107] This excludes for example making a work public without consulting the author. It should be noted that naming the author can be done via pseudonyms or a logo – it also does not have to be on the work itself but can also be done verbally (for example in a speech) or in the accompanying material.[108] Similarly, saying thanks to someone in the intro can have the function of naming the author – not in all cases though.[109]

Secondly, the legal entity and the actual author can deviate from the terms by contract.[110] It is the communication to the public without the author's name which is decisive here and what the contract states about this. This means in practice that the general relationship between the legal entity and the author as such does not matter. As a result, it can also apply to commissioned works.[111] In fact, it does not even require a commissioning of the work – rather, it is sufficient that the work has been made available by the institution.[112] It should be noted here that article 8 affects the duration of copyright protection. The term of protection is limited to 70 years from the first communication of the work under this article[113] and therefore likely to be shorter than the usual 70 years post mortem rule.

104 Article 8 Aw.

105 'Auteurswet', §8, para. 2b in P. Geerts and D. Visser (eds.), *Tekst & Commentaar Intellectuele Eigendom*.

106 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 49.

107 Article 8 Aw.

108 'Auteurswet', §8, para. 2 and 2c in P. Geerts and D. Visser (eds.), *Tekst & Commentaar Intellectuele Eigendom*.

109 S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, Deventer: Kluwer, 1988, p. 56.

110 H. De Beaufort, *Auteurswet 1912 – wet van den 23sten September 1912, S. 308, zooals die wet nader is gewijzigd met aanteekeningen, ontleend aan de beraadslagingen en gewisselde stukken enz., bijlagen en alphabetisch register*, Zwolle: Tjeenk Willink, 1936, 6th ed., p. 22.

111 T. Wink, *Auteursrecht in Nederland – Auteurswet 1912, Berner Conventie, Reglement voo het Vetaling* (Amsterdam: Vereeniging ter bevording van de belangen des Boekhandels, 1952), p. 23; 'Auteurswet', §8, para. 1 and 2c in P. Geerts and D. Visser (eds.), *Tekst & Commentaar Intellectuele Eigendom* Online. If the moral rights also shift remains debated though.

112 Hof 's-Gravenhage, 12-10-2010, *IER* 2011, nr 6, para 5.

113 Article 38(2) Aw.

In terms of empirical evidence, this translates into:

C1:	The legal entity is considered the author. This will most likely be a single entity.
C2:	The legal entity as the author will own all economic rights.
C3:	The legal entity as the author will own the rights at least for its broadcasting area, meaning the Netherlands.
C4:	The legal entity as the author will own the economic rights for all purposes.
C5:	The legal entity as the author will own the economic rights for the full term of protection.
C6:	A legal entity can only acquire the copyright if the name of the author is not made public at the same time. As a result, the works will most likely not carry any individual author information in the catalogue data.
C7:	Article 8 does not require any contract to take effect. In addition, the presence of the contract could (be interpreted to) include requirements as to naming the author, this provides an incentive to not rely on one.

Table 8: Disclosure by legal entities of copyright works 1912- 1973.

	1912 onwards
Legal Provision	Communication to the public by a legal person, e.g. a legal entity or other institution
	Justified communication to the public without the name of the author
Scholarly debate	Applies to commissioned works
	Only communication to the public by the institution is covered
	All moral rights assumed to be owned by the institution
	Deviation from contract perceived as relevant

The Disclosure Provision Across Time

The provisions of article 8 remained largely stable over time. Only three issues merit attention. First, it was clarified that article 8 also applies to works which were communicated as part of the legal entity's functions. Gerbrandy argues in this context that as long as it is clear to the public that the work is related to the legal entity and its aims, then this requirement is met.[114] In other words, the work needs have been communicated to the public; it is clear to the public that it comes from the legal entity in question; and the work is related to the legal entity's aims. This is a bit broader than before because it means that the communication can be done by a third party. At the same time, if another legal person is named instead, then this person will be considered the author.[115] In the context of broadcasting, this would mean that if a work was communicated to the public by a broadcaster as part of his programming and without naming the original author, then the conditions should be met.

Secondly, it was held that even if article 8 does not apply, it can have the effect of an exclusive license to the benefit of the legal entity.[116] In this case, the position of the legal entity is weaker than it would be under article 8 because it is not the actual author. However, it is able to exclusively use the work and therefore can also prevent others from exploiting it. In other words, if the author should have been named, it does not necessarily mean that the broadcaster would lose all the rights. However, he will be an exclusive assignee as discussed below rather than considered the author. This in particular affects the scope of rights he controls.

The status of moral rights remains highly debated and ultimately unresolved. While the lower courts decided that the moral rights stay with the author, the High Court has not addressed the issue yet.[117] Overall, the balance seems to have shifted towards the legal entity by expanding the scope of activities covered as well as providing for derivative rights in the form of an exclusive license. The possibility that they own the moral rights also works in their favour.

114 H. Pfeffer and S. Gerbrandy, *Kort commentaar op de auteurswet 1912*, Haarlem: De Erven Bohn, 1973, 2nd ed., p. 42.

115 Rechtbank Amsterdam, 5 april 1991, *BIE* 1992, 59: uitnodigings- en wenskaarticleen, para. 4. However, if both a natural person and a company are named, then the natural person will be given priority. J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 50.

116 Pres. Utrecht, 12 oktober 1981 ECLI:NL:RBUTR:1981:AG9546.

117 H. Pfeffer and S. Gerbrandy, *Kort commentaar op de auteurswet 1912*, Haarlem: De Erven Bohn 1973, p. 41 but not decided by HR yet, only lower court: Hof Amsterdam, 10 februar 1970, NJ 1971, 130.

Table 9: Disclosure by legal entities of copyright works 1912- 1988.

<table>
<tr><th></th><th>1912 onwards</th><th>1973</th><th>1981 onwards</th><th>1988</th></tr>
<tr><td rowspan="2">Legal Provision</td><td colspan="4">Communication to the public by a legal person, e.g. a legal entity or other institution</td></tr>
<tr><td colspan="4">Justified communication to the public without the name of the author</td></tr>
<tr><td rowspan="6">Scholarly debate</td><td colspan="4">Applies to commissioned works</td></tr>
<tr><td>Only communication to the public by the institution itself is covered</td><td colspan="3">Any communication to the public by the institution as part of its functions is covered</td></tr>
<tr><td colspan="4">Deviation from contract perceived as relevant</td></tr>
<tr><td colspan="2"></td><td colspan="2">Contract can be exclusive license rather than copyright ownership</td></tr>
<tr><td>Moral rights assumed owned by employer</td><td colspan="3">Ownership of moral rights debated: tendency towards author ownership</td></tr>
<tr><td colspan="3"></td><td>Declining relevance for TV broadcasting as the status of the director increases</td></tr>
</table>

The relevance of article 8 is increasingly declining in the TV and radio sector from the 1980s onwards. It is becoming increasingly uncommon that companies publish works 'als van haar afkomstig'.[118] In particular, directors are always named in practice.[119] This is the result of a legal reform in another sector of the law (article 45 Aw, discussed below). The change should therefore be most pronounced from the time the reform was debated and especially took legal effect in 1986. Similarly, article 8 is also increasingly unlikely to apply as commercials for a film usually include the name of authors.[120] This should be reflected in the empirical evidence as follows:

C8: The status of the director has increased over time for audio-visual works, including in the broadcasting sector. As a result, it is increasingly likely that at least the director will be named from the 1980s onwards. The relevance of article 8 Aw declines accordingly.

118 S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, Deventer: Kluwer 1988, p. 55.
119 S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, Deventer: Kluwer 1988, p. 402.
120 J. Vermeijden, *Auteursrecht en het kinematografische werk*, Zwolle: Tjeenk Willink 1952, p. 157

4.1.2 Works created by employees

The second situation in which the ownership of copyright works is affected is employment.[121] Under article 7 Aw, the author is the employer if the work was made in the course of employment. The article itself has not been amended since 1912 and states:

> *'Indien de arbeid, in dienst van een ander verricht, bestaat in het vervaardigen van bepaalde werken van letterkunde, wetenschap of kunst, dan wordt, tenzij tusschen partijen anders is overeengekomen, als de maker van die werken aangemerkt degene, in wiens dienst de werken zijn vervaardigd.'*

In other words, if an employee has made a copyright work as part of his work, his employer will be considered the author of it – unless there are contractual provisions to the contrary.[122]

Based on this, the following core characteristics can be deduced:

E1:	Since the employer is the maker, the catalogue data is unlikely to list individuals in the author functions. Instead, they will be left empty since the individuals are not authors in the sense of the copyright law.

In these early days of broadcasting, the broadcasters heavily relied on its own staff to make programs. In the early years, the broadcasters developed their own program independent of each other or externals in the sense that the focus was on the own group.[123] The film producer's position is very strong if authors were employed.[124]

While the article has not been amended, the meaning of article 7 Aw has evolved. In particular, the meaning of what constitutes employment has shifted from a broad interpretation to a narrower one over time as the following doctrinal analysis will show.

The Employment Provision Across Time

In the early stages, article 7 served only as delineation between works made under employment and commissioned works. In this context, the article's core criterion is 'dienstbetrekking': the existence of an employment relationship.[125] This was illus-

121 The law applicable to performers under employment is discussed below in section 4.2.2.

122 It should be noted here that the term of protection is limited to 70 years from the first communication of the work under this article if the employer is a legal entity (art. 38(2)).

123 H. Wijfjes, *Radio onder Restrictie – Overheidsbemoeiing met radioprogramma's 1919-1941*, Amsterdam: Stichting Beheer IISG 1988, p. 19.

124 J. Vermeijden, *Auteursrecht en het kinematografische werk*, Zwolle: Tjeenk Willink 1952, p. 83.

125 H. De Beaufort, *Auteurswet 1912 – wet van den 23sten September 1912, S. 308, zooals die wet nader is gewijzigd met aanteekeningen, ontleend aan de beraadslagingen en gewisselde stukken enz., bijlagen en alphabetisch register*, Zwolle: Tjeenk Willink, 1936, 6th ed., p. 19.

trated at the time with the difference between a journalist who writes pieces for a newspaper now and then and one who is actually fully employed.[126] This example shows the main features of the early employment concept. First, there has to be a relationship of authority in the sense that the employee has the duty to the employer to create the works in question. After all, a journalist would not fulfil his purpose if he was not to write articles. Secondly, compensation is paid by the employer to the employee on a regular basis, without a direct link for each work created. In other words, it is the employment contract and therefore the relationship and tasks defined within it that determine if article 7 applies.[127] Following this reasoning, article 7 does not and has never applied to commissioned works.[128] Commissioning works is not sufficient because the relationship is not continuous and focuses on the creation of individual works as such.

It should also be noted that there is at this stage little discussion of the scope of works covered. Rather, it is assumed that all the works an employee creates belong to the employer as long as they are linked to the job in some way. This link is exclusively defined by the employment contract itself. This particular point can be examined using the Schoon Schip data:

E2:	The basis for rights ownership is the employment contract. A separate production contract is not required and may indeed constitute an 'agreement to the contrary', threatening the employer's ownership of rights.

While the employment rule under article 7 has always been subject to proof to the contrary, this does not feature in the copyright commentary. This could indicate a strong assumption that employers do exercise significant authority over their employees by default with comparatively little leeway for these to deviate contractually. Therefore, we should see this pattern of absent contracts extensively for earlier periods in time.

It is also assumed that the employer as the maker and therefore author controls all rights relating to a work. In this respect, moral rights are not discussed at all and therefore most likely were assumed to belong to the employer as well.[129]

126 H. De Beaufort, *Auteurswet 1912 – wet van den 23sten September 1912, S. 308, zooals die wet nader is gewijzigd met aanteekeningen, ontleend aan de beraadslagingen en gewisselde stukken enz., bijlagen en alphabetisch register*, Zwolle: Tjeenk Willink, 1936, 6th ed., p. 20.

127 H. De Beaufort, *Auteurswet 1912 – wet van den 23sten September 1912, S. 308, zooals die wet nader is gewijzigd met aanteekeningen, ontleend aan de beraadslagingen en gewisselde stukken enz., bijlagen en alphabetisch register*, Zwolle: Tjeenk Willink, 1936, 6th ed., p. 21.

128 Hof Amsterdam 17 januari 1919, NJ 1920, p. 306.

129 Broadcasters may not be able to exploit their rights in other jurisdictions and may have assigned them to others as a result. However, this presumption does not apply to their home market, here the Netherlands.

E3:	Due to the financial resources required, the author will most likely be a legal entity. This will most likely be a single entity.
E4:	The legal entity as the author will own all economic rights.
E5:	The legal entity as the author will own the rights at least for its broadcasting area, meaning the Netherlands.
E6:	The legal entity as the author will own the economic rights for all purposes.
E7:	The legal entity as the author will own the economic rights for the full term of protection.

The findings on the features of early employment characteristics are summarised below.

Table 10: Employment rules for copyright works from 1912.

	From 1912
Legal Provision	In the course of employment, unless agreed otherwise
Inter-pretation	Relationship of authority: employer defines the tasks
	Salary/ compensation
	All works covered by explicit employment contract
Scholarly debate	Moral rights assumed owned by employer
	Contracts to the contrary not discussed

Over the next decades, the understanding of employment moved towards a more practical consideration. First, article 7 only applies to 'specific' works: the requested task is based on the legal duty arising from the employment terms. This includes feeling a sense of duty.[130] In particular, it was held in 1951 *Van der Laan/ Schoonderbeck* that the 'specific' works can also include if an employment contract was temporally extended and the work was incidentally outside the permanent contract, as long as the employee has agreed to carry out the work – explicitly or implicitly.[131] In other words, it applies to works that the employee had to make and not those he could make.[132] The employment relationship is therefore not to be interpreted as a static relation defined only in the employment contract. Rather, it is the nature in practice that is relevant.

130 J. Vermeijden, *Auteursrecht en het kinematografische werk*, Zwolle: Tjeenk Willink 1952, p. 151.
131 HR 19 Jan 1951, N.J. 1952, 37 (*Van der Laan/ Schoonderbeck).*
132 H. Pfeffer and S. Gerbrandy, *Kort commentaar op de auteurswet 1912*, Haarlem: De Erven Bohn 1973, p. 40.

The empirical effect of this change is limited. It strengthened the employer in comparison to the individual author, making it more feasible to rely on employment contracts alone. This translates into the continued absence of employment contracts and lack of individuals listed in copyright roles. The concentration of rights as mentioned above should continue.

Table 11: Employment rules for copyright works 1912-1951.

	From 1912	1951 onwards
Legal Provision	In the course of employment, unless agreed otherwise	
Inter-pretation	Relationship of authority: employer defines the tasks	
	Salary/ compensation	
	All works covered by employment	
	Explicit employment contract	Implicit Scope of Employment (Sense of Duty)
Scholarly debate	Moral rights assumed owned by employer	
	Contracts to the contrary not discussed	

The strong preference for the employer started to shift after the 1950s. As time progressed, the position of the employee author was strengthened. From the beginning the employer and employee have been explicitly been able to deviate from the employment rule. All that is required is a contract.[133] It is noticeable here that earlier legal scholarship did not emphasise this point significantly. However, by 1973 a discussion of this option is seen as relevant. In addition, it is also clear by this time that contracts to this effect do not have to be in writing. Instead, the notion of implied contracts is gaining currency. For example, it was held that if the author puts his name on the work, and the employer agrees (explicitly or implicitly), then there may be a contract in this.[134] This development represents a strengthening of the author vis-à-vis the employer. Finally, if a work has not been completed, then the copyright stays with the author. It should be noted though that completion is not to be confused with publication in this context.[135]

This change in legal interpretation can lead to empirically observable results. In particular, while naming an individual before had no impact on copyright ownership, it can now jeopardise the employer's copyright control.

133 Article 7 Aw.

134 H. Pfeffer and S. Gerbrandy, *Kort commentaar op de auteurswet 1912*, 1973, Haarlem: De Erven Bohn, p. 40. This is established by linking article 7 to the presumption of authorship rules in article 4. This link was not previously made in the literature.

135 H. Pfeffer and S. Gerbrandy, *Kort commentaar op de auteurswet 1912*, Haarlem: De Erven Bohn, 1973, p. 41.

E8: Permitting the author to put his name on a work can indicate an implicit contract, acting as a disincentive to the naming of authors (especially after 1973). Works of employment are therefore more likely to not have any author information.

The position of the author over time has also been strengthened by a second development. In particular, while early legal scholarship considered the employer as the holder of both the economic and the moral rights,[136] this has changed clearly by 1973.[137] Legal scholars have increasingly argued that the employer does not have the moral rights. In fact, lower courts have followed this shift until today but the question has not been fully resolved yet.[138] Moral rights are only available to authors and can potentially limit the exploitation of a work. This should reinforce the trend identified under point 4: naming individuals in copyright roles can affect the employer's copyright and therefore makes this less likely. There is no incentive for the employer to name individuals if this is not necessary at this stage.

Table 12: Employment rules for copyright works 1912-1973.

<table>
<tr><th></th><th>From 1912</th><th>1951</th><th>1973 onwards</th></tr>
<tr><td>Legal Provision</td><td colspan="3">In the course of employment, unless agreed otherwise</td></tr>
<tr><td rowspan="4">Interpretation</td><td colspan="3">Relationship of authority: employer defines the tasks</td></tr>
<tr><td colspan="3">Salary/ compensation</td></tr>
<tr><td colspan="3">All works covered by employment</td></tr>
<tr><td>Explicit employment contract</td><td colspan="2">Implicit Scope of Employment (Sense of Duty)</td></tr>
<tr><td rowspan="2">Scholarly debate</td><td colspan="2">Moral rights assumed owned by employer</td><td>Ownership of moral rights debated: tendency towards author ownership</td></tr>
<tr><td colspan="2">Contracts to the contrary not discussed</td><td>Contracts to the contrary are increasingly relevant, including implicit ones</td></tr>
</table>

136 J. Vermeijden, *Auteursrecht en het kinematografische werk*, Zwolle: Tjeenk Willink 1952, p. 156.

137 H. Pfeffer and S. Gerbrandy, *Kort commentaar op de auteurswet 1912*, Haarlem: De Erven Bohn 1973, p. 40-41; but not by the High Court yet, only lower court: Hof Amsterdam, 10 febr 1970, NJ 1971, 130.

138 For an overview of the full debates and examples on each side, see J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 361-362.

This trend of strengthening the author was further enhanced by 1988. By 1988, it was found that in some circumstances, a contract to the contrary can be considered if author puts his name on the work and the employer agrees tacitly.[139] In other words, the legal requirement for a contract to the contrary was interpreted more broadly, making it easier for the employee to prove this point. In addition, the implicit extension of employment contracts was circumscribed by the courts. In general, the author has to prove that article 7 does not apply.[140] While implicit agreements to this effect have been found valid before, it now becomes clear that approval is not the same as a requirement. In particular, if the employer only approves something but does not ask for it, it is not part of the employment.[141] In other words, if the employer approves a work that the employee was free to make but not required to, then this is not part of the employment relationship.[142] If an earlier agreement is amended, its reach is dependent on which is required to give the agreement effect (noodzakelijk voortvloeit).[143]

In terms of observable patterns, this change in interpretation should be a move away from relying entirely on employment contracts. In particular, it is now more risky to solely rely on employment contracts and not ensure copyright ownership in another way.

E9: Relying on employment contracts is increasingly risky since 1988. This increases the likelihood that additional contracts are made to underpin major investments and ensure copyright ownership, such as expensive film productions. As a result, the presence of production contracts increases.

Today the requirements of employment are largely defined by the Burgerlijk Wetboek (BW). In general, it refers to: an employee carrying out work for the employer in return for a salary during a prescribed timeframe.[144] In essence though, the relationship has the same four components which have always mattered: work, salary, timeframe and a relationship of authority. However, by linking it more explicitly to the BW, some of the so-far unaddressed issues are clarified.

139 S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, Deventer: Kluwer 1988, p. 53.
140 S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, Deventer: Kluwer 1988, p. 53.
141 S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, Deventer: Kluwer 1988, p. 52.
142 It is essentially the same logic that underlies copyright ownership in the university context.
143 Rechtbank Haarlem, 9 oktober 1987, uitspraak nr 355, *AMI* 1988, nr 3, p. 64.
144 Article 7:610(1) BW.

Table 13: Employment rules for copyright works 1912-1988.

<table>
<tr><th></th><th>From 1912</th><th>1951</th><th>1973</th><th>1988</th></tr>
<tr><td>Legal Provision</td><td colspan="4">In the course of employment, unless agreed otherwise</td></tr>
<tr><td rowspan="4">Inter-pretation</td><td colspan="4">Relationship of authority: employer defines the tasks</td></tr>
<tr><td colspan="4">Salary/ compensation</td></tr>
<tr><td colspan="4">All works covered by employment</td></tr>
<tr><td>Explicit employ-ment contract</td><td colspan="2">Implicit Scope of Employment (Sense of Duty)</td><td>Implicit Scope of Employment (Sense of Duty) Creation of work is required by employer</td></tr>
<tr><td rowspan="2">Scholarly debate</td><td colspan="2">Moral rights assumed owned by employer</td><td colspan="2">Ownership of moral rights debated: tendency towards author ownership</td></tr>
<tr><td colspan="2">Contracts to the contrary not discussed</td><td colspan="2">Contracts to the contrary are increas-ingly relevant, including implicit ones</td></tr>
</table>

First, works made during the work time but not as part of the employment spectrum, even if the work is useful for the employer, do not fall into this category.[145] It has to be in the course of the employee's normal duties.[146] However, the employee may still have to give the employer exploitation rights without further remuneration, even if the work does not fall under article 7.[147] This is based on the relevance of employment law which influences the relationship and therefore duties of both the employer and employee.[148]

Secondly, the Burgerlijk Wetboek clarifies what the relationship of authority means in practice. As established before, the employer has the authority to supervise the work. In practical terms, it is the ability of the employer to define tasks more precisely, although individual components can include or require a degree of freedom.[149] In terms of copyright, this means that the authority has to extend to specific works –

145 'Auteurswet', §7, para. 2b in P. Geerts and D. Visser (eds.), *Tekst & Commentaar Intellectuele Eigendom*; HR 19 januari 1951, NJ 1952/37 (*Van der Laan/Schoonderbeek*).

146 M. van Eechoud, 'Netherlands', §4[1][b][iii]. This essentially constitutes a license. The employer however is not the author.

147 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 39.

148 Hof Amsterdam 17 februari 1994, *AMI* 1995, p. 14.

149 'Commentaar op art. 7:610 BW' in C. Stolker and W. Valk and H. Krans, *Tekst & Commentaar Burgerlijk Wetboek* (Online, 2015, 2 ed.).

excluding for example the work academics do as a result of a general order.[150] There is no minimum term for employment for the definition to take effect.[151] The provisions also apply to agreements of a similar nature, even if they are not called employment.[152] However, it does not extend to freelancers.[153] It is also not sufficient to reserve the copyrights after the event, here the working together between a company as commissioning party and the self-employment as the author.[154]

Overall, today's interpretation of the term employment is a reinforcement of the trend from 1988: it is increasingly risky to rely on employment contracts alone and the copyright is more negotiated than before. At the same time, if a work has been more successful than anticipated, the employee can have a claim to additional remuneration.[155] The most likely beneficiary of this rule are the main contributors to a film work. By 1988, it is argued that this always includes at least: author of the script, those turning the novel into a script, dialogue author, camera men, cutter, sound engineers and the director.[156]

E10: By 1988, successful works can give rise to a right to receive additional remuneration to the main authors. An increasing number of key contributor categories should therefore be used. In the context of film works, this will be in particular the director.

The Burgerlijk Wetboek does not provide guidance on moral rights. The issue of who owns moral rights still remains undecided at this point. The High Court has not yet explicitly decided on the issue yet. Nonetheless, the Court has determined that a company can have reputational interests under article 25.[157] On the other hand, this rule is not absolute. The employed authors can keep their moral rights under article 25, however, their exercise is limited by the wishes of the employer. For example, while the authors of a book have to be named, the employer is free to not name them on the cover of the book (front, back inlay) as long as they are sufficiently clearly named in the prologue. The actual extent of naming the authors remains a question of circumstances which include contractual relations.[158]

150 'Auteurswet', §7, para. 2c in P. Geerts and D. Visser (eds.), *Tekst & Commentaar Intellectuele Eigendom*.
151 'Commentaar op art. 7:610 BW' in: C. Stolker and W. Valk and H. Krans, *Tekst & Commentaar Burgerlijk Wetboek* (Online, 2015, 11 ed.).
152 Article 7:610(2) BW.
153 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 40.
154 Hof 's-Hertogenbosch, 15 mei 2015, IER 2015/41 – *Aluminium Scaffolding company*, para. 3.14.6.
155 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 39, under art. 6(2) and 6(258) BW.
156 S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, Deventer: Kluwer 1988, p. 389- 390.
157 High Court 13 July 1995, NJ 1996, 682 – *Dior v Evors*.
158 Rechtbank Utrecht 12 mei 2005, Prg 2005, 99, para. 4.6, 4.7 and 4.9.

It is not possible to establish an observable pattern from this change though. Stronger moral rights considerations would favour naming the director in the catalogue data while permitting reputational considerations for legal persons speak against it.

Table 14: Employment rules for copyright works 1912-2015.

