COPYRIGHT, COMMODIFICATION AND THE STRUCTURE OF DIGITAL MEDIA ECONOMIES: INDEPENDENT PODCASTING IN CONTEXT

BY

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A thesis submitted to the Victoria University of Wellington in partial fulfilment of the requirements for the degree of Doctor of Philosophy

Victoria University of Wellington

2023

Abstract

Copyright law has, since its inception, been a key regulating force in economies based on the reproduction of creative works. Since the 18th century it expanded from its initial ambit of books to protect other types of works including music, film, television, and computer programs, and would be broad enough by the digital transition to also cover emerging digital media like online video and podcasts. The first two decades of the 21st century saw the rise of digital platforms, a key development in the formation of the contemporary digital media economy. It was in large part through these platforms' conflicts with traditional publishers that the legal context for digital creativity would be shaped. Publishers retained an important role in the new structure of the copyright industries; while the low barriers to accessing distribution channels through the new platforms meant that independent creators could potentially reach much wider audiences than ever before, the challenge for anyone attempting to make a living from creative work in this context was how to be found in a veritable sea of content—captured in the industry term "discovery".

This thesis considers how copyright law has adapted to the digital transition, and how digital creative economies have been shaped by copyright. It accomplishes this by proceeding over the first four chapters from the abstract and macro-level to the concrete and micro-level. The first two chapters establish a theoretical approach and framework which consider copyright law's structural in creative economies. This culminates in a novel analysis which focuses on copyright's role in commodifying creative labour. The next two chapters consider concrete examples of the copyright regime and digital creative economies in action. Chapter Three addresses specific copyright conflicts in the context of the 2010s adaptation of copyright law to the realities of digital distribution. This chapter argues that the distributional stakes of these conflicts have been under-appreciated, but that recent movement towards platform regulation has begun to change this. Chapter Four considers how the system appears from the position of one group of independent creators, history podcasters, through a series of interviews conducted in 2021. The picture of the podcasting industry which emerges from this chapter serves as a microcosm of digital creative economies more broadly by highlighting the different business models in play, particularly advertising and subscription models. The final chapter ties together the empirical and jurisprudential analysis of the preceding chapters with the commodification analysis posited in Chapter Two to argue for greater attention to the distributional outcomes of the copyright regime.

Acknowledgments

Much of the work for this thesis was done in something resembling monastic solitude, in a small room in a windy city tucked away on an island far away from everything. In the uncertain days at the height of the pandemic, the rest of the world seemed like a mere image, no more real than any other configuration of tiny lights on a computer screen. That appearance was never true, though; through everything, there were always people out there who remained a part of my life in ways big and small. These are but just a few of them:

> My PhD supervisors, Jessica Lai and Susy Frankel, whose insight and tolerance sustained me from start to finish.
>
> My LLM supervisor, Graham Reynolds, whose continuing advice and mentorship I could always rely on.
>
> My PhD colleagues (and frequent pub quiz teammates), Baptiste, Patrick, Tessa, Talia, Khushbu, Amy, Sraddha, Tessa, and Jaime, who shared the journey with me.
>
> My old friends, Laura and Connor, and little Peter, who kept in touch across several time zones and gave me a couch to sleep on when I returned (never mind the cat hair).
>
> My union buddies, Erica and Dani, who fought the good fight.
>
> My online friends, Zeke, Khalid, Brian, and all the rest, who were an enriching and supportive community.
>
> And my parents, Dave and Elaine, who encouraged me from afar and without whom I would not have become the person who could write this.

All of you deserve a part of the credit (and none of the blame) for how this thesis turned out. Thank you.

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Introduction

There is a cliché which has often been brought out in the context of copyright: that "law has failed to keep pace with technology". What this means, in a given instance, is usually either that the law does not protect some existing right or interest adequately given new technological circumstances, or that the law needs to adapt to clear the way for new innovations to proceed without interference by vested interests. In fact, in the context of copyright law and the transition to digital distribution and consumption of creative works, the changes witnessed in the first two decades of the 21st century were part of a continuous interchange between law and technology. Copyright law has, since its inception, been a key regulating force in economies based on the reproduction of creative works. Since the 18th century it expanded from its initial ambit of books to protect other types of works including music, film, television, and computer programs, and would be broad enough by the digital transition to also cover emerging digital media like online video and podcasts. But it was never primarily the physical instantiation of the works which copyright protected; rather, it regulated the relations between actors in creative economies. The transition to digital distribution and consumption of creative works, made possible by the ubiquitous adoption of personal computers and smartphones, upended one of these relations. For the first time, the ability to make a perfect copy of a creative work and make that copy available—historically a privilege enjoyed only by the owners of printing presses, film production facilities, and so on—became broadly accessible. This is the fundamental disruption to which copyright law had to adapt, through case law and legislation which helped to establish the new regime which creative economy actors would inhabit.

Among these actors are the now-familiar faces of the giants of the technology industry. Amazon was an online bookstore before it was a logistics and web services colossus, and remains a dominant player in physical books, eBooks, and audiobooks; Alphabet's YouTube is counted among the largest streaming music providers; and even the comparatively small (by market capitalisation) Spotify and Netflix are nevertheless hugely important in their local contexts of music and video streaming.[1] The rise of these platforms was a key development in

[1] See Wall Communications "Study on the economic impacts of music streaming platforms on Canadian creators" (Canadian Heritage, 2019) <www.canada.ca/en/canadian-heritage/>; David Hesmondhalgh, Richard Osborne, Hyojung Sun and Kenny Barr "Music creators' earnings in the digital era" (Intellectual Property

the formation of the contemporary digital media economy. It was in large part through their conflicts with traditional publishers that the legal context for digital creativity would be shaped. Publishers retained an important role in the new structure of the copyright industries; while the low barriers to accessing distribution channels through the new platforms meant that independent creators could potentially reach much wider audiences than ever before, the challenge for anyone attempting to make a living from creative work in this context was how to be found in a veritable sea of content—captured in the industry term "discovery".

This thesis considers how copyright law has adapted to the digital transition. It accomplishes this by proceeding over the first four chapters from the abstract and macro-level to the concrete and micro-level. The first two chapters establish a theoretical approach and framework which consider copyright law as a whole. This culminates in an analysis based around copyright's role in commodifying creative labour. The next two chapters consider specific copyright conflicts and how the system appears from the position of one group of independent creators. The final chapter ties these threads together with a look at the bigger picture and possible futures for copyright law. Chapter One starts by surveying the two traditional theoretical justifications for copyright: as an incentive for producing and disseminating creative work, and as a natural right of creators. Next, the focus moves to the arguments made by various critics of copyright law's real-world effects in different jurisdictions and across borders: on freedom of expression, exacerbating existing inequalities, and in creating an inequitable system for rewarding creative labour. This chapter synthesises critiques of copyright and the traditional approaches to copyright law to propose a novel theoretical framework, which is dubbed "structural-relational". This approach is "relational" because it focuses on the role copyright law plays in determining and regulating relationships between creators, audiences, publishers, and platforms, and "structural" because it focuses on the systems that produce creative work, in particular the various copyright industries, in which copyright law intervenes. This approach also highlights the importance of looking outside of the strict confines of copyright doctrine and towards its regulatory role and the broader structures which it enables.

Putting this theoretical approach into practice, Chapter Two looks at the transition to digital distribution and consumption over the first two decades of the 21st century. These years saw

Office, UK, 2021); Kal Raustiala and Christopher Jon Sprigman "The second digital disruption: Streaming & the dawn of data-driven creativity" (NYU Center for Law, Economics and Organization, Public Law & Legal Theory Working Paper No. 18-41, 2019).

a major shift in several copyright industries in the how works were consumed by users: from sale of physical copies of copyrighted works, to sale of digital "copies" (accomplished through licensing), to streaming works.[2] These shifts were uneven and incomplete, but by the end of the 2010s the central importance of digital consumption and distribution in modern creative economies was undeniable. How did copyright law's role change as digital technologies meant that the copy and the act of copying slipped out from the control of the publishers? This process had already begun with the advent of audio and video cassettes, but the file-sharing piracy crisis of the 2000s played a key role in hastening the adoption of new business models. These adaptations were adopted out of necessity to preserve the possibility of commodifying creative labour so that it can be sold on the market, the *raison d'être* of the copyright industries. As presented in this chapter, the piracy crisis was a challenge specifically to copyright law's role in the commodification of creative labour; elaborating on this shows how copyright law is predominantly oriented towards enabling this commodification process. Copyright law had to be adapted to serve the new digital environment to preserve the continuity in its role as a facilitator and guarantor of the commodification of creative work.

Chapter Three considers how this adaptation proceeded through case studies. The digital revolution in cultural works meant the emergence of new "zero marginal cost" uses: ways that copyrighted works could be employed while incurring little or no cost to the user. The distributional impact of these uses—whether they would fall within the ambit of copyright protection and necessitate payment from user to rightholder—had to be resolved on a case-by-case basis, by courts and legislatures. This chapter considers three of these instances where platforms and publishers came into conflict: the digital rebroadcasting of television signals, the use of short preview audio clips of musical tracks on a digital storefront, and the hosting of copyrighted works on platforms generally open for user uploads (such as YouTube).[3] In the first two cases, the United States and Canadian Supreme Courts relied implicitly or explicitly on a principle of "technological neutrality" to chart a course between the "innovation" logic of the platforms and the "property" logic of the publishers. In the third instance, the European Parliament more directly approached the question of distribution,

[2] See Wall Communications, above n 1; Hesmondhalgh and others, above n 1; Raustiala and Sprigman, above n 1.
[3] *Society of Composers, Authors and Music Publishers of Canada v Bell Canada* [2012] 2 SCR 326; *American Broadcasting Company v Aereo* 134 S Ct 2498 (2014); Directive 2019/790 on copyright and related rights in the Digital Single Market (17 April 2019) [2019] OJ L130/92.

which contrasts with the United States and Canadian courts' implicit or explicit reliance on "technological neutrality" as a guiding principle for the adaptation of copyright law. This chapter argues that even the best version of the technological neutrality principle cannot, by definition, address head-on the fundamental distributive questions raised by the application of copyright law in the digital age. Only a legislative process which can directly engage these questions—like that engaged in by the EU—can tackle copyright law's structural problems, but it must be a legislative process in which the interests of the public and creators get at least as much input as the moneyed interests of publishers and platforms.

The first three chapters provide a high-level view of copyright regulation of creative industries. But how do these structures appear from the ground? Chapter Four considers the specific circumstances of the podcasting industry, one of the media formats which arose out of the rise of digital distribution and consumption. Podcasting started out as a hobbyist phenomenon but became increasingly commercialised over the 2010s with the rise of new platforms, business models and high-profile podcast series. By 2020, it was an arena for competition between large platforms like Spotify and Amazon, as well as large media companies such as the iHeart network.[4] Despite these shifts, a significant number of independent podcasters continue to be active. For Chapter Four, a series of interviews were conducted with independent history podcasters. The data from these interviews informs a discussion in this chapter on how podcasting has changed and consolidated since its inception, how podcasters make money off of their work, and what roles copyright plays. This chapter finds that, consistent with the commodification framework introduced in Chapter Two, copyright law is an ambivalent benefit for independent creators. While it performs the basic function of providing the legal basis for both the control of works and the structures through which works can be monetised, copyright law and the platform policies it underpins also form a significant barrier and limitation for creators in some instances. For independent history podcasters, examples of this include arguable overenforcement of copyright through YouTube's ContentID system (a problem also addressed in Chapter Three) as well as the inaccessibility of history research texts aimed at an academic library market. This contrasts with copyright law's undeniable utility for publishers and platforms in underpinning their business models.

[4] See Forest Hunt "The New Podcast Oligopoly" (21 May 2021) FAIR <https://fair.org>.

Chapter Five reflects on these findings and considers the implications with respect to challenges currently facing creative economies. It does this first by identifying and critiquing three aspects of how copyright law operates in digital creative economies: copyright as a way to achieve greater control over the uses to which users put copyright works; copyright as a structure approaching a lottery, in which the possibility of making it as a middle-income creator is increasingly vanishing; and copyright as creating a class of assets which generate returns without necessarily incentivising new creative work. All of these tendencies can be identified in pre-digital copyright to some extent, but the specific dynamics of streaming and digital "discovery" as well as the dominance of large platforms and publishers have put yet more wind in their sails. This chapter outlines possible policy responses to the problems these trends present. Finally, looking to the future, further technological disruptions are visible on the horizon—though they may yet prove to be a mirage. This chapter will conclude by drawing on the relational framework developed in this thesis to consider the incipient private ordering responses of NFTs and the "decentralised web" movements and how they engage or fail to engage with the real issues in digital creative economies.

A commodification analysis for copyright law

It is important to be clear that the commodification analysis that this thesis puts forward is a theory about what copyright law (and its neighbouring rights) does rather than a general theory about the role of intellectual property law. A commodification analysis of patents, trade-marks or other intellectual property may be a worthwhile project, but it is outside the scope of this thesis. As presented here, the commodification analysis of copyright law relies on a special relationship between copyright and the creative industries. A central claim of this theory is that copyright law is, essentially, the way that the market in creative works is constructed and regulated by the state, and that this role has shaped copyright law's development. To give an idea why, consider the example of patent law, covering inventions. The pharmaceutical industry is a particularly important one for patent law in the present day; however, patent law was and remains important for many other kinds of inventions as well. Patent law may be a constitutive element of the current structure of the pharmaceutical industry, but the historical development of patent law was informed by many other areas of inventive activity. Indeed, chemicals only became patentable over the course of the 20th

century.[5] In contrast, it is difficult to imagine the modern film industry, for example, arising without copyright protection of moving pictures. The creative industries are also integrated and co-dependent in clear ways—dependencies which are regulated in large part by copyright law's adaptation right, and neighbouring synchronisation rights.[6] In this sense, copyright law can be characterised as having a special relationship with industries based around the reproduction of creative works.

To be sure, different media forms have arisen and come to be protected throughout copyright law's history, and copyright laws differentiate between different types of work. However, the creative industries that copyright plays a role in regulating—book publishing, music, film, and others—are all united in that their output can be categorised as "works". These works are generally meant to be consumed by a public in one form or another. As such, the relationships between creator, publisher, distributor, and audience can be characterised abstractly; we can sensibly talk in similar terms for different types of works, even as we recognise differences in the creative economies which produce them. Perhaps there is some similar commonality to be found between the subject matter of patents, like pharmaceutical drugs, chemical processes, and machines and the parties involved in their creation, dissemination, and use. However, this would require a different analysis, with different terms. A commodification analysis of trade-mark law would require no less adaptation than this, given that it regulates the use of signs in commerce and as such touches nearly all areas of commercial activity.

What the empirical investigation in Chapter Four describes is, on one hand, the varied motivations of one subset of podcast creators, and on the other, the trend toward consolidation in the podcasting industry as a manifestation of the pressure of intensifying commodification. This thesis suggests elsewhere that copyright, on the whole, is an intervention that facilitates commodification. Creative impulses have many motivations; commodification has but one. But taking the example of podcasting, even in the context of its more-commodified sections, copyright does not have the central importance that it does to traditional media because the business models which podcasting largely relies on place less importance on restricting copying. Nicolas Suzor has referred to this type of media as being

[5] See Alain Pottage and Brad Sherman *Figures of invention: A history of modern patent law* (Oxford University Press, Oxford, UK, 2010) at 153-182.
[6] See Rasmus Fleischer "Protecting the musicians and/or the record industry? On the history of 'neighbouring rights' and the role of Fascist Italy" (2015) 5 Queen Mary Journal of Intellectual Property 327 at 327-28 (describing the 1930s to the 1960s as the "neighbouring rights era" in music copyright).

based on an "abundance model" rather than a "scarcity model", with the latter being more reliant on copyright law.[7] What this thesis argues is that commodification is the more central phenomenon: it uses copyright; it does not absolutely require copyright. So, if we are interested in whether creators or audiences are getting a fair shake, it is the commodification of creative work, and the legal mechanisms which facilitate it, that should be our object of study.