<table>
<tr><th></th><th>From 1912</th><th>1951</th><th>1973</th><th>1988</th><th>1992</th><th>1995</th><th>1997</th><th>2015</th></tr>
<tr><td>Legal Provision</td><td colspan="8">In the course of employment, unless agreed otherwise</td></tr>
<tr><td rowspan="9">Inter-pretation</td><td colspan="8">Relationship of authority: employer defines the tasks</td></tr>
<tr><td colspan="8">Salary/ compensation</td></tr>
<tr><td colspan="8">All works covered by contract</td></tr>
<tr><td colspan="2"></td><td colspan="6">Incomplete works are not included</td></tr>
<tr><td colspan="4"></td><td colspan="4">Remuneration rights for exceptionally successful works</td></tr>
<tr><td colspan="7"></td><td>No minimum timeframe</td></tr>
<tr><td>Explicit employment contract</td><td>Implicit Scope of Employment (Sense of Duty)</td><td colspan="6">Implicit Scope of Employment (Sense of Duty) Creation of work is required by employer</td></tr>
<tr><td colspan="5"></td><td colspan="3">Limited exploitation rights for works not explicitly covered by contracts under employment law</td></tr>
<tr><td colspan="8"></td><td>Employment contracts cannot be post-hoc</td></tr>
<tr><td rowspan="2">Scholarly debate</td><td colspan="2">Moral rights assumed owned by employer</td><td colspan="6">Ownership of moral rights debated: tendency towards author ownership</td></tr>
<tr><td colspan="2">Contracts to the contrary not discussed</td><td colspan="6">Contracts to the contrary are increasingly relevant, including implicit ones</td></tr>
</table>

It should be noted here that employment is not relevant in the same way for neighbouring rights. On one hand, phonograms, first fixation of films and broadcasts are already owned by legal entities in most cases. In particular, the requirement for having been charge makes it very likely that the employer of an individual qualifies via the first ownership rules. The only category not covered by this default company ownership is performers' rights.[159] In difference to phonograms and broadcasters, the rights in the performance are owned by the performer and therefore a natural person rather than the legal person carrying the organisational and/ or the financial burden. At the same time, there is no employment article along the lines of article 7 Aw or 8 Aw for neighbouring rights.[160] Instead, the only way a legal entity can become the right holder is based on copyright transfers. The details will be discussed in the relevant section below.

4.2 Transfer of Rights

If the broadcaster or producer does not qualify as maker of all contributions to the final product or if a contributor has agreed with them other terms as provided for by article 7 Aw and article 8 Aw, they need to acquire the exclusive rights by legal instrument and therefore a contract. The contract can take one of two distinct shapes: rights transfers and licenses. The key difference between the two is the holder of the actual rights. In a transfer, the ownership of rights shifts to the assignee. A license, on the other hand, is essentially a permission to exploit a work in certain ways without actually transferring the ownership of the rights. Exclusive licenses are most commonly given to those who want to exploit a work further while non-exclusive ones are often for users.[161] However, the rules and interpretation of contracts is neither uniform nor has it been static over time. Instead, the rules vary between copyright works and other subject matter. As a result, they will now be discussed in turn starting with copyright works. The second section focuses on neighbouring rights, first in general and then highlighting the additional rules applicable to performers.

159 For a detailed analysis, see section 4.2 Transfer of Rights.

160 Performers under employment are discussed in art. 3 WNR but this is not an ownership rule as discussed here. Instead, it related to licensing and will be discussed below.

161 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 436. The same distinctions between transfer and license have always existed, see for example H. De Beaufort, *Auteurswet 1912*, 1936, p. 10 and T. Wink, *Auteursrecht in Nederland*, Amsterdam: Ver. bevordering belangen des Boekhandels 1952, p. 14-15.

4.2.1 The role and interpretation of copyright-related contracts

Copyright Contracts 1912- 1992

The transfer of copyright is shaped by article 2 Aw. A transfer under this provision is always from the author to a third party. In its 1912 version (not amended until 1992), it stated:

> *'Het auteursrecht wordt beschouwd als eene roerende zaak. Het gaat over bij erfopvoling en is vatbaar voor geheele of gedeeltelijke overdracht. Geheele of gedeeltelijke overdracht van het auteursrecht kan niet anders geschieden dan door middel van eene authentieke of onderhandsche akte. Zij omvat allen die bevoegdheden, waarvan de overdracht in de akte is vermeld of uit aard en strekking der gesloten overeenkomst noodzakelijk voorvloeit.'*

Based on this, the key features of contracts are clear. First, article 2 of the Copyright Act declared that copyright was assignable.[162] In particular, copyright was considered a moveable asset which is in principle transferable in part or as whole. When the copyright is shared between more than one author as is the case for joint works, then all of them have to agree.[163] A valid assignment therefore cannot be partial but has to cover all relevant authors and therefore original right holder. It should be noted though that the transfer of rights in future works was not held possible in 1936.[164] In other words, a work must have already been created, even if not completed, before any rights relating to it could be assigned. In addition, the transfer of copyright must have been the explicit aim: unless the assignment of copyright has been explicitly stated, the commissioner only held a license to use the work but not the copyright in it. As a result, the author would be free to use it further.[165]

Secondly, all transfers of rights need a written instrument.[166] However, the formal requirements were considered low in practice. For example, a letter was sufficient as long as it was intended to act as a transfer.[167] In this vein, a transfer between two parties without the involvement of a third party did not require a seal or regis-

162 A copyright which has been transferred can be transferred further. S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, Deventer: Kluwer 1988, p. 32.

163 T. Wink, *Auteursrecht in Nederland*, Amsterdam: Ver. bevordering belangen des Boekhandels 1952, p. 14-15, 21.

164 HR 13 Februari 1936, NJ 1936 no. 433; also H. De Beaufort, *Auteurswet 1912 – wet van den 23sten September 1912, S. 308, zooals die wet nader is gewijzigd met aanteekeningen, ontleend aan de beraadslagingen en gewisselde stukken enz., bijlagen en alphabetisch register*, Zwolle: Tjeenk Willink, 1936, 6th ed., p. 9.

165 T. Wink, *Auteursrecht in Nederland*, Amsterdam: Ver. bevordering belangen des Boekhandels 1952, p. 14.

166 H. Pfeffer and S. Gerbrandy, *Kort commentaar op de auteurswet 1912*, Haarlem: De Erven Bohn 1973, p. 10.

167 Rechtbank Rotterdam 16 juni 1924, W11244; Rechtbank s'Gravenhage 3 mei 1927, W. 11800; H. De Beaufort, *Auteurswet 1912 – wet van den 23sten September 1912, S. 308, zooals die wet nader is gewijzigd met aanteekeningen, ontleend aan de beraadslagingen en gewisselde stukken enz., bijlagen en alphabetisch register*, Zwolle: Tjeenk Willink, 1936, 6th ed., p. 10.

tration.[168] While a registration system for transfers existed and was free of charge, it was not legally required to do so.[169] Therefore, as long as the transfer was made in writing, it needs to be presumed to have been effective.

T1:	Works for which the copyright has been transferred are subject to a written legal instrument. Most likely, this will be reflected in the presence of a contract.
T2:	After 1936, copyright assignments only cover existing works. A production contract can therefore not act as a transfer agreement.

A particular situation arises if the aim or purpose of the assignment is to assign the whole copyright as such. The full transfer of rights is possible as article 2 explicitly refers to 'het volledige auteursrecht'. In these cases, the scope of assignment is not to be examined.[170] Indeed, the issue of a full transfer does not raise any special debate in the copyright commentaries at the time. However, it has been common industry practice from early on to only assign specific parts of the copyright. In theory, copyright can be divided along the lines of economic rights, territory, for a specific duration, or any combination of these. From the literature, it is clear that the economic rights were often assigned to different parties. For example, de Beaufort already argues in 1936 that the performance right is commonly assigned separately.[171] At the same time, divisions along territorial lines or duration were still not common in 1952.[172] In other words, if copyright was assigned to a third party in the early decades covered here, the division would most likely be along the lines of economic rights and therefore type of use rather than by territory or the duration.

T3:	Transfer contracts can cover the whole or parts of the author's copyright. However, when the rights are transferred from the author to a third party, it will most likely lead to a division of rights.
T4:	The most likely division of copyright is along the economic rights rather than jurisdictions or timeframe.
T5:	Transfers are not likely to lead to purpose divisions[173] between 1912 and 1973.

168 Article 51 Aw. However, receipts of remuneration payments do require a seal. Arrest van den Hoogen Raad van 8 april 1925, NJ 1925, 668.

169 T. Wink, *Auteursrecht in Nederland*, Amsterdam: Ver. bevordering belangen des Boekhandel 1952, p. 13.

170 H. Pfeffer and S. Gerbrandy, *Kort commentaar op de auteurswet 1912*, Haarlem: De Erven Bohn 1973, p. 16.

171 H. De Beaufort, *Auteurswet 1912– wet van den 23sten September 1912, S. 308, zooals die wet nader is gewijzigd met aanteekeningen, ontleend aan de beraadslagingen en gewisselde stukken enz., bijlagen en alphabetisch register*, Zwolle: Tjeenk Willink, 1936, 6th ed., p. 10.

172 T. Wink, *Auteursrecht in Nederland*, Amsterdam: Ver. bevordering belangen des Boekhandel 1952, p. 12-13.

173 As mentioned before, the Schoon Schip dataset also includes information on the purpose of use, e.g. cultural, education, etc.

Table 15: Contract rules for copyright works 1912-1936.

<table>
<tr><th></th><th>1912</th><th>1924</th><th>1925</th><th>1936</th><th>1952</th></tr>
<tr><td rowspan="3">Legal Provision</td><td colspan="5">Copyright is considered a moveable asset</td></tr>
<tr><td colspan="5">Copyright can be transferred in part or as a whole</td></tr>
<tr><td colspan="5">Any transfer has to be based on a written instrument</td></tr>
<tr><td rowspan="4">Inter-pretation</td><td></td><td colspan="4">The formal requirements of the written instrument are low</td></tr>
<tr><td colspan="2"></td><td colspan="3">There is no registration requirement for the written instrument</td></tr>
<tr><td colspan="3"></td><td colspan="2">Future works are not covered</td></tr>
<tr><td colspan="4"></td><td>Commis-sioned works are not covered</td></tr>
</table>

The scholarly interpretation of how contracts should be understood started to shift in the 1970s. The debate has two linked components: the full transfer of copyright and how to interpret gaps in the contract. Writing in 1975, Gerbrandy argues that copyright can be transferred as a whole by stating this explicitly. As a result, the context or purpose of assignment is not relevant when the whole copyright is transferred. The assignment always covers all rights. However, Wink argues differently in the same year: the intent of the transfer remains relevant because a full transfer is not desirable.[174] In particular, when judges interpret contracts, they tend to favour author if in doubt.[175] As a result, the situation and circumstances under which the full copyright was assigned remain relevant.[176] These contradictory positions reflect a change in the purpose of article 2. For the first school of thought, article 2 is a neutral instrument in which the affected parties state their will. On the other hand, Wink reflects a new rationale for article 2 which is increasingly gaining influence: article 2 requires a written instrument to protect the author from himself.[177] This aim can only be achieved if the instrument is interpreted narrowly, for example by taking the context into account even if the written instrument does refer to the 'whole copyright'.

174 T. Wink, *Auteursrecht in Nederland: auteurswet 1912, Berner conventie, universele auteursrecht-conventie* (Amsterdam: ereeniging ter bevordering van de belangen des boekhandels, 1975, 7th ed.), p. 23.
175 T. Wink, *Auteursrecht in Nederland*, Amsterdam: Ver. bevordering belangen des Boekhandel 1952, p. 22.
176 S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, Deventer: Kluwer 1988, p. 22.
177 T. Wink, *Auteursrecht in Nederland*, Amsterdam: Ver. bevordering belangen des Boekhandel 1952, p. 21.

In line with this shift in emphasis, the interpretation of contracts is also shifting. When a contract is interpreted, it is not sufficient to only follow the letter of the law. Instead, it is also relevant what the contracting parties could expect from one another based on the circumstances and good faith. In this respect, the interpretation follows the general rules for contract interpretation as set out by the 1972 Burgerlijke Wetboek.[178] The analysis first interprets the relationship between the parties, such as the social position of the parties and the extent to which they can be expected to have legal knowledge.[179] In addition though, the contract covers who could *redelijkerwijs* be expected by the parties – in practice a reference to common industry practice.[180] If the transfer instrument lists the specific rights to be covered, then the interpretation is comparatively clear. In particular, only those rights explicitly mentioned or described in the transfer instrument are covered.[181] However, the implication of basing the interpretation of transfers on their purpose is that even those rights not explicitly named in the instrument can be covered in practice. The scope of the purpose itself has to be read narrowly though: another purpose is not included,[182] even when it may seem related. By 1988, agreements most commonly do not only list the economic rights but as article 2 states also the purpose of assignment: the nature of reason why the copyright was assigned in the first place.[183]

T6: By 1973, full copyright transfers are increasingly debated. As a result, contracts will be more detailed to ensure those rights required by the assignee are covered. The assignment is likely to be more fine-grained, listing more individual rights.

178 BW 7, title 8 [ontwerp].

179 HR 30 maart 1981, NJ 1981, 635.

180 T. Wink, *Auteursrecht in Nederland*, Amsterdam: Ver. bevordering belangen des Boekhandel 1952, p. 22; H. Pfeffer and S. Gerbrandy, *Kort commentaar op de auteurswet 1912*, Haarlem: De Erven Bohn 1973, p. 17 – it should be noted though that the cited cases are from 1923.

181 T. Wink, *Auteursrecht in Nederland*, Amsterdam: Ver. bevordering belangen des Boekhandel 1952, p. 22.

182 H. Pfeffer and S. Gerbrandy, *Kort commentaar op de auteurswet 1912*, Haarlem: De Erven Bohn 1973, p. 9; T. Wink, *Auteursrecht in Nederland*, Amsterdam: Ver. bevordering belangen des Boekhandel 1952, p. 21.

183 Aard van de overeenkomst is not the same as the Zwecksübertragungstheorie. In particular, it is broader and therefore potentially gives the assignee a broader claim, according to Gerbrandy. In this respect, the purpose of the work is the only thing to consider S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, Deventer: Kluwer 1988, p. 31.

Similarly, the trend favouring authors is also visible in respect to moral rights. In particular, a transfer only affects the economic, not moral rights.[184] While the author can waive them, they cannot be exercised by the assignee. If the proposed exploitation impacts on the author's moral rights, it is therefore essential to get permission from him, irrespective of if he still holds the economic rights or not.

T7: After 1973, it is clear that the author keeps his moral rights and therefore some control of the final product. This acts as an incentive to record the name of the author, most likely reflected in the broadcast's metadata.

Finally, even a full transfer does not include uses unknown at the time of the assignment.[185] This means in practice that new technologies are not covered. The right is instead held by the assignor, therefore the original author. In respect to this report, this has important implications. First, NISV's current licensing efforts focus on online use and therefore the making available right. While, the scope of a transfer crucially relies on the wording of the agreement, the distance between the known technology at the time and today (especially the internet) means that it cannot be reasonably assumed that the assignment would include the making available right.[186]

T8: New digital uses of broadcasts made after 1975 have to be based on separate licenses or transfer agreements. This should be directly linked to an increase in authorship information in the metadata.

184 T. Wink, *Auteursrecht in Nederland*, Amsterdam: Ver. bevordering belangen des Boekhandel 1952, p. 21, 27.

185 H. Pfeffer and S. Gerbrandy, *Kort commentaar op de auteurswet 1912*, Haarlem: De Erven Bohn 1973, p. 16-17.

186 P.B. Hugenholtz and L. Guibault, 'Auteurscontractenrecht: naar een wettelijke regeling? – Onderzoek in opdracht van het WODC (Ministerie van Justitie), 2004 (available at: https://www.ivir.nl/publicaties/download/auteurscontractenrecht.pdf, last accessed 27/2/17), 2004, p. 9; Pres. Rechtbank Amsterdam 17 juli 1997, *Informatierecht/AMI* 1997-8, p. 168 (*Kodo/Canon*); Rechtbank Amsterdam 24 september 1997, *Informatierecht/AMI* 1997-9, p. 194 (*Heg cs./De Volkskrant*); Rechtbank Amsterdam 9 augustus 2000, AMI 2001-3, p. 66 (*PCM/freelancers*); Hof Amsterdam 2 mei 2002, *AMI* 2002-4, p. 144 (*Stam/De Volkskrant*); Rechtbank Utrecht 18 september 2002, *AMI* 2003-1, p. 33 (*NVJ/PCM*).

Table 16: Contract rules for copyright works 1912-1988.

<table>
<tr><th></th><th>1912</th><th>1924</th><th>1925</th><th>1936</th><th>1952</th><th>1973</th><th>1975</th><th>1988</th></tr>
<tr><td rowspan="4">Legal Provision</td><td colspan="7">Copyright is considered a moveable asset</td></tr>
<tr><td colspan="7">Copyright can be transferred in part or as a whole</td></tr>
<tr><td colspan="7">Any transfer has to be based on a written instrument</td></tr>
<tr><td colspan="6"></td><td colspan="2">Moral rights are not transferable but some can be waived[a]</td></tr>
<tr><td rowspan="5">Interpretation</td><td colspan="7">The formal requirements of the written instrument are low</td></tr>
<tr><td colspan="4"></td><td colspan="4">There is no registration requirement for the written instrument</td></tr>
<tr><td colspan="5"></td><td colspan="3">Future works are not covered</td></tr>
<tr><td colspan="6"></td><td colspan="2">Unknown uses are not covered</td></tr>
<tr><td colspan="5"></td><td colspan="3">Commissioned works are not covered</td></tr>
<tr><td>Scholarly Debate</td><td colspan="6">A full transfer of rights does not require interpreting the purpose of the contract separately</td><td>Purpose is increasingly relevant: full transfer depends on purpose of the contract</td></tr>
</table>

a Article 25 Aw.

Copyright Contracts after 1992

Article 2 was revised fundamentally in 1992. The fundamental statement as to the nature of copyright was dropped. In the older version, article 2 first states that copyright is a 'roerende zaak'. This is now not the case anymore. However, the changes were necessitated by a reform of the underlying civil code as whole rather than the wish of making substantive changes to the Copyright Act.[187] Instead, the article is still essentially an implementation of the core rules taken from the revised Burgerlijk Wetboek.[188] As a result of the amendments, the interpretation is more closely linked to other contracts.

187 Kamerstukken *II* 1989/90, 17 896, 3, p. 21.

188 C. Gielen, *Intellectuele eigendom: de tekst van de Auteurswet 1912, de Wet op de naburige rechten, de Beneluxverdragen en wetten betreffende merken en tekeningen of modellen, de Handelsnaamwet, de Rijksoctrooiwet 1995, de Wet inzake topografieën van halfgeleiderprodukten en de Zaaizaad- en Plantgoedwet voorzien van commentaar en met toevoeging van enige andere nationale en Benelux-regelingen*, Deventer: Kluwer, 1998, p. 5.

Copyrights and neighbouring rights are in principle subject to contractual freedom.[189] This means it is up to the contracting parties to determine the details of any contract or license. Copyright remains explicitly assignable in whole or in part ('gehele of gedeeltelijke'). Any transfer still has to be in writing though.[190] In addition, the instrument needs to be clearly defined; in particular, it now explicitly has to mention that a transfer is involved.[191]

Any assignment has to be specific enough to be clear, under the requirement of 3:84(2) BW. It requires that the information is sufficient to identify what has been transferred.[192] In the context of copyright, this requirement is met if the assignment is linked to specific repertoire items and rights.[193] Most notably, this can now include future works which have not been created yet.[194]

T10: Contracts can explicitly show the transfer of future works after 1992. A production contract can therefore now act as an instrument of transfer.

In difference to general BW rules, transfers are – if in doubt – to be interpreted in favour of the author. The transfer, based on subparagraph 2, only includes what is explicitly named or results from the intent or nature of the transfer. The principles of *redelijkheid* and *billijkheid* determine how any licensing or transfer agreement has to be interpreted, in particular the meaning and extent of the assignment.[195] Contractual conditions are void if they impose an unreasonably long timeframe for future works or are otherwise unreasonably onerous for the author.[196] At the same time, a complete transfer is possible since the law specifically accounts for it, even if not all rights are separately named.[197] In practice however, this provision continues to limit a complete transfer despite the instrument referring to 'the copyright'.[198] In this context, general legal principles, common practice as relevant to specific circles

189 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 446-447.

190 Article 2(3) Aw; J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 414. It implemented 3:83 BW.

191 Article 2(3) Aw; Hof Den Bosch, 19 mei 1997, AMI 1998 nr 1, p. 16.

192 HR 28 maart 2014, ECLI:NL:PHR:2013:1093 (*NORMA/ NLK*), para. 4.4.2.

193 HR 28 maart 2014, ECLI:NL:PHR:2013:1093 (*NORMA/ NLK*), conclusie by Verkade, para. 5.5-5.9.

194 M. van Eechoud, 'Netherlands', §4[3][c].

195 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 447.

196 Article 25f Aw.

197 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 433.

198 C. Gielen, *Intellectuele eigendom: de tekst van de Auteurswet 1912*, p. 5; art. 5(2) Aw.

as well as societal and personal aspects are all taken into account.[199] The application crucially depends on the specific circumstances of the case; it would for example take into account common behaviour and expectations in a creative sector. In practice, assignment contracts can be expected to be standardised to some extent, influencing how deviating ones will be interpreted. Although the terminology used to describe the rights assigned differs, there are some terms which have become commonly used – depending on the parts of the business.[200]

It should be noted that when a work is commissioned, paid for and even when the copies are delivered, none of these acts includes the underlying copyright in the work.[201] In fact, if the contract includes payment, it can but does not necessarily mean that a copyright transfer has occurred.[202] Implicit transfers remain excluded.

The status of the author has also been strengthened in other respects. While a transfer or licensing of rights does include not the right to have them exploited in practice, if they are not used, then they need to be returned to the author, depending on the situation.[203] This is first mentioned explicitly in the scholarly commentary by 2005. In addition, the author has a right to additional remuneration if the original payment is not in line with the economic value.[204]

T11: Since 2005, authors have the right to additional remuneration, making a record of their names more likely. This trend is enhanced with the introduction of article 25d in 2015. It is therefore expected that more key contributors are named as such in the metadata.

It should be noted at this point that moral rights are not affected by any transfers or licenses.[205] The first sentence in article 25 refers explicitly to 'even after assignment of copyright'.[206] Moral rights cannot be transferred but are often waivable.[207] Waivable are the right to be mentioned by name, to restrain publication under another name, as well as make modifications to a work, but it does not include the right to

199 'Commentaar op art. 3:12 BW' [Redelijkheid en billijkheid]in C. Stolker and W. Valk and H. Krans, *Tekst & Commentaar Burgerlijk Wetboek*.

200 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 428.

201 Rechtbank Zutphen 8 juni 1994 CR 1994, p. 215; J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 422.

202 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 424.

203 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 444-446.

204 Article 25d Aw.

205 C. Gielen, *Intellectuele eigendom: de tekst van de Auteurswet 1912*, p. 4.

206 Article 25 Aw.

207 M. van Eechoud, 'Netherlands', §4[2][a].

oppose distortions of the work.[208] Moral rights can be invoked against assignees, licensees as well as third parties.[209]

Debate remains about how contracts relate to technical innovation. Unknown uses is debated as article 2, subparagraph 2 can be interpreted as allowing for the transfer of future uses ('*aard and strekking*' and the full transfer is explicitly recognised 'geheele') while others say it can never be included.[210] Spoor et al argue that future uses can be included if this justified by the nature of the agreement.[211] On the other hand, Hugenholtz maintains that recent case law indicates that agreements are now increasingly interpreted following the German-style *doeloverdrachtsleer* (Zweckübertragungstheorie).[212] With respect to forms of exploitation unknown at the time of the assignment, the lower courts tend to interpret them restrictively.[213] The question was indirectly answered in 2015: the introduction of article 25c states that authors who have transferred their rights have the right to additional remuneration if the assignee uses the work in ways not known at the time of the transfer.[214] This means in practice that new uses are included.

T12:	As a result of the academic debate preceding 2015, unknown uses are likely to be explicitly listed in the contracts.
T13:	Unknown uses are presumed included in contracts after 2015, subject to remuneration, and therefore act as a requirement for recording the name of the authors.[215]

208 M. van Eechoud, 'Netherlands', §7[4].

209 M. van Eechoud, 'Netherlands', §6[2][1].

210 C. Gielen, *Intellectuele eigendom: de tekst van de Auteurswet 1912*, p. 5.

211 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 434.

212 Rechtbank Haarlem 3 december 2003, *AMI* 2004 nr 3, noot van Hugenholtz, p. 112

213 M. van Eechoud, 'Netherlands', §4[3][a].

214 Article 25c(6) Aw.

215 The incentive to keep records of key authors increases if additional remuneration needs to be paid. The metadata is one way to keep these records because of its easy accessibility compared to alternatives.

Table 17: Contract rules for copyright works 1912-2015.

<table>
<tr><th></th><th>1912</th><th>1924</th><th>1925</th><th>1936</th><th>1973</th><th>1975</th><th>1988</th><th>1992</th><th>1998</th><th>2014</th><th>2015</th></tr>
<tr><td rowspan="5">Legal Provision</td><td colspan="7">Copyright is considered a moveable asset</td><td colspan="4">Copyright is not a moveable asset</td></tr>
<tr><td colspan="11">Copyright can be transferred in part or as a whole</td></tr>
<tr><td colspan="11">Any transfer has to be based on a written instrument</td></tr>
<tr><td colspan="3"></td><td colspan="8">Moral rights are not transferable but some can be waived</td></tr>
<tr><td colspan="10"></td><td>New uses are covered in copyright transfer contract</td></tr>
<tr><td rowspan="6">Interpretation</td><td></td><td colspan="9">The formal requirements of the written instrument are low</td><td>The document has to clearly state that it is a transfer</td></tr>
<tr><td colspan="3"></td><td colspan="4">There is no registration requirement for the written instrument</td><td colspan="4">No registration facility exists anymore</td></tr>
<tr><td colspan="4"></td><td colspan="3">Future works are not covered</td><td colspan="2">Future works are included</td><td>Transfer of rights is void if conditions are too onerous for author</td></tr>
<tr><td colspan="6"></td><td colspan="5">Unknown uses are not covered by transfer</td></tr>
<tr><td colspan="5"></td><td colspan="6">Commissioned works are not covered by transfer</td></tr>
<tr><td colspan="10"></td><td>Author has right to additional remuneration if work has been exceptionally economically successful</td></tr>
</table>

	1912	1924	1925	1936	1973	1975	1988	1992	1998	2014	2015
Scholarly Debate							Possibility of full transfer is debated				
	A full transfer of rights does not require interpreting the purpose of the contract separately			For a full transfer, the purpose is increasingly relevant: full transfer depends on purpose of the contract		The purpose of assignment in addition to details of the transfer determines if a full transfer has occurred		Repertoire and rights in question have to be identifiable		Contractual provisions are void if they are too onerous for the author	

4.2.2 The difference between a transfer and a license: doctrinal and empirical aspects

A similar but nonetheless distinct situation occurs when the author does not transfer his rights but instead licenses them to a third party. In particular, while the effect in terms of who can use the rights can be virtually the same, the meaning of transfer needs to be distinguished from licensing when a copyright work is concerned.[216] Discussing this is especially important today because there is an increasing trend away from authors transferring their copyrights towards licensing.[217]

Article 2 was found to not apply to the interpretation of licensing agreements in 1939.[218] Instead, licenses are subject to the BW and therefore follow the standard rules for contracts and their interpretation.[219] The result of is that several specific requirements are only applicable to transfers, but not licenses. First, licenses for copyright works are not subject to the instrument of transfer requirement. In other words, they do not have to be writing.[220] Following from this, licenses do not even have to be explicit. Instead, implied licenses are just as valid.[221]

216 H. De Beaufort, *Auteurswet 1912 – wet van den 23sten September 1912, S. 308, zooals die wet nader is gewijzigd met aanteekeningen, ontleend aan de beraadslagingen en gewisselde stukken enz., bijlagen en alphabetisch register*, Zwolle: Tjeenk Willink, 1936, 6th ed., p. 10.

217 T. Wink, *Auteursrecht in Nederland*, Amsterdam: Ver. bevordering belangen des Boekhandel 1952, p. 23.

218 Hof Amsterdam 29 juni 1939, Copyright V, 293; H. De Beaufort, *Auteurswet 1912,* 1942, p. 10.

219 C. Gielen, *Intellectuele eigendom: de tekst van de Auteurswet 1912*, p. 5.

220 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 414.

221 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 436.

L1: Copyright licenses can be implicit and do not require a written instrument. This means that the presence of a production contract is likely but not necessary.

Secondly, the interpretation of the license is not as narrow as a transfer of rights is. In principle, the interpretation of redelijkheid and billijkheid is determinative here. It essentially boils down to the reasonable expectations of the parties, as previously discussed.[222] In particular, if economic rights are listed separately and in detail, then these act as a limitation. An analysis based on the purpose of the assignment is not applicable.[223] At the same time, the notion of reasonable expectation can also work in the author's favour. In case of bankruptcy, transferred rights are treated as property of the company while in case of a license, the author can argue that the contract is broken by shortcomings on behalf of the licensee.[224] Finally, while a transfer of rights or licensing them does not include the right for them to have exploited in practice, there are circumstances in which they need to be returned to the author if they are not used.[225]

It should be noted that the reasonable expectation can extend to the transfer of licenses to third parties. Licenses can in principle be transferred but it crucially depends on the situation in question.[226] In other words, it strongly depends on the circumstances in which the licenses were issued and generalisations are not possible on its own. Instead, the facts of the specific case in question are determinative.

4.2.3 The role and interpretation of neighbouring rights – related contracts[227]

In general, the rules on transfer for neighbouring rights are closely modelled on those for copyright works. Article 9 WNR defines the rules for transfers. In its original 1993 version, it stated:

222 M. van Eechoud, 'Netherlands', §4[2][c], footnote 46.

223 M. van Eechoud, 'Netherlands', §4[2][c]; art. 2(3) Aw.

224 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 442.

225 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 444-446.

226 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 439-440.

227 Please note that performers are discussed separately.

'De rechten die deze wet verleent gaan over bij erfopvolging. Deze rechten zijn, met uitzondering van die welke genoemd zijn in het eerste lid van artikel 5, vatbaar voor gehele of gedeeltelijke overdracht. Levering vereist voor gehele of gedeeltelijke overdracht, geschiedt door een daartoe bestemde akte. De overdracht omvat alleen die bevoegdheden waarvan dit in de akte is vermeld of uit de aard of strekking van de titel noodzakelijk voortvloeit. Ten aanzien van het verlenen van toestemming als bedoeld in de artikelen 2, 6 en 8 is het bepaalde in de derde en vierde volzin van dit artikel van overeenkomstige toepassing.'

While the article has been amended in 1995 (to change the article numbering) and again in 2015, the substance remains the same. Today, it states:

'1) De rechten die deze wet verleent gaan over bij erfopvolging. Deze rechten zijn vatbaar voor gehele of gedeeltelijke overdracht. Voor het verrichten van handelingen als bedoeld in de artikelen 2, 6, 7a en 8 kan voor het geheel of een gedeelte van het uitsluitend recht een licentie worden verleend.
2) De levering vereist voor gehele of gedeeltelijke overdracht, alsmede het verlenen van een exclusieve licentie, geschiedt door een daartoe bestemde akte. [...]'

The core characteristics overlap with copyright works. First, the rights can be transferred in whole or in part – subject to a written instrument of transfer.[228]

N1:	The transfer of neighbouring rights will be based on a transfer agreement. This is likely to include production contracts.

The scope of the transfer is defined by what is explicitly listed in the instrument as well as those aspects which are necessary to give effect to the contract (noodzakelijk voortvloeit).[229]

In this context, older agreements made before the WNR was in effect remain in force.[230] This means that they need to be read according to the law in effect at the time rather than modern interpretations. The first ownerships for broadcasts, first fixation of films and phonograms already ensure that in practice the rights are

228 Article 9 WNR; Rechtbank Assen 10 december 2003, ECLI:NL:RBASS:2003:AO1020, para. 3.3-3.4.
229 Article 9 WNR.
230 Article 35(3) and (4) WNR; J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 675.

owned by the company rather than an individual. However, performers are subject to a different set of rules, making contracts the key concern.

N2:	There will be no transfer agreements before 1993. The commercial intermediary will own the neighbouring rights based on first ownership provisions, with the exception of performers.[231]
N3:	There will most likely not be any transfer agreements for phonograms and broadcasts as these are most likely company owned by default.

Most notably though, if two or more producers of phonograms, fixation of films, or broadcasters share the rights in the same phonograms, fixation or program, then each can exercise the rights unless it has been agreed differently.[232] It has the effect of licensing easier as potentially one category of right holder is sufficient for those having organisational roles in the production process. It should be noted that this does not apply to performers.

Table 18: Contract rules for neighbouring rights.

	1912	1993
Legal Provision		Law distinguishes between phonograms, first fixation of film and broadcasts on one side and performers on the other
	No protection for any neighbouring rights. Modern first ownership rules determine ownership for older subject matter	Full or partial transfer is possible
		Requires written instrument
		No safeguards limiting the full transfer of rights.
		Presumption of owners being able to act independently of other owners
Interpretation	Contract law and copyright contract law determine scope of agreements	WNR shapes interpretation of agreements

231 For broadcasts made before 1993, the neighbouring rights cannot have been transferred. As a result, it needs to be presumed that the owner is the party that the default first ownership provisions deem them to be.

232 Article 14 WNR.

In this context, it should be noted that licensing is an explicit feature of the Neighbouring Rights Act. Licenses for neighbouring rights follow the same requirements as for transfers.[233] This includes for example the need for a written instrument to give a license legal effect.[234] There are also particular situations when the WNR provides for remuneration rights rather than exclusive ones. This means that the right holder cannot prevent the use of his subject matter, as such as long as he receives compensation. The remuneration rights available under article 2, 6, 7a and 8 and therefore the rights of performers, phonogram producers, broadcasters and film producers cannot be assigned or waived.[235]

Additional rules for performers

In difference to the other neighbouring rights, performers are the first owner of their rights. As a result, they are subject to another set of transfer rules. The first part of Article 3 WNR states:

> *'De werkgever is bevoegd de rechten van de uitvoerende kunstenaar, bedoeld in artikel 2, te exploiteren, voor zover dit tussen partijen is overeengekomen dan wel voortvloeit uit de aard van de tussen hen gesloten arbeidsovereenkomst, de gewoonte of de eisen van redelijkheid en billijkheid.'*

Most notably, in addition to the general transfer rules under article 9 WNR, performers are subject to an employment rule. Article 3 presumes that there is an employment contract between the performer and a third party.[236]

N4:	The employment of performers requires a contract.

However, the conceptualisation of employment is different compared to copyright works. Under copyright law, the employer is presumed to be the author, giving him the same status as any other author receives. Article 3 is essentially a presumption of licensing in favour of the performer's employer.[237] In other words, when a performer is employed to participate in a project, there is a legal presumption that the performer has licensed at least some rights to the employer. It does not make the

233 Article 9 WNR; J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 674.

234 C. Gielen, *Intellectuele eigendom: de tekst van de Auteurswet 1912*, p. 114.

235 Article 9 WNR; C. Gielen, *Intellectuele eigendom: de tekst van de Auteurswet 1912*, p. 114.

236 This is the case because art 45a Aw-45g Aw apply by reference under art. 4 WNR and therefore also the waiver on the right to integrity under article 45f Aw. 'Wet op de naburige rechten', § 3 in P. Geerts and D. Visser (eds.), Tekst & Commentaar Intellectuele Eigendom (Wolters Kluwer, 2016, 5th ed.).

237 C. Gielen, *Intellectuele eigendom: de tekst van de Auteurswet 1912*, p. 105.

employer the performer as such, but instead gives the employer control over the economic rights. In other words, the rights in the performance have to be interpreted as a license and therefore subject to contract law rather than first ownership provisions as it applies in the copyright act. While employment contracts and productions are separate for copyright works, they merge in respect to performers' rights. It should be noted that this article does not apply to commissioned works.[238]

N5: Performer rights are shaped by their employment contract which acts as an instrument of transfer. As a result, a production contract can constitute an employment contract.

Since the relationship between the employer and performer is essentially based on licensing and therefore contract law rather than employment law, the interpretation of the contracts becomes paramount. Article 3 WNR then defines how the relevant contract have to be interpreted:

> *'Tenzij anders is overeengekomen of uit de aard van de overeenkomst, de gewoonte of de eisen van redelijkheid en billijkheid anders voortvloeit, is de werkgever aan de uitvoerende kunstenaar of zijn rechtverkrijgende een billijke vergoeding verschuldigd voor iedere vorm van exploitatie van diens rechten. De werkgever eerbiedigt de in artikel 5 bedoelde rechten van de uitvoerende kunstenaar.'*

As article 3 states, the interpretation of a performer's contract is subject to redelijkheid and billijkheid. As with copyright works, they essentially mean that common industry practice and the justified expectations of all parties are the benchmark. The conditions under which a new use is considered reasonable included is limited. In particular, if other non-standard uses are treated separately, then the new use would not be included.[239] However, the presumption of licensing is very strong and not reduced by a quitclaim.[240] As a result, the interpretation of performer contracts is significantly different from other transfers of neighbouring rights. In particular, performers benefit from similar safeguards that authors get in article 2 Aw. However, the limitations in interpretation do not apply to the other neighbouring rights – as Spoor argues, there is no need to limit transfers between phonogram-, film producers and broadcasters.[241] After all, these are already company owned and not by an individual.

238 C. Gielen, *Intellectuele eigendom: de tekst van de Auteurswet 1912*, p. 105.

239 The case was on royalties for commissioned phonogram producers; Rechtbank Dordrecht 11 augustus 1999, *AMI* 1999 nr 10, p. 161.

240 A. Rechtbank Amsterdam, 22 juli 1999, Abramovic, *AMI* 2001 nr 1, p. 19.

241 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 674.

N6: The employment contract of a performer can include new uses, depending on how other non-standard ones are listed. As a result, their inclusion is less likely in a highly detailed contract compared to one referring to more general uses. This acts as a disincentive against detailed contracts.

Similar to authors, performers have the right to remuneration unless the contract says differently, subject to redelijkheid and billijkheid apply.[242] A fair remuneration which was fair at one point is not without a change in circumstances not fair anymore.[243]

N7: Since 1993, the remuneration requirement acts as an incentive to record the names of main performers.

More importantly, the fact that it is a transfer also means that the moral rights remain with the employee, although they are waivable.[244] It should be noted here that the performer's moral rights are narrower than those of the author. In particular, they do not have the moral right to object changes of the work.[245]

N8: The waivable nature of moral rights does not act as an incentive to record the name of the performer.

Table 19: Contract rules for neighbouring rights in the context of employed performers.

	1993
Legal Provision	Written employment contract is required.
	Employees are presumed to have transferred or exclusively licensed relevant economic rights.
	Contracts are subject to redelijkheid and billijkheid, both in terms of rights transferred to the employer and remuneration due to the performer
Inter-pretation	Interpretation is more favourable to individual performer than other WNR rules
	Moral rights are narrower for performers and fully waivable
	New uses are not automatically included in the employment contract

242 C. Gielen, *Intellectuele eigendom: de tekst van de Auteurswet 1912*, p. 106.
243 A. Rechtbank Amsterdam, 22 juli 1999, *AMI* 2001 nr 1 (*Abramovic*), p. 19.
244 C. Gielen, *Intellectuele eigendom: de tekst van de Auteurswet 1912*, p. 106.
245 C. Gielen, *Intellectuele eigendom: de tekst van de Auteurswet 1912*, p. 107.

4.3 Contracts in the context of film works

In 1912 when the copyright law was first introduced, filming was a new phenomenon.[246] Film works were protected in the same class as photographs, rather than an independent type of work. As a result, all authors shared the copyright in the final product, requiring their combined consent to exploit the film. However, while a photograph usually only has one maker (or at most), films have always been a team effort. As a result, concerns about who can exploit the final product became increasingly dominant. In particular, the requirement for all authors to give permission to the use of the final product raises the potential of individuals blocking the efforts of everyone else. In response to this, the law has been interpreted in such a way as to concentrate the decision making powers into the hand of one individual: the producer. However, how this has been done has significantly changed over time.

The early conceptualisation of audio-visual works by the courts saw them as a collective work. Collective works are subject to their own authorship rules, under article 5(1) Aw stated:

> *'Van een werk van letterkunde, wetenschap of kunst, hetwelk bestaat uit afzonderlijke werken van twee of meer personen, wordt, onverminderd het auteursrecht op ieder werk afzonderlijk, als de maker aangemerkt degene, onder wiens leiding en toezicht het gansche werk is tot stand gebracht, of bij gebreke van dien, degene, die de verschillende werken verzameld heeft.'*[247]

Most notably, the notion of the film as a joint work and therefore all authors sharing the copyright under article 26 Aw,[248] was explicitly rejected in 1949.[249]

Applying article 5 Aw (old) to film works has the effect of creating a separate copyright in the final product (as opposed to the copyright in the individual contributions). The author of the final product is the person who has supervised and taken the lead in the creation of the overall collective work. Following this logic, the producer (natural or legal person)[250] of the film was considered the maker of the overall

246 The 1908 revision of the Berne Convention introduced film works as copyrightable material but this was not explicitly implemented by the Dutch law maker.

247 Article 5(1) Aw, version 1912-2004.

248 Article 26 Aw reads: ‚Indien aan twee of meer personen een gemeenschappelijk auteursrecht op een zelfde werk toekomt, kan, tenzij anders is overeengekomen, de handhaving van dit recht door ieder hunner geschieden'.

249 Confirmed in 1938 HR 27 Mai 1938 N.J. 1095 (*Blom/ GEMA*); HR 25 maart 1949, N.J. 1950, no. 643 (*La Belle et la Bête*).

250 It should also be noted that this reliance on article 5 Aw did have implications on the term of protection. The term has to be calculated from the death of the author, rather than the death of the last surviving author. This also means that individual contributions can be protected longer than the final product. J. Vermeijden, *Auteursrecht en het kinematografische werk*, Zwolle: Tjeenk Willink 1952, p. 84-85.

film work.[251] The producer is therefore right holder in his own right by default,[252] strengthening his position in comparison to the individual contributors. It should be noted though that the creation of collective works has always been based on contracts, written or oral, as a range of different contributors work together to create a final product. After all, to qualify as the author here, the producer needs to have supervised the creation of the work.

F1:	Between 1912 and 1985, the copyright in the film work as a collective work is most likely owned by the producer. This provides an incentive to name the producer in the metadata.
F2:	The relationship between the producer and the contributors is often based on contracts. If the producer is a legal person, these contracts will most likely be in writing.

Not all contributions to the film work were considered equally subject to article 5 Aw. In particular, the court also held that a film work was only the audio-visual work as such, meaning the moving images and spoken words seen as one unit. The film's music had to be considered separately.[253] In other words, composers had an independent copyright in the music in addition to the copyright in the film as such.[254] This particular approach also means that it is more likely that a composer rather than any other author category will be named.

F3:	The film work was conceptualised as the audio-visual component and the film's music. This strengthens the position of the composer compared to the producer, providing an incentive to name the composer in the metadata.

Nonetheless, the rights of the producer under these rules are limited vis-à-vis the contributing authors. As article 5(1) mentioned: the individual components are independent from the final product from a copyright point of view.[255] In other words, the person carrying the organisational burden does not own the rights in the individual contributions as such.[256] As a result, the producer's rights are limited to circumstances which

251 HR 14 februari 1935, NJ 531 (*Das Blaue Licht I*).

252 J. Vermeijden, *Auteursrecht en het kinematografische werk*, Zwolle: Tjeenk Willink 1952, p. 81-82.

253 J. Vermeijden, *Auteursrecht en het kinematografische werk*, Zwolle: Tjeenk Willink 1952, p. 91-92.

254 HR 14 februar 1935, NJ 531 (*Das Blaue Licht I*).

255 T. Wink, *Auteursrecht in Nederland*, Amsterdam: Ver. bevordering belangen des Boekhandel 1952, p. 21.

256 H. De Beaufort, *Auteurswet 1912 – wet van den 23sten September 1912, S. 308, zooals die wet nader is gewijzigd met aanteekeningen, ontleend aan de beraadslagingen en gewisselde stukken enz., bijlagen en alphabetisch register*, Zwolle: Tjeenk Willink, 1936, 6th ed., p. 15.

fall within the normal exploitation of the work. At the time, a film was shown in cinemas around the country. In 1949, the Hoge Raad also held that the term 'normal exploitation' varied between the collective part (the audio-visual component) and the underlying music. In particular, while the producer's rights in the former did include the right to perform, this did not apply to the musical contribution. First, the right to perform was not necessary for the producer to sell and distribute copies of the film. Secondly, the theatre could always access licenses for the performance of the musical work via the Collective Management Organisation (CMO) system.[257] This particular interpretation further strengthens the position of the composer vis-à-vis the producer.

F4: Between 1912 and 1985, the rights of the producer are limited to the normal exploitation of the work. While this refers to the reproduction, distribution and performance of the audio-visual component, it only covers the reproduction and distribution of the film's music.

It should at this point also be noted that the moral rights of the contributors are not considered an important factor and are indeed usually omitted from the discussion.

Table 20: Film works as collective works 1912-1952.

<table>
<tr><th></th><th>1912</th><th>1935</th><th>1949</th></tr>
<tr><td>Legislation</td><td>Film work is a joint work</td><td colspan="2">Film is collective work</td></tr>
<tr><td rowspan="5">Interpretation</td><td>All authors share the rights in the final product</td><td colspan="2">Producer has the rights in the collective work and the composer in the music.</td></tr>
<tr><td rowspan="3"></td><td colspan="2">Relationship between producer and authors is based on contracts</td></tr>
<tr><td>Producer has right to normal exploitation of the work (reproduction, distribution and performance)</td><td>Producer has right to normal exploitation of the work (reproduction, distribution and performance) for the collective component but not performance of the musical work</td></tr>
<tr><td colspan="2">No clear understanding of which contributions are copyrightable in their own right, except for composers</td></tr>
<tr><td colspan="3">No discussion of moral rights</td></tr>
</table>

257 HR 25 maart 1949, NJ 1950, no. 643 (*La Belle et la Bête).*

While the legal situation remained unchanged, the debate about the nature of film works continued – not least as other court decisions treated film works implicitly differently. For example, the Hoge Raad examined the applicability of article 6 Aw to the benefit of a film producer. While it did not reject the applicability as such, it found it unlikely that the film producer would ever exercise the required degree of control.[258] In this context, some have argued that the same case leads to the interpretation that the court now sees the work as a joint work rather than a collective work, however, this is disputed by Vermeijden.[259] In other words, while the case law relied on the collective works rules, the Hooge Raad implicitly treated films as a joint work in other cases.

In addition, there is a pronounced shift towards the role of the creative authors in the debate. On one hand, it becomes increasingly clear which category of contributors are likely to have made an original contribution. In 1952, Vermeijden only explicitly named the set designer and composer but left the option open for other contributors.[260] By 1975, new categories are added, in particular the authors of the underlying works such as the script and decors are clearly recognised.[261] Secondly, while film works are still seen as collective works under article 5, the possible beneficiary changed. Gerbrandy argues that for example a director or author of the dialogue may be considered as the maker on the basis of article 5 Aw.[262] This is a change compared to earlier arguments which considered only the producer as the beneficiary. As a result of these trends, it is likely that the metadata lists more categories of contributors. This increase will be most likely visible for those authors involved in writing the script, the director as well as the maker of decor.

F5:	A wider range of creative contributors to the film are recognised by 1975. As a result, it is likely that the metadata will show a gradually wider range of categories.
F6:	By 1975, the beneficiary of the collective works provision can in theory be the producer, director or author of the dialogue. This change may be reflected in the metadata.

To limit the effect of stronger author-recognition, contracts are now considered a key feature of film works. When contributions are also copyright works in their own right, the potential interferences with the rights of the collective work's beneficiary increase. After all, this is essentially the effect the composer's rights had from the

258 HR 25 maart 1949, NJ 1950, no. 643 (*La Belle et la Bête).*

259 J. Vermeijden, *Auteursrecht en het kinematografische werk*, Zwolle: Tjeenk Willink 1952, p. 60.

260 J. Vermeijden, *Auteursrecht en het kinematografische werk*, Zwolle: Tjeenk Willink 1952, p. 79 based on German view by Ulmer. Vermeijden proposes a solution for the producer with a presumption of transfer and a separate fixation right.

261 H. Pfeffer and S. Gerbrandy, *Kort commentaar op de auteurswet 1912*, Haarlem: De Erven Bohn 1973, p. 71-72.

262 H. Pfeffer and S. Gerbrandy, *Kort commentaar op de auteurswet 1912*, Haarlem: De Erven Bohn 1973, p. 71-72.

beginning. As a result, the role of contracts becomes more pronounced. In particular, as these contributions are designed with the film in mind, the contractual relations will reflect this.[263] The producer will have contracts with all authors whose works he uses.[264] In addition, it will be clear that the contributions are made with the final product in mind, strengthening the application of article 5 to their benefit. The aim is therefore to safeguard the producer's interests vis-à-vis all other authors.

F7: In the context of stronger recognition for individual authors since the mid-1970s, producers will rely on contracts to ensure their status under article 5 Aw. This should be reflected in the presence of contracts, including production contracts.

Table 21: Film works as collective works 1912-1984.

<table>
<tr><th></th><th>1912</th><th>1935</th><th>1949</th><th>1975</th></tr>
<tr><td>Legislation</td><td>Film work is a joint work</td><td colspan="3">Film is collective work</td></tr>
<tr><td rowspan="5">Interpretation</td><td>All authors share the rights in the final product</td><td colspan="2">Producer has the rights in the collective work and the composer in the music</td><td>Producer, director or script writer holds the rights in the collective work while composer is author of the music</td></tr>
<tr><td></td><td colspan="3">Relationship between producer and authors is based on contracts</td></tr>
<tr><td></td><td>Right to normal exploitation of the work (reproduction, distribution and performance)</td><td>Right to normal exploitation of the work (reproduction, distribution and performance) for the collective component but not performance of the musical work</td><td>Right to normal exploitation of the work (reproduction, distribution and performance) for the collective component but not performance of the musical work</td></tr>
<tr><td colspan="2">No clear understanding of which contributions are copyrightable in their own right, except for composers</td><td colspan="2">Categories of recognised contributors is expanding: director, script writer, décor, etc</td></tr>
<tr><td colspan="4">No discussion of moral rights</td></tr>
</table>

263 H. Pfeffer and S. Gerbrandy, *Kort commentaar op de auteurswet 1912*, Haarlem: De Erven Bohn 1973, p. 73.
264 H. Pfeffer and S. Gerbrandy, *Kort commentaar op de auteurswet 1912*, Haarlem: De Erven Bohn 1973, p. 73.