What is a 'podcast'?

Because podcasting is a field which this thesis will return to repeatedly, it is helpful to establish a working definition for what constitutes a "podcast". The term is primarily applied to audio files released over the Internet asynchronously and serially. "Asynchronously" here is used in contrast to media which is broadcast live, sometimes also referred to as "linear" (as in "linear television"). Podcasts can be streamed or downloaded; in either case they are made available as a digital file which is largely static, although by the late 2010s podcasts with dynamically inserted advertising had become common.[8] "Serially" in this definition refers to how podcasts are released as individual "episodes" in a series "feed"; the technological backbone of podcasting syndication is the "Really Simple Syndication" (RSS) standard.

An RSS feed is a file which contains entries for individual items such as podcast episodes, news stories, or blog posts.[9] In brief, the process of uploading a podcast is as follows: a podcast creator records and edits a podcast episode and saves it to and audio file; the audio file is uploaded to a web server; and then the RSS feed online for the podcast series is updated with the information about the podcast episode, including a download link; the episode can then be accessed by various podcast listening applications. The RSS feed for a podcast series also includes general metadata about that series, often including a link to cover art. The other key part of podcast publishing are podcast directories, the most prominent of which is operated by Apple. Because RSS is an open standard, there are a wide range of podcast listening applications available.[10] These largely rely on podcast directories such as

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[7] Nicolas Suzor "Access, Progress, and Fairness: Rethinking Exclusivity in Copyright" (2013) 15 Vanderbilt Journal of Entertainment & Technology Law 297. See also Niva Elkin-Koren *The law and economics of intellectual property in the digital age* (Routledge, Abingdon, Oxon, UK, 2013) at 82 (noting that "[w]hat makes the new online intermediaries interesting in the context of the incentives analysis is the fact that their business models do not necessarily rely on the sale of copies, and therefore these models are less dependent on copyright").

[8] See John L Sullivan "The Platforms of Podcasting: Past and Present" [2019] Social Media 1; Chapter 4, section 2.3.3, below.

[9] See RSS Advisory Board "RSS 2.0 Specification" <www.rssboard.org /rss-specification>.

[10] See Sullivan, above n 8 at 10.

Apple's to populate the list of podcasts in the app; however, many apps include functionality to manually add podcast series by an RSS feed's URL. This can be used to add podcast series which are unlisted on podcast directories, such as when a podcast creator makes a private feed available for paying subscribers. Authentication and other "closed" podcasting systems also exist.[11]

This use of the RSS standard is central to podcasting as of 2022. However, it is fundamentally a technical definition; it is plausible that the podcasting industry could turn away from open standards in the future and still meet the definition of a podcast as a series of audio files released over the Internet asynchronously.[12] However, this definition breaks down around the edges: video podcasts, while not as common as audio podcasts, do exist and some podcasts are recorded and broadcast live. This leads to the question: what makes a podcast different from a radio show? Audio programs made for terrestrial radio have been "recycled" as podcasts, going back to the early days of podcasting, so there is certainly some overlap between the two formats. Most podcasts are not, however, broadcast on terrestrial or Internet radio stations. Indeed the continued existence of linear audio programming through Internet "radio" stations is perhaps the best evidence that there is a difference between podcasting and radio; the question to ask is precisely whether the content was broadcast live or put out asynchronously, recognising that something may be both a radio show and a podcast.

The radio example also highlights that it is not only the technical specifications or mode of delivery which defines a medium: it is also the structures of production and distribution. This is a theme which will be elaborated on over the course of this thesis. These structures, for podcasting, certainly include the technical points discussed above, but such abstract definitions are only a part. The structures of podcasting also include the many podcasting platforms and service providers which do everything from hosting series, to facilitating advertising and sponsorships on podcasts, to promoting and cross-promoting different series, to getting the podcast audio into listeners' ears. These structures have emerged over less than two decades, more or less organically. Apple's podcast directory was and remains a vital part of podcasting, but the technology company was never able to capitalise on this to become something like a "Netflix for podcasts". Whether this was an admirable show of restraint or

[11] See Ben Thompson "Dithering and Open Versus Free" (12 May 2020) Stratechery by Ben Thompson <https://stratechery.com>.
[12] Spotify would seem like a likely candidate to consolidate and close off the podcasting ecosystem, but their approach to the sector to date has not yet turned in this direction: see Ben Thompson "Spotify's Surprise" (28 April 2021) Stratechery by Ben Thompson <https://stratechery.com>.

benign neglect is arguable; in any case, it set the stage both for competition between technology and media companies in the late 2010s to grab a piece of the podcasting market, as well as an extensive stratum of independent podcasters.

Finally, the complex social reality of podcasting is, like other structures of creative production, run through with law, and in particular with copyright law. Part of the task of understanding how copyright law works out in the world is coming to grips with how it fits into these larger systems.

The choice of podcasting may seem like a strange one for this kind of project, because other cultural fields like music, film, and book publishing all have much more well-defined and well-established business structures which have affected and been affected by copyright law in obvious ways. Copyright law is more clearly a part of the day-to-day business of music, for example, than it is for podcasting. However, there is an argument to be made for looking to a newer medium, the business models for which have emerged in the digital age. It is obvious that copyright law has a role in the music industry which is intimately connected to the ongoing business of that industry; finding the role of copyright law in podcasting requires deeper investigation and thinking about how copyright law works to shape behaviour. Further, the process of searching for copyright law's influence in podcasting can uncover artifacts both of podcasting's particular character as a medium, and the digital environment's effects on the forms and monetisation of creative work. Where music and other industries strained themselves to preserve continuity with the business models of the pre-digital age (including through copyright law), in podcasting we can see the development of a medium which emerged directly out of the possibilities of digital distribution.

Chapter 1: Theorising copyright

Introduction

The widespread adoption of digital technologies in the first two decades of the twenty-first century fundamentally changed how people create, distribute, and consume creative works such as films, books and music. These changes manifested as digitisation, where creative works began to be distributed and consumed through digital technologies, and platformisation, in which digital platforms like Spotify, Netflix, and Amazon took over the distribution of large quantities of works. Copyright law's subject matter is the creative works at the centre of these transformations; but how should we understand copyright's role? This chapter argues that taking a structural turn in copyright theory can help: by looking at copyright law as just one element of the systems which facilitate the production of creative works, we can examine the role that copyright plays in the relations between creators, audiences and intermediaries. This structural turn requires looking at the real-life operation of creative economies to understand the intervention that copyright makes. The next chapter will make a more specific claim: that viewing copyright as a process of commodifying creative labour under this structural framework provides both the best response to structural critiques of copyright, and a clearer picture of what copyright does in the digital age.

This chapter starts from the beginning by interrogating the purpose of copyright law and critiques levelled against it. Legal scholarship often starts by examining how the law works in the abstract operation of rules and principles and then comparing this against how it works in the world on a more or less a-theoretical basis, sometimes borrowing methodological epistemology from social sciences (such as in the law and economics approach). Often the goal is more technical than critical: how can we make the law better achieve its stated goals. Critical accounts in the broad category of "law and society" can describe systems and structures but are often limited to individual cases or injustices. Rather than taking the normative claims justifying copyright as given, this thesis starts by a theory of how copyright law works, and then focuses on describing what it is actually doing, in an account which is both descriptive and empirical. To get to the initial theory, however, requires some idea of what is happening in a mutually reinforcing process of observation and theorising.

The two major schools of thought which are traditionally used to justify copyright law have both normative and descriptive aspects; taken together they provide a valuable starting point

from which to articulate a new descriptive framework. The standard justifications have, undoubtedly, guided the decision making of judges and legislators, and thus guided the development of the law. First, copyright law is often justified as an incentive to create and distribute works. This utilitarian justification has the benefit of framing copyright as a systemic intervention, in the form of an economic right which is valued through markets based on selling and licensing. This justification does not, however, account for other motivations for creating; in order to frame copyright as necessary or desirable, this utilitarian account must be supplemented by reasoning about why the creative economy it produces is a desirable one. This brings the inquiry back around to observation: what is happening within creative economies? Are we convinced that they are achieving normatively desirable outcomes? Several lines of structural criticism of copyright law conclude that they are not. Further, if we accept that copyright does function as an incentive, but other motivations also drive creativity, it raises the question: how does the copyright incentive then interact with those other motivations? Finally, the details of creative economies are significantly more complex than the abstract market models furnished by law and economics, which has provided a particularly influential descriptive account of how copyright law incentivises creativity.[1] While more complexity can be integrated into those models, this highlights that the "copyright as incentive" justification requires more for a full descriptive account of what copyright law does; this chapter will make the case for one that is engaged with copyright's social as well as economic consequences.

The second canonical justification for copyright law focuses on the creator: copyright is the author's right emerging from their connection to the work. Depending on the interpretation, this connection is established through the creator's labour, the expression of their personality, their original genius or otherwise.[2] This is balanced against a public interest through limitations on copyright's term, scope, and application in particular circumstances such as

[1] See Susy Frankel *Intellectual Property in New Zealand* (2nd ed, LexisNexis, Wellington, NZ, 2011) at 201-05; Christopher Jon Sprigman "Copyright and creative incentives: What we know (and don't)" (2017–2018) 55 Hous L Rev 451 (discussing consequentialism and incentives in US copyright); Niva Elkin-Koren *The law and economics of intellectual property in the digital age* (Routledge, Abingdon, Oxon [England]; New York, 2013).
[2] See Frankel, above n 1 at 201-05; Ronan Deazley "Commentary on the Statute of Anne 1710", in Lionel Bently & Martin Kretschmer (eds), (2008) *Primary Sources on Copyright (1450-1900)* <www.copyrighthistory.org> (noting that in drafting the Statute of Anne, the first modern copyright statute, "it seems likely that the Lords fully intended to benefit the author and only the author"); Lionel Bently and Jane C Ginsburg "The Sole Right Shall Return to the Authors: Anglo-American Authors Reversion Rights from the Statute of Anne to Contemporary U.S." (2010) 25 Berkeley Tech LJ 1475 (discussing the historical reversion right in British copyright and the contemporary reversion right in US copyright, emphasising the benefits (or lack thereof) for authors).

quotation or parody (known variously in different legal systems as copyright exceptions, user rights, fair use or fair dealing). In contrast to the utilitarian approach, the author's right justification focuses on copyright as a right enjoyed by individuals. It is more difficult to reason about how copyright law works as a system through this lens. But it does capture how copyright in an individual work is born: as a right good against the world, copyright stakes a claim on the behalf of a work's creator(s). In coming into being, copyright in a work immediately changes the relationship between an individual creator and everyone else. The legal existence of a right does not imply its practical utility, however. In practice, a copyright is only useful to its holder if it can be enforced, licensed, or sold. This again brings us back to the question of what structures exist in the world where creators can make use of their copyrights: namely, publishers and platforms.

Taking these critiques together, this chapter arrives at a theoretical approach to describing copyright law's role in the world that is structural and relational. It is structural in the sense of looking at the means by which creative work is produced and distributed through intermediaries. These intermediaries may shift and change over time but they nevertheless fulfil important structural roles, exercise power in those roles, and profit off of the exploitation of works. This account is relational in the sense that it focuses on how copyright mediates relationships between actors in creative economies. By providing a legal object through which control can be exercised, copyright law becomes a regulatory tool not just in the hands of states, but in those of platforms and publishers as well.

This chapter will conclude by applying this structural-relational approach to the historical development of copyright law and suggest that the role which it was made to play was one of facilitating the commodification of creative work. The digital transition is one particular instance where this role was called into question, before ultimately resolving into a new digital copyright regime, as Chapter Two will explore. The crystallisation of this regime is described through case studies in Chapter Three, and its form in the context of podcasting is considered in Chapter Four. Returning to the normative question, Chapter Five asks whether copyright law is achieving desirable outcomes, what could change, and what is on the horizon?

1. Theories of copyright

The social purpose justification of copyright as an economic right asserts that by providing a set of legal rights in creative works that can be traded, licensed and contracted around,

copyright encourages the production and distribution of creative works in society. In recent decades, debates around the optimal scope of copyright protection have often centred economic efficiency as the metric with which to evaluate the success of the copyright regime. At the same time, sceptical voices have introduced powerful critiques of copyright: that it entrenches existing social and distributive inequalities and that it circumscribes the freedom of expression of creators and audiences. These critiques of copyright can be called "structural" critiques because they identify how the law of copyright in action systemically and predictably reproduces substantive injustices.

This chapter advances an alternative theoretical approach to copyright informed by these critiques which attempts to reconstruct the social purpose justification of copyright on firmer foundations. The framing of copyright as an incentive within a law and economics framework can be useful and clarifying. However, it amounts to a better fit for approaches which focus on distributional and social justice aspects of copyright law because of its focus on the role of law and rights in structuring relationships. The proposed theoretical framework looks beyond copyright as a right to the relations it mediates and system legible first in terms of market efficiency. Putting forward a structural account of what copyright does can provide a common grounding for discussion without that precommitment to efficiency as the ultimate value. Furthermore, neither creators' nor audiences' interests in the continued production and dissemination of creative works can be reduced to a market preference, and a structural approach to copyright offers a way to capture more of these interests. This account looks primarily at the role copyright as an economic right plays in the structure of relationships among creators, audiences and intermediaries. This focus on copyright's structural role contrasts with another relational theory of copyright suggested by Carys Craig, and is intended to provide a descriptive account of the work that copyright does.[3]

The social purpose justification for copyright provides the starting point for this analysis. This justification can be contrasted to the "author's right" justification. Writing on copyright as an author's right focuses on how the connection between an author and their work gives rise, in one way or another, to a justifiable right for the author to (broadly speaking) control and profit from uses of that work. These two justifications go back to the beginnings of copyright and underpin different jurisdictions' copyright laws to different degrees. While this

[3] Carys J Craig *Copyright, Communication and Culture* (Edward Elgar Publishing Limited, Cheltenham, Gloucestershire, UK, 2011).

chapter is squarely focused on the social purpose justification, the idea of the author as the intended beneficiary of copyright legislation is present as well. A problem that has been resurfaced by recent copyright scholarship has been that, in the words of one scholar, "we need to face the fact that our copyright system does an embarrassingly lousy job of funnelling money to creators".[4] A structural approach to copyright can help in resolving the apparent contradiction that even as the scope of copyright expands, creators seem to see little benefit. The answer to this contradiction is in the structures that get creators paid.

Another apparent problem for the justification of copyright as an incentive is that there are contexts in which copyright is not present as an incentive in which creative activity nevertheless thrives. Several examples of these have been showcased in the literature exploring what Christopher Sprigman and Kal Raustiala call intellectual property's "negative space": these areas include stand-up comedy, fashion, and craft beer brewing.[5] In some of these examples, copyright law or other intellectual property rights are present in some way, but do not protect the core creative practice at the heart.[6] Neither is it always the case that these contexts are ones in which no financial incentive is needed—it is just that copyright is not providing it. This phenomenon, and the difficulty of measuring the incentive effect of copyright generally, can be understood through taking a structural account of copyright's role in the commodification of creative work.