4.3.1 Presumption of transfer

The debate on the nature of film works only effectively ended in 1985. On one hand, film works were listed as a distinct category of copyright work under article 10(10) Aw rather than a series of photographs.[265] On the other hand, the introduction of the new article 45a provided a new definition of film works:

> *'Onder filmwerk wordt verstaan een werk dat bestaat uit een reeks beelden met of zonder geluid, ongeacht de wijze van vastlegging van het werk, indien het is vastgelegd.'*[266]

This means that a film work today includes the sound – it is not a separate work again and therefore the final product is also not a collective work under article 5 anymore.[267]

The reform also answered the debate about who the authors are. In this context, the term 'author' covers all those individuals which have made a creative contribution to the film work.[268] It is therefore distinct from the definition of author relied upon in the rest of the act.[269] To determine if deserves to be qualified as author, the rule is that they are considered authors if their contribution could not be removed without changing the nature of the film.[270] By 1988, it is argued that this always includes at least: author of the script, those turning the novel into a script, dialogue author, camera men, cutter, sound engineers and the director.[271] The first thing to note is that it only refers to natural persons and therefore excludes companies and similar legal entities. Overall, the status of the contributors as authors in their own right has been strengthened, providing an incentive to naming them.

265 Article 10(10) Aw, version 1985-1994.

266 Article 5(1) Aw 1985 version is the same as today.

267 S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, Deventer: Kluwer 1988, p. 39.

268 Article 45a(2): 'Onverminderd het in de artikelen 7 en 8 bepaalde worden als de makers van een filmwerk aangemerkt de natuurlijke personen die tot het ontstaan van het filmwerk een daartoe bestemde bijdrage van scheppend karakter hebben geleverd.' – unchanged since 1985; see also: S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, Deventer: Kluwer 1988, p. 390.

269 The definition differs because of the specific nature of film works; in particular the director cannot/ will not make individual components such as the décor. As a result, in film works, the components are more varied. S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, 1988, p. 391.

270 J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 572.

271 S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, Deventer: Kluwer 1988, p. 389-390.

F8: The film work is defined as joint work after 1985. Its authors include a wide variety of contributors which share the copyright. This provides an incentive to name them in the metadata, reflected as an increase in both the number and categories of authors named.

As a joint work, the copyright is shared amongst all authors and therefore a comparatively large number of people. However, it does not include the producer. As a result, the producer now clearly does not have independent rights. Instead, all of his claims are transferred to him by the actual authors.[272]

This change in authorship by itself can threaten the exploitation of a film work. As mentioned before, film works are dependent on a whole series of other copyright works which are created during production, ranging from the dialogue to the art work. As a result, the exploitation of the film could be held up by incomplete contracts between the producer who finances the production and the creators who contribute to the work. The legislator intervened by providing guidelines as to how contractual gaps between the creators and the producer are to be interpreted.[273] Article 45d states that:

> *'Tenzij de makers en de producent schriftelijk anders overeengekomen zijn, worden de makers geacht aan de producent het recht overgedragen te hebben om vanaf het in artikel 45c bedoelde tijdstip het filmwerk openbaar te maken, dit te verveelvoudigen in de zin van artikel 14, er ondertitels bij aan te brengen en de teksten ervan na te synchroniseren. [...]'*

In essence, the authors of the film works are presumed to have transferred their rights to the film producer, rather than only provide a license.[274] As a result, the contracts are now essential to safeguard the producer's influence.

F9: The introduction of article 45d presumes a contractual relationship between the producer and the authors. This makes the presence of a contract more likely.

The focus on the economic exploitation of the final product is clear from the definition of 'producer'. Article 45a states: '*Producent van het filmwerk is de natuurlijke of rechtspersoon die verantwoordelijk is voor de totstandbrenging van het filmwerk met het oog op de exploitatie daarvan.*'[275] In other words, the producer is whoever has

272 S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, Deventer: Kluwer 1988, p. 394.
273 S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, Deventer: Kluwer 1988, p. 399.
274 Article 45d Aw; S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, 1988, p. 396.
275 Article 45a(3) Aw.

borne the responsibility of making an economically exploitable film work. It should be noted here that this definition has another important implication. The producer must have actually been involved in the production of the film. As a result, the parties involved cannot label someone as the producer if he has not played this role.[276] Overall, this is a very strong presumption: any arrangements to the contrary have to be in writing[277] and therefore leave a paper trail. In other words, although the producer does not have an independent copyright anymore, he is still the central figure in the exploitation of works. In addition, the producer should be identifiable from the production contracts as he must have been directly involved in the process.

F10:	The producer does not have an independent right in the film work after 1985. Instead, his role is based on copyright transfers and therefore contracts. This makes the presence of contracts is essential.
F11:	After 1985, the producer is always directly involved in the production of the work and therefore should be party to the production contracts.

While this presumption is definitely strong, article 45d also imposes certain limits on it. First, the rules take effect once the film is completed – a time in point which is decided by the producer unless it has been decided differently in the relevant contracts.[278] Secondly, two sets of authors are explicitly excluded from this coverage. First, the presumption is limited to those works created during the production of the film.[279] It therefore does not apply to pre-existing works, such as underlying novels. This means that both novelist and play writer have to give permission to make a film out of a play which is based on a pre-existing book.[280] On the other hand, turning a book into a film does not make the author of the book a co-author of the film. Instead, the film is essentially a reproduction of the book.[281]

Secondly, article 45d excludes the film music from the presumption of transfer and therefore the composer and lyricist.[282] These rights would fall under the normal transfer rules and therefore either need to be transferred by the composer to the producer under article 2 Aw or need to be licensed by the producer via a CMO. This means in practice that the traditionally special status of the composer is maintained, providing a continuous incentive to name him.

276 S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, Deventer: Kluwer 1988, p. 392.
277 S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, Deventer: Kluwer 1988, p. 396.
278 Article 45c Aw.
279 S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, Deventer: Kluwer 1988, p. 392.
280 S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, Deventer: Kluwer 1988, p. 334.
281 S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, Deventer: Kluwer 1988, p. 388.
282 S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, Deventer: Kluwer 1988, p. 396.

F12:	The rights of the film music's composer are not affected by the presumption under article 45d. His continuously special status provides an incentive to name him in the metadata.

Thirdly, the presumption is limited to the normal exploitation of the work. The presumed transfer of rights, as interpreted early on, covered the complete communication to the public and reproduction rights, as defined by article 12 and 14.[283] In practice, this includes making copies of the film work and performing it in public – with the audience present or not. It should be noted that authors can exercise their rights independently unless this has been organised differently in their contractual relationship.[284] They can exploit these independently as long as it does not infer with the film work.

Most notably though, the normal exploitation can extend to new uses. Article 2 Aw is until 2015 interpreted to prevent the assignment of unknown uses – these rights remain with the author. Article 45d on the other hand turns this exclusive right into a right to receive remuneration in the context of film works since its introduction in 1985.[285] Since the producer is the beneficiary of the transfer and paid for other parts of the copyright transfer, he will also be required to ensure that this remuneration is paid if he seeks to exploit the work in such a way. In other words, the term 'normal exploitation' is not fixed and has to be interpreted on a case to case basis and in context. This leads to significant uncertainty about the scope of transfer, providing an incentive to rely on detailed contracts instead. In addition, the remuneration requirement translates into a need to keep track of the authors, providing an incentive to name them in the metadata.

F13:	Article 45d explicitly recognises the importance of foreign markets to the producer. It is likely that references to jurisdictional limitations will be increasingly common.
F14:	After 1985, the presumption of transfer is context dependant in scope. To have legal certainty, this means that contracts are more likely to rely on a fine-grained assignment of rights, especially those not clearly in the scope of the 'normal exploitation' as defined in article 45d.
F15:	The remuneration requirement since 2005 for new uses requires the producer to keep a record of the main authors.

283 S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, Deventer: Kluwer 1988, p. 397-398.
284 Article 45g Aw.
285 S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, Deventer: Kluwer 1988, p. 399.

Finally, the transfer does not cover the creators' moral rights under article 45e. This is generally in line with the interpretation of other situations where the creator is not by default in control of all rights, in particular article 7 Aw and 8 Aw.[286] Nonetheless, any exercise is subject to a potential waiver under article 25(2) Aw and 25(3) Aw which lists the moral rights available to all creators, independent of the category of works.[287] It should be noted though that the moral rights under 45e cannot be waved. However, it is narrower than article 25 Aw which applies to other types of works. In particular, it only provides for the right to be named as the author or to not be named (under certain circumstances).[288] How far the moral rights actually went was not clear. No case law had arisen at this point.

F16:	The presumed transfer under article 45d does not extend to the moral rights but some of these can be waived by the author (article 45f).

The rules on contracts affecting film works do extend to the affected performances as well. Under article 4 WNR, articles 45a to 45g are declared applicable to performances which were made for the purpose of a film work.[289] In this context, a performer is a natural person that interprets a copyright protected work or work of folklore, for example by presenting, singing or otherwise performing it.[290] The definition furthermore gives specific illustrating examples, in particular the stage performer, singer and dancer. The beneficiary of the presumed transfer is the producer. It should be noted that the film producer here is in practice in most cases the same as in article 45a-ff Aw.[291] This includes the rights for the main performers under 45d(2)- 45d(6) for remuneration. Furthermore, this provision only applies to main performers and not all of them.[292] Nonetheless, for these at least, there is an incentive to name them.

F17:	Performers are subject to the presumption of transfer. Their rights ownership pattern should therefore be similar to that of authors.
F18:	Only lead performers have moral rights. The average number named in the metadata should therefore be low.

286 S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, Deventer: Kluwer 1988, p. 401-402.
287 S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, Deventer: Kluwer 1988, p. 403.
288 Article 45e (1)-(3) Aw.
289 Article 4 WNR.
290 Article 1(1) WNR.
291 C. Gielen, *Intellectuele eigendom: de tekst van de Auteurswet 1912*, p. 101.
292 'Wet op de naburige Rechten', §4 NR, para. 2 and §1, para. 4 in P. Geerts and D. Visser (eds.), *Tekst & Commentaar Intellectuele Eigendom*; Art 4(2) WNR.

Table 22: Contractual rules for film works and performances 1985-today.

	1985
Legislation	Film is joint work but preparatory work has copyright independent of film
	Authorship of the film work lies with the creative contributors, not the producer. The producer does not have an independent right in the film work
	Presumption of transfer to the benefit of the producer, the person who ensures an economically exploitable work is made
	Contracts are essential, supported by presumed transfer of rights, except for musical work
	Rights ownership is limited to the normal exploitation of the work: reproduction and communication to public; subtitling. It covers new uses but excludes adaptations
	Transfers presumed to include future uses
	Moral rights are not included in transfer but their scope is narrower than for other copyright works (waivable rights). Only leader performers have moral rights

4.4 Legal Mechanisms and Process-Tracing

This section has analysed the different mechanisms available for the concentration of rights in the hands of a legal entity using doctrinal research. Throughout the analysis, specific legal features were linked to available indicators wherever this was feasible. In addition, particular attention was paid to specific turning points and their effect on indicators.

Overall, four distinct areas are discernible on which the different mechanisms are likely to have an effect. First, there is the ownership of rights. The relevant indicators are the identity of the right holder as well as their number. It should be noticed that all indicators amount to straw tests with the one exception: ownership by a legal entity in the context of rights required by a deviation from the creator doctrine rather than a transfer-based mechanism. In the case of a first communication by a public entity, the rule is only available for legal entities by definition. In the context of employment, the required high levels of investment for broadcasting on a public broadcasting channel de-facto limit the availability to companies as well.

Table 23: Indicators for rights ownership indicators and the related process-tracing tests.

Broad-casting Type	Mechanism	Indicator	Test Type
TV	Communication by Public Entity and employment	Schoon Schip: Ownership by Legal Entity	Hoop
		Schoon Schip: Single right holder	Straw
		Catalogue: No contributor information	Straw
		Catalogue: 1 producer and 1 broadcaster	Straw
	Transfer	Schoon Schip: Legal Entity	Straw
		Catalogue: 1 producer and 1 broadcaster	Straw
Radio	Communication by Public Entity and Employment	Catalogue: No contributor information	Straw
		Catalogue: 1 producer and 1 broadcaster	Straw
	Transfer	Catalogue: 1 producer and 1 broadcaster	Straw

Secondly, there is the reliance of a contract to support the rights ownership. Given the nature of the empirical indicators available at this time, the only relevant dataset is the Schoon Schip dataset. This in turn means that the analysis is de-facto limited to TV broadcasts. The presence of a contract or its absence can have many causes, including accidental loss. As a result, all of the tests are straw tests. In addition, even predictions relating to specific events in this context are only indirectly linked to the presence of a contract. As a result, what would usually be a smoking gun test only translates into a straw in the wind one.

Table 24: Indicators for the presence of contracts and the related process-tracing tests.

Mechanism	Indicator	Test Type
Communication by Public Entity and Employment	Schoon Schip: Contract presence	Straw
Transfer	Schoon Schip: Contract presence	Straw
	Schoon Schip: Presence 1970s (status authors)	Straw
	Schoon Schip: Increase 1980s (article 45d)	Straw
	Schoon Schip: Increase 1990s (1992-1993 reforms)	Straw

Thirdly, there is the concentration of rights. The relevant indicators here are only available in the Schoon Schip dataset, e.g. TV broadcasts, and therefore cannot be tested for radio broadcasts. Again, the majority of tests fall into the category of straw in the wind.

In the case of employment as well as the communication to the public, the jurisdiction covered is a hoop test. To be valuable for a broadcaster, the rights have to at least cover their broadcasting area, in other words the Netherlands. In addition, the predictions allow for strong smoking gun test by combining several indicators together: since the legal entity here is the author, they own the rights outright. As a result, the combination of owning all economic rights, for all purposes, for the whole term of protection and at least covering the Netherlands is a strong test. It is significantly less likely that this degree of rights concentration would be achieved under another mechanism. There are also three smoking gun tests for the transfer-based mechanisms. All of these relate to specific changes in the interpretation of the law at specific time points.

Table 25: Indicators for the concentration of rights indicators and the related process-tracing tests.

Mechanism	Indicator	Test Type
Communication by Public Entity and Employment	Schoon Schip: Average number of rights	Straw
	Schoon Schip: Distinct Number of Rights	Straw
	Schoon Schip: Type of right	Straw
	Schoon Schip: Purpose of uses[a]	Straw
	Schoon Schip: Number of distinct jurisdictions	Straw
	Schoon Schip: Identity of jurisdictions	Hoop
	Schoon Schip: Duration	Straw
	Schoon Schip: Combined concentrated ownership	4x Combined Smoking Gun
Transfer	Schoon Schip: Average number of rights	Straw
	Schoon Schip: Average number of rights 1970s	Smoking Gun
	Schoon Schip: Distinct Number of Rights	Straw
	Schoon Schip: Type of right	Straw
	Schoon Schip: Identity of jurisdictions	Smoking Gun

a This refers to purpose of use.

The fourth area where the mechanisms are likely to have an effect is the status of contributors. This area is also the most varied across the three mechanisms examined as well as between radio and TV broadcasts. In particular, there are a number of specific events that are predicted to have influenced specific indicators, making them smoking gun tests.

Table 26: Indicators for the status of contributors and the related process-tracing tests.

Broadcasting Type	Mechanism	Indicator	Test Type
Radio	Communication by Public Entity and Employment	Catalogue Data: Broadcast without author	Straw
		Catalogue Data: Author categories	Straw
	Employment	Catalogue Data: Author categories (specified drop)	Smoking Gun
	Transfer	Catalogue Data: Broadcast without author	Smoking Gun
		Catalogue Data: Importance performer	Straw
TV	Communication by Public Entity	Catalogue Data: Broadcast without author	Straw
		Catalogue Data: Author categories	Straw
		Catalogue Data: Importance director	Smoking Gun
	Employment	Catalogue Data: Broadcast without author	Straw
		Catalogue Data: Author categories	Straw
		Catalogue Data: Author categories (specified drop)	Smoking Gun
		Catalogue Data: Importance director	Smoking Gun
	Transfer	Catalogue Data: Broadcast without author	Smoking Gun
		Catalogue Data: Author categories	Smoking Gun
		Catalogue Data: Importance director	Smoking Gun
		Catalogue Data: Importance composer	Straw
		Catalogue Data: Importance performer	Straw

5 Empirical Analysis

Section 4 described the three mechanisms that explain the concentration of rights in the hands of a third party rather than the creator: employment (article 7 Aw), first communication by a public entity (article 8 Aw) and transfers. This section now focuses on testing the mechanisms described in the previous section against the available empirical evidence using process-tracing.[293] The doctrinal analysis in this respect has already laid the foundations. First, it identified the relevant observable patterns for each mechanism as a set of hypotheses. Secondly, it also determined the relevant indicators for each hypothesis, drawing on the two available datasets. Thirdly, it stated for each hypothesis when and how the relevant indicator is deemed to change. Overall, these three components therefore meet the requirements of process-tracing tests: a hypothesis that can be tested against the empirical evidence.

The doctrinal analysis identified four core areas that are expected to vary between the different mechanisms: the identity of the rights holder, the presence of a contract, the degree of rights concentration and the importance of certain contributors. For each of them, a series of indicators is deemed relevant which need to be analysed one by one. For each indicator, the relevant hypotheses as derived from the doctrinal analysis for each mechanism will first be summarised to establish the expected pattern. The empirical pattern of the indicator will then be compared to all of the relevant predictions. In other words, each indicator is compared to all of the relevant mechanisms and their predictions. As a result, all hypotheses are treated as equally likely in the process-tracing. Finally, each section will conclude with an overall assessment of the mechanisms on the specific area examined.

The summary draws together the findings in two distinct ways. The first part focuses on the extent to which the individual hypotheses were affirmed. The relevance of mechanisms is essentially based on the number of process-tracing tests that were passed or failed. Green indicates that the test was passed while red means that the test was failed. In addition, if the evidence is inconclusive, orange is used.

293 See section 3. Rights Concentration in TV Productions for the rights concentration and section 1.3 Methodology for the nature and use of process-tracing.

Finally, in cases when a test is border-lining pass or failing, a lighter variant of the relevant colour is used to indicate this. The larger the number of passed tests is in comparison to inconclusive and especially failed ones, the more likely a mechanism has been relevant.

The second part of the summary then takes into account the weighted importance of the individual tests. A straw test is awarded a score of 1. The slightly stronger smoking gun test is weighted as a 1.5. Hoop tests are more critical and therefore get the score 2 while combined tests are given a 3. In addition, when a test was determined as borderline and therefore lighter colours were used, 0.5 is subtracted from the standard test value. For example, a light green straw test is awarded 0.5 rather than 1. When the test is failed, the value is subtracted. The conclusion is based on the awarded score in comparison to the maximum possible score. The higher the relative score, the more likely it is that a mechanism has been influential.

5.1 Ownership of rights

The first area under examination is the ownership of rights. The first main indicator relates to the actual ownership of rights. The predictions are that if the rights have been acquired by employment or first communication by a public entity, then a legal entity (rather than a natural person) will own the rights.

C1:	The legal entity is considered the author. This will most likely be a single entity.
E3:	Due to the financial resources required, the author will most likely be a legal entity. This will most likely be a single entity.

These rules are stable across time and therefore in force from 1912 until today. The process-tracing test is essentially a hoop test for both hypotheses. In the case of C1, it is actually a legal requirement that a public entity is the beneficiary. In the context of employment, it is theoretically possible that a natural person employs the contributors. However, this is not feasible for public service broadcasts as examined in this report because the resources and management required to do a broadcast in this sector are too extensive to be handled by an individual. Even if the broadcast was made by a third party, this party will be a legal entity.

The transfer-based mechanism does not have an explicit prediction as to who owns the rights: an individual or a legal entity. Nonetheless, the consideration of resources involved in making a broadcast mean that a legal entity is the more likely right holder compared to an individual. As a result, legal entity ownership is consistent with a transfer-based mechanism. However, this is only a 'straw in the wind' test.

The identity of the right holder can only be examined using the Schoon Schip dataset. In particular, the category of right holder listed there identifies the kind of right holder. This has already been discussed in Section 3 (Rights Concentration in TV Productions). While it is not necessary to repeat the analysis, it is worth recapping the results. The analysis showed that not a single production in the dataset was owned by a creator. Instead, three types of legal entities owned the rights: a national public service broadcaster, a foreign broadcaster or an independent producer.

This pattern meets the expectations of both the specific hypotheses examined. As a result, both C1 and E3 pass this hoop test for the whole timeframe examined. The findings are also consistent with the transfer-based mechanisms. However, the findings only apply to TV broadcasts as a similar dataset to the Schoon Schip one is not available for radio broadcasts. As a result, it is not possible to infer if the same pattern also holds for them.

5.1.1 Single entity ownership

In addition to the identity of the first owner, the extent to which ownership is shared is also relevant. Mechanisms based on a deviation from the creator doctrine especially are less likely to create shared ownership:[294]

C1:	The legal entity is considered the author. This will most likely be a single entity.
E3:	Due to the financial resources required, the author will most likely be a legal entity. This will most likely be a single entity.

The test strength is weaker than for the first test. Although the doctrinal analysis emphasises that it is unlikely, it is theoretically possible for more than one entity relying on the rules covering employment or first communication to the public. As a result, single entity ownership is not a requirement. This makes it a 'straw in the wind' test.

The transfer mechanism does not have a specific prediction on the amount of right holders and is therefore not relevant in this analysis. Both single entity ownership as well as shared ownership is in line with this mechanism.

294 It should be noted that the doctrinal analysis has shown that the first ownership rules of neighbouring rights mean that the legal entity owning the rights under art. 7 Aw or art. 8 Aw also own the neighbouring rights.

The first option is to examine shared ownership by using the Schoon Schip dataset. The data names the right holder for each economic right listed separately. Therefore, if more than one distinct entity appears in the assignments, then the rights are shared between several actors. The following table summarises the prevalence of shared rights:

Table 27: Productions in the Schoon Schip dataset that have more than one right holder.

Decade	Item	Overall	Percentage
1950s	0	191	0%
1960s	0	1176	0%
1970s	2	913	0%
1980s	3	1154	0%
1990s	22	2195	1%
2000s	20	2347	1%
Unknown	0	436	0%
Total	47	7976	1%

According to the empirical data, multiple right holders are not a common feature. In particular, only 47 of 8394 productions list more than one substantial right holder. This is only 1% of the total. Indeed, for most decades the share is 0% (1950-1980). It can therefore be concluded that multiple ownership is not a relevant feature in the context of TV broadcasts. As a result, all of the hypotheses pass their straw tests on this indicator.

Another way to examine shared ownership draws on the catalogue data. In particular, if records only list the broadcaster but not any other contributor, including for example a producer, then it is less likely that the ownership is shared. The catalogue data is not primarily aimed at copyright concerns. As a result, the link between rights ownership and the information is less direct compared to the Schoon Schip data. However, the information is available for both radio and TV broadcasts.

The following figure shows the percentage of broadcasts that have a single broadcaster and no additional contributory information listed in the catalogue data.

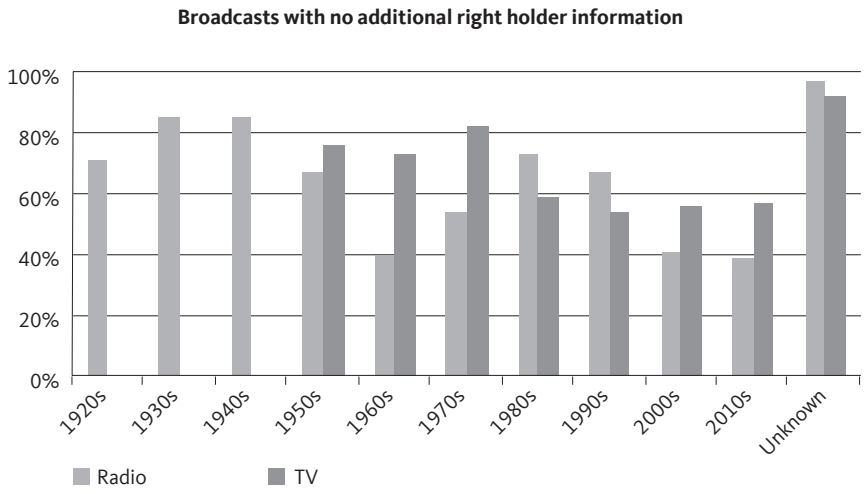


Figure 10: Broadcasters that do not have any contributor information in the catalogue data.

The data shows that TV broadcasts between the 1950s and 1970s have for the most part only one broadcaster and no additional contributory information. Indeed, the percentages are continuously in the range between 70% and 82%. Since the 1980s, the percentages have fallen significantly. The lowest point was reached in the 1990s with 54%. However, this is still a majority of all broadcasts. In other words, it is more likely than not that a TV broadcast only lists a single broadcaster and no contributory information even today.

In terms of the relevance to the hypothesis, the straw tests for employment-based ownership as well as first communication to the public are passed for the whole timeframe as the majority of TV broadcasts do not contain any contributor information. The passed test is significantly weaker though for the 1990s-2010s as the overall percentages have dropped significantly.

In the context of radio broadcasts, the pattern is more varied. Single broadcaster ownership is most likely between the 1920s and 1940s. For these decades, the percentages are continuously above 70%, reaching their peak in the 1930s with 86%. It is therefore by far the most likely scenario for this period. However, the percentages then drop markedly between the 1950s and 1960s with their all-time low in the 1960s of only 39%. In other words, only a minority of cases can be presumed to have only one owner for this time period. The trend to have no contributor information did strengthen again in the 1970s and 1990s when they rose again above 50% and indeed reach their high of 73% in the 1980s. Nonetheless, they have been below 50% since 2000.

Overall, it needs to be concluded though that single ownership is most likely for broadcasts made between the 1920s-1940s and 1970s to 1990s although less

strongly in the latter. In other words, the straw test for these decades can be considered passed. However, the indicators are not favouring the same conclusion for the 1950s, 1960s or since 2000. For these decades, it is more likely than not that a broadcast has more than one owner according to this indicator. The test for these decades was failed.

5.1.2 Shared Ownership: The Importance of the Producer

The previous section has tested the employment and first communication by a public entity mechanisms using the most stringent interpretation. However, this interpretation may be overly restrictive. In particular, the doctrinal analysis has also emphasised the role of neighbouring rights.

N2:	There will be no transfer agreements before 1993. The commercial intermediary will own the neighbouring rights based on first ownership provisions, with the exception of performers.
N3:	There will most likely not be any transfer agreements for phonograms and broadcasts as these are most likely company owned by default.

Due to these changes, it is now possible that the producer is listed separately to account for the new rights. This means that if, for example, the broadcaster is the producer of the phonogram or the first fixation of the film, he may but is not necessarily named separately. As a result, listing the producer after 1993 is consistent with both employment and first communication by a public entity. It amounts to a straw in the wind test.

There is no specific prediction on shared ownership in respect to rights ownership shaped by transfers. Listing a producer in addition to the broadcaster meets the expectations for a transfer-based mechanism. Indeed, in the context of TV broadcasts in particular the importance of the producer has been highlighted:

F1:	Between 1912 and 1985, the copyright in the film work as a collective work is most likely owned by the producer. This provides an incentive to name the producer in the metadata.
F6:	By 1975, the beneficiary of the collective works provision can in theory be the producer, director or author of the dialogue. This change may be reflected in the metadata.
F11:	After 1985, the producer is always directly involved in the production of the work and therefore should be party to the production contracts.

In other words, the producer is a key actor in the context of film works and therefore TV broadcasts. It should also be noted though that the weakening role of the producer under F6 is not portrayed as highly likely in the literature. The presence of this shift is therefore explainable but not required for the straw test to be passed.

Overall, the expected empirical pattern is twofold. The straw test is by default inconclusive given that the mechanism as such is indifferent to shared ownership. At the same time, naming the producer can be indicative of transfers. As a result, a high proportion of producers can tilt the straw test into a pass.

To take into account the importance of the producer, the catalogue data is examined for shared ownership between a single broadcaster and a single producer. The data shows however that the scenario of listing one broadcaster and one producer is not relevant for either TV or radio broadcasts.

Table 28: Percentage of broadcasts naming one broadcaster and one producer.

Decade	Radio	TV
1920s	0%	
1930s	0%	
1940s	0%	
1950s	0%	1%
1960s	0%	1%
1970s	1%	2%
1980s	0%	5%
1990s	0%	3%
2000s	0%	1%
2010s	0%	2%
Unknown	0%	1%
Grand Total	0%	2%

Most notably, there are practically no radio broadcasts that list a single broadcaster and a single producer. This is in line with the employment and communication-based mechanisms but contradict the assumptions of the transfer ones. As a result, while the former passes its straw tests, they are inconclusive for the latter.

The phenomenon is more relevant in respect to TV broadcasts but not significantly. In particular, only the 1980s and 1990s are 3% or above. On the other hand, this means that naming the producer as a contributor is not a relevant feature at

any given point in time. The only exception is the 1980s when 5% have a producer named. However, this share is not large enough to consider the test passed rather than inconclusive. In summary, the data is inconclusive for the transfer-mechanism tests. In particular, it does not provide sufficient evidence to affirm the hypothesis.

5.1.3 Conclusion: Ownership of Rights

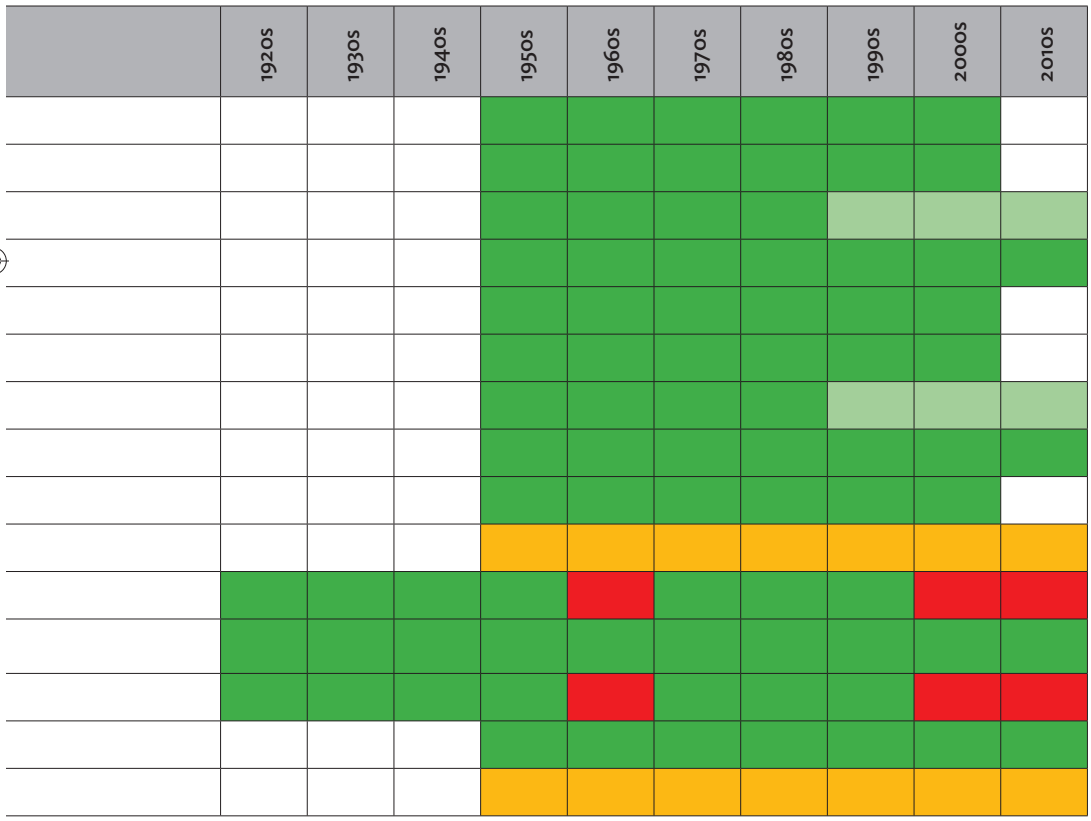
Figure 11 summarises the passed and failed process-tracing tests for the ownership of rights. It is very noticeable that both employment and communication to the public by a public entity have not been subject to any failed tests in the context of

Broadcasting Type	Mechanism	Indicator	Test Type	
TV	**Communication by Public Entity**	Schoon Schip: Ownership by Legal Entity	Hoop	
		Schoon Schip: Single right holder	Straw	
		Catalogue: No contributor information	Straw	
		Catalogue: 1 producer and 1 broadcaster	Straw	
	Employment	Schoon Schip: Ownership by Legal Entity	Hoop	
		Schoon Schip: Single right holder	Straw	
		Catalogue: No contributor information	Straw	
		Catalogue: 1 producer and 1 broadcaster	Straw	
	Transfer	Schoon Schip: Legal Entity	Straw	
		Catalogue: 1 producer and 1 broadcaster	Straw	
Radio	**Communication by Public Entity**	Catalogue: No contributor information	Straw	
		Catalogue: 1 producer and 1 broadcaster	Straw	
	Employment	Catalogue: No contributor information	Straw	
		Catalogue: 1 producer and 1 broadcaster	Straw	
	Transfer	Catalogue: 1 producer and 1 broadcaster	Straw	

Figure 11: Summary of the process-tracing tests on the ownership of rights.

TV broadcasts. They have passed all four, including the hoop tests. However, the image is less clear for radio broadcasts. Here less evidence is available and all tests are essentially straw tests. Most notably, the straw test for contributor information is failed in the 1960s and 2000s.

There is at this stage significantly less evidence available for transfer-based mechanisms as the predictions in this area are less specific. There are only two relevant straw tests for both TV and radio broadcasts. Most notably, only one of these was passed. The second one proved inconclusive.



The following table summarises the empirical evidence on the ownership of rights according to the weighted process-tracing tests. For TV broadcasts, the evidence is most clearly in favour of article 8 Aw or 7 Aw-based mechanism for the decades 1950- 1980s. After that, the scores fall but remain very close: the lowest is 4.5 out of 5 for the decades 1990s-2010s in the case of TV broadcasts. There is less evidence available for radio broadcasts. Here the scores are lower for the 1960s and 2000s with 1 out of 2. The other decades have not been subject to any deductions. On the other hand, the scores for transfer-based mechanisms are consistently lower: 1 out of 2 for both radio and TV broadcasts for the whole timeframe.

In conclusion, the ownership of rights indicators and process-tracing tests are more in line with a deviation from the creator doctrine-based mechanism than a transfer-based one.

Table 29: Summary of the weighted process-tracing scores in the area of rights ownership.

	Mechanism		1920s	1930s	1940s	1950s	1960s	1970s	1980s	1990s	2000s	2010s
TV	**Communication by Public Entity**	Score				5.0	5.0	5.0	5.0	4.5	4.5	4.5
		Possible Score				5.0	5.0	5.0	5.0	5.0	5.0	5.0
	Employment	Score				5.0	5.0	5.0	5.0	4.5	4.5	4.5
		Possible Score				5.0	5.0	5.0	5.0	5.0	5.0	5.0
	Transfer	Score				1.0	1.0	1.0	1.0	1.0	1.0	1.0
		Possible Score				2.0	2.0	2.0	2.0	2.0	2.0	2.0
Radio	**Communication by Public Entity**	Score	2.0	2.0	2.0	2.0	1.0	2.0	2.0	2.0	1.0	1.0
		Possible Score	2.0	2.0	2.0	2.0	2.0	2.0	2.0	2.0	2.0	2.0
	Employment	Score	2.0	2.0	2.0	2.0	1.0	2.0	2.0	2.0	1.0	1.0
		Possible Score	2.0	2.0	2.0	2.0	2.0	2.0	2.0	2.0	2.0	2.0
	Transfer	Score	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0
		Possible Score	2.0	2.0	2.0	2.0	2.0	2.0	2.0	2.0	2.0	2.0

5.2 Contract Presence

The second major area influencing the judgement on whether a copyright ownership is based on default copyright rules or a later transfer is the role of contracts. The relevance of contracts can be examined using the Schoon Schip dataset. It should be noted that the term contract here does not necessarily refer to a single document. Instead, it refers to the presence of contractual documentation in the production file which in many cases is a whole series of documents. As a result, when the analysis refers to contracts, it means that contractual relations are evident. It is not clear however how many contracts there are per production or even if they also include parties which are not listed as licensing parties. Since the sample is not representative of the overall TV broadcasting collection, any findings need to be interpreted as trends but not proof as such. This means that all tests are essentially straw tests. In addition, no conclusions can be drawn for radio broadcasts.

In principle, both communication by a public entity under article 8 Aw and employment under article 7 Aw do not require a separate production contract.

C7:	Article 8 does not require any contract to take effect. In addition, since the presence of the contract could (be interpreted to) include requirements as to naming the author, this provides an incentive to not rely on one.
E2:	The basis for rights ownership is the employment contract. A separate production contract is not required and may indeed constitute an 'agreement to the contrary', threatening the employer's ownership of rights.

As a result, the absence of a contract by itself is indicative of one of the non-transfer based mechanisms.

The doctrinal analysis also showed that the interpretation of what employment constitutes has become increasingly narrow. As a result of it, the legal literature points out that additional production contracts are made as a safety net, even though the applicable rule would still be employment.

E9:	Relying on employment contracts is increasingly risky since 1988. This increases the likelihood that additional contracts are made to underpin major investments and ensure copyright ownership, such as expensive film productions. As a result, the presence of production contracts increases.

In other words, while the presence of a contract is always contrary to the expectations under article 8 Aw, they are neutral to the interpretation of article 7 Aw from 1988 onwards. Indeed, a certain increase in the reliance of contracts is to be expected.

The need for a contract is also evident in respect to the neighbouring rights, the licensing and transfer of which is always based on a written instrument.

N1:	The transfer of neighbouring rights will be based on a transfer agreement. This is likely to include production contracts.
N4:	The employment of performers requires a contract.
N5:	Performer rights are shaped by their employment contract which acts as an instrument of transfer. As a result, a production contract can constitute an employment contract.

Since articles 7 Aw and 8 Aw only apply to copyright works but not the neighbouring rights, it is therefore possible that the existence of a contract in particular covering performers does not contradict their relevance after 1993 when the neighbouring rights were introduced. Overall, the presence of a contract is a 'straw in the wind' test.

While articles 8 Aw and 7 Aw are essentially based on the absence of contracts, transfer-based mechanisms strongly rely on them. Here, the presence of a contract rather than its absence follows the predictions:

T1:	Works for which the copyright has been transferred are subject to a written legal instrument. Most likely, this will be reflected in the presence of a contract.

Transfer-based mechanisms therefore require a contract in principle. This would be reinforced by the neighbouring rights' preference for contractual relationships as all of these are essentially transfer mechanisms. Finally, TV broadcasts are essentially film works. These are commonly based on contractual structures as well.

F2:	The relationship between the producer and the contributors is often based on contracts. If the producer is a legal person, these contracts will most likely be in writing.

In summary, a transfer-based mechanism is clearly related to a written instrument, here a production contract.

The doctrinal analysis also highlighted that there are factors which mitigate for and against separate contracts over time. First, a production contract cannot act as an instrument of transfer in respect to copyright works between 1936 and 1992.

T2:	Between 1936, copyright assignments only cover existing works. A production contract can therefore not act as a transfer agreement.
T10:	Contracts can explicitly show the transfer of future works after 1992. A production contract can therefore now act as an instrument of transfer.

This means in practice that even though a contract is present, it is not indicative of a transfer. Rather both the presence and absence of contracts between 1936 and 1992 does not allow for any judgement in relation to the likelihood of a transfer-based mechanism.

In addition, it needs to be kept in mind that rights cannot only be transferred but also licensed, including exclusive licenses. However, licenses can leave a weaker paper trail:

L1:	Copyright licenses can be implicit and do not require a written instrument. This means that the presence of a production contract is likely but not necessary.

The end result would not be distinguishable in the Schoon Schip dataset. Overall therefore, the presence or absence of a contract is explained by a variety of considerations and has to be interpreted in context. All of this means the presence of a contract is a straw in the wind test.

Table 30: The presence of contracts by decade.

Decade	Contract Exists		Percentage Present	Total
	Not present	Present		
1950s	185	5	3%	190
1960s	1142	31	3%	1173
1970s	820	90	10%	910
1980s	854	291	25%	1145
1990s	1244	916	42%	2160
2000s	1052	1255	54%	2307
Total	5297	2588	33%	7885

The Schoon Schip data shows that separate production contracts did not play a major role until the 1980s. Indeed, only 3% of all productions covered had a contract attached to them in both the 1950s and 1960s. This increased by the 1970s but still remained an exception with only 10%. The pattern however started to shift by the 1980s when 25% of all productions had a contract, increasing further to 42% in the 1990s. After 2000, the majority of items are subject to a production contract (54%). The data for this indicator therefore shows that the emphasis is likely to have shifted from a non-contracts based mechanism such as employment towards a contracts-based at some point in the 1980s and 1990s. However, since production contracts cannot act as instruments of transfer before 1992 (T2 and T10) and employment rules had become so narrow that additional contracts are likely from the late 1980s onwards (E9), it is argued that the empirical evidence only confirms a shift in the 1990s. As a result, while the 1980s pattern is in line with employment, the case is significantly weaker for an interpretation in line with article 8 Aw.

In terms of interpretation, the straw test relating to the presence of contracts is passed for employment and first communication from the 1950s-1970s. After this point, the patterns deviate. While the 1980s are a borderline pass for first communication, the employment one does not show this restriction. The test however is inconclusive for the 1990s and a failed for the 2000s for both mechanisms.

The analysis for transfer-based mechanisms is only relevant from the 1990s due to restriction in the role that production contracts can have played as instruments of transfer (T2 and T10). The test is inconclusive for the 1990s as the presence of contracts is close to 50% and therefore no determination can be made. However, the 2000s show that a majority of productions have a contract, meaning that the process-tracing test for this decade is passed.

In addition to the general trend, the doctrinal analysis also provided for a number of key events which may be relevant in this context of transfers.

F7:	In the context of stronger recognition for individual authors since the mid- 1970s, producers will rely on contracts to ensure their status under article 5 Aw. This should be reflected in the presence of contracts, including production contracts.

Therefore, the doctrinal analysis suggests that production contracts can be expected to increase in relevance and therefore number from the mid-1970s.

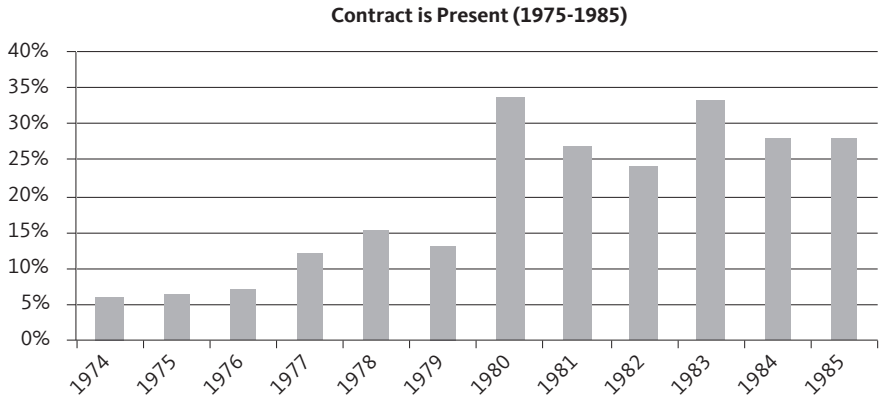


Figure 12: Presence of contracts between 1975-1985.

A closer look at the years 1974-1985 shows that there are two major increases. The first one is unexpectedly early and starts in 1979 – leading to a plateau until 1985. The share rises from 13% in 1979 to 28% in 1985, peaking at 34% in 1980. This pattern is probably explained by the nature of TV broadcasts as film works. As mentioned above, since the mid-1970s, the status of authors is gaining importance. As a result, producers are increasingly expected to safeguard their rights in the final film work as a collective work (article 5 Aw) by relying on contracts. This would at least explain the slow rise between 1975 and 1979. However, it does not provide an explanation for the jump between the 1979 and 1980.

In addition to an increase in contracts in the mid- 1970s, the introduction of article 45d is predicted to have triggered a similar rise around 1985.

F9:	The introduction of article 45d presumes a contractual relationship between the producer and the authors. This makes the presence of a contract more likely.
F10:	The producer does not have an independent right in the film work after 1985. Instead, his role is based on copyright transfers and therefore contracts. This makes the presence of contracts is essential.

The expectation was that the replacement of article 5 Aw with article 45d Aw would increase the reliance on contracts. After all, the producer loses his independent right and now has to rely entirely on contracts for the new presumption to take effect.

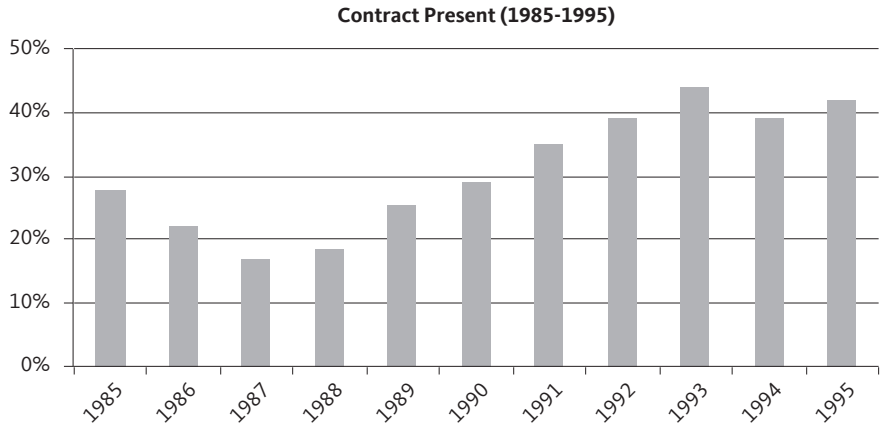


Figure 13: Presence of contracts between 1985-1995.

However, the data does not support this conclusion. The presence of contracts falls from 28% in 1985 to only 17% in 1987. Indeed, it takes until 1990 for the shares to recover to the same level as in 1985. However, the effect of any changes may have been dampened by the fact that production contracts are not able to transfer the rights in future works at this time, indeed until 1992. As a result, all conclusions are indicative of a borderline failed test.

It should be noted though that the doctrinal analysis did not fully predict the strong increases in production contracts after 1990. The percentage of contracts rises after 1990 from 29% to 44% in 1993. There are three possible explanations suggested in the literature. First, the changes to article 45d Aw took time to feed through. Secondly, the introduction of neighbouring rights could have led to a stronger reliance on contracts because all of its transfers and licensing requirements have to be based on a written instrument. Thirdly, it is noticeable that the date overlaps also with the reform of article 2 Aw. While the legal literature maintains that the substantive rules have stayed the same, the empirical evidence shows that it may have led to a stronger reliance on contracts. However, it is at this point not clear which or which combination of these possible explanations is applicable nor can the presence of other factors be excluded. In terms of the process-tracing, the results are inconclusive here.

5.2.1 Conclusion: the Presence of Contracts

Overall, Figure 14 shows that both employment and communication to the public passed their straw tests clearly for the 1950s- 1970s and become inconclusive in the 1990s. The tests are failed after the year 2000. However, it is important to note the deviation between the two in the 1980s: while the test is clearly passed for employment, the evidence is weaker for the first communication-based mechanism.

The available evidence is more restricted for the transfer-based mechanisms as the role of production contracts varies across time. Here, they are interpreted as a written instrument in the sense of the transfer-mechanism only from the 1990s onwards. In the 1990s, the evidence is inconclusive though and the straw test is only passed for the 2000s. In addition, the straw tests relating to particular events are also not adding much credence to the transfer mechanisms in the earlier decades. Only the effect of rising author status in the 1970s can be traced, while test for the proposed effect of article 45d Aw here is failed. The impact of article 2 Aw reforms proved inconclusive at best.

The same is evident when the weighted scores are taken into account. This is not surprising, given that all tests were essentially straw tests. Both employment and communication to the public are non-contradicted between 1950s and 1970. After that, the latter declines in importance: it is strongly contradicted with a negative score in the 2000s. The same is true for employment with the exception that the decline is steeper and does not start in the 1980s but the 1990s. Finally, the transfer-based mechanism is unlikely to have been the most influential in the 1980s and 1990s. This changes however after the year 2000.

In conclusion, the presence of contracts favours an explanation derived from the deviation from the creator doctrine-based mechanism between 1950 and 1990 and a transfer-based one since 2000.

Table 31: Summary of the weighted process-tracing scores relating to the presence of a contract.

	Mechanism		1950s	1960s	1970s	1980s	1990s	2000s
TV	**Communication by Public Entity**	Score	1.0	1.0	1.0	0.5	0.0	–1.0
		Possible Score	1.0	1.0	1.0	1.0	1.0	1.0
	Employment	Score	1.0	1.0	1.0	1.0	0.0	–1.0
		Possible Score	1.0	1.0	1.0	1.0	1.0	1.0
	Transfer	Score			0.5	–0.5	0.0	1.0
		Possible Score			1.0	1.0	2.0	1.0

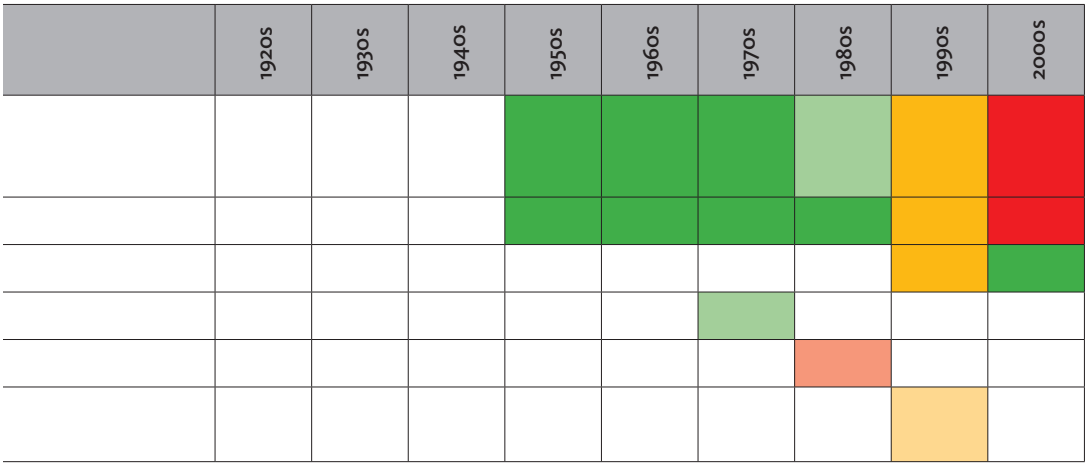
Broadcasting Type	Mechanism	Indicator	Test Type	
TV	**Communication by Public Entity**	Schoon Schip: Contract present	Straw	
	Employment	Schoon Schip: Contract present	Straw	
	Transfer	Schoon Schip: Contract present	Straw	
		Schoon Schip: Presence 1970s (status authors)	Straw	
		Schoon Schip: Increase 1980s (article 45d)	Straw	
		Schoon Schip: Increase 1990s (1992-1993 reforms)	Straw	

Figure 14: Summary of the process-tracing tests on the presence of a contract.

5.3 The Degree of Rights Concentration

The third major area of variation is the assignment of rights, in particular their concentration in the hands of a single actor. Rights concentration is determined by four interrelated components: the division of economic rights, the purpose of use, the jurisdiction and the timeframe.[295] Establishing the concentration of rights is only directly possible using the Schoon Schip dataset. Similar data is not currently available for radio broadcasts. As a result, all findings in this part are only applicable to TV broadcasts.