This theoretical framework is also well-suited to accounting for and understanding the effects of the digital revolution on creative economies. New business models have been made possible (or least profitable) by the shift to digital, an effect which has had deep ramifications for existing creative economies. It has not, however, fundamentally altered how creators stand in relation to intermediaries—platforms and publishers remain in a dominant position

[4] Jessica Litman "Fetishizing copies" in Ruth L Okediji (ed) *Copyright law in an age of limitations and exceptions* (Cambridge University Press, Cambridge, 2017) 107 (writing in the context of the US copyright system).

[5] See Kal Raustiala and Christopher Sprigman "The piracy paradox: Innovation and intellectual property in fashion design" (2006) 92 Virginia L Rev 1687 at 1762. For other examples of copyright investigations of creators who do not make use of copyright (whether by choice or by subject matter exclusion from the copyright regime), see e.g., Debora Halbert "Creativity without copyright: Anarchist publishers and their approaches to copyright protection" in Shubha Ghosh and Robin Paul Malloy (eds) *Creativity, Law and Entrepreneurship* (Edward Elgar, Cheltenham, 2011); Zahr K Said "Craft beer and the rising tide effect: An empirical study of sharing and collaboration among Seattle's craft breweries" (2019) 23 Lewis & Clark L Rev 355; Elizabeth Moranian Bolles "Stand-up comedy, joke theft, and copyright law" (2011) 14 Tul J Tech & Intell Prop 237; Scott Woodard "Who owns a joke: Copyright law and stand-up comedy" (2018–2019) 21 Vand J Ent & Tech L 1041.

[6] Note that protection for clothing articles can, in limited circumstances, come under copyright protection as works of artistic craftsmanship in New Zealand and other jurisdictions: see *Bonz Group (Pty) v Cooke* [1994] 3 NZLR 216.

overall but the most successful creators, even as the digital transition reallocated power between them. Likewise audiences, while now increasingly invited to participate as creators, find their activities with respect to works ever more subject to intermediary control (a theme which returned to in Chapter Five. New creative economies, meanwhile, have grown up taking advantage of these business models, and should be illuminating subjects for study. Chapter Four will show how podcasting is one of these, and trace out how the relationships between creators, intermediaries and audiences work in that context.

These three problems in current copyright scholarship—the under-rewarded author problem; the "no incentive" problem; and reckoning with the effects of the digital revolution—certainly have had other answers posed. However, the theoretical framework advanced here provides a compelling answer—or at least a path to an answer—for all three. This section will outline the theories of copyright which have informed this theoretical framework, starting with the familiar dichotomy between conceptions of copyright as an author's right and as an incentive granted for the public good. This will lead into a discussion of the structural critiques of copyright which have posed particular challenges for the social purpose justification of copyright.

1.1. Copyright as an incentive

The claim that providing economic rights in creative works incentivises the production of those works in society has been an influential—though frequently contested—justification for the existence of copyright law.[7] The rights associated with copyright and the kinds of "creative work" that the rights can attach to has changed over time and from place to place, but the fundamental premise of this view of copyright as an economic right remains the same: to enable the intangible part of creative products (i.e., the collection of words in a book rather than the physical object) to be treated as marketable commodities. The ownership of copyrights is vested in individual rightsholders: usually the first owner is the author, or in some cases the author's employer. Nevertheless, under this understanding the putative ends of the copyright system are social. Some of the societal benefits that have been attributed to

[7] See Brett M Frischmann "Evaluating the Demsetzian trend in copyright law" (2007) 3 Rev L & Econ 649 at 667-68 (arguing that rather than merely maximising incentives, copyright law should be designed for productive "spillovers"); Rochelle Dreyfuss and Susy Frankel "From incentive to commodity to asset: How international law is reconceptualizing intellectual property" (2014–2015) 36 Mich J Int'l L 557 at 560-66 (describing changing thinking in international law about copyright's role).

the copyright system include the consumer choice that comes with having many creative works available and more opportunities to exercise freedom of expression.[8]

In contrast, the view of copyright as an author's right justifies the award of rights in a creative work based on the creator's connection to it. This connection may arise out of the labour the creator put into producing the work (a formulation often based on the work of philosopher John Locke), from the work as an expression of the creator's personality, or from the work as a communicative act (with some scholars drawing on the work of Immanuel Kant or GWF Hegel).[9] This is copyright conceived primarily as an individual right, rather than as a system of public regulation which uses individual rights as a mechanism for societal ends.

These views are representative of broad camps about the role of copyright with some areas of compatibility rather than strict, exclusive positions. While the socially-oriented economic justification has been very influential in copyright policy and scholarship in the United States and British Commonwealth, certain author's rights arguments have also made impacts. For example, Carys Craig notes that a Romantic notion of "authorship" which privileges the special status of the author as a unique genius to justify greater copyright protection "has served the commercial interests of publishers, employers and distributors, often at the expense of the people whose role in the 'creative' process was most similar to that of the Romantic author figure."[10] This function of this concept of the Romantic author as a rhetorical tool "has altered very little since the occasion of its first deployment in the eighteenth century literary-property debates, where it was an effective ideological instrument used to cloak the economic interests of the booksellers".[11]

1.2. Copyright as property

One long-running structural debate in copyright thinking is over whether it is misleading to treat it as a "property right". This debate includes questions over whether "traditional"

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[8] This includes the view of copyright as an "engine of free expression" notably espoused by the United States Supreme Court in *Harper & Row*: *Harper & Row v Nation Enterprises* 471 US 539 (1985).
[9] See Anne Barron "Kant, copyright and communicative freedom" (2012) 31 Law and Philosophy 1; Tom G Palmer "Are patents and copyrights morally justified? The philosophy of property rights and ideal objects" (1990) 13 Harv J L & Pub Pol'y 817.
[10] Craig, above n 3 at 22.
[11] At 22, citing Peter Jaszi, "Towards a theory of copyright: The metamorphoses of 'authorship'" (1991) 2 Duke LJ 455 at 500. On the 18th C. literary property debates up to and following the passage of the first modern copyright statute, see Bently and Ginsburg, above n 2. See also Jane C Ginsburg "The exclusive right to their writings: Copyright and control in the digital age" (2002) 54 Me L Rev 195 at 202 (noting that in the US Constitution the "employment of the word 'securing' demonstrates that the property right was not for Congress to *create*, but rather to reaffirm and to strengthen").

property rights provide useful analogies for how copyright should operate and develop, and whether the rhetoric of property rights tends to lead to a stronger, more expansive copyright through a kind of creeping conceptualism.[12] At a minimum, the different subject matter of copyright and other intellectual property rights means they must be differentiated in some ways from traditional property rights to be useful or meaningful.

The property right debate is important for framing the structural part of this argument as it is an entry point to elaborating the difference between Craig's approach, which will be engaged in further detail below, and the approach advocated here. Both are "relational" in the sense of dealing with copyright as structuring relations between persons. However, this approach focuses less on reconceptualising copyright as a relational right and more on interrogating the role it plays in creative economic structures. Craig, responding to the charge that there is an "irony" in trying to get copyright to embrace a critique of private property rights, argues that any such irony disappears if we "replace the idea of copyright as the regulation of private property rights with the idea of copyright as vehicle to encourage the creation of meaning and widespread engagement in social discourse."[13] While reconceptualising copyright itself is valuable, a critical descriptive account of copyright in creative economy systems can accomplish more by providing a basis for critiquing existing structures. Hence where Craig's account focuses on why copyright should not be considered a property right, this contribution will focus on how it actually is treated by actors in the copyright system.[14]

An alternative view of whether copyright should be considered a property right could arise from considering the conceptualism/nominalism. The question of conceptualism, as described by Joseph Singer, is at what level can concepts be "operative", in the sense that one can deduce particular consequences in the form of subrules from them.[15] Conceptualism understands that higher level concepts like "property" can be operative: that referring to a legal right as "property" entails a certain scope to the right. This is relevant to the "copyright as property" debate because the differences between other forms of property and copyright are quite large, so if one understands property as an operative concept, if intellectual property is within that concept certain incidents of ownership should flow. Ultimately, what does it

[12] Conceptualism here meaning the idea that "property" is a concept which has a concrete meaning which can be operationalized into our definition of copyright, usually to expand it. See Joseph William Singer "The legal rights debate in analytical jurisprudence from Bentham to Hohfeld" 1982 Wisconsin L Rev 975.
[13] Craig, above n 10, at 25–26.
[14] Perhaps not all of them consider it property, but it still plays the role of property—as discussed in more depth below.
[15] For the conceptualism/nominalism divide see Singer, above n 12, 1015ff, 1057.

mean to ask what Emily Hudson calls the formalist question as to whether copyright is a "property right"?[16] The position that copyright (or other intellectual property) should not be described as a property right is in part a defensive move against the idea that "property" has specific incidents that need to be completely protected, when in fact even property has always had limitations laid out in law and these limitations have changed over time.[17]

If, however, we accept that "property" does not entail a specific legal regime or set of rights as a matter of necessity, it can only be a descriptively useful nominal category capturing some degree of similarity between different legal concepts. Personal property is different from real property, which is in turn different from intellectual property. Intellectual property in particular swallows a diverse set of rights—including most prominently copyright, patent, and trade-mark—which arguably do not even fit together all that well. But abjuring the "property" label for copyright is only *analytically* helpful (to a nominalist) if it does not in fact share relevant similarities with other property or *rhetorically* helpful if we want it to change such that it no longer shares those similarities. As to the rhetorical value of removing the property label, this depends on the connotations of "property", which those with an interest in strong copyright are likely to exploit regardless of what sceptics want to call it. On the other hand, this rhetorical move would also serve to divorce the movement for greater justice in the goals and effects of a copyright regime from those for greater justice in different property regimes.

Craig makes the case that the "property" label distorts the reality of copyright law as a regulatory tool in part by overemphasizing the relation between the author and the work. However, even if the property account is not conceptually useful it can still be descriptively useful. Jennifer Nedelsky, writing on relational theory and law, does not see an unresolvable contradiction between asserting rights as part of a social justice project and a relational understanding of law. Rather, she suggests that "a relational approach to rights means that people should see rights as structuring relations".[18] How rights talk is used rhetorically is separate from the kinds of commitments strong versions of rights like bodily security entail.[19]

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[16] See Emily Hudson "Copyright and Invisible Authors: A Property Perspective" in Andrew Johnston and Lorraine Talbot (eds) *Great Debates in Commercial and Corporate Law* (Macmillan, 2020) 108 at 109.
[17] At 120-23 (emphasising limitations on property law which are not reflected in copyright, including doctrines of estoppel and adverse possession); Jessica Litman "What we don't see when we see copyright as property" (2018) 77 Cambridge Law Journal 536 at 536 (contending that "[c]onstituting something as a freely alienable property right will almost always lead to results mirroring or exacerbating disparities in wealth and bargaining power", in contrast to the prevailing legal dogma that property rights are necessarily empowering to its owner).
[18] Jennifer Nedelsky *Law's Relations* (Oxford University Press) at 315.
[19] At 316.

Her approach is ultimately pragmatic: rights talk can be useful shorthand, and even a relational legal theory which emphasises the nuance and complexity of how law works does not need to jettison it entirely. While Nedelsky is not writing particularly about intellectual property rights, a similar logic can be seen to apply here.

1.3. Copyright as regulation

The idea of copyright as regulation has been made elsewhere and essentially amounts to the claim that, like other forms of law, copyright law is about influencing behaviour and is a product of a societal choice to achieve particular ends.[20] In this context, copyright as regulation is meant as a broad approach to viewing copyright rather than an adoption of any particular regulatory theory.[21] Accepting the framing of copyright as a tool for the regulation of creative production leads to a few questions: Who or what is regulated? What is the ultimate goal of this regulation? And, relatedly, how do we evaluate the success of the regulatory regime?

Another key definitional question is—if copyright is regulation, who or what is being regulated? What this chapter refers to as a structural-relational approach looks at how copyright works into relationships between different actors and shapes their behaviour. The relevant actors this framework proposes to look at are creators, users, and intermediaries—while recognising that these are broad, heterogeneous, and sometimes overlapping classifications. However, the object of the regulation, in this conception, are the relationships between these actors. For example, copyright rules around works-for-hire play a regulatory role in the relationships between creative workers and their employers (conceived as one kind of intermediary).[22] However, in this relationship, other structural factors, like the employee's bargaining power *vis à vis* the employer or the presence of a collective agreement covering

[20] Examples of copyright law being considered as a form of regulation include Rebecca Giblin and Jane C Ginsburg "Asking the right questions in copyright cases: lessons from Aereo and its international brethren" in Tana Pistorius (ed) *Intellectual Property Perspectives on the Regulation of New Technologies* (Elgar, 2018); João Pedro Quintais and Sebastian Felix Schwemer "The Interplay between the Digital Services Act and Sector Regulation: How Special Is Copyright?" (2022) 13 European Journal of Risk Regulation 191; Zoe Adams and Henning Grosse Ruse-Khan "Work and works on digital platforms in capitalism: conceptual and regulatory challenges for labour and copyright law" (2021) 28 International Journal of Law and Information Technology 329.

[21] Chapters Two and Three will expand on a regulatory approach to copyright with respect to internet platforms which distribute copyright works: see Martin Eifert, Axel Metzger, Heike Schweitzer and Gerhard Wagner "Taming the giants: The DMA/DSA package" (2021) 58 Common Market L Rev 987 (discussing the European Union's attempt to "provide a coherent regulatory framework for digital platforms"). A parallel strain of legal scholarship with an eye to these platforms is antitrust/competition law: see Sanjukta Paul "Antitrust as Allocator of Coordination Rights" (2020) 67 UCLA L Rev 378.

[22] See Litman, above n 17 at 546.

the role between the employer and a union may influence or even completely overpower the role of copyright. Hence this thesis considers copyright as a part of structures, and as a part of commodification processes.

Further, this should not be applied too simplistically: although in some instances it may be appropriate to speak generally of the relationship dynamics between creators as a whole and intermediaries as a whole, that level of generality risks flattening out significant differences. Chapter Four will investigate the relationships between history podcasters and the platforms they rely on, including distributors like iTunes and Spotify, and between history podcasters and their audiences. This chapter advances some claims with greater generality (such as characterising the relationships between podcasters generally and their distribution platforms, or between digital creators and payment platforms) that will assume some similarities, but which will ultimately be subject to further evidence.

2. Critiques of copyright

The following sections will consider some of the critiques levelled at copyright law which go to its overall structure and effects in the world. In contrast to the theories discussed above, which attempt to provide a positive basis or explanation for copyright law's essential purpose, these critiques aim to identify injustices perpetuated by copyright law and propose ways to mitigate them. The framework being developed here, which will be further elaborated in the final section of this chapter, is an attempt to synthesise these critiques into a systematic approach. A relational theory of copyright which understands it as operating through structures bridges the gap between theory and critique.