295 It should be noted at this stage that there is not an expectation that neighbouring rights differ from copyright works in terms of rights concentration. On one hand, phonograms, first fixation of films and broadcasts are unlikely to be listed separately as already outlined above. On the other hand, the main transfer rule in effect for performers in the context of TV broadcasts is subject to a presumed transfer when a performer is employed. Here, the copyright rules apply by reference. (F17: Performers are subject to the presumption of transfer. Their rights ownership pattern should therefore be similar to that of authors).



5.3.1 Economic rights

Rights Concentration

Under articles 7 Aw and 8 Aw, the legal entity is considered the author.

C2:	The legal entity as the author will own all economic rights.
E4:	The legal entity as the author will own all economic rights.

In other words, a full concentration of economic rights will be in line with both articles 7 and 8 Aw.

The pattern is more varied if the rights are assumed to be transferred. Contractual relations are based on negotiations and therefore each side clarifying its interests. The result is a division of rights according to these interests. In particular, while a full ownership of rights is possible after a transfer, this is not necessarily the case.

T3:	Transfer contracts can cover the whole or parts of the author's copyright. However, when the rights are transferred from the author to a third party, it will most likely lead to a division of rights.
T4:	The most likely division of copyright is along the economic rights.
T6:	By 1973, full copyright transfers are increasingly debated. As a result, contracts will be more detailed to ensure those rights required by the assignee are covered. The assignment is likely to be more fine-grained, listing more individual rights.

In other words, both full rights ownership as well as a division among economic rights is in line with the predictions of a rights transfer. Nonetheless, it can be expected that more economic rights are listed as full transfers become more debated. This increase is likely to be present from the mid- 1970s onwards.

The first possible indicator to assess the degree to which rights are concentrated is the average number of rights assigned in a contract. The Schoon Schip dataset distinguishes between six distinct rights: broadcasting, narrow casting, subscriptions, on-demand, distribution and public performance. In addition, there is the additional option of 'all rights'. For each one of the 7 options mentioned, the score increases by 1. The following graph summarises how many rights are on average listed in a contract across time.

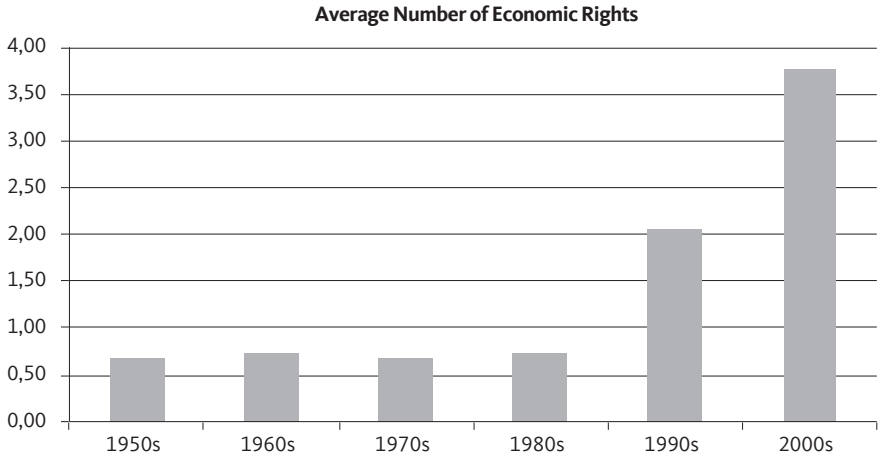


Figure 15: The average number of assigned economic rights in Schoon Schip data by decade.

The average number of rights assigned is clearly divided into two distinct phases. Between the 1950s and 1970s, the averages are very low: 0.68, 0.75 and 0.69 respectively.[296] In terms of interpretation, this only means that more likely than not, at least one option was chosen. In other words, the data is most clearly indicating that rights were assigned at all for the earlier decades rather than showing an actual increase in the division. An additional test for the mode (the most common value) however shows that the chosen option is actually 'all rights'.

The rights concentration predicted by the straw tests for the employment and first communication mechanisms are therefore passed between 1950 and 1970.

296 It should be noted that technological progress by itself is not an explanation. The rights distinguished in the dataset are not all new and the averages should be higher if only technologically known uses would have been listed. This is also confirmed below when the identity of the rights is examined.

The evidence however only reflects a weakly passed straw test for the transfer-based mechanism as a full transfer of rights and therefore rights concentration is possible but less likely. In addition, there is no increase in the average number of rights in the 1970s as the transfer-based hypotheses T6 had predicted. The smoking gun test is therefore failed.

The information is more revealing for the later decades. In particular, the average number of rights assigned increases significantly from 0.73 in the 1980s to 2,05 in the 1990s. This trend is even more pronounced by the 2000s (3,76). In other words, the average number of assigned rights more than doubled between the 1980s and the 1990s as well as by another 83% in the decade thereafter. The large increase in the number of assigned rights means that the straw tests for both employment and communication to the public are failed for both the 1990s and 2000s. The rights are simply not concentrated enough anymore.

However, while the empirical evidence favours an interpretation along a transfer-based mechanism for both the 1990s and 2000s, the actual evolution weakens this conclusion. In particular, the observable pattern does not follow the hypotheses. A closer look at the individual years clarifies this.

Table 32: The average number of assigned economic rights between 1989 and 2002.

Year of the Broadcast	Mean	Increase per year
1989	0.83	
1990	0.82	–1%
1991	1.16	41%
1992	1.46	26%
1993	1.61	10%
1994	1.72	7%
1995	1.73	0%
1996	2.26	31%
1997	2.29	1%
1998	3.29	44%
1999	3.10	–6%
2000	3.49	12%
2001	3.61	3%
2002	4.15	15%

The average number of assigned economic rights is stable up to 1990 with 0.82 and 0.81 respectively. Then, it strongly increases by 1991 (1.16) – a trend which amplifies in 1992 (1.45) and 1993 (1.6). This is a relative increase of 41%, 26% and 10% respectively. In other words, the average number of rights in broadcasting productions that are covered in the contracts nearly doubled between 1990 and 1993. It should be noted here that 1992 is exactly the year when the new article new article 2 Aw[297] and therefore the reform of copyright transfer rules came into effect. However, the literature did not conceptualise the 1992 reform as having a profound impact in how contracts are made. In other words, this indicator at least suggests that the reform of article 2 Aw had an impact on contractual practices in the TV broadcasting sector although the literature does not point to this.

A second theoretical weakness is apparent with the changes around 1998: there is no theoretical copyright explanation to account for the shifts in 1998. None of the hypotheses pinpoints changes at this point in time. It is interesting here that this directly overlaps with the increasing debate among scholars on the extent of a copyright transfer, in particular if a full transfer is possible and what kind of detail is required in practice to secure rights. In other words, the changes in the contractual practices may be a result of the scholarly debate on copyright transfers but there is no actual legal reform at this point.

In terms of the process-tracing relevance of these findings, the lack of overlap between the doctrinal analysis' key events and the actual pattern observable for the 1990s makes the straw test here weak for this decade despite the strong and expected increase in the average number of rights.

The average number of rights itself does not say much about the diversity of rights. After all, it is possible that the same right is assigned or licensed several times just for different timeframes. The transfer-based mechanism however does posit that there are a wider range of rights assigned. The following table shows the number of productions which refer to one of the specific rights distinguished in the Schoon Schip dataset: broadcasting, narrow casting, subscriptions, on-demand, distribution and public performance.

297 Article 2 was reformed as a result of the changes to the Burgerlijk Wetboek which were subject to a long-term debate. As a result, it would not be surprising if actors anticipated changes and amended their behaviour accordingly even before the revised article took effect.

Table 33: Number of discrete rights assigned in a production.

Decade	number of distinct rights assigned							Number of with more than 1	Percentage at least one right assigned
	0	1	2	3	4	5	6		
1950s	186	5	0	0	0	0	0	5	3%
1960s	1148	28	0	0	0	0	0	28	2%
1970s	893	16	1	1	1	0	1	20	2%
1980s	1038	96	11	1	1	4	3	116	10%
1990s	1376	286	153	40	118	203	19	819	37%
2000s	1073	243	142	89	235	493	72	1274	54%
Total	5714	674	307	131	355	700	95	2262	28%

The pattern already observable in the average number of rights is replicated here. In particular, while the number of productions that assigns at least one distinct right is very small between the 1950s and 1970s, it increases more than fivefold in the 1980s (from 20 to 116 productions). This is an increase from 2% to 10% of the productions. Furthermore, a division of rights is for all intents and purposes increasingly important thereafter and indeed the rule after 2000. There are more items with a division of rights in the 2000s than there are without it: 1274 compared to 1073 (+ 54%).

The second trend is that the division of economic rights is increasingly fine-grained. Before the 1980s, it is common practice to only list one specific right in the contracts. There are no cases of more rights being assigned until the 1970s and even then, only 4 productions have more than one distinct right listed. This pattern is reversed by the 1980s. The number of productions which does have more than one distinct right listed is increasing and by 1990 the numbers actually exceed them. For example, in the 1990s 533 productions have more than one right compared to 286 listing only one. This trend is even more pronounced thereafter. In other words, contracts are becoming increasingly fine-grained since 1980.

In terms of the process-tracing, the empirical evidence means that the straw tests for both employment and communication to public-based mechanisms are passed between the 1950s-1980s. The tests however are inconclusive for the 1990s and failed for the 2000s. The evidence is less stable for the transfer-based mechanisms. In particular, while the tests are clearly failed for the 1950s-1970s as the majority of productions do not list any rights descriptions, the pattern starts to shift by the 1980s. However, despite the pronounced change, the overall percentage

remains low with 10%. This makes the straw test inconclusive for this decade. The strong increase in productions with more than one distinct right in the 1990s means the straw test is passed but only borderline though, given that the overall percentage remains well below 50%. The majority of productions does have distinct rights assigned by 2000 and from that point onwards, the straw test is clearly passed.

Identity of Rights

In addition to the general tests on the rights concentration, the identity of the rights is also likely to differ. The rights concentration predicted by articles 7 and 8 Aw should be most directly reflected in the Schoon Schip dataset as the category of 'all rights assigned'. High percentages here are indicative of these mechanisms. On the other hand, a division referring to particular rights is not.

The transfer mechanism is more likely to mirror the interests of the assignee. In the broadcasting sector, this means that the transfer needs to ensure that a broadcast can actually be commercially exploited. In this context, the broadcaster or other assignee has an interest in ensuring that these rights are at least explicitly mentioned in the contracts. Given that all of the works here were made to be broadcast, the most likely right to be explicitly covered is the broadcasting right. In addition, TV broadcasts are essentially film works and therefore subject to the presumption of transfer under article 45d.

F4:	Between 1912 and 1985, the rights of the producer are limited to the normal exploitation of the work. While this refers to the reproduction, distribution and performance of the audio-visual component, it only covers the reproduction and distribution of the film's music.
F14:	After 1985, the presumption of transfer is context dependant in scope. To have legal certainty, this means that contracts are more likely to rely on a fine-grained assignment of rights, especially those not clearly in the scope of the 'normal exploitation' as defined in article 45d.

These hypotheses show that the other highly commercially relevant right are the rights to reproduce the work, distribute it and perform it in public. It can therefore be expected that these rights would also be explicitly mentioned. As a result, contracts explicitly mentioning any of the following rights are most likely transfer-based: broadcasting, reproduction, performance and distribution.

It should be noted at this point that the lack of a division of rights however does not necessarily mean that a transfer was not involved. In principle, a full transfer of rights is possible and can be reflected in assigning 'all rights'. As a result, not referring to specific rights as such does not fail the process-tracing test.

Table 34: The identity of rights by decade.

Decade	Broadcast	Narrow Cast	Abo	On Demand	Distribution	Public Performance	Total specific rights assigned	All Rights	Total	Percentage all rights
1950s					2	3	5	123	133	92%
1960s	5	1			5	17	28	847	903	94%
1970s	17	2	2	1	6	3	31	590	652	90%
1980s	111	9	7	7	15	14	163	638	964	66%
1990s	753	295	380	82	370	433	2313	1130	5756	20%
2000s	1149	587	659	326	893	1017	4631	1523	10785	14%
Total	2035	894	1048	416	1291	1487	7171	4851	19193	25%

The empirical evidence indicates that it was common practice between 1950 and 1980 to assign all rights at once without distinguishing between any specific right. In particular, this approach consistently applies to 90% or more of all the rights assigned in the Schoon Schip dataset. It is therefore an exception to divide the rights for these decades. This pattern is clearly in line with the first communication by a public entity and the employment mechanism. In the context of transfers, this could only be explained if a full rights transfer was done which is theoretically possible although increasingly debated from the mid-1970s onwards.

The pattern starts to change in the 1980s. In particular, there is increasing reference to both the broadcasting and the performance right. These are the rights explicitly commercially relevant and therefore indicative of the transfer-based mechanism to play a role. Nonetheless, two thirds of the total number of rights assigned (66%) is still referred to en bloc. It is therefore still more common to not divide the rights, but the pattern is clearly changing. Given the changes to article 45d in the 1980s, the swing should have been stronger. Instead, individual assignment of rights is only the rule from 1990 onwards. Here, only 20% of all productions refer to a bundled rights assignment, dropping to only 14% in the 2000s. At the same time, the use of the broadcasting right remains stable: 12% in the 1980s and 11% by the 2000s. However, the performance right is used significantly more widely (1% in 1980s to 8% in the 1990s). Overall, this pattern is indicative of the transfer-based mechanism from the 1990s in particular. It also means that the other two mechanisms fail their test for this timeframe.

The second trend that is noticeable is the increasing reliance on rights which are not directly related to broadcasting: narrow casting, subscription and on-demand. All of

these increase significantly after 1990. This is important because it provides a standard for how contracts should be interpreted. After all, new uses are not covered if other unusual uses had been given explicit treatment. It weakens the argument that a full transfer of rights has occurred – at least as long as not all feasible unusual uses are listed. The large difference between how often the individual rights have been named seems to speak against this. As a result, contracts from the 1990s and 2000s should be interpreted narrowly: it was not common to list all unusual modes of exploitation.

The hypotheses for employment and first communication were proven by the prevalence of assigning all rights at once between the 1950s-1980s. Most productions here have concentrated rights. However, the tests are clearly failed from 1990 onwards as both the identity of rights assigned and the sharp drop of productions having an assignment of 'all rights' contradicts the expected concentration of rights. The image is reversed for transfers. While the rights concentration does not contradict the transfer-based mechanisms prior to 1980, it is also confirmed by the division. It should be noted though that the passed test is less clear in the 1980s as the predictions based on article 45d were not confirmed, in particular the increase in distinct rights is delayed.

5.3.2 Purpose of use

The second indicator for the concentration of rights is the purpose of use. This refers for example to educational or commercial uses. In situations where the right holder is considered the author, divisions along the purpose of use are unlikely.

C4:	The legal entity as the author will own the economic rights for all purposes.
E6:	The legal entity as the author will own the economic rights for all purposes.

The transfer of copyrights does not lead to specific hypotheses relating to the purpose of use.

T5:	Transfers are not likely to lead to purpose divisions between 1912 and 1973.

As a result, both the absence and presence of specified uses by themselves are compatible with a transfer. The doctrinal analysis instead maintains that relying on a purpose of use may be done but does not actually lead to the conclusion that it is more likely since 1973. In other words: transfer-based mechanisms are essentially neutral to the type of use, meaning that there is no test for this indicator.

The Schoon Schip dataset allows an examination of how common it was to divide the rights according to the type of use. To do this, the percentage of contracts which refer to a particular use (all uses, public uses, commercial uses, cultural uses and private uses) needs to be compared to those which do not mention any use of all.

Table 35: The share of specific use purposes by decade.

Decade	All Uses	Public Uses	Commercial Uses	Cultural Uses	Private Uses	No Use Listed
1950s	16%	0%	0%	0%	0%	84%
1960s	16%	0%	0%	0%	0%	84%
1970s	13%	0%	0%	0%	0%	87%
1980s	7%	1%	0%	0%	0%	92%
1990s	6%	5%	2%	3%	1%	83%
2000s	6%	7%	3%	6%	4%	75%

It should first be noted that the largest share of all items does not refer to any use at all. While it is the lowest in the 2000s with 75%, this still means that a large majority of rights does not carry a specific purpose restriction. In other words, purpose restrictions are only of limited relevance as a whole.

This does not mean that relying on specific uses has not become more relevant over time. In particular, in the 1950s all of the contracts that did not omit the type of use, assigned it explicitly on the basis of 'all uses'.[298] This started to change in the 1980s when the omissions became the dominant choice: 92% of rights have no purpose listed at all. At the same time, the full purpose assignment fell from 13% to 7%. Indeed, the importance of purpose restrictions even on a small scale is a new phenomenon. Since the 1990s, the specific restrictions have increased across all categories listed in the Schoon Schip dataset while the full assignment has dropped: only 6% in the 1990s have no restriction while the specific ones increased from 1% in the 1980s to 11% in the 1990s. At the same time, the omissions also fell from 92% to 83%. The 1990s are only the first decade that the categories most relevant according to the literature appear for the first time: commercial, cultural, educational and private uses. They were not relevant however before this point.

For the process-tracing therefore, it is clear that none of the mechanisms is actually contradicted. Rather, both employment and communication to the public are affirmed from the 1950s until the 2000s, although the pass is weaker in the last decade.

298 The methodology used in the Schoon Schip project only lists a purpose, including 'all uses' only if this is explicitly stated in the contracts. Otherwise, the field was left empty. This means that changes here are conscious choices rather than methodological residue.

5.3.3 Jurisdiction

The concentration of rights ownership is also influenced by the territorial scope of the assignment. Three main aspects stand out. First, both article 7 and 8 Aw are comparatively flexible here. In particular, they posit that in the context of broadcasting, the rights ownership will at least cover the territory commercially valuable to this.

C3:	The legal entity as the author will own the rights at least for its broadcasting area, meaning the Netherlands.
E5:	The legal entity as the author will own the rights at least for its broadcasting area, meaning the Netherlands.

This means that the broader the territorial scope, the stronger the indicator favours an interpretation in line with articles 7 Aw or 8 Aw. However, it is only contradicted if the Netherlands are not clearly covered because this would amount to a restriction on the broadcasters' activities.

The analysis of the transfer rules has shown that both concentrated and divided jurisdictional divisions are possible. The issue is not actually mentioned before 1985 though.

F13:	Article 45d explicitly recognises the importance of foreign markets to the producer. It is likely that references to jurisdictional limitations will be increasingly common.

In other words, there is an expectation that jurisdictions feature more strongly from 1985 onwards but this is by no means determinative. It does provide for an additional straw test though as a rising reliance on jurisdictions can only relate to a transfer-based mechanism.[299]

The Schoon Schip dataset distinguishes between five jurisdictional scopes: the 'Netherlands', 'Dutch-speaking territory', 'Dutch-speaking community'[300], 'world-

299 This prediction is specific to film works and based on larger predictions rather than TV broadcasts. As a result, the prediction is too weak for a smoking gun test. Instead, a straw test is used here.

300 If information on the type of use is not explicitly named, the instructions said to leave the field empty. The category Dutch-speaking refers to those understanding Dutch as the series are often lacks sub-titles, examples here include the world service. Nederlands Instituut voor Beeld en Geluid, 'Handleiding behorend bij invoertemplate betreffende Auteursrechteninventarisatie in het kader van het project Schoon Schip', p. 12.

wide except the Netherlands', 'world-wide' coverage as well as a category labelled 'other'. Based on this, the first indicator has to be the number of distinct jurisdictions assigned. Here, having more than two distinct categories mentioned would be affirming the transfer-based mechanism but contradicting the predictions for the first communication to the public and employment ones.

Table 36: The percentage of productions that list more than one or no jurisdiction.

Decade	More than one jurisdiction	No jurisdiction mentioned
1950s	0%	35%
1960s	0%	35%
1970s	1%	46%
1980s	2%	62%
1990s	14%	50%
2000s	34%	43%
Total	14%	46%

The first notable aspect is that having more than one distinct jurisdiction assigned is not a relevant phenomenon before 1990s. In particular, the percentage that refers to more than one jurisdiction is 2% or lower from the 1950s to the 1980s. However, the share increased in importance since then, rising to 14% in the 1990s and peaking at 34% in the 2000s. The by far most common choice remains not to refer to any jurisdiction at all and instead omit the issue entirely. In fact, the percentage is higher with 43% than it was in the 1950s (35%). However, it was most common in the 1980s when the share peaked at 62%.

The number of jurisdictions assigned by itself is not sufficient to answer the relevance of the different hypothesis. To do this, it is instead necessary to also examine the specific type of jurisdiction covered. In terms of the process-tracing tests, the employment and first communication by a public entity based mechanisms are consistent with all jurisdictional options, except world-wide excluding the Netherlands.[301]

301 The category 'other' cannot be analysed in this context as it can include for example a scenario of EU-wide which would meet the requirement of commercial interests. It could however also refer to 'Germany-only' which would not.

The following table shows the percentage of contracts that refers to a particular type of jurisdiction.

Table 37: The percentage of economic rights that refer to specific territorial restrictions.

Decade	Netherlands	Dutch speaking territory	Dutch speaking community	World-Wide Excluding the Netherlands	World-wide	No jurisdictions
1950s	0%	0%	0%	0%	13%	87%
1960s	0%	0%	0%	0%	13%	87%
1970s	0%	0%	0%	0%	11%	89%
1980s	1%	0%	0%	0%	6%	92%
1990s	4%	1%	0%	2%	5%	87%
2000s	6%	2%	2%	5%	6%	78%

First of all, the importance of jurisdictions is overall limited: only 22% of all rights in the 2000s even mention a territory. Indeed, the other decades show an overwhelming majority of 87%-92% that do not refer to any jurisdiction at all, reaching the highest point in the 1980s. In addition, even when a jurisdiction is mentioned, this nearly exclusively refers to world-wide coverage until 1980. None of the other options reaches even 1%. The 1980s however do have an interesting aspect: the assignment of 'world-wide' coverage drops significantly from 11% to 6%. Secondly, although jurisdiction becomes a more common feature from the 1990s onwards, only a small minority affect the broadcasters. In the 1990s, the non-Netherlands option increases to 2% and reaches 5% in the 2000s. While this is indicative that at least these productions are subject to the transfer-mechanism, the same evidence is not available on a larger scale. In particular, 78% do not mention the jurisdiction at all and another 6% assign rights on a world-wide basis.

In summary, the process-tracing tests in respect to the employment and communication to the public are clearly passed between 1950 and 2010. At the same time though, there is no evidence that the importance of jurisdictions outlined for film works has affected broadcasting by increasing the number of distinct jurisdictions. However, the assignment on a world-wide basis has dropped significantly. This means the straw test here for the 1980s is inconclusive overall.

5.3.4 Duration

The final aspect of rights concentration is the duration of rights ownership. If the right holder is also the author, then the term of protection should not be restricted.

C5:	The legal entity as the author will own the economic rights for the full term of protection.
E7:	The legal entity as the author will own the economic rights for the full term of protection.

As before, transfer-based mechanisms are neutral as to the duration of rights: both a full duration and partial ones are possible.[302] This mechanism is therefore not subjected to a test here.

Table 38: Percentage of productions that refer to a specific duration.

Duration	1950s	1960s	1970s	1980s	1990s	2000s
less than 1 year	0%	0%	0%	0%	0%	0%
1 year	0%	0%	0%	1%	1%	1%
2 years	0%	0%	0%	0%	1%	2%
3 years	0%	0%	0%	0%	0%	3%
4 years	0%	0%	0%	0%	0%	2%
5 years	0%	0%	0%	1%	3%	11%
6 years	0%	0%	0%	0%	0%	1%
7 years	0%	0%	0%	1%	2%	8%
8 years	0%	0%	0%	0%	0%	0%
9 years	0%	0%	0%	0%	0%	0%
10 years	1%	0%	0%	0%	1%	1%
25 years or more	37%	72%	61%	47%	53%	62%
Total 10 years or less	1%	0%	1%	3%	9%	28%

302 The start date is either the date named in the contract or the first broadcasting date. The end date is named in the contract or classified as 'doorlopend', referring to the full term of protection.

First, it needs to be noted that assignments above 10 years are always at least 25 years long, indeed therefore most likely cover the whole term of protection. This long timeframe is also by far the most common duration. In particular, more than half of all contracts have at least one right listed or even all of them with a duration of more than 25 years long for the 1960s, 1970s, 1990s and 2000s. This means in practice that the division of rights by their duration has increased in importance but is not actually a matter of default industry practice as such. As a result, this is affirming the mechanisms examined here.

Secondly, the data clearly shows that a reliance on duration restrictions is increasingly common since the 1990s. While only 1% of the productions refer to a term restriction before 1980, this increases to 3% in the 1980s. However, they only become part of a relevant contractual option after 1990 when the share of items increases to 9%. Since 2000, it can be argued that they turned into a relevant although not dominant industry practice as 28% of rights have restricted durations. Most notably, this reflects the same pattern as the analysis on distinct economic rights.

It should be noted that some restrictions in the duration of assignment are significantly more common than others. First, contracts do not commonly rely on very short timeframes. While the use of very short terms has increased since the early 1990s, only 2% in 1990s and 8% in the 2000s of all restrictions are 4 years or shorter. Most notably in this respect, the broadcasts made in the 2000s are the most likely to be subject to short term arrangements. However, the overall percentages are too low to speak of common industry practice. Instead, the most commonly referred to term restriction found in the contracts in the 2000s are by far the 5 and 7 year ones.

The following table summarises the allocation of term limits by decades as a percentage of all those items which rely on a term limit.