2.1. Structural critiques of copyright theory

Beyond the question of framing copyright as a natural right or an economic right, many authors have critiqued broad structural features of copyright law. Some scholarship addresses the copyright system's impacts on the realisation of human rights. This includes longstanding concerns over copyright's relationship with freedom of expression and its potential to suppress speech, as well as copyright's impacts on rights to cultural participation, development and education.[23] For example, Ruth Okediji argues that there is an intellectual

[23] See e.g., Graham Reynolds "The Limits of Statutory Interpretation: Towards Explicit Engagement, by the Supreme Court of Canada, with the Charter Right to Freedom of Expression in the Context of Copyright"

property and human rights "interface" which finds expression in international intellectual property treaties, but that these treaties have not to date gone far enough to live up to human rights obligations. Okediji writes that in the context of intellectual property, "reliance on market mechanisms is insufficient to fulfil the requirements of economic, social, and cultural rights."[24] Other authors address their critiques of copyright through the lens of critical theory rather than rights discourse. Craig writes on critical theory and copyright that while "[t]heoretical perspectives informed by liberal conceptions of equality and progress can effectively challenge some disparities in the allocation and enforcement of rights," critical perspectives are valuable because through them we can "perceive the ways in which the inequalities flow through the inherited legal constructs, and so demand a more fundamental reimagination of legal norms and institutions".[25]

One claim made by some critical copyright scholarship is that copyright has failed to live up to a fundamental promise of the system: getting creators paid.[26] Creators of works rely on other parties to get their works to audiences: variously, publishers, platforms, distributors and other "intermediaries". Critics of the distributional effects of copyright argue that creators have been left out in the cold by the copyright system.[27] The blame for this situation "belongs with the architecture of the system", in part because "[t]he law encourages creators to convey their copyright interests to publishers, aggregators, and other intermediaries, and it does not pay much attention to whether they can take advantage of copyright's benefits once they have done so."[28] But it is important to remember than in the digital age the conveyance of copyright interests from creators to intermediaries is far from the only way in which copyright works are exploited: the digital platforms which are essential to getting creative work out to an audience generally do not require the transfer of copyright or even an

(2015–2016) 41 Queen's LJ 455 at 492. On the other hand, copyright has also been portrayed as a boon for the production of expression. See Chongnang Wiputhanupong "'Copyright is an engine of free expression' or 'free expression is an engine of copyright'?" in Susy Frankel (ed) *Is Intellectual Property Pluralism Functional?* (Edward Elgar, 2019) (elaborating on the tension between these two positions).

[24] Ruth L Okediji "Does Intellectual Property Need Human Rights?" (2018–2019) 51 NYU J Int'l L & Pol 1 at 60.

[25] Carys J Craig "Critical Copyright Law & the Politics of 'IP'" in Emilios Christodoulidis, Ruth Dukes and Marco Goldoni (eds) *Research Handbook on Critical Legal Theory* (2019) at 322.

[26] Rebecca Giblin "A New Copyright Bargain?: Reclaiming Lost Culture and Getting Authors Paid" (2018) 41 Col J Law & Arts 369.

[27] See, e.g., Litman, "Fetishizing copies", above n 4 at 127 (noting that "copyright law is not yet well-designed to ensure that creators of works get paid"); Lea Shaver "Copyright and inequality" (2014) 92 Washington University L Rev 117; Daniel J Gervais *(Re)structuring copyright a comprehensive path to international copyright reform* (Edward Elgar, Northampton, MA, 2017) at 191 (asserting that "[t]he success of any structural reform of copyright should be judged in part on whether sustainable financial flows to authors are restored").

[28] Litman, "Fetishizing copies", above n 4, at 129.

exclusive license. Instead, the works become "content", which is then monetised through advertising or subscriptions, out of which the platforms can pay creators some proportion. These business models will be considered in more depth and detail in Chapter Four, but it is sufficient to note here that they enable exploitation without dispossession.

The concerns noted in this section seem to demand wide-ranging change rather than piecemeal reform. One proposal which takes this on comes from Daniel Gervais, who proposes to "(re)structure" copyright to respond to the new technological reality of digital reproduction and distribution of works.[29] The lynchpin of his proposed change would be a reconceptualisation of copyright as a right against demonstrable economic harm and away from reliance on the act of copying (or performing or broadcasting as the case may be).[30] This is an astute move: with the rise of ubiquitous digital technologies and the Internet, the significance of "copying" to copyright law's operation became a significant weak point in the legal regime, a theme which will be explored further in Chapter Two.

In order to outline a regulatory regime more appropriate to the digital age, Gervais identifies different possible motivations of authors/rightsholders in four categories—ranging from those with no economic or attributional motivations, those motivated to spread their attributed work around without direct economic gain (often realising their financial return on work elsewhere), those motivated to realise financial returns from their work to keep working and maintain themselves, and those purely motivated to make as much financial return as possible off of exploiting copyright works.[31] The structure of the revised copyright regime Gervais proposes is intended to respond, to one extent or another, to all of these parties' respective needs.[32] While this is a useful way of thinking about the parties in the copyright system, focusing on the relationships between parties may be more productive for an understanding of how the system works.

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[29] Gervais, above n 27.
[30] At 3.
[31] At 193.
[32] Gervais suggests limiting copyright to an economic right, suggesting that "copyright holders would be content with a strong economic right that applies in cases where use is prejudicial to their (commercial) interests": Gervais, above n 29 at 213. Séverine Dusollier likewise considers a radical reframing of copyright as an economic right, "setting aside the ill-adapted notions of reproduction right and communication right to devise a new concept delineating the control a copyright owner should have over her work": Séverine Dusollier "Realigning Economic Rights With Exploitation of Works: The Control of Authors Over the Circulation of Works in the Public Sphere" in Bernt Hugenholtz (ed) *Copyright Reconstructed: Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change* (Kluwer Law International, 2018) 163 at 163.

2.2. Relational theory and copyright

Assessing copyright's role in the structuring of creative economies through copyright's relational aspects requires a particular focus on how copyright law plays in conflicts and negotiations between different actors in the copyright system: creators, audiences and intermediaries such as platforms and publishers.[33] What is notable in these relationships are the differences in power: what actors can do (or abstain from doing), what they can make other actors do (or abstain from doing), and how the actions they actually take affect other actors' interests.[34] These relationships include the business relationships entered into by creators and intermediaries, as well as creators' community relationships with their audiences. While these relationships may be simply transactional, many of them have a continuing character: an ongoing relationship between a musical artist and their label, or between a podcaster and their community of fans.[35]

Carys Craig proposes a "relational" theory of copyright in her 2010 book *Copyright, Communication and Culture*, characterising the copyright system "as the result of a collective choice" which "always requires evaluation and re-evaluation."[36] She lays out an instrumentalist view of copyright that, while attentive to individual flourishing, addresses copyright first and foremost as a social mechanism. Copyright's purpose in this telling is tied to its incentive function: "to maximise communication and exchange by putting in place incentives for the creation and dissemination of intellectual works."[37]

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[33] The inclusion of platform and publisher intermediaries contrasts with another relational schema for copyright law developed by James Meese, which considers authors, users, and the "pirate": see James Meese, *Authors, users, and pirates: Copyright law and subjectivity* (Cambridge, MIT Press, 2018) at 9. For the purposes of a structural approach to copyright law, intermediaries play too large a part to be ignored. The "pirate" in the view presented here occupies one point on a spectrum of users, with blatant unauthorised reproduction of works blending into other infringing but tolerated uses of works (such as use on social media).

[34] See Singer, above n 12 at 994.

[35] The shift to digital media may have changed to some extent how these relationships operate, but they are not new. For example, 18th century booksellers commonly made voluntary payments to successful authors beyond what was required by their publishing contracts. Understanding that booksellers and authors were engaged in ongoing relationships during this time explains this behaviour better than viewing the publishing contracts as isolated, transactional affairs: see Bently & Ginsburg, above note 11 at 1540. Kathy Bowrey similarly writes about additional payments by a 19th century publisher to an author who had sold his copyright as the actions of a businessperson concerned with his respectability within the profession: see Kathy Bowrey *Copyright, creativity, big media and cultural value: Incorporating the author* (Routledge, Abingdon, UK, 2021) at 38. This example shows how the relational extends beyond ongoing relations with current business partners to include e.g., reputation. This thesis will explore the kinds of relationships implicated in the specific context of podcasting in more detail.

[36] Craig, above n 10, at 53.

[37] At 52.

Craig is also critical of the exaggerated importance of the ownership relation between work and author that comes with treating copyright as a property right.[38] Craig calls for a greater attentiveness to "the relationships of power and responsibility that [the copyright system] generates" and "whether they foster the kind of creativity that we value."[39] Craig emphasises both the importance of copyright to power relations and "its capacity to structure relations of communication, and also, to establish the power dynamics that will shape these relations."[40] Per Craig, "[c]opyright's purpose is to create opportunities for people to speak—developing relationships of communication between the author and the audience—and to fashion conditions that might cultivate a higher quality of expression."[41] Following on from this approach in the context of podcasting would highlight the openness and ease of access for creators. This could make for a different set of power relations between creators and intermediaries than in other media more dominated by publishers. One aim of this thesis will be to investigate whether these differences allow podcasting to foster more opportunities to speak.[42]

Copyright's function in structuring power relations is evident in relationships between creators and the publishers, platforms and other parties they rely on to get their creative work to audiences and to realise income from their work. The term "intermediary" is often used as an umbrella term for this latter group. It is important to bear in mind, for example, that intermediaries can themselves be rightsholders through licensing or assignment by the author of a work, or through the operation of a "work-for-hire" statutory provision or copyright doctrine that makes a creator's employer the first owner of a copyright. The contractual arrangements under which revenue and risk are shared between creators and intermediaries may reflect power imbalances between the parties.[43] There is a need here to be attentive to the specifics of different industries and creators. A musical artist's relationship with her record label is distinct and different from her relationship with a platform like Spotify, and these both differ greatly from a podcaster's relationship with a distribution platform like iTunes or Spotify, and where applicable with crowdfunding platforms like Patreon or

[38] At 26.
[39] At 53.
[40] At 52.
[41] At 230.
[42] Platforms may have significant power in this context, particularly where they are a major source of income for creators (e.g., crowdfunding platforms).
[43] See Duncan Kennedy "The Stakes of Law, or Hale and Foucault!" (1991) 15 Legal Studies Forum 327; Susan Marks "False Contingency" (2009) 62 Current Legal Problems 1.

advertisers. These complexities come with the model of a "networked market" like Spotify, and with the management of different relationships required of independent creators.[44] Chapters Four and Five will look at this tangle of relationships in the context of podcasting through the lens of power relations and ask: what role copyright does play here? Is it a boon or a burden for podcast creators? While the interviews show concern for controlling the circulation of their works, for the most part the positive effects of copyright for podcast creators are less apparent than the limitations it places on their creativity.[45]

3. Framework: A structural-relational synthesis for copyright

Whatever claim that copyright law has to incentivising creativity depends, in practice, on structures. In the typical pre-digital case, an author would not make money off their work by selling directly to the public but by working through a publisher. This publisher is in turn able to base their business off the certainty that copyright provides—that they will not be in competition with other publishers that could undercut their sales. Digital distribution and consumption have not fundamentally altered the importance of intermediaries. For example, authors self-publishing through Amazon, are still dealing with an intermediary whose business similarly relies on a copyright license.

Other copyright scholarship has emphasised the importance of intermediaries.[46] A structural account of copyright law like the one advanced here emphasises that copyright is only one element of the structures that make up creative economies—it includes other areas of law as well as the modes of distribution, the actors in those economies, and norms. In response to the question, "why does copyright do a poor job of getting authors paid?" a structural approach suggests taking a view that is both broader in its scope and inclusive of other areas of law, as well as sensitive to variations between different creative industries. As Jessica Litman writes, "the blame belongs with the architecture of the [copyright] system."[47]

This is an alternative to an incentives-based approach, which would hold for instance that the wider (and thus more economically valuable) the definition of the right (copyright), the greater the incentive for individual creators.[48] The opposition between creators' and users'

[44] See Maria Eriksson, Rasmus Fleischer, Anna Johansson, Pelle Snickars and Patrick Vonderau *Spotify teardown: Inside the black box of streaming music* (MIT Press, Cambridge, Mass., 2019) at 159.
[45] See Chapter Four, section 2.4, below.
[46] See e.g., Gervais, above n 29, ch 8; Litman, "Fetishizing copies", above n 4 at 129.
[47] Litman, "Fetishizing copies", above n 4 at 129.
[48] Incentives accounts do frequently go beyond this simple account of greater rights meaning greater incentive, for instance to correct for the effects of market failures and transaction costs.

interests starts by supposing that any increase in users' rights leads to a decrease in financial returns to creators' work and vice versa, which has not been born out in practice.[49] This obscures, and a structural approach reveals, the greater terrain of conflict between intermediaries of various stripes on the one hand and creators and users on the other.[50]

This approach favours the position that a broad distribution of opportunities for creative activity (production and consumption) and equitable remuneration for creative work should both be important objectives of copyright law. The beneficiaries of copyright regulation ought to be authors (in every medium) and audiences, with intermediaries serving a primarily instrumental role. As Nedelsky notes about relational theory, this normative frame presumes a commitment to equality.[51] The descriptive goal of the structural-relational framework is ostensibly separate from this normative commitment; however, the relational aspect of the framework means that inequalities are often what is going to be described. In contrast to the traditional law and economics approach, this may be a useful feature: a descriptive account where the targets for (policy or judicial) intervention are framed in terms of inequality rather than economic efficiency.[52]

Focusing on copyright law economics need not close off consideration of other values. In his 1996 work "Copyright and a Democratic Civil Society", Neil Netanel similarly describes copyright law as having "production" and "structural" functions. In his account, copyright law is "democracy-enhancing" in how it achieves artist independence from "state subsidy, elite patronage, and cultural hierarchy".[53] Implicitly, the alternative which copyright embraces to construct a "system of self-reliant authorship" is artist dependence on the market,

[49] See Litman, "Fetishizing copies", above n 4 at 130 (noting that "[t]he lesson of past copyright revisions is that even massive enhancement of the scope of copyright owners' rights . . . doesn't effect a noticeable increase in author compensation"); at 113 (writing that "[w]hen the legal erosion in reader, listener, and viewer copyright liberties meets up with copyright owners' appetite for enhanced control over all uses of their works, the combination creates a genuine danger that our copyright system will discourage rather than encourage reading, listening, and viewing").

[50] The shift to digital media may have changed to some extent how these relationships operate, but they are not new. For example, 18th century booksellers commonly made voluntary payments to successful authors beyond what was required by their publishing contracts. Understanding that booksellers and authors were engaged in ongoing relationships during this time explains this behaviour better than viewing the publishing contracts as isolated, transactional affairs: see Bently & Ginsburg, *supra* note 11 at 1540. Kathy Bowrey similarly writes about additional payments by a 19th century publisher to an author who had sold his copyright as the actions of a businessperson concerned with his respectability within the profession: see Bowrey, above n 35 at 38. This example shows how the relational extends beyond ongoing relations with current business partners to include e.g., reputation.

[51] Nedelsky, above n 18, at 27.

[52] See Steven Shavell, *Foundations of Economic Analysis of Law* (Cambridge, Mass., Harvard University Press, 2004).

[53] Neil Weinstock Netanel, "Copyright and a democratic civil society" (1996) 106:2 Yale LJ 283 at 288.

and on the structures of creative economies.[54] For Netanel, while copyright operates "in the market", its fundamental goals are not "of the market".[55] While the structural-relational account of copyright and the commodification framework share with Netanel's account similar language regarding copyright's role in structure and production, they do not share the same optimism about markets. Indeed, the thrust of this approach is precisely to critique the political economy of creative economy structures and the power of publishers and platforms to shape copyright law and profit off of creative labour. Writing at the beginning of the digital revolution, Netanel situates his defense of copyright's market orientation against advocates of "minimalist" copyright.[56] However, with the benefit of hindsight we can see how the platforms who opposed "strong" copyright in the 2010s were no less committed to commodifying creative labour than the property-favouring publishers were, they simply had a different model of commodification in mind. This will be explored further in Chapter Three.

The structural focus on economies may draw comparison to law and economics accounts of copyright as an incentive. However, where traditional law and economics analysis of copyright centres the concept of "economic efficiency", this structural account will instead take inequality in power relations.[57] This approach would open space within the contestation of copyright law for the question of what to value, such that diversity, access, and education might compete on more equal grounds with economics, particularly efficiency. These concerns can be seen in their particular instantiations in the context of digital creative economies.

3.1. Creators and users: Finding the distinction

The significance of copyright as a social fact has changed tremendously with the introduction and proliferation of digital technologies. In the digital context, exact copying with no degradation of the original became not only possible but effortless. One result of this change has been that copyright is now salient to many more people outside the "copyright industries" than it was prior to the rise of the Internet. This is in part attributable to the vast increase in importance and volume of textual and visual communication which accompanied first the personal computer followed by the smartphone—since copyright attaches so easily to textual and visual materials. The common refrain earlier in the digital revolution was that everyone is

[54] At 339.
[55] At 341.
[56] At 336-41.
[57] See Kennedy, above n 43.

a creator. Legally, perhaps. Structurally, many "creators" remain in the same position as users insofar as their contributions go (by choice or otherwise) unremunerated.[58] The phrase "user-generated content" captures this ambiguity.[59] As it happens, platforms like Twitch and YouTube rely to a greater or lesser extent on creators who monetise their work through those platforms.[60] Copyright scholarship should recognise that there are creators who do not fit within traditional publishing structures; the "creator" interest in getting paid is not wholly exhausted by the traditional categories of creative production.[61] Similarly, discussion of rules around "user-generated content" should recognise that independent digital creators often rely on the flexibilities (or ambiguities) in copyright law around exceptions and fair use/dealing—as will be touched on in Chapter Four with respect to podcasters.[62]

In the context of digital media, users are creators are users—the roles fundamentally overlap.[63] How can this be reconciled with a model that separates them? Ultimately it is the

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[58] See Brooke Erin Duffy *(Not) getting paid to do what you love: Gender, social media, and aspirational work* (Yale University Press, New Haven, 2017) at 15 (noting that the aspirational framing of digital creative labour by platforms belies "the practical realities of the digital labor marketplace: just a few digital content creators reap significant material rewards from their activities"); Christian Peukert "The next wave of digital technological change and the cultural industries" (2019) 43 J Cult Econ 189 ("arguing that digitization and internet-enabled platforms, together with automated licensing of user-generated content, have substantially lowered the costs of individual-level cultural participation"); Leigh Claire La Berge *Wages against artwork: Decommodified labor and the claims of socially engaged art* (Durham: Duke University Press, 2019) (describing "decommodified" uncompensated labour in the context of the arts).

[59] See Madhavi Sunder "Copyright Law for the Participation Age" (2013–2014) 40 Ohio NU L Rev 359. There are also important symbiotic relationships between commercial media works and user-generated content which draws from them: see Christopher S Brunt, Amanda S King and John T King "The influence of user-generated content on video game demand" [2019] J Cult Econ. Allowing fans of a media property to share images, video, and other content based on a work is effective advertisement for a copyright holder's product. This likely accounts for the proliferation of user-generated content as much as any flexibility offered by copyright law. However, the threat of copyright enforcement gives rightholders a powerful tool to shape what user-generated content can be shared on platforms. To take one example from video gaming, in 2017 the publisher Atlus specifically prohibited game streamers and video creators from sharing content from their game Persona 5 after a certain point in the story: see Gita Jackson, "Twitch And YouTube Streamers Slam Persona 5's Video Policy" (4 May 2017) Kotaku Australia <www.kotaku.com.au>.

[60] See Mark R Johnson and Jamie Woodcock "'And Today's Top Donator is': How Live Streamers on Twitch.tv Monetize and Gamify Their Broadcasts" (2019) 5 Social Media + Society 1; Irene S Berkowitz, Charles H Davis and Hanako Smith "Watchtime Canada: How YouTube Connects Creators & Consumers" (Ryerson University Faculty of Communication and Design, 2019); Robyn Caplan and Tarleton Gillespie "Tiered Governance and Demonetization: The Shifting Terms of Labor and Compensation in the Platform Economy" (2020) 6 Social Media + Society 1.

[61] The "user-generated content" discourse in copyright cholarship has tended to focus on non-commercial content. See e.g., Sunder, above n 60 at 367 ("much user-generated content is noncommercial and consciously so"); Martin Senftleben "Bermuda Triangle: Licensing, filtering and privileging user-generated content under the new Directive on Copyright in the Digital Single Market" (2019) 41 European Intellectual Property Review 480. By highlighting digital creators who do make money off their work, this thesis will try to capture the experience of a new subset of creators: see Chapter Four, below.

[62] See Chapter Four, section 2.4, below.

[63] See Sunder, above n 60; Shyamkrishna Balganesh "Do we need a new conception of authorship?" (2020) 43 Columbia Journal of Law & the Arts 371.

market, facilitated in part by copyright, which definitively separates creators and users at the point of transaction. When an artist puts their music on a platform which feeds into Spotify, they are a creator. When they listen to music on Spotify, they are a user. The fact that this dichotomy is not reflected in human individuals does not mean that there are not creators and users—in the context of transactions, there clearly are. Trying to collapse the conceptual distinction between audiences and creators runs into the hard and fast wall of market transactions where whatever function or role someone is playing at a given moment determines which side of the fence they are on.[64]

3.2. The business of being an intermediary

Between creators and users sit intermediaries. As will be discussed in the next section, while the character of intermediaries has changed, copyright law has always been intimately connected with the interests of the booksellers, publishers, record companies, film studios, and so on. The division of labour between different sorts of intermediaries (for example, between publishers and record labels in the music industry) is only relevant here insofar as it goes to the distinction between platforms and publishers. "Platforms" will be defined in more detail in Chapter Two, but in brief they have taken over the user-facing distribution of creative works in the digital age. Their expansion into creative industries took advantage of the disruptive potential of digital technologies, and, in some cases, flexibility or ambiguity in copyright law (with some specific instances of this to be discussed further in Chapter Three).

Although platform companies have come in for increased scrutiny for their domination of digital space, they also face constraints. When Amazon announced its intention to add podcast streaming to its Amazon Music service, several podcasters discovered a clause in the terms of service which would have barred any advertising or messages "that disparage or are directed against Amazon or any Service".[65] The clause was quickly removed following a social media outcry. One can only speculate about the calculations which went into including an anti-disparagement clause and into removing it, and how such a clause might have been enforced. What is reasonably clear from this episode, however, is that while platforms may

[64] It is worth noting also that the ability to act collectively comes up frequently with audiences (who are more likely to act individually), to a lesser extent creators (who have in some contexts organisations which may be more or less representative of common interests), and to an even lesser extent intermediaries (who are relatively few in number particularly in the platform mono-/oligopoly setting but who are also competing vertically and horizontally, which introduces some constraints).

[65] See Evan Minsker "Amazon Music Adding Podcasts, Walk Back Condition That Podcasters Don't Disparage Amazon" Pitchfork <pitchfork.com>.

operate largely on their own terms, there are limits to what audiences and creators will accept. In this case, an expectation (perhaps a norm) can be observed that a platform be neutral towards what content it will host (neutral at least in respect of whether that content favours their own position). This expectation or norm is backed up by the fact that there are other podcast platforms which creators and audiences can opt for, and by the reputational consequences Amazon would face if they broke with it (which would likely be greater if creators and audiences could exercise an exit option).

It is important to identify these constraints as well as those on audiences, creators, and other intermediaries because otherwise a descriptive account of power relations would tend to overstate the freedom of action enjoyed by the platforms, which may lead one to conclude (incorrectly) in this case that it is outside the platforms' power to regulate content. In fact, the platforms do have that power. The constraints on how they use it are contingent: were Amazon the only game in town for podcasting, and were Amazon to estimate the negative reputational consequences of allowing disparaging messages on their podcasting platform as exceeding those of including and enforcing a non-disparagement clause, they could (and surely would) include and enforce such a clause.

Law constrains as well. In this case, the contract clause may have been found by a court to be unenforceable had it survived. Whether this particular clause would be as it is not the intention of this chapter to analyse specific laws, and certainly not contract law. This example is meant to illustrate the structural-relational approach: relational because it focuses on the power relations between parties; structural because it highlights the constraints under which parties act when they exercise their powers, and the limits of those constraints. The relational focus escapes the distorted picture of creative economies which the utilitarian law and economics approach entails; the structural component fixes the analysis to a descriptive account which includes behaviour-making constraints inside and outside law.

3.3. The history of copyright's role in commodification

This section will draw on scholarship in copyright history which has addressed relations between creators and the intermediaries who helped bring their works to market, and the structures in which they operated. It will highlight how three scholars have considered the importance of copyright in processes of commodification in different historical periods: how creativity is worked into objects that can be bought and sold on the market. Following this, the focus moves to commodification in the modern digital context, and how the changed

conditions of production and consumption of creative works over the last two decades have changed copyright's role in the commodification process.

Martha Woodmansee describes how the changing conditions of production and consumption of books in the late 18th and early 19th century in Germany led to the emergence of aesthetic distinctions between high and low art.[66] Social, economic, and cultural factors including an increase in literacy rates and a growing middle class with relatively more leisure time led to a boom in reading (even a "reading epidemic") and writing; however, the lack of uniform copyright legislation across the numerous German states of the period meant that commercial piracy of works proliferated.[67] These conditions spawned two seemingly contradictory reactions: the emergence of a divide between "high" and "low" culture where the former was seen as non-market and elevated and the latter base and profitable, and the elevation of the "original genius" of the author into the basis for a new literary property right—in large part to secure a livelihood for writers from the market.[68] Both writers and publishers suffered from the effects of commercial piracy, but it was the writers who struggled to earn a livelihood.[69] The introduction of more uniform copyright legislation later in the 19th century in Germany thus served both to improve the lot of writers and to give both writers and publishers a shield against commercial pirates.[70]

In his 1996 text, *Copyrighting Culture*, Ronald Bettig makes a particularly pointed distributive claim about the structural effects of the intellectual property system, that it "results in the unequal distribution of the rewards for human intellectual and artistic creativity, especially to the detriment of actual creators, and that it primarily benefits the capitalist class rather than society as a whole".[71] His Marxist historical account of copyright law focuses on how the changes to communication technologies in the late 20th century were metabolised by the creative industries, both incumbents and new entrants. Viewing his

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[66] Martha Woodmansee *The author, art, and the market: Rereading the history of aesthetics* (Columbia University Press, New York, 1994) at 22-33.
[67] At 46.
[68] At 49. Interestingly, Woodmansee notes that "the weight of opinion was for a long time with the book pirates" because the availability of inexpensive reprints kept book prices low for the consumer.
[69] At 45-47. One response to this situation echoes the crowdfunding models of the digital age: in 1772 the German poet "Friedrich Gottlob Klopstock unveiled a scheme to enable writers to circumvent publishers altogether and bring their works directly to the public by subscription." However, the scheme failed to meaningfully change the structure of book publishing; subscription was "too demanding of the time and resources of writers for many other writers to follow his example" and customers still preferred to buy their books through booksellers: at 48.
[70] At 52-53.
[71] Ronald V Bettig *Copyrighting culture: The political economy of intellectual property* (Westview Press, Boulder, Colo, 1996) at 44.

history of cable retransmission copyright debates related in Chapter Five, there is a clear echo of the development of copyright law in response to the rise of the Internet, as both deal with cases of incumbents challenged by new entrants who use new technologies to profit off of uses of copyright works which incur little or no marginal cost. In the historical example, this includes the retransmission of a cable signal, while a more contemporary example would be file-sharing. The basic issue when new technologies are introduced is, Bettig claims, "how revenues . . . should be apportioned between the participating industries", and he argues that it is through this lens that battles over copyright law should be viewed.[72]

This engages the regulatory question raised in the previous section: who is being regulated? These histories show how this target has changed: historically it was the commercial pirate—rival publishers of works—being regulated; now the target of regulation includes the user. The increased political valence of copyright reflects this change: the public cares about copyright now because now it directly affects them. On the side of the creator, the value of the intermediary was initially challenged with the rise of digital technologies, but this disruption was temporary: intermediaries were able to leverage new business models, particularly the subscription library; their existing marketing, gatekeeping, and (on- and offline) distribution resources; and of course, copyright law to preserve and adapt the existing creative economy structures for the digital age.

Copyright increasingly regulating users mirrors the deepening commodification of audiences that copyright has played a part in. Kathy Bowrey identifies the commodification of audiences as a feature of the late 19th century book publishing business, with literary celebrities like Sir Arthur Conan Doyle as well as lesser known authors cultivating their audiences as part of their business.[73] In the 20th century, the practice of "bundling"—selling tranches of audience share to television and other advertisers—reflects this commodification process as well.[74] Today, the complex data analytics capabilities possessed by intermediaries such as Spotify and Netflix increasingly go to shaping the creative process and what works are produced: directly, through Netflix and other streamers' production houses; and indirectly, through optimisation for delivery mechanisms like music playlists.[75] The audience as commodity is the audience that can be reached and monetised in one way or another; one

[72] At 121.
[73] Bowrey, above n 35 at 31.
[74] See Bettig, above n 71 at 80.
[75] Raustiala & Sprigman, above n 8; Eriksson and others, above n 44.

of the regulatory functions of modern copyright is to corral users into the zone of licensed use of copyright works, to keep value flowing into various structures of the creative economy.

Conclusion

The next chapter will continue to develop and apply the structural-relational framework in the context of digital media, and further define the "commodification" process that copyright law serves to facilitate. The consumption and distribution of creative works moved from one based around physical, analogue copies, to fixed digital copies, and then to mere access through on-demand streaming. Platforms came to play a more central role, mirroring a "platformisation" taking place in other parts of the economy. Despite this, the digital creative economy is not entirely captured by the largest intermediaries. The "disintermediation" allowed by the digital revolution has also opened the possibility of direct support of creators by audiences.[76] The focus of the empirical work in Chapter Four, podcasting, grew up with minimal existing structures (except those carried over from traditional radio, which never dominated the field) and many creators in this field have turned to this kind of direct support. Through platforms like Bandcamp and Patreon as well as generic payment processing through their own websites, creators in various fields (including in areas such as visual art, music, news and opinion and video games) solicit support for their work directly from their fans. What the structural-relational approach emphasises is that it is worth investigating further how direct relationships between creators and audiences may embody a different form of creative production less reliant on copyright and commodification. This in turn, may allow creators to be less beholden to market pressures on their work and audiences to be more engaged in the process of creative production.

[76] This word choice is not meant to refer to intermediaries disappearing from the creative economy, but rather that the basic, necessary functions of monetising creative work, like distribution and payment processing, can now be accessed by individual, independent creators.

Chapter 2: The digital media landscape and copyright law: Towards a commodification analysis

Introduction

The first two decades of the twenty-first century fundamentally changed the creative economies which copyright law plays a major role in regulating. The previous chapter argued for a "structural turn" in copyright theory to focus in on the roles copyright plays in the relations between creators, audiences and intermediaries, and that this turn requires looking at the real-life operation of creative economies to understand the intervention that copyright makes. This chapter considers the changing environment of creative production in the digital age and argues that the structural-relational approach supports viewing copyright primarily as a tool for commodifying creative labour.