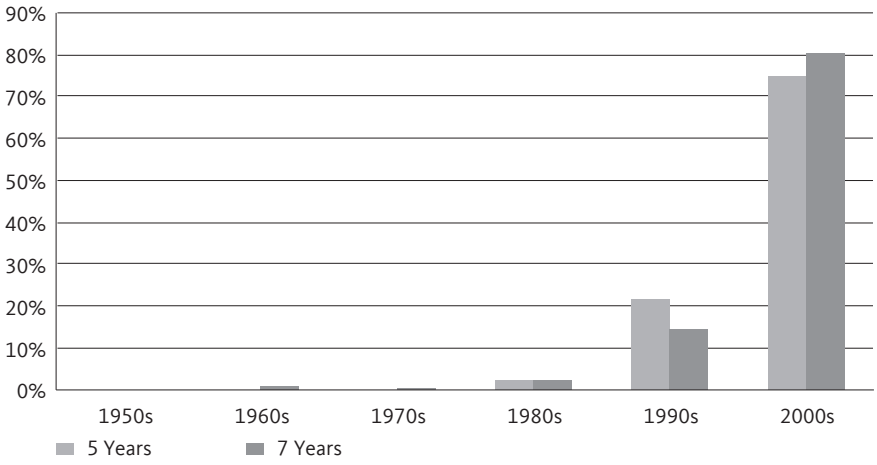


Figure 16: Percentage of duration restrictions which refer to either 5 years or 7 years.

A closer look reveals that both the 5 and 7 year terms are recent developments: they first appear in the 1980s and then gain popularity in the 1990s. In particular, 15% of all productions with a division of the timeframe stipulate at least once a term of 7 years. This increases to 80% after 2000. The 5 year term is in comparison less influential but still 22% and 75% of productions that have a term limit use it.

In terms of the process-tracing tests therefore, the predictions based on the employment and communication to the public mechanisms are not contradicted for any decade. The tests are generally passed because the clear majority of cases do not have a restriction. However, the averages are lower for the 1990s and 2000s, leading to the weaker pass than in the previous decades.

5.3.5 Full concentration of rights

Up to this point, the different aspects affecting the concentration of rights were examined separately. However, under article 7 Aw and 8 Aw, the beneficiary is considered the author and rights are predicted to be concentrated across the individual dimensions as examined so far. In addition, they are also expected to be concentrated across all four dimensions at the same time. This constitutes a double decisive process tracing test for those two mechanisms.[303]

The following table shows the percentages of productions in the Schoon Schip dataset that have fully concentrated rights, for all purposes, the full term of protection and cover at least the Netherlands.

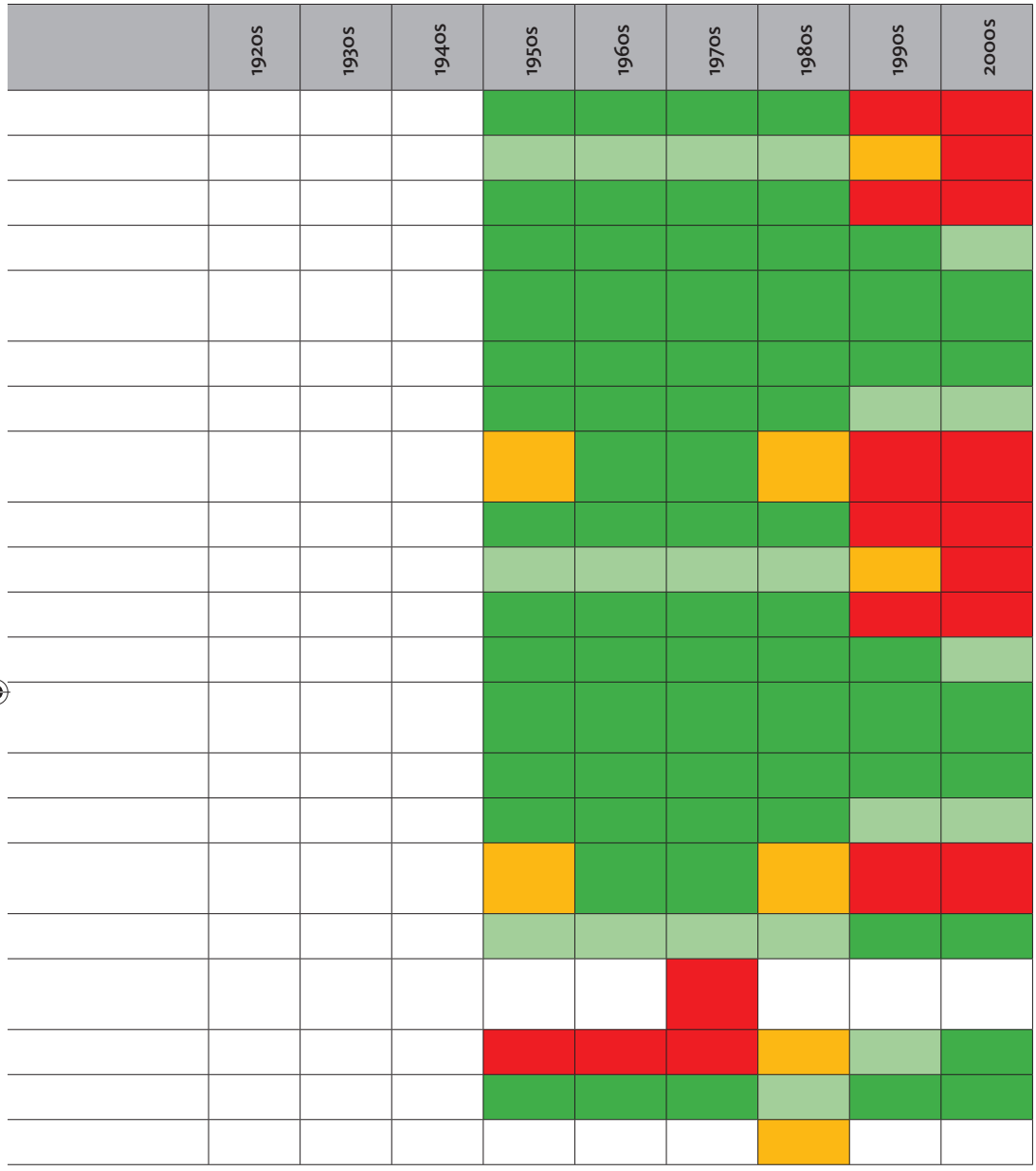
Table 39: Number of productions with full rights concentration covering all economic rights, for all purposes, for 25 years or longer and covering at least the Netherlands.

Decade	Full Rights	Total	Percentage
1950s	64	179	36%
1960s	740	1111	67%
1970s	441	784	56%
1980s	199	903	22%
1990s	30	1902	2%
2000s	10	2177	0%

303 The relevant percentages here are likely to be lower because the test is overall harder to pass. The more indicators are combined, the more pronounced the measurement is.

Broadcasting Type	Mechanism	Indicator	Test Type	
TV	**Communication by Public Entity**	Schoon Schip: Average number of rights	Straw	
		Schoon Schip: Distinct Number of Rights	Straw	
		Schoon Schip: Type of right	Straw	
		Schoon Schip: Purpose of uses	Straw	
		Schoon Schip: Number of distinct jurisdictions	Straw	
		Schoon Schip: Identity of jurisdictions	Hoop	
		Schoon Schip: Duration	Straw	
		Schoon Schip: Combined concentrated ownership	4x Combined Smoking Gun	
	Employment	Schoon Schip: Average number of rights	Straw	
		Schoon Schip: Distinct Number of Rights	Straw	
		Schoon Schip: Type of right	Straw	
		Schoon Schip: Purpose of uses	Straw	
		Schoon Schip: Number of distinct jurisdictions	Straw	
		Schoon Schip: Identity of jurisdictions	Hoop	
		Schoon Schip: Duration	Straw	
		Schoon Schip: Combined concentrated ownership	4x Combined Smoking Gun	
	Transfer	Schoon Schip: Average number of rights	Straw	
		Schoon Schip: Average number of rights 1970s	Smoking Gun	
		Schoon Schip: Distinct Number of Rights	Straw	
		Schoon Schip: Type of right	Straw	
		Schoon Schip: Identity of jurisdictions	Smoking Gun	

Figure 17: Summary of the process-tracing tests on the concentration of rights.



The empirical data shows that the majority of productions have concentrated rights in the 1960s and 1970s with 67% and 56% respectively. Directly before and after this point, the percentages are significantly lower (only 36% in the 1950s and 22% in the 1980s) and indeed can be neglected since the 1990s, ranging between 0% and 3%. In summary, the employment and communication to the public double decisive test is clearly passed for the 1960s and 1970s. The results are inconclusive for the 1950s and 1980s but clearly failed for the 1990s and 2000s.

5.3.6 Conclusion: the Concentration of Rights

Figure 17 summarises the process-tracing tests for the rights concentration, highlighting the distribution of passed, inconclusive and failed tests. The overview of the tests shows that deviation of the creator doctrine-based mechanisms are most likely for the 1960s and 1970s in practice. Here, all tests have been passed including all the hoop and more importantly the double decisive one. The 1950s and 1980s are less likely to be covered although here the odds still largely outweigh the alternatives. In particular, there have been no failed tests for these decades either (6 passed, 2 inconclusive). The 1990s and 2000s should not be presumed to be covered by these mechanisms as the number of failed tests increases and indeed includes the important double decisive ones: 4 are failed and only 4 passed – some of which are weak passes.

On the other hand, the evidence suggests that transfer-based mechanisms are not relevant until the 1980s. Before this decade, passes are weak and some tests have been failed. Only the 1990s and 2000s show a coherent pattern as predicted by the doctrinal analysis.

These conclusions are confirmed by the weighted tests. Both employment and communication to the public get 10.5 out of 11 for the 1960s and 1970s, making it by far the most likely scenario. In comparison to this, the transfer scores are very low and indeed negative for the 1970s – making it highly unlikely that it was a dominant factor at this time. The pattern is reversed from the 1990s onwards. By 2000, the transfer scores are identical to the maximum value while the ones for employment and communication to the public have turned negative. This is even more remarkable given the large number of indicators relevant here.

Table 40: Summary of the weighted process-tracing scores in the area of rights concentration.

	Mechanism		1950s	1960s	1970s	1980s	1990s	2000s
TV	**Communication by Public Entity**	Score	7.5	10.5	10.5	7.5	−0.5	−2.0
		Maximum Score	11.0	11.0	11.0	11.0	11.0	11.0
	Employment	Score	7.5	10.5	10.5	7.5	−0.5	−2.0
		Maximum Score	11.0	11.0	11.0	11.0	11.0	11.0
	Transfer	Score	0.5	0.5	−1	1	2.5	3
		Maximum Score	3.0	3.0	4.5	4.5	3.0	3.0

5.4 Status of Contributors

The final area of variation relates to the importance of authors and in particular their likelihood to be named in the metadata. In principle, the findings from this section are relevant to TV and radio broadcasts alike. The underlying presumption for this section is that the status of authors is reflected in their likelihood to be named in the metadata. The more important they are, the more common it will be to name them. Four categories of authors and contributors are relevant for the assessment of the three mechanisms examined in this report: the status of authors as such, the importance of the director, the composer of film works as well as the performers.

5.4.1 Importance of Authors

In principle, the first communication by a public entity mechanism is the most sensitive to the status of authors. After all, acquiring the rights is based on not naming them:

> C6: A legal entity can only acquire the copyright if the name of the author is not made public at the same time. As a result, the works will most likely not carry any individual author information in the catalogue data.

This means that this mechanism is the least likely to name any authors. However, it also needs to be noticed that the key point in time for article 8 Aw is the *first* communication. As a result, while it is highly unlikely that the metadata will include information on authors, it is not impossible.

The pattern expected to be observable for works made in the course of employment overlaps with the first one but key differences remain. In principle, there is no incentive for an employer to name individual authors.

E1:	Since the employer is the maker, the catalogue data is unlikely to list individuals in the author functions. Instead, they will be left empty since the individuals are not authors in the sense of the copyright law.

In addition to the general principle, the doctrinal analysis indicated that naming the author can actually threaten the application of article 7 Aw. Therefore, not naming any authors is fully consistent with this mechanism.

In difference to the non-contract based mechanisms, transfers-based mechanisms are not affected if the author is named. The baseline principle is therefore neutral in respect to naming authors or other contributors. Indeed, there are several historical developments that push for naming them in the metadata. First, the number of authors is expected to increase:

T7:	After 1973, it is clear that the author keeps his moral rights and therefore some control of the final product. This acts as an incentive to record the name of the author, most likely reflected in the broadcast's metadata.
T8:	New digital uses of broadcasts made after 1975 have to be based on separate licenses or transfer agreements. This should be directly linked with an increase in authorship information in the metadata.
T11:	Since 2005, authors have the right to additional remuneration, making a record of their names more likely. This trend is enhanced with the introduction of article 25d in 2015. It is therefore expected that more key contributors are named as such in the metadata.
T13:	Unknown uses are presumed included in contracts after 2015, subject to remuneration, and therefore act as a requirement for recording the name of the authors.

In other words, increases in the number of authors listed in the metadata can be expected around 1975, 2005 and 2015. All of these are based on the requirements to either get permission from authors for new uses or potentially having to pay them additional remuneration.

In addition to the general pattern expected for all transfers, there are further expectations in respect to TV broadcast based on their underlying film works. The changes in the nature of a film work should increase the number of authors listed:

F8:	The film work is defined as joint work after 1985. Its authors include a wide variety of contributors which share the copyright. This provides an incentive to name them in the metadata, reflected as an increase in both the number and categories of authors named.
F16:	The presumed transfer under article 45d does not extend to the moral rights but some of these can be waived by the author (article 45f). This provides a weak incentive to record the authors' names, both in absolute number and across core categories.
F15:	The remuneration requirement since 2005 for new uses requires the producer to keep a record of the main authors.

In the case of TV broadcasts therefore, an increase in the number of authors can therefore also be expected in the mid-1980s as well as 2005. These expectations however do not apply to radio broadcasts.

To examine how many authors are named, the first is the proportion of broadcasts which do not contain any authorship information at all.

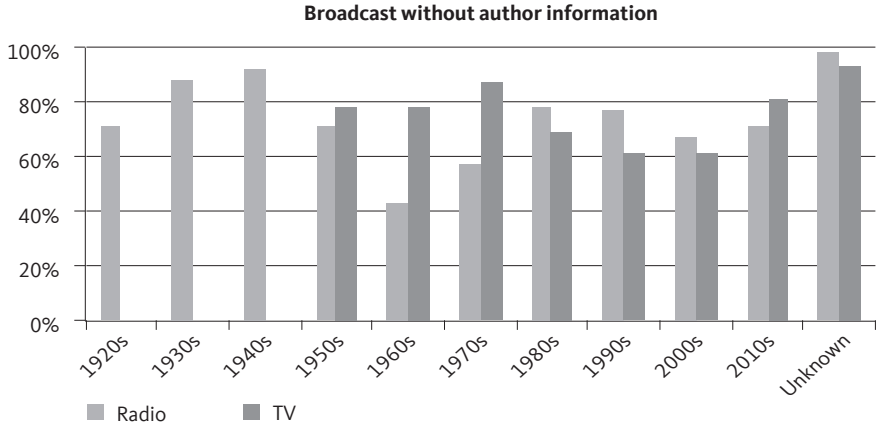


Figure 18: Percentage of TV and radio broadcasts that do list any information on authors.

In the case of radio broadcasts, the majority of broadcasts do not contain any author information with the exception of the 1960s. Indeed, the percentages are very high: they are above 70% for the 1920s-1950s and then again 1980s-1990s as well as after 2010. In addition, 98% of the broadcasts for which no broadcasting is known also do not have authorship information. It is therefore likely that the percentages at least for some decades are even higher. As a result, these decades are in line with the employment and first communication to the public predictions.

The transfer-based mechanisms are more neutral towards not naming authors. It is interesting though that there has not been a drop in the 1970s or in the 2010s as predicted. The only change in line with a rights arrangement based on transfers would be the falling values in the 2000s.

More importantly though, it should also be noted that none of the mechanisms examined here can explain the rising tendency to name authors in the 1960s. This is especially problematic since this is the decade where the percentage of radio broadcasts without any authorship information falls to its lowest proportion of only 43%. In addition, the drop is comparatively strong with 28%. At this stage, there is no explanation for this pattern based on the mechanisms examined here.

In terms of the process-tracing tests, the empirical results affirm the employment and communication to the public mechanism based predictions for nearly the whole timeframe. The only exceptions are the 1960s for which the tests are inconclusive. It should be noted that the passes for the 1970s and 2000s are weaker than for the other decades. The transfer-based mechanism tests are only passed for the 2000s but failed for both the 1970s and 2010s. The test for the 1960s is inconclusive.

TV broadcasts are most likely to contain authorship information in their metadata between the 1950s and 1970s as well as since 2010. At all these time points, more than 78% of all items do not carry the relevant information. The most noticeable break relates to the 1980s-1990s when the averages first drop to 69% and then 62% respectively. This pattern is interesting because it overlaps with the specific transfer predictions for film works.

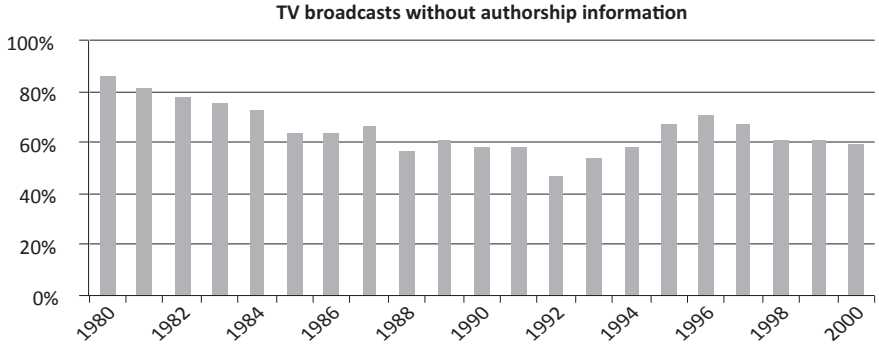


Figure 19: Percentage of TV broadcasts that do list any information on authors between 1980 and 2000.

A closer look reveals two interesting changes. First, as predicted, there is a rising tendency to name authors in 1985 and the following years. In particular, the percentage of broadcasts without authorship information falls from 72% in 1984 to 63% in 1985. In addition, the values stay lower on average. This is therefore in line with a transfer-based mechanism at work in the context of TV broadcasts.

Nonetheless, the second fall in 1992 was not predicted. The percentage drops from 58% (1993) to 47% in 1992. While this fall is short-lived, none of the mechanisms predicts this pattern for 1992. It should be noted though that the year itself is instructive: it is the same year as article 2 Aw was revised. It is therefore possible that the article 2 Aw reform had a more profound impact than legal scholars have commonly assumed.

In terms of the process-tracing tests applicable to TV broadcasts, the communication to the public and employment based tests are only affirmed between the 1950s and 1970s. They are inconclusive thereafter. Complementary to this, the transfer-based mechanism is affirmed for the 1980s but inconclusive for the 1990s.

5.4.2 The Importance of Key Categories of Authors

In addition to the likelihood of naming authors at all, all mechanisms predict that specific events have affected the overall trend of naming different categories of authors. These predictions are based on a strengthening of moral rights, benefitting some categories of authors[304] more than others.

C8:	The status of the director has increased over time for audio-visual works, including in the broadcasting sector. As a result, it is increasingly likely that at least the director will be named from the 1980s onwards. The relevance of article 8 Aw declines accordingly.

It can therefore be expected that at least one authorship category is covered after 1980. This is in line with the expected declining relevance of the article 8 Aw already identified in the literature. This is most likely to be visible in the context of TV broadcasts.

The 1980s are also a key turning point prediction by the employment-based mechanism.

E10:	By 1988, successful works can give rise to a right to receive additional remuneration rights to the main authors. An increasing number of key contributor categories should therefore be used. In the context of film works, this will be in particular the director.

304 The hypotheses only mention authors because they are all based on film works and the Copyright Act. There is no equivalent presumption here in respect to performers, even though the film work provisions also apply to them. All of the tests here are before the introduction of performers.

As a result, an increase in the different categories of key contributors is likely in the case of employment after 1988. In addition to this general pattern, there is another specific event that should be reflected in the data:

E8:	Permitting the author to put his name on a work can indicate an implicit contract, acting as a disincentive to the naming of authors (especially after 1973). Works of employment are therefore more likely to not have any author information.

It can therefore be expected that the number of authors named in the metadata drops around 1973. This is a smoking-gun test.

While the transfer-based mechanism is neutral towards naming the authors, it does provide for a set of specific events which are deemed influential on the overall pattern. These relate only to film works and therefore TV broadcasts:

F5:	A wider range of creative contributors to the film are recognised by 1975. As a result, it is likely that the metadata will show a gradually wider range of categories.
F8:	The film work is defined as joint work after 1985. Its authors include a wide variety of contributors which share the copyright. This provides an incentive to name them in the metadata, reflected as an increase in both the number and categories of authors named.
F16:	The presumed transfer under article 45d does not extend to the moral rights but some of these can be waived by the author (article 45f). This provides a weak incentive to record the authors' names, both in absolute number and across core categories.

In summary, the transfer-based mechanism predicts that for TV broadcasts in particular the number of categories for which authorship information is available is likely to increase in the mid-1970s as well as the mid-1980s. All of these are smoking gun tests.

All of the smoking gun tests in this section are derived from film works or general discussion but not radio broadcasts in particular. However, while they are not explicitly named for radio broadcasts as well, there is nothing in the doctrinal analysis to not apply them. However, if the tests are failed, then the conclusions would be deemed inconclusive rather than a fail.

To test these hypotheses, it is essential to identify what the key contributors are in theory. In the case of film works, the literature identifies in particular those creators involved in writing the script, sound engineers and composers, cameraman and

the director. The following table summarises the number of TV productions that provide information in these categories.

Table 41: Share of TV broadcasts that contain information on at least one of main contributor categories.

Decade	None	At least 1	At Least One Category Named	Total
1950s	4236	1009	19%	5245
1960s	20324	4518	18%	24842
1970s	25003	2907	10%	27910
1980s	27735	11364	29%	39099
1990s	69903	40349	37%	110252
2000s	105255	48513	32%	153768
2010s	111461	11809	10%	123270
Unknown	13260	481	4%	13741
Grand Total	377177	120950	24%	498127

Overall, the empirical data shows that naming one of the key author categories remains uncommon at all times. The high point is reached in the 1990s with 37%. In terms of the actual pattern and therefore the hypotheses' predictions, the increases in the 1980s are in line with all mechanisms examined here. In essence, the rising status of authors limits the applicability of article 8 Aw as predicted while also meeting the expectation for employment under article 7 Aw. In addition, the empirical evidence also shows the expected pattern for film works under the newly introduced article 45d and is therefore also consistent with the transfer-based mechanism. As a result, all of the process-tracing tests relating to the 1980s are passed.

The second relevant pattern relates to the 1970s. While the employment-mechanism predicts a fall in naming the authors, the transfer-based mechanism expects an increase. The empirical evidence shows that the former is true: the percentage of TV broadcasts that name at least one type of core author category is higher in the 1950s than in the 1970s. If the employment-based mechanism actually explains this, requires a closer look though. In particular, the drop caused by a narrower interpretation of employment contracts should be most pronounced around the year of reaching that conclusion: 1973. As all parties concerned adapt to the new legal situations, the values should recover.

Table 42: Share of TV broadcasts that contain information on at least one of main contributor categories 1970-1979.

Year	At Least One Category Named
1971	11%
1972	10%
1973	8%
1974	7%
1975	9%
1976	9%
1977	10%
1978	12%
1979	16%

A look at the decade reveals that the pattern fully meets the employment-based mechanism. The percentage of TV broadcasts that names at least one contributor drops from 10% in 1972 to 8% in 1973. The lowest point is reached in 1974 (7%) before the percentages recover to pre- 1973 levels from 1975 onwards. As a result, the highly specific prediction that there would be a drop in naming authors around 1973 is visible in the data, lending support to the employment hypothesis. The smoking gun test is therefore passed.

The theoretical basis to determine the key contributors for radio broadcasts is very weak. The expectation is that the core categories should be the same, although the relevance in comparison to each other may not be. As a result, the following table summarises the number of radio broadcasts which either do not have information on any of the core authorship categories in comparison to those mentioning at least one.

Table 43: Share of radio broadcasts that contain information on at least one of main contributor categories.

Decade	None	At Least One Category Named		Total
1920s	14		0%	14
1930s	1392	18	1%	1410
1940s	2011	20	1%	2031
1950s	3790	360	9%	4150
1960s	7902	1278	14%	9180
1970s	12659	2087	14%	14746
1980s	38763	1781	4%	40544
1990s	65237	702	1%	65939
2000s	124943	1339	1%	126282
2010s	114591	429	0%	115020
Unknown	47363	244	1%	47607
Grand Total	418665	8258	2%	426923

Most notably, none of these categories are ever commonly named in the case of radio broadcasts. Only 2% of the overall number of radio broadcasts lists any one of these roles. In conclusion, the deviation from the creator doctrine-based mechanisms is affirmed here for the whole timeframe. The evidence is weaker through for the 1960s-1970s.

The actual pattern conforms to some of the smoking gun tests. The percentage of radio broadcasts that list at least one of the core categories increases from 1% in the 1940s to 9% by the 1950s, peaking in the 1960s and 1970s with 14% respectively. The values then drop again sharply as only 4% have this kind of information in the 1980s. This means that while the transfer-based smoking gun test for the 1970s is affirmed, the drop specified by the employment-mechanism in the author categories was not evident, making the test inconclusive.

5.4.3 Importance of Specific Contributors

So far, the status of authors has been examined in general. However, the hypotheses also identify specific types of contributors that are deemed to have played a role.