An approach to copyright which focuses on commodification can help make sense of the developments of the last two decades, and where copyright is going now. The digitisation and platformisation of creative economies have fundamentally changed how creators create and audiences experience creative works. Unquestionably, some benefits have accrued to audiences and creators as a result of these changes: audiences now have easy access to a huge variety of works, if they can pay for them, while creators in many different fields can enter markets for creative works without dealing with traditional gatekeepers. In some accounts, the digital revolution lowered barriers to participation led to the "democratisation" of creativity and encouraged "creative entrepreneurship"—two ideas that this thesis will challenge.[1] Benefits from the digital shift, however, have come at a price: creators' incomes now often depend on terms largely set by major platforms, and with the decline of physical media, audiences face a looming

[1] See e.g., Irene S Berkowitz, Charles H Davis and Hanako Smith "Watchtime Canada: How YouTube Connects Creators & Consumers" (Ryerson University Faculty of Communication and Design, 2019) at 38.

"end of ownership" where their access to digital creative works—even ones that they have purchased—is wholly contingent on platform intermediaries.[2]

The previous chapter suggested that copyright theory should take a turn towards the structural and focus in on how copyright law mediates the relations between creators, audiences and intermediaries. This turn requires looking at things outside of copyright law to understand the intervention that copyright makes because it is not the only thing determining the content of those relationships. It is also done with a mind to other structural critiques of copyright's impacts in the world, and therefore attentive to the function of copyright in structuring creative economies. This chapter in turn develops an account of how creative economies adapted to the digitisation of large amounts of creative work, and how copyright's function and application evolved alongside. The focus reveals both change and continuity: the radical transformation that the adoption of digital technologies to distribute and produce creative works made, as well as the relations preserved in the new business models.[3] This chapter draws on critical (re)evaluations of the broader digital economy by other scholars who have introduced theories around "platform capitalism", "informational capitalism", and "surveillance capitalism".[4] The authors behind these terms make different claims about the structure and incentives of the modern digital economy, but share in common the contention that something about the economy has fundamentally shifted with the introduction of ubiquitous digital technologies. In the context of the creative industries, however, major platforms have not been alone in setting terms.[5] Instead, these changes have

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[2] See Aaron Perzanowski *The end of ownership: Personal property in the digital economy* (The MIT Press, Cambridge, Massachusetts, 2016).

[3] Julie E Cohen *Between truth and power* (Oxford University Press, New York, New York, 2019) at 7 (emphasising continuity and change in the transition to informational capitalism); Brooke Erin Duffy, Thomas Poell and David B Nieborg "Platform Practices in the Cultural Industries: Creativity, Labor, and Citizenship" (2019) 5 Social Media + Society 1 (using "continuity and change" as a thematic cluster for mapping platform activity).

[4] See Nick Srnicek *Platform capitalism* (Polity Press, Oxford, United Kingdom, 2016); Cohen, above n 3; Shoshana Zuboff *The age of surveillance capitalism: The fight for the future at the new frontier of power* (Profile Books, London, 2019); Jathan Sadowski *Too smart: How digital capitalism is extracting data, controlling our lives, and taking over the world* (Cambridge: MIT Press, 2020).

[5] Terms of use set by platforms relating to copyright and other issues play an important role in regulating the environment of digital creativity: see Robyn Caplan and Tarleton Gillespie "Tiered governance and demonetization: The shifting terms of labor and compensation in the platform economy" (2020) 6 Social Media + Society 1; Emily Hudson "Copyright and Invisible Authors: A Property Perspective" in Andrew Johnston and Lorraine Talbot (eds) *Great Debates in Commercial and Corporate Law* (Macmillan, 2020) 108 at 123-4 (noting how providers of digital works can now restrict and limit how works may be used and suggesting that a numerus clausus principle for copyright may be needed); Evan Minsker "Amazon Music Adding Podcasts, Walk Back Condition That Podcasters Don't Disparage Amazon" Pitchfork <https://pitchfork.com>.

been absorbed and metabolised by pre-existing creative economy structures including the various copyright industries.

The most obvious changes over this time (roughly 2000–2020) are in how creative work is commodified and who is involved (particularly the entrance of "platforms"). Commodification continued to be central to creative economies, while copyright became even more essential to the commodification of creative works. Copyright, and the technological means of enforcing it, has become the phantom thread which binds creative works into commodities in the digital age, in the absence of physical reproduction. The developments of this period support the proposition that commodification is the central structural role for copyright within creative economies.

These general observations about the digital economy inform a structural look at two specific contexts: music and podcasting. Music entered the digital age in crisis over copyright infringement, which threatened to undermine any business model based on the sale of music. By the end of the second decade of the 21st century, however, music streaming, typified by Spotify, was in a comfortable position—despite facing mounting criticism over the remuneration of artists and challenges from other technology companies with their own streaming platforms.[6] On the other hand, podcasts built their business models for the digital economy in the first place. By characterising the business of podcasting and the key relationships involved, this chapter will set the stage for the interviews which will inform chapter four of this thesis.

Seeing copyright as related to commodification is not a new idea, and has been expressed in various terms by scholars in different disciplines.[7] The specific argument in this chapter is that recentring an approach to copyright around commodification can help make sense of the developments of the last two decades, and where copyright is going now. Where might this analysis take us? This chapter concludes with two broad takeaways that follow from the

[6] See Molly Hogan "Upstream Effects of the Streaming Revolution: A Look into the Law and Economics of a Spotify-Dominated Music Industry" (2015–2016) 14 Colo Tech LJ 131; Wall Communications "Study on the economic impacts of music streaming platforms on Canadian creators" (Canadian Heritage, 2019) <www.canada.ca/en/canadian-heritage/>.

[7] See Ronald V Bettig *Copyrighting culture: The political economy of intellectual property* (Westview Press, Boulder, Colo, 1996); Dong Han "Copyrighting Media Labor and Production" [2012] New Media 24; Jeremy Wade Morris *Selling digital music, formatting culture* (University of California Press, Oakland, California, USA, 2015); Kathy Bowrey *Copyright, creativity, big media and cultural value: Incorporating the author* (Routledge, Abingdon, UK, 2021); Dan Schiller *How to think about information* (University of Illinois Press, Urbana, Illinois, USA, 2007); Nicholas Brown *Autonomy: The social ontology of art under capitalism* (Duke University Press, 2019).

commodification analysis. In one, commodification highlights the distributive impact of copyright. The impacts of the digital revolution affected everyone involved in the creative economies, but those with the least bargaining power were the ones who lost out. A deeper concern coming out of this analysis is that commodification might degrade the relationships between creators and audiences, and between creators and their works.

1. From digitisation to platformisation: The evolution of creative economies

The adoption of new technologies by the creative industries—first digital formats such as CDs and DVDs, then distribution of digital files via the Internet, and now increasingly streaming media to audiences—led to profound shifts in how media is distributed and consumed. Copyright scholarship needs to proceed with an understanding of the changes that digitisation has wrought for traditional media, as well as the new forms of media that have emerged with the digital transition. In particular, digital platforms demand attention because they have become central to the digital distribution of creative works and are important actors in copyright debates and litigation.

1.1. Defining "platforms"

The idea of a "platform" is now a mainstay of scholarly and policy discussions around the broader digital economy, encompassing products offered by companies like Amazon, Facebook, and Apple. In the creative industries in particular, many traditional media formats such as music, film, and television are now predominantly distributed digitally through platforms.[8] Spotify, for example, is a streaming platform which offers music and podcasts, and has become a particularly important player in the music industry.[9] While the definition of "platform" is contested, these actors can be understood as digital infrastructure, "position[ing] themselves as intermediaries that bring together different users", including customers, advertisers and producers.[10] Along with distribution platforms like iTunes and Spotify, other platforms may be important to other aspects

[8] See Kal Raustiala and Christopher Jon Sprigman "The Second Digital Disruption: Streaming & the Dawn of Data-Driven Creativity" (NYU Center for Law, Economics and Organization, Public Law & Legal Theory Working Paper No. 18-41, 2019).
[9] At 4.
[10] Srnicek, above n 4, at 24. Central to platforms' function and functionality is the collection of data about these different users: per Srnicek, platforms can also be conceived as an "extractive apparatus for data."

of media, such as social media platforms like Facebook and Twitter for promotion and community-building and payment or crowd-funding platforms such as PayPal and Patreon.

While the use of "platform" as a term has become widespread, including in debates and proposals around regulating digital technology companies, some authors are sceptical of the coherence or adequacy of the concept.[11] Technology companies may use the term "platform" as a rhetorical device to guide the conversation around their products in a favourable direction and elide the tensions inherent in serving constituencies with conflicting interests—users, clients and advertisers—as an influential article by scholar Tarleton Gillespie argues.[12] "Platform" in this reading seems to imply a more-or-less neutral actor, or one that primarily empowers others. This language can also help these companies in positioning themselves as against traditional, elitist media gatekeepers and for the so-called "democratizing potential of the Internet",[13] and in disputes where their services have hosted potentially copyright-infringing materials.[14] It has also been suggested that the term "platform" serves to mask technology companies' similarities with traditional media companies.[15] However, the term "platform", whatever its connotations, has not been enough to deflect the criticism that has mounted over the conduct of large technology companies and their impacts on society.[16]

For the purposes of this chapter, however, the term "platform" is a useful shorthand for the intermediaries which have emerged in the digital cultural economy to serve (and sometimes connect) different users, including creators, audiences and other intermediaries, including publishers. The term is used with the implicit caveats that "platforms" are heterogeneous, may

[11] See Tarleton Gillespie "The politics of 'platforms'" (2010) 12 New Media & Soc'y 347; Ben Tarnoff "Platforms don't exist" (23 November 2019) Metal Machine Music by Ben Tarnoff <bentarnoff.substack.com>.
[12] Gillespie, above n 11 at 352.
[13] Echoes of this rhetoric can now also be found in the communication strategies of far-right YouTube personalities, who emphasise their "relatability, authenticity, and accountability" in contrast to the purportedly elitist mainstream media: see Rebecca Lewis "'This Is What the News Won't Show You': YouTube Creators and the Reactionary Politics of Micro-celebrity" (2020) 21(2) Television & New Media 201.
[14] Gillespie, above n 12 at 11.
[15] At 11–15.
[16] See Katrina Geddes "Meet Your New Overlords: How Digital Platforms Develop and Sustain Technofeudalism" (2019–2020) 43 Colum JL & Arts 455; Cédric Durand *Techno-féodalisme: Critique de l'économie numérique* (La Découverte, Paris, 2020) [Durand, *Techno-féodalisme*]; Zuboff, above n 4; Cohen, above n 3. The debate around different conceptions of the impact of platforms and the concept of "techno-feudalism" is considered again in Chapter Five: see Chapter Five, section 1.2, below.

operate similarly to traditional media companies in some ways, and should not be assumed to be neutral providers of content.

1.2. Platformisation and commodification

The rise of platforms ("platformisation") has spawned a significant literature discussing their impacts in the broader economy.[17] The contributors to this literature make a range of different claims about the structure and incentives of the modern digital economy.[18] However, few seem to disagree that the digital revolution has been just that: a profound shift in how economies operate. This area of scholarship provides a wealth of ideas on how to characterise the changes of the last twenty years, particularly around the growing importance of data. It is clear enough that the platforms these authors talk about are hugely powerful and important, and clearly they have impacted on individuals' rights, particularly privacy, and even raise serious concerns around democratic governance. For the purposes of this chapter, however, the focus will be on the shifts in the creative economies which copyright most directly affects.

For Nick Srnicek, one of the consequences of the digital shift in high-income economies is that "*the product of work becomes immaterial*: cultural content, knowledge, affects, and services."[19] Digital platforms are further able to leverage their advantages as infrastructure by making it difficult for users to quit their services. As Srnicek writes, "[w]hen extensive means are not sufficient for competitive advantage, this approach tries to tie users and data to the platform by locking them in through various measures: dependency on a service, inability to use alternatives, or lack of data portability, for instance."[20] His analysis extends "work" to both "media content like YouTube and blogs, as well as broader contributions in the form of creating websites, participating in online forums, and producing software."[21] For copyright and the creative industries the product has always been immaterial in some sense, even when the media were

[17] The term "platformisation" is used by Cohen: above n 3 at 15.
[18] See Zuboff, above n 4; Durand, *Techno-féodalisme*, above n 16; Cohen, above n 3; Srnicek, above n 3. See also K Sabeel Rahman, "Infrastructural regulation and the new utilities" (2018) 35 Yale J Regulation 911 (citing platform regulation as one policy debate in US context). In US political context tech regulation increasingly has supporters on both sides of the fence but the demands may be contradictory: see Adi Robertson "How America turned against the First Amendment" The Verge (3 November 2022) <www.theverge.com>.
[19] Srnicek, above n 3 at 22 [emphasis in original].
[20] At 51.
[21] At 22.

physical, but in Srnicek's telling this transformation is one in the broader economy. This approach recalls other considerations of "digital labour" which employ a broad understanding of what said "labour" includes—such as participation on social networks and other activity which generates data off of which digital platforms profit.[22] However, for the purposes of thinking about copyright law and commodification, it will be more helpful to keep in mind the specific economies centred on production of distinctively creative works. The "broader contributions" Srnicek references which encompass other aspects of living digitally are frequently commodified through advertising in ways that overlap with how some discrete creative works are commodified; however, copyright plays a marginal role in the former.[23]

Leigh Claire La Berge emphasises human labour in the commodity: following Marx, she writes "while anything may take the form of a commodity, only one action may generate the value found within it: the expenditure of human labor power."[24] More important for La Berge's project is her definition of "decommodification". While the term usually carries a positive connotation for those on the political left, La Berge's usage of "decommodification carries more modest ambitions than communization or than 'commoning' precisely because it recognizes" that *commodification remains the way that individuals support themselves*.[25] "In the specific case of decommodified labor, the status of the commodity is preserved, but its circulation is halted and its possibility for exchange is foreclosed." Decommodified labour is "a configuration of value in which the wage is diminished but the formal organization of work—its rhythms, commitments, and narratives—remain."[26] The decommodification of artistic labour for La Berge is part and parcel with the declining possibilities for individual artists to support themselves from their work. La Berge's focus in *Wages Against Artwork* is on socially-engaged artists and the

[22] See Brooke Erin Duffy *(Not) getting paid to do what you love: Gender, social media, and aspirational work* (Yale University Press, New Haven, 2017) at 11 (noting types of brand-building digital labour, including "building and maintaining one's social networks; curating one's feeds with a digital cocktail of informative, thought- provoking, and witty content; and ensuring the consistency of one's self- brand across the sprawling digital ecosystem"); Evgeny Morozov "Capitalism's New Clothes" (4 February 2019) The Baffler <https://thebaffler.com>; Zoe Adams and Henning Grosse Ruse-Khan "Work and works on digital platforms in capitalism: Conceptual and regulatory challenges for labour and copyright law" (2021) 28 International Journal of Law and Information Technology 329.
[23] Although it should be noted that one of the aspects of the copyright regime is that myriad aspects of digital life are touched by it—copyright takedowns happen on Facebook and Twitter as well, after all.
[24] Leigh Claire La Berge *Wages Against Artwork: Decommodified Labor and the Claims of Socially Engaged Art* (Duke University Press, Durham, North Carolina, 2019) at 10.
[25] At 25–26 [emphasis added].
[26] At 24.

structures of artistic work in a narrow sense, coming out of MFA programs and galleries, but her definition of decommodified labour is not specific to this milieu and can be ported to other areas of cultural production. Musical artists who receive paltry royalties from streaming may not have had their labour decommodified in a strict sense of the term, but the effect (that they are unable to support themselves on their work) is the same.

Turning towards legal scholarship, Julie Cohen emphasises the role of platforms in creative industries, but she also asserts that parties she refers to as "production intermediaries" enjoy an "ever-increasing primacy".[27] She implicitly invokes the effect of digital technologies and the Internet on the production and distribution of creative works when she writes that the outsize influence of production intermediaries was in part due to characteristics of the pre-digital technological environment in which they emerged:

> [B]efore the advent of powerful desktop computing platforms put professional-quality editing capabilities within easy reach, access to specialized equipment was necessary to produce cultural goods in forms suitable for the mass market. Dissemination of creative outputs required access to printing presses, newsstands and bookstores, movie theaters, or broadcast airwaves.[28]

In this environment, the United States copyright regime evolved such that it was "increasingly optimized for facilitating industrial processes" of creative production. Cohen also emphasises how legal systems have changed and are changing in response to technological developments, driven in part by "interested and well-resourced" parties, while simultaneously the implementation of "highly-configurable" technologies is shaped by law.[29]

Copyright scholarship is also drawn into this dynamic. Cohen characterises the "disagree[ments] about whether romantic creatorship or economic instrumentalism is the dominant strand" of copyright thinking and "the goodness of fit between [those] justifications and the actual practices of individual creators and creative communities" as overlooking how both have been used to "bolster a particular regime of legal protection for intangibles that relied on and reinforced the role of capital in underwriting intellectual production."[30] Likewise, Amy Kapczynski's review of

[27] There is some tension here with the broad powers she ascribes to platforms, at least insofar as these parties' interests are opposed—the theme that platforms and publishers often have conflicting interests that shape the law will be explored in more detail in Chapter Three.
[28] Cohen, above n 3 at 17.
[29] At 1-2.
[30] At 18.

Cohen's text recounts how "'copyleft' scholars and other progressives sceptical of strong intellectual-property law and who celebrated "peer-to-peer" production helped further some of these same [anti-regulatory, pro-'innovation'] ideas, though with no intention to bolster the corporate power that has benefitted from them (in fact quite the opposite)".[31]

For the structure of her first chapter, Cohen relies on the work of Karl Polanyi in analogising the modern shift to "informational capitalism" to the account of Britain's shift to industrial capitalism in Polanyi's *Great Transformation*. Along with analysing how the "fictitious commodities" of land, labour and money have been transformed in the information economy, Cohen draws on the concept of protective "countermovements" which resisted the changes.[32] These countermovements included legal mechanisms like social protection legislation (for example the New Deal in the United States), but also social movements (such as worker organising). While Cohen is vague on what form these countermovements will take in the current moment, their prospect animates some hope in her concluding chapter that the deleterious effects of the current shift to informational capitalism can be avoided. These aspects of Cohen's work suggest something to look for in the coming analysis of creative economy business models. Musical artists using crowdfunding platforms to supplement their inadequate streaming incomes and connect more directly with listeners are perhaps a modest example of the new kinds of countermovements Cohen suggests. Within podcasting, workers at two Spotify-owned podcast companies, The Ringer and Gimlet, unionised in 2020 and 2021.[33] If countering the effects of intensifying commodification includes contesting distribution within the (creative) workplace, this represents a form of pushback that would be more familiar to Polanyi.[34]

However, it is not universally agreed among theorists of platformisation that commodification is central to the dynamics of the new digital economy. For the French scholar Cédric Durand, the most important and useful effects of services provided by digital economy actors such as

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[31] Amy Kapczynski "Book Review: The Law of Informational Capitalism" [2020] Yale LJ 1460.
[32] Cohen, above n 3 at 269 (summarising Polanyian countermovements as "crude but effective circuit breakers that interrupted market-driven logics of commodification by imposing basic worker-protection requirements"). See Karl Polanyi *The great transformation: The political and economic origins of our time* (2nd Beacon Paperback ed. ed, Beacon Press, Boston, MA, 2001).
[33] Liz Pelly "Podcast Overlords" (10 November 2020) The Baffler <https://thebaffler.com>.
[34] For an historical perspective see Catherine L Fisk "Hollywood Writers and the Gig Economy" (2017) 2017 U Chi Leg F 177 (describing unionisation efforts by Hollywood writers in the 1930s and 40s).

platforms "escape" market economy because they are provided free of charge to consumers.[35] In exchange, the technology companies extract data for which, "[u]nlike tradable goods, whose exchange-value is backed by some use-value, the business . . . is first and foremost about control."[36] For Durand, this is symptomatic of weakness in contemporary capitalism and a transition towards a new system of "techno-feudalism" in which technology companies (and the people behind them) extract wealth through their control of digital infrastructure in what is essentially a predatory relationship.[37] ("Techno-feudalism" and the debate around it is revisited in Chapter Five.) Durand recognises the importance of advertising to digital business models, but suggests that this is merely a "secondary" or "residual" form of commodification.[38] Rather than being income received as a result of market activity, Durand claims that "[i]f the bottom line is an effective intellectual monopoly by Big Tech of the means of socio-economic co-ordination, then we must conceptualize the income they obtain from their dominant position as a fee or a tax on the user's activity."[39]

To respond to this claim of the declining importance of commodification in the specific case of digital creative economies, it should be noted that while free-to-consumer, advertising-supported content is a significant part of the modern digital media landscape, it is far from the only business model available to contemporary publishers and platforms. To draw examples from creative industries, the subscription model which Netflix popularised for digital video streaming has been eagerly taken up by other platforms and publishers, such as Disney (Disney+), Amazon (Prime Video), and Apple (Apple TV Plus). Further, the subscription model has not entirely displaced sale and rental of "copies" of works—each of the companies provided as examples above, save Netflix, also sell or rent digital video. The music and book industries likewise have various digital business models, which to a greater or lesser extent rely on consumers actually paying for works or subscriptions. Lest we conclude that this is merely an artifact of legacy media business models, take as a new media example the livestreaming platform Twitch, owned by Amazon. On this platform, streams are monetised through voluntary donations to streamers (in a "currency" which the platform sells) and monthly subscriptions (with the platform taking a

[35] Durand, *Techno-féodalisme*, above n 16 at 73, author's translation.
[36] Cédric Durand "Scouting capital's frontiers" (2022) 136 New Left Review.
[37] Durand, *Technoféodalisme*, above n 16 at 253.
[38] Durand, "Scouting capital's frontiers", above n 36; Durand, *Technoféodalisme*, above n 16 at 73.
[39] Durand, "Scouting capital's frontiers", above n 36.

50% cut), in addition to advertising.[40] It certainly would appear that Twitch as a platform is profiting off of its control of the streaming infrastructure; however, it does not follow that the control is the point here—rather, they are clearly trying to run a profitable platform.

Durand's concern is for the broader economy, and the social networking and other Internet services he has in mind are perhaps more essential and infrastructural than those of creative economies. However, his characterisation of advertising, which is undeniably important to some creative economy business models, as merely "secondary" commodification is worth addressing. First, Durand's analysis of commodification appears to focus on whether a commodity is sold to a consumer rather than in the labour expended in producing it.[41] The labour in the production of creative works is perhaps more visible than in digital economy services. It is perhaps easier to overlook the coding and data gathering work that goes into producing Google Maps or the content moderation labour which goes into producing the user experience of Facebook or other social networks than it is to miss the contributions of a writer or musician to a work.[42] Nevertheless, this is an odd placement of emphasis for a Marxian scholar like Durand. In any case, it should be emphasised that there certainly are markets at work with respect to free, advertising-supported content and services, but they are markets in which the "consumer" is the advertiser. Advertisers buy advertising space—whether in search results, on a podcast, or on Amazon—largely to reach audiences and achieve "conversions" (in industry parlance). This usually means turning them into customers of some paid product or service, political and other persuasive advertising notwithstanding. Inherent in the composition of the "attention" commodity is something which draws the audience in, and human labour is required to create

[40] See Mark R Johnson and Jamie Woodcock "'And Today's Top Donator is': How Live Streamers on Twitch.tv Monetize and Gamify Their Broadcasts" (2019) 5 Social Media + Society 1.

[41] Durand writes that "though digital activities float on an ocean of money, they are not commodified in the traditional way. Most services offered by Google or Facebook are only commodified at a secondary level, through the sale of advertising to companies wishing to access their users": See Durand "Scouting capital's frontiers", above n 36. He suggests that digital activities are determined "by a logic of access" (to consumers) as opposed to a "logic of consumption". Yet it is ultimately this access to consumers which technology companies sell through advertising; that is the commodity which they produce. When digital advertising slumps (as it did in 2022), technology companies whose fortunes depend on it act like commodity producers—they cut costs. See Hannah Murphy and Cristina Criddle "Meta cuts 11,000 staff in largest cull in company's history" Financial Times (10 November 2022) <www.ft.com>; Richard Waters and Tabby Kinder "Alphabet faces call from activist fund to cut headcount" Financial Times (15 November 2022) <www.ft.com>.

[42] Despite some advances in automated moderation, human moderation remains a vital part of the user experience of platforms: see Sarah T Roberts *Behind the screen: Content moderation in the shadows of social media* (Yale University Press, New Haven, 2019).

that something—whether that is a TV program, podcast episode, or a social network feed. Ultimately it is parsing out how creative labour feeds into this commodification process (whatever the eventual commodity looks like) and how copyright law regulates this relationship that is the focus of the copyright and commodification framework developed here.

1.3. Copyright's persistence and structural importance

The difficulty faced by the copyright industries in the early years of the Internet revealed the extent to which the effective enforcement of copyright relied on the technological limitations of a pre-digital world. When copying became as easy for the user as for the publisher, enforcement of copyright against potentially millions of parties proved a daunting task. Along with direct enforcement, these industries pursued technological solutions (frequently burdensome to legitimate users while rarely deterrent of dedicated copiers), inculcating norms against infringement, and, perhaps most successfully, adaptation of their business models.[43] In the end, businesses like Spotify proved that many users, enough to buoy some industries, were willing to pay for convenience and forgo ownership of copies.

At the same time, the expansion of copyright's importance as a social fact to more and more outside the traditional boundaries of the creative industries has resulted in some pushback from users. Both the ease of blatantly infringing and the scope of possibly-infringing activities opened up considerably for many individuals. Activities which in a non-digital context avoid entanglement with copyright law often run afoul of copyright or licenses when undertaken over the Internet, for example, screening a movie in-person to friends as opposed to streaming it or sharing a book as opposed to sharing an eBook.[44] Further, the panoptical potential of digital life has opened the possibility of rightsholders or their proxies being much more aware of users' activities with respect to copyrighted works, in the name of effective enforcement of rights. While many digital copyright questions have been resolved, either by legal decisions, legislative intervention, or changes in business practices, many still remain open.

[43] See João Quintais and Joost Poort "The Decline of Online Piracy: How Markets – Not Enforcement – Drive Down Copyright Infringement" (2019) 34 American University International L Rev 807.
[44] See Giorgio Spedicato "Digital lending and public access to knowledge" in Jessica C Lai and Antoinette Maget Dominicé (eds) *Intellectual property and access to im/material goods* (Edward Elgar Publishing, 2016) 149.

2. Music and podcasting: Creative economies in the platform age

Music is a natural choice for a traditional media form to compare and contrast with podcasting. Music and podcasting are both primarily audio media[45] and share major distribution platforms—Apple's iTunes and Spotify.[46] The music industry has had to adapt to digital distribution, while podcasting has developed as a new medium in the same context. Both the music industry and podcasters face a digital environment where free content is abundant.[47] Advertising has therefore been an important business model for both as a way to monetise work without charging for it.[48] Where podcasting and music audiences do pay, it is often to access works, support creators, or avoid advertisements rather than in exchange for ownership of a physical or digital copy of a work.[49]

Despite similarities in their means of (digital) distribution, music and podcasting are substantially different. Music is a familiar form of creative expression with a very long history, but musical artists in the age of streaming are faced with very low royalty rates and reliance on touring and other means of raising money, especially for those not in the top tier of musicians.[50] Podcasts, on the other hand, are a new medium which incorporates many older forms, including dialogue, lecture, storytelling and drama. Podcasting is distinguished mainly by its method of delivery (i.e., over the Internet) and may eventually be seen as a continuation of its immediate precedents, talk radio and radio drama; however, the culture and business models which have built up around podcasting are distinctive and worthy of further study.

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[45] Podcasts with video content exist but are much less common than audio podcasts. Many video podcasts are also released in audio-only format, and so a comparison might be drawn to music videos.

[46] Spotify announced their intention to expand into podcasts in 2015 and now feature them prominently: Maria Eriksson and others *Spotify teardown: Inside the black box of streaming music* (MIT Press, Cambridge, MA, 2019) at 65.

[47] See Chris Jay Hoofnagle and Jan Whittington "Free: Accounting for the costs of the internet's most popular price" (2014) 61 UCLA L Rev 606; Ramadan Aly-Tovar, Maya Bacache-Beauvallet, Marc Bourreau and Francois Moreau "Why would artists favor free streaming?" [2019] J Cult Econ. YouTube ContentID (i.e. advertising supported streaming music through YouTube) accounts for a large percentage of streaming revenue: see Wall Communications, above n 6.

[48] Spotify launched in 2008 as a free, ad-supported streaming music service, and touted itself as an answer to the music industry's issues with unauthorised filesharing: Eriksson and others, above n 46 at 45–49. Advertisements in podcasts have also been a way for creators in that medium to fund their work.

[49] See Raustiala and Sprigman, above n 8.

[50] Daniel J Gervais *(Re)structuring copyright: A comprehensive path to international copyright reform* (Edward Elgar, Northampton, MA, 2017) at 212; Eriksson and others, above n 46 at 3.

Music is not the only relevant point of comparison for podcasts; audiobooks are another interesting analogue. Audiobooks are superficially very similar to podcasts as media, in that they are both spoken word, and there are some connections between the two industries: for example, Audible, an audiobook provider, has been a major advertiser on podcasts for some time, and podcasters who publish books sometimes go on to narrate their own audiobooks.[51] Spotify has also recently started featuring audiobooks.[52] Unlike podcasts, however, audiobooks are derivative of books rather than being wholly original works. Audiobooks are as such subject to the structures of the larger book publishing industry. Music, in contrast, is more visible and a larger industry, and allows for the comparison of a very much established medium with an emerging one in podcasting.