The Importance of the Director

First and foremost, the rising status of directors has been highlighted by the doctrinal analysis in the context of film works and therefore TV broadcasts:

> F6: By 1975, the beneficiary of the collective works provision can in theory be the producer, director or author of the dialogue. This change may be reflected in the metadata.

The transfer-based mechanism therefore predicts an increasing tendency to name the director, in particular from the 1970s onwards. This is a smoking-gun test, focusing on the relevance of this particular change in the doctrinal analysis.

The importance of the director, however, is also pinpointed at a later time point for both first communication by a public entity as well as the employment mechanism. As mentioned before:

> C8: The status of the director has increased over time for audio-visual works, including in the broadcasting sector. As a result, it is increasingly likely that at least the director will be named from the 1980s onwards. The relevance of article 8 Aw declines accordingly.

In other words, increasingly naming the director confirms that article 8 lost relevance since the 1980s as the literature predicts. This is essentially a smoking gun test.

Similarly, the employment-mechanism also predicts an increase in the naming of the director but based on a different rationale.

> E10: By 1988, successful works can give rise to a right to receive additional remuneration rights to the main authors. An increasing number of key contributor categories should therefore be used. In the context of film works, this will be in particular the director.

After 1988 therefore, the director in particular should be named more often. This constitutes a specific smoking gun test.

To assess the importance of the director as an authorship category, the following table summarises the percentage of TV broadcasts which list a) only the director and b) authors but not a director.

Table 44: TV broadcasts that contain information on the director and those that name other kinds of authors but not the director.

Decade	Only Director	Only Non-Director
1950s	5%	13%
1960s	13%	2%
1970s	7%	0%
1980s	24%	1%
1990s	31%	1%
2000s	25%	1%
2010s	7%	0%
Unknown	3%	1%
Grand Total	19%	1%

The importance of the director is most likely reflected in the number of TV broadcasts that list information on him in the metadata but not any other author category. This pattern affects 19% of all TV broadcasts and is most common in the 1980s (24%) and 1990% (31%). The rise of director is also confirmed by the second data point here: the percentage of broadcasts which list authors but not the director. While this still affects 13% of all productions in the 1950s, the value is below 2% from there on. In other words, if at least one contributor is named, then this will most likely be the director. He is the core author since the 1960s and still today. In terms of the process-tracing therefore, the smoking gun tests for the employment and the first communication by a public entity are both passed. However, as the 1970s did not see an increase but instead a fall in the relative importance of the director, the transfer-based mechanism's smoking gun test for the 1970s is failed.

Importance Composer for Film Works

In addition to the director, the composer should play a major role for film works, given his continuous special status compared to other contributors when a transfer-based mechanism is involved.

F3:	The film work was conceptualised as the audio-visual component and the film's music. This strengthens the position of the composer compared to the producer, providing an incentive to name the composer in the metadata.
F12:	The rights of the film music's composer are not affected by the presumption under article 45d. His continuously special status provides an incentive to name him in the metadata.

In other words, TV broadcasts are more likely to have been based on transfers when the name of the composer is recorded in the metadata. This applies to the whole timeframe.

Decade	At Least One Composer	At Least One Sound-Related Role
1950s	0%	0%
1960s	0%	0%
1970s	0%	0%
1980s	0%	0%
1990s	0%	0%
2000s	0%	1%
2010s	0%	1%
Unknown	0%	0%
Grand Total	0%	1%

Figure 20: Share of TV broadcasts that list a composer and other sound-relevant authors.

The empirical data clearly shows that the composer is not given the same practical importance as the legal literature suggests. In particular, not even 1% of all broadcasts or indeed for any decade have a composer listed. The same pattern is reflected when a broader definition is applied. Only 1% of all TV productions list any role related to sound. However, the actual value is 0% for all decades except 2000s and 2010s. In conclusion, the composer or indeed authors involved in sound do not have the special status in practice.

One possible explanation for this unexpected result could be related to the prevalence of collective management in the field music. After all, it was already held in

1935 that acquiring a license for the film music is easily possible.[305] This provides an incentive against a need to name the composer in the records.

In summary, the transfer-based mechanism hypothesised that the composer plays a special role for film works and therefore TV broadcasts. This is not evident for any decade under examination here. As a result, the test is failed.

Importance Performers

Finally, the naming of performers should be reflected in the metadata in the case of transfer-based mechanisms.

N7:	Since 1993, the remuneration requirement acts as an incentive to record the names of main performers.
N8:	The waivable nature of moral rights does not act as an incentive to record the name of the performer.

As the hypotheses show, the incentives are contradictory. As a result, this test is only a weak straw test. However, it is relevant to both TV and radio broadcasts.

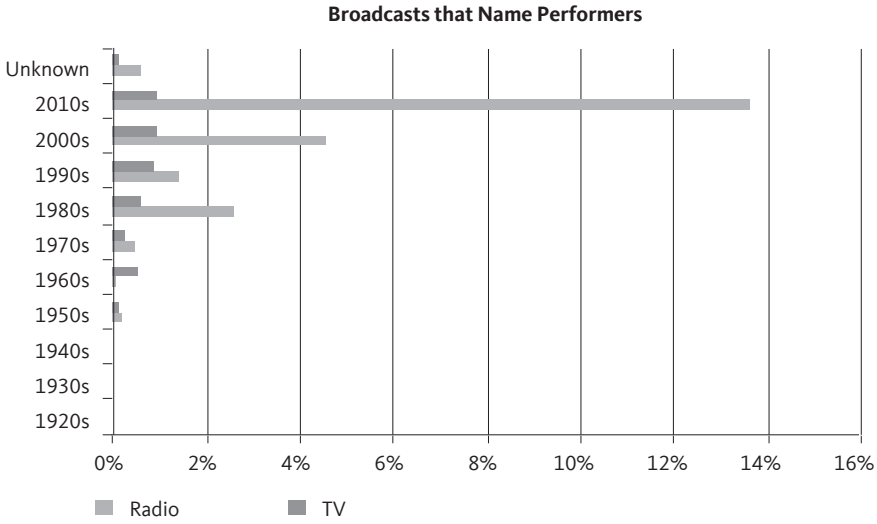


Figure 21: Share of TV and radio broadcasts that have information on the performers.

305 See Section 4.3 Contracts in the Context of Film Works.

For both TV and radio broadcasts, the naming of performers increases as times goes on. However, the relevance of performers is limited: it never reaches more than 14%. The majority of broadcasts therefore do not list any performers at all. In addition, it is more likely that a radio broadcast names a performer compared to TV broadcasts. Indeed, it is never more than 1% of all TV broadcasts that names a performer. This means that the phenomenon is not relevant on a larger scale. For radio broadcasts, the relevance of performers is also recent: the percentage is only above 3% since the 1980s onwards. It is the 2010s though which really stand out: 14% compared to 5% just one decade before this.

The importance of performers was predicted as increasingly relevant for both TV and radio broadcasts in the context of transfers. The evidence is affirming this hypothesis for the relevant timeframe (since 1993) and therefore the straw test is passed.

5.4.4 Conclusion: the Status of Authors

The empirical tests vary between the different mechanisms as well as TV and radio broadcasts. In the context of radio broadcasts, little empirical evidence is available. The tests for the communication to the public are passed for the timeframe, except in the 1960s when the test is inconclusive. However, the evidence is weaker for the 1970s and 2000s. This is also evident for the weighted scores: they are the lowest for the 1960s and 2000s – at all these time points nothing contradicts this mechanism. The evidence for employment is more extensive because of the smoking gun tests. However, since the test was inconclusive, the employment-based reasoning in the 1960s is especially weak. The smoking gun tests in relation to the transfer-based mechanism have also served to discount this as an explanation for the 1970s. The only time transfer is relevant according to this evidence is the 2000s when the awarded score reaches 2 out of 2.5. There is on balance no evidence though for the 1960s where the score is 0 out of 1.5.

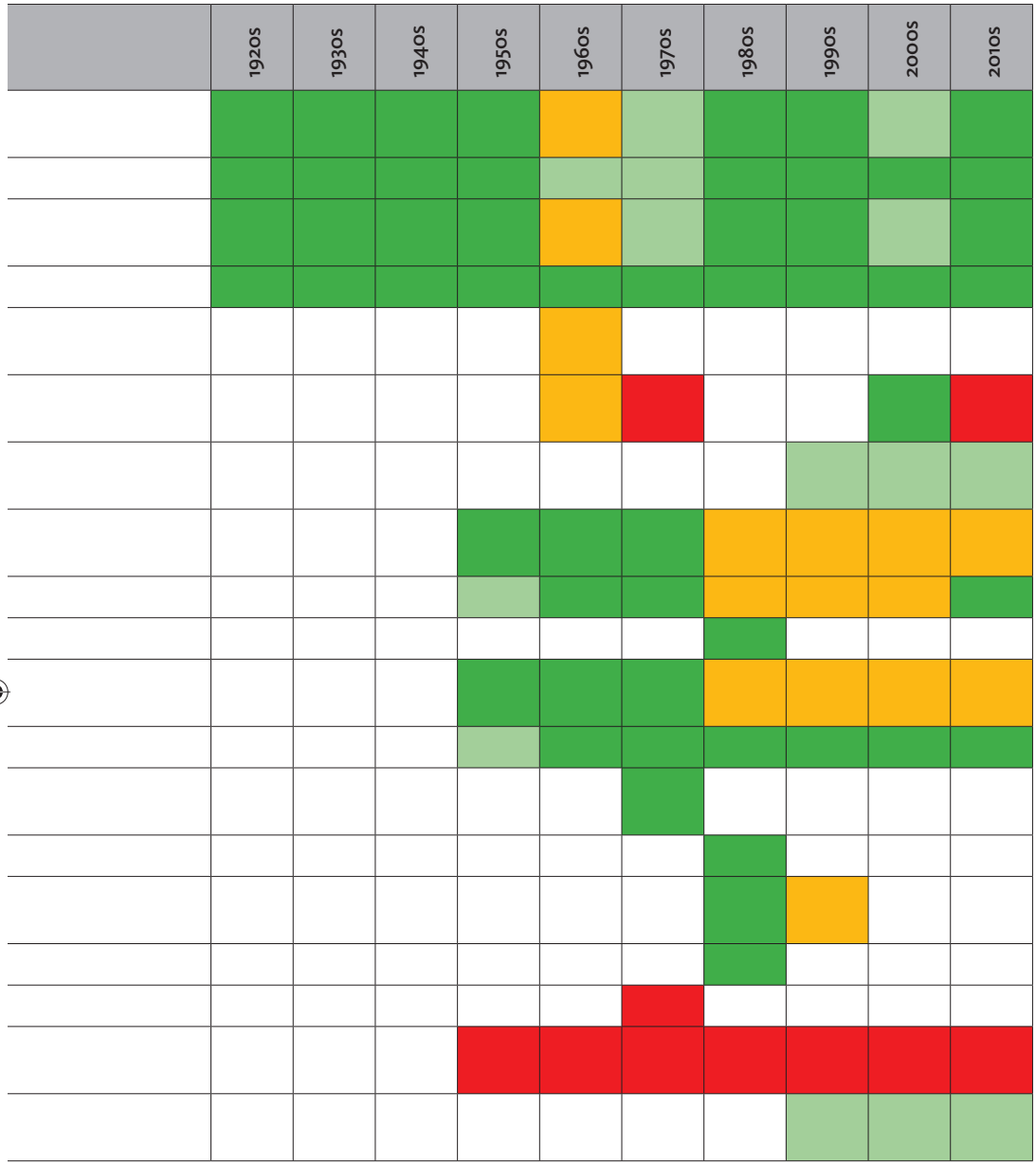
The image is different for TV broadcasts. Here, the communication to the public can practically be discounted from the 1990s onwards. There is no evidence that the predications are met, indeed the majority of tests is inconclusive. On the other hand, employment is most likely to have played a role in the 1960s and 1970s. Here, the tests affirm this conclusion, not least because the smoking gun test predicting a drop in naming the authors around 1973 is clearly evident in the data. In comparison to this, the 1980s are most likely shaped by the transfer mechanism. It is noticeable though that the majority of scores are negative for all other decades, meaning that it is likely that transfer has not played a major role. In the 1970s, the score is even – 2.5 out of 2.5 – indicating that all tests were not failed.

Table 45: Summary of the weighted process-tracing scores in the area of key contributor's status.

	Mechanism		1920s	1930s	1940s	1950s	1960s	1970s	1980s	1990s	2000s	2010s
Radio	**Communication by Public Entity**	Score	2.0	2.0	2.0	2.0	0.5	1.0	2.0	2.0	1.5	2.0
		Possible Score	2.0	2.0	2.0	2.0	2.0	2.0	2.0	2.0	2.0	2.0
	Employment	Score	2.0	2.0	2.0	2.0	1.0	1.5	2.0	2.0	1.5	2.0
		Possible Score	2.0	2.0	2.0	2.0	3.5	2.0	2.0	2.0	2.0	2.0
	Transfer	Score					0.0	–1.5		0.5	2.0	–1.0
		Possible Score					1.5	1.5		1.0	2.5	2.5
TV	**Communication by Public Entity**	Score				1.5	2.0	2.0	2.0	0.0	0.0	1.0
		Possible Score				2.0	2.0	2.0	4.0	2.0	2.0	2.0
	Employment	Score				1.5	2.0	3.5	2.5	1.0	1.0	1.0
		Possible Score				2.0	2.0	3.5	3.5	2.0	2.0	2.0
	Transfer	Score				–1.0	–1.0	–2.5	2.0	–0.5	–0.5	–0.5
		Possible Score				1.0	1.0	2.5	4.0	3.0	2.0	2.0

Broadcasting Type	Mechanism	Indicator	Test Type	
Radio	**Communication by Public Entity**	Catalogue Data: Broadcast without author	Straw	
		Catalogue Data: Author categories	Straw	
	Employment	Catalogue Data: Broadcast without author	Straw	
		Catalogue Data: Author categories	Straw	
		Catalogue Data: Author categories (specified drop)	Smoking Gun	
	Transfer	Catalogue Data: Broadcast without author	Smoking Gun	
		Catalogue Data: Importance performer	Straw	
TV	**Communication by Public Entity**	Catalogue Data: Broadcast without author	Straw	
		Catalogue Data: Author categories	Straw	
		Catalogue Data: Importance director	Smoking Gun	
	Employment	Catalogue Data: Broadcast without author	Straw	
		Catalogue Data: Author categories	Straw	
		Catalogue Data: Author categories (specified drop)	Smoking Gun	
		Catalogue Data: Importance director	Smoking Gun	
	Transfer	Catalogue Data: Broadcast without author	Smoking Gun	
		Catalogue Data: Author categories	Smoking Gun	
		Catalogue Data: Importance director	Smoking Gun	
		Catalogue Data: Importance composer	Straw	
		Catalogue Data: Importance performer	Straw	

Figure 22: Summary of the process-tracing tests on the status of key contributors.



5.5 Summary: The importance of Individual Mechanisms over Time

Using process tracing, this section of the report has systematically analysed to what extent the available empirical evidence affirms or contradicts the predictions made by the doctrinal analysis of the rights concentration mechanisms. This final summary will draw the findings together by focusing not on the individual indicators but the mechanisms as such. The aim is to identify the decades in which a mechanism is likely to have been relevant. The first part of the conclusion will focus on rights ownership via a deviation from the creator doctrine, namely works made in the course of employment and first communication by a public entity. The second section then centres on transfer-based mechanisms. This includes copyright and neighbouring rights transfers as well as presumptions on the transfer of rights.

5.5.1 Deviations from the Creator Doctrine

In principle, both works made under employment (article 7 Aw) and works first communicated to the public (article 8 Aw) have the same ownership pattern. Namely, a legal entity will own all of the rights for at least the Netherlands without having to rely on a contract. Despite this strong overlap in final outcome and therefore most of the empirical indicators examined here, there are some differences between the two. These relate in particular to the effect that the status of different categories of contributors is likely to have on the applicability of these articles.

The first mechanism is the employment provision. In the context of TV broadcasts, the results are comparatively clear. Productions based on the employment rules are most likely for the 1960s and 1970s: none of the tests contradict the hypotheses or are inconclusive. In addition, the awarded score is very close to the maximum score possible: 18.5 out of 19 in the 1960s and 20 out of 20.5 in the 1970s. After this point, the relevance of employment is less clear though: the pattern shifts in the 1980s with two inconclusive tests but still no contradictions. At the same time, the overall score drops to only 16 out of 20.5. This is largely driven by the failure to confirm the combined test for rights concentration: the prevalence of concentrated rights has fallen significantly in the 1980s. Finally, it is not likely that employment played a role since the 1990s. On one hand, the scores are only 5 out of 19 for the 1990s and 2.5 out of 19 for the 2000s. On the other hand, an increasing number of tests are inconclusive or indeed failed. In particular, the failing of the combined test here is important to note: very few broadcasts have the kind of concentrated rights employment provisions are likely to provide.

Table 46: Summary of the weighted process-tracing scores for the employment-based mechanism (art. 7 Aw).

	Decade	Score	Possible Score	Tests Passed	Tests Inconclusive	Tests Failed
TV	1950s	15	19.0	14	1	
	1960s	18.5	19.0	15		
	1970s	20	20.5	16		
	1980s	16	20.5	14	2	
	1990s	5	19.0	9	3	3
	2000s	2.5	19.0	9	5	1
	2010s	2.5	4.0	3		1
Radio	1920s	3	3.0	3		
	1930s	3	3.0	3		
	1940s	3	3.0	3		
	1950s	4	4.0	4		
	1960s	1	5.5	2	2	1
	1970s	3.5	4.0	4		
	1980s	4	4.0	4		
	1990s	4	4.0	4		
	2000s	1.5	4.0	3		1
	2010s	2	4.0	3		1

The evidence for radio is significantly less extensive, simply because fewer indicators are available. However, there is an indication that employment has been a more pronounced force for radio broadcasts compared to TV between 1920s-1950s as well as the 1970s-2000s. All of these decades do not have any failed tests at all as well as full scores or very close to it. Most notably though, the 1960s and since 2000 have a different pattern with low scores (only 1 out of 5.5 in the 1960s in particular).

The pattern is similar for the applicability under article 8 Aw: first communication to the public by a public entity. The most likely decades for this article to have been relevant in the context of TV broadcasts are the 1960s and 1970s with scores of 18.5 out of 19. As with employment, its relevance starts to fall significantly in the

1980s although no contradictory evidence is present. Three tests are inconclusive. Most notably, this again includes the double decisive test on the concentration of rights. It is highly unlikely though that article 8 Aw plays a role since the 1990s, as the awarded score drops to only 4 out of a possible 19 and half of the tests are either failed or inconclusive. In the 2000s, the score is only 1.5 out of 19.

Table 47: Summary of the weighted process-tracing scores for the first communication by a public entity-based mechanism (art. 8 Aw).

	Decade	Score	Possible Score	Tests Passed	Tests Inconclusive	Tests Failed
TV	1950s	15	19	14	1	
	1960s	18.5	19	15		
	1970s	18.5	19	15		
	1980s	14.5	20.5	13	3	
	1990s	4	19	8	4	3
	2000s	1.5	19	8	2	5
	2010s	2.5	4	3	1	
Radio	1920s	4	4	4		
	1930s	4	4	4		
	1940s	4	4	4		
	1950s	4	4	4		
	1960s	0.5	4	2	1	1
	1970s	3	4	4		
	1980s	4	4	4		
	1990s	4	4	4		
	2000s	1.5	4	3		1
	2010s	2	4	3		1

Again, the evidence for radio broadcasts is overall very limited. The only noticeable aspect is that one test in the 1960s, 2000s and 2010s was failed. However, it is overall still a straw test and should therefore not be given more weight than the other ones. The scores indicate that the 1920s-1950s are most likely to be within the realm of this mechanism as well as the 1980s-1990s. For these decades, all tests were passed.

In conclusion, the analysis identified the 1960s and 1970s as the most likely decades to be shaped by deviations from the creator doctrine either via the employment provision or the first communication to the public by a public entity.

5.5.2 Contract-based Mechanism

The final mechanism that can lead to the concentration of rights in the hands of non-creators is the transfer or licensing of rights. Here, the evidence also varies significantly between radio and TV broadcasts.

The mechanism is most relevant in the context of TV broadcasts since the 2000s. The awarded score is higher than in any other decade and actually covers more than half of the available points. In addition, the 7 out of 8 tests were passed although the failed one is above average weight. It should be noted that a number of the passed tests are borderline cases. At the same time, it is clear that transfers are unlikely to have played a role from 1950 to 1970 as the scores are not only low but in some cases even negative. The number of failed tests is also high.

For radio broadcasts, the overall evidence is not very extensive. Here, the least contradictory evidence is present for the 1920s- 1950s and 1970s- 1990s. For the remaining decades, at least one test was failed. The least likely decade is the 1960s with a score of 0.5 out 4 and only half of the possible tests passed. However, there are only four indicators available overall, making all conclusions highly tentative.

Table 48: Summary of the weighted process-tracing scores for the transfer-based mechanism.

	Decade	Score	Possible Score	Tests Passed	Tests Inconclusive	Tests Failed
TV	1950s	1.5	6	4		2
	1960s	1.5	6	4		2
	1970s	–1	10	5		4
	1980s	4.5	11.5	6	2	1
	1990s	4	10.5	6	3	1
	2000s	6.5	9	7		1
	2010s	0.5	3	2		1
Radio	1920s	4	4	4		
	1930s	4	4	4		
	1940s	4	4	4		
	1950s	4	4	4		
	1960s	0.5	4	2	1	1
	1970s	3	4	4		
	1980s	4	4	4		
	1990s	4	4	4		
	2000s	1.5	4	3		1
	2010s	2	4	3		1

6 Conclusion

This report has systematically analysed TV and radio broadcasts from both a legal and market practice angle. In the first part, the NISV archive was examined from a copyright angle. Based on a detailed doctrinal analysis, TV and radio broadcasts were broken down into the different copyright works and other subject matter cover by neighbouring rights. In addition, the potential right holder and the term of protection were identified for each work. The chapter concluded with a checklist of potentially relevant works, their term of protection and right holders. This list can be used to assess individual broadcasts. The chapter concluded that a large number of contributors share the rights in any particular broadcast. This is in particular the case for TV broadcasts.

To assess if rights are widely dispersed in practice, this report then examined the rights ownership of TV broadcasts empirically. It showed that that against the expectations, the rights are highly concentrated in the hands of a few actors. Therefore, relying only on the default rules in the copyright and neighbouring rights law is misleading in the broadcasting context. It is not clear though how this concentration has happened in practice. There is comparatively little knowledge available about industry practices that formed the (legal) context in which works were produced. In particular, while it is clear that public service broadcasters have bundled and acquired some rights in the final media productions, it is not clear how these were acquired: by first ownership provisions or by contract?

These two different routes have an important effect on the ownership of the making available right, and therefore who owns can license the specific right required by NISV to make its archives accessible online. If the broadcasters acquired the rights by law, then they will also be able to license online use. However, if the rights were contractually transferred to the broadcasters, then it is significantly less likely that they will be able to do so, as contracts have to be interpreted narrowly. Uses unknown at the time of the transfer, like online use, are not automatically included in a transfer, with the courts taking an author friendly position. The scope of contracts in turn is strongly influenced by what is common in the industry at a given point in time. In addition, rights on other subject matter such as performances have only been introduced by the legislator after 1994 but with prospective effect.

To address the question of right concentration, this report has analysed the different mechanisms that can underlie the concentration of rights. The first two mechanisms work on the basis of the operation of the law as deviations from the creator doctrine. These are the first communication to the public by a public entity and works made in the course of employment. The third mechanism relates to transfers, both in general and a presumption of transfer in the context of film works in particular. All mechanisms were then assessed against the empirical evidence available in the form of the archive catalogue data and the dataset on the copyright status of TV broadcasts collected by the Schoon Schip project.

This conclusion now directly compares the relevance of the mechanisms for TV and radio broadcasts. To do so, it uses the percentage of scores awarded as a result of the weighted process-tracing tests.

Table 49: Comparison of the three mechanisms based on the weighted process-tracing score as a share of the maximum possible score.

	Decade	Transfer	Communication	Employment
TV	1950s	25%	79%	79%
	1960s	25%	97%	97%
	1970s	–10%	97%	98%
	1980s	39%	71%	78%
	1990s	38%	21%	26%
	2000s	72%	8%	13%
	2010s	17%	63%	63%
Radio	1920s	100%	100%	100%
	1930s	100%	100%	100%
	1940s	100%	100%	100%
	1950s	100%	100%	100%
	1960s	13%	13%	18%
	1970s	75%	75%	88%
	1980s	100%	100%	100%
	1990s	100%	100%	100%
	2000s	38%	38%	38%
	2010s	50%	50%	50%

In context of TV broadcasts, the weighted process-tracing tests indicate that a mechanism based on the deviation of the creator doctrine is most likely the relevant force from the 1950s to the 1970s. The evidence for this is the strongest for the 1970s because the percentage of scores is very high while the alternative transfer mechanism is highly unlikely. After that, the pattern shifts, favouring transfers for the 1980s and 1990s and in particular the 2000s. The findings indicate that licensing TV broadcasts on a large scale will most likely be easier for older broadcasts as the rights will be more concentrated. Furthermore, the empirical evidence has in addition indicated that the owner is most likely the broadcaster.

The pattern is significantly less clear for radio broadcasts. This is not surprising given the very limited number of indicators available here. In particular, it is on direct comparison not possible to determine which mechanism is more likely than another. There is simply not enough information available at this point in time. More noticeable, it is not even possible to distinguish between the individual mechanisms by looking at the passed and failed tests. All of them are straw tests and the only smoking gun test was inconclusive. In other words, without further triangulation, it is not possible to make any empirical comment on the practical rights ownership of radio broadcasts.

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