2.1. Creative economy business models in the digital age

While the scholarship on the broader digital economy cited above focus largely on massive platforms like Facebook and Amazon, the digital age brought about a major shift in creative economies as well. The economies this chapter discusses are music and podcasting, but a brief look at creative industries more broadly is worthwhile. The rise of streaming services in the distribution of film and television, for example, is part of the same phenomenon of digitisation-platformisation. Writing in the context of the music industry, Morris emphasises that commodification is "an ongoing cultural process . . . as dependent on users as it is on industries and institutions", and highlights how features and innovations in the digital age have originated from users as well as publishers and tech companies.[53] Following from this, he observes that the process of commodification for digital music has not been wholly guided by "rules and rule-makers". In practice, however, under the pressures of commodification, both the consumption of creative works and the creative process are increasingly subordinated to business considerations and profitability.[54] Commodification is omnivorous—but not necessarily co-operative. The development of copyright in the 21st century—and how creativity would be commodified—was in large part determined by conflicts between publishers and platforms, with a smaller role for

[51] See Audible "Audible Affiliates | Make Money with Audible!" <www.audible.com>; Mike Duncan, *Hero of two worlds: The Marquis de Lafayette in the Age of Revolutions* (Audiobook ed., Public Affairs, New York, 2021) <www.audible.com/pd/Hero-of-Two-Worlds-Audiobook/1549173480>.
[52] See Spotify, "Spotify Audiobooks" <www.spotify.com/us/audiobooks/>.
[53] Morris, above n 7, at 28.
[54] Brown, above n 7.

creators and audiences as their proxies or auxiliaries. But the impacts of platformisation have been felt by both creators and users.

Broadly, the three most prominent digital business models which emerged for traditional media formats are the "sale" or "rental" of digital copies, subscription libraries of streaming media and free-to-consumer content supported by advertising. "Sale" and "rental" models directly evoke non-digital purchasing, in which users pay for a copy of a work either for a limited or an indefinite period of time. However, these purchases are legally accomplished through licensing, and do not have the same effect as physical purchases—as users who have had eBooks removed from their library or lost access to their purchases in digital storefronts can attest.[55] Subscription libraries like Spotify or Netflix offer access to a large variety of copyright works for a flat subscription fee. These subscriptions offer convenience, but as subscriptions for services rather than licenses to individual works, this model further removes the user from the work. As competition has increased for streaming video, for example, turnover in streaming libraries has become a business issue for platforms (and an annoyance for their subscribers).[56] Finally, digital advertising, usually supporting media offered to consumers for free, is a central part of the digital

[55] See Hudson, above n 5 at 123. Relatively early in the platformisation era, Amazon sparked controversy through an episode where it remotely removed copies of George Orwell's novels *1984* and *Animal Farm* from users' devices: see e.g., Alicia C Sanders "Restraining Amazon.com's Orwellian potential: The Computer Fraud and Abuse Act as consumer rights legislation" (2010–2011) 63 Fed Comm LJ 535 at 535-36; Mariel L Belanger "Amazon.com's Orwellian gaffe: The legal implications of sending e-Books down the memory hole" (2011) 41 Seton Hall L Rev 361; Michael Seringhaus "E-Book transactions: Amazon kindles the copy ownership debate" (2009–2010) 12 Yale JL & Tech 147. In the streaming era, works are frequently added to and removed from libraries, side-stepping this issue. However, digital storefronts to "buy" digital works remain an important part of digital creative economies. For example, in the context of video gaming streaming has largely not overtaken the purchase of digital copies through storefronts, including those operated by video game console makers as the exclusive storefront for their hardware systems. The continued operation of those storefronts (and the continued accessibility of users' purchases) is not guaranteed as companies like Sony and Nintendo phase out support for older hardware. See Owen S Good "PlayStation Store for PS3, PS Vita will not shut down, Sony announces" (19 April 2021) Polygon <www.polygon.com>; Michael McWhertor "Nintendo shutting down Wii U, Nintendo 3DS eShops and frustrating fans" (16 February 2022) Polygon <www.polygon.com>.

[56] This phenomenon is most prominent in the audiovisual streaming space, where film and television libraries of major producers are major assets. In 2021, for example, Amazon (a competitor with Netflix through its Prime Video streaming platform) spent US$8.45bn to acquire film studio MGM and its extensive library: see Dave Lee and James Fontanella-Khan "Will MGM be Amazon's ticket to Hollywood's big leagues?" Financial Times (26 May 2021) <www.ft.com>. See also Alexander Cuntz and Kyle Bergquist "Exclusive content and platform competition in Latin America" (World Intellectual Property Organisation, 2020) Economic Research Working Paper No 63 (finding that widespread availability of audiovisual works across streaming platforms is more effective at deterring piracy than where they are available exclusively on certain platforms).

economy well beyond the scope of the creative industries.[57] As alluded to in the section above on platformisation, the parent companies of Facebook and Google (now styled Meta and Alphabet, respectively) built their digital empires on selling online advertising space and advertising exchanges, and retain a position in the market often described as a duopoly.[58] Within the creative economy, advertising serves as an important source of revenue for both independent and large scale commercial media, and for both traditional media formats and new digital media.

Some independent digital media rely on so-called "crowdfunding" models to raise revenue; podcasts are one important example.[59] These models call on audiences to fund creative work more or less directly, often through intermediary platforms like Kickstarter, PayPal, or Patreon. Different crowdfunding platforms allow creators to ask their audiences for individual pledges (Kickstarter's original model), one-time donations (PayPal and other payment providers), or recurring payments (Patreon's model). In each case, the platforms take a cut of these revenues, the precise proportion of which has varied over time. Some features of these platforms resemble or replicate commercial business models, such as where funders of a project receive a copy of the work in exchange for their pledge, or access to a library of past works (or ad-free versions of freely-available works) in exchange for a monthly subscription. This raises the question of how similar the Patreon-style monthly payment model is to the subscription model used by platforms like Netflix and Spotify. This question is considered in greater depth in Chapter Four; for the time being it is sufficient to note that some creators do not use it as a *quid pro quo*, and instead treat it as a voluntary donation.

Music and podcasting provide two interesting examples of different digital creative economies—one established, and one upstart. Podcasting, grew from a hobbyist phenomenon to a big media business in the last two decades. This ascent has been helped by hits like *Serial* growing awareness and interest in the format. Spotify acquired several podcast networks and popular

[57] Tim Hwang *Subprime attention crisis: Advertising and the time bomb at the heart of the Internet* (Farrar, Strauss and Groux, New York, NY, 2020); Competitions and Market Authority (UK) "Online platforms and digital advertising: Market study final report" (2020); Sadowski, above n 4; Zuboff, above n 4.
[58] Hwang, above n 57 at 10; Competitions and Markets Authority, above n 57 at 62 (noting that in 2019 in the UK "more than half [of display advertising spend] went directly to Facebook, and around 60% to Facebook and Google combined").
[59] See Chapter Four, section 2.3.3, below.

series over 2019 and 2020, signalling something of a land grab within the medium.[60] However, independent podcasting remains a large field, and one in which crowdfunding is particularly widespread.[61] As podcasting has become more mainstream, some of the barriers to entry may have lowered—for example with respect to resources for those starting out—but it has perhaps become increasingly difficult to make an impact in a crowded market.

In contrast, the music industry was forced to adapt to digitisation and platformisation. Over several decades analogue formats (vinyl records and tapes) gave way to a digital format (compact discs), which then gave way to direct digital distribution and consumption (compressed audio files, most prominently MP3s).[62] The rise in digital formats was characterised by a perceived crisis in the industry over unlicensed file-sharing, which will be unpacked in greater detail below. This phase was followed by the rise of streaming: services which provide access to music libraries without providing a permanent copy of a digital file to the user. Spotify led the way as one particularly influential actor, but its market share varies across different geographical regions, and has been challenged (with varying degrees of success) by new services like Apple Music, YouTube Premium, and TIDAL.[63]

The changes to the distribution and consumption of media were metabolised by established industry: record companies and publishers retained important positions even as the new platforms arose.[64] However, recent years have seen Spotify dogged by rising concerns over inadequate streaming royalties for songwriters and artists, and general criticism of the streaming model's viability for artists.[65] Further, the streaming services now control the important dynamics of "discovery": the power to determine which artists and tracks are featured on the

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[60] See Pelly, "Podcast overlords", above n 33.
[61] As of 22 November 2022, eight of the top ten projects on Patreon by number of subscribers were podcasts: see Graphtreon, "Top Patreon creators" <https://graphtreon.com/top-patreon-creators>. The podcasters interviewed for Chapter Four of this thesis also spoke to the popularity of Patreon as a fundraising platform within that medium: see Chapter Four, section 2.3.3, below.
[62] Morris, above n 7 at 22.
[63] Wall Communications, above n 6, table 2 (showing different streaming services' market share in Canada) and table 5 (showing rise of streaming revenues in Canada 2012-17); David Hesmondhalgh "Is music streaming bad for musicians? Problems of evidence and argument" (2021) 23 New Media & Society 3593 at 3 (describing different streaming services' geographic spread and ownership).
[64] Morris, above n 7 at 34.
[65] See Hesmondhalgh, above n 63 at 5-6 (describing how the per-stream rates cited for streaming services can be misleading with respect to Spotify's pay-outs to artists). Hesmondhalgh also notes, however, that "the problem of how many musicians can gain a living in the new musical world needs to be understood by seeing [major streaming services] as embedded in a wider system of cultural production and consumption . . . and of cultural labour": at 10.

front pages of services and in influential playlists, which are an important determinant of success within the business.[66] How these playlists are created remains opaque, but it is reasonably clear that they have a great deal of influence in what musical artists get heard by audiences.[67] Spotify and other streamers' use of this power has been painted as a new type of "payola".[68]

The difficulties faced by musical artists through streaming services were compounded as measures taken to combat the COVID-19 pandemic in 2020, 2021, and 2022 led to widespread cancellation of live music events around the world. With the low incomes musical artists below the highest tier receive from streaming music royalties, this disruption was particularly acute. Some artists have been able to turn to alternative platforms to more directly engage with fans, including crowdfunding platforms like Patreon, but it is not clear that this is sufficient to make up for recent losses. As will be discussed below, the effect of the move to platforms has been to lower barriers to entry for artists with respect to distributing music, but simultaneously the pathways to becoming successful have become increasingly closed off and managed by big intermediaries.

2.2. Barriers to entry and the concept of "discovery"

One of the most remarked-upon effects of digital technologies on creative work has been a general lowering of the "barriers to entry" to creating and distributing works.[69] Examples drawn from music and podcasting can help further explain and support this claim. In the context of music, the transition to digital media resulted in both increased access to high quality audio editing and mixing software, creating a lower barrier on the production side, and an increased ease of access to popular distribution channels such as streaming services, creating a lower barrier to distribution.[70] Podcasts feature lower barriers for both production and distribution: podcasts are generally talk format and require less production than music, and are generally distributed using an open standard which simplifies the process of making podcasts available

[66] Eriksson and others, above n 46, at 61.
[67] At 116-20; Liz Pelly "Big mood machine" (10 June 2019) The Baffler <https://thebaffler.com>.
[68] See Anna Nicolaou "Music labels split over Spotify's push to promote songs for lower royalties" Financial Times (29 July 2021) <www.ft.com>.
[69] Note however that this is about barriers to entry for creators, not new platforms. The size, market power and network effects enjoyed by incumbent digital distribution platforms are significant, making it difficult for new entrants to compete: Raustiala and Sprigman, above n 8 at 54–55.
[70] Eriksson and others, above n 46 at 69–78.

across different platforms.[71] While barriers to access to the means of making and recording music remain, it is far easier now than in the past to get music out to where people can hear it.[72] There may be still other significant barriers to becoming a successful creator of music or podcasts, such as the wide variety of content already available in both media, and barriers to acquiring necessary skills, such as audio production. Even after surmounting these challenges, creators face uncertain prospects in realising a financial return from their creative work. The problem of "discovery" is one challenge creators face best explored by returning to the idea of barriers to entry in distribution.

The digital transition has lowered barriers to entry in distributing works in part by changing the cost to distributors of putting out an individual piece of content: whereas a printed book or record would need a large capital outlay before it can be put in the hands of consumers, digital albums, eBooks and other digital files require only online hosting to be made available to the public. Capital costs are not nearly as significant in reproduction and distribution as it was in the pre-digital age.[73] This hosting is costly at scale, but the cost per-unit is very low to the distributor (i.e. the platform), so only a minimum of gatekeeping out unprofitable or undesirable items is necessary—the challenge instead becomes creating a positive experience for users who might otherwise be overwhelmed by the amount of choice offered.[74] The dynamics and mechanisms of exposing works or artists to new audiences is captured by the term "discovery".

Although not unique to the context of digital distribution, managing discovery has become a central business concern of digital media platforms. In a deep analysis or "teardown" of Spotify's technology and business, Maria Eriksson and her co-authors describe how Spotify in 2012 and 2013 took a "curatorial turn" away from being a mere distributor of music with social features and towards more actively recommending music to users. Rather than curating what music is available on the platform, Spotify curates what audiences are presented with (in the

[71] Note that while the cost floor for podcasting may be low, more resources might be required by projects that rely on, for example, investigative journalism like the popular true crime podcast *Serial*. See Nicholas Quah "Podcasting is just radio now" (22 September 2022) Vulture <www.vulture.com> (describing the phenomenon of blockbuster podcasts).
[72] Hesmondhalgh, above n 63 at 9; David Hesmondhalgh, Richard Osborne, Hyojung Sun and Kenny Barr "Music creators' earnings in the digital era" (Intellectual Property Office, UK, 2021) at 40.
[73] While there have certainly been changes to the capital involved in production of, e.g., movies, television and music with the rise of digitisation, that is not the focus here.
[74] Naturally, what can be profitably offered has also changed with the lower cost of distribution.

form of various individually customised playlists based on Spotify's extensive data analytics operation).[75] Spotify's recommendations "can be understood as [a] way[] of managing overabundance in an archive so vast that it makes other browsing practices . . . impossible".[76] The curatorial turn follows from the very conditions that make it possible for Spotify and similar digital culture providers to present themselves as neutral platforms (i.e. accepting a wide range of content with little gatekeeping), as the deluge of content contributes to the pressure to abandon this neutrality in favour of data-driven recommendation. In effect, the product which Spotify offers to paying users is an experiential commodity: not only on-demand streaming, but streams of music which are personalised, or curated by human judgment or algorithms, and fit to given moods, settings, and so on. The other commodity Spotify (and other Internet platforms) deal in is the audience commodity: access to the attention of users through an advertising product which can be precisely targeted to specific demographics. The question is: if the song is no longer the commodity, what role does copyright law now play in commodification?[77]

3. Copyright and commodification

This section will argue for a commodification analysis of copyright that answers the question of what copyright is doing, structurally, in digital creative economies. this analysis is then applied to the digital media business models described above. The cases of advertising and subscriptions are of particular interest because the "sale of copies" model is the easy case: it is easier to identify a piece of physical media or even a digital file as a commodity but the commodity nature of a stream is more complex to unpack. The focus here is on copyright's role in the commodification of creative work. The process of commodification being described is the process by which the skill and labour of creators (individual or collective) is transformed into a

[75] Eriksson and others, above n 46 at 61.
[76] At 117–18. However, it is worth noting also that the "personalisation" Spotify claims to offer is limited: Eriksson and co-authors observe that the user feedback mechanisms within Spotify do not produce significant differences in recommended music and conclude that "[t]he claim that 'the more you personalize, the better the music gets'" was little more than a marketing gimmick. While the authors note that Spotify has since tended to de-emphasise the "radio" functionality, this should serve as a cautionary example to take claims from platforms about the efficacy (and value to users) of data-driven recommendation with a grain of salt: at 102–03.
[77] See Rasmus Fleischer "If the song has no price, is it still a commodity?: Rethinking the commodification of digital music" (2017) 9 Culture Unbound: Journal of Current Cultural Research 146.

marketable product which is sold or licensed.[78] This description owes much to Karl Marx's characterisation of commodities, as filtered through a number of modern authors on copyright, digital media and creative labour.[79] In the context of copyright law and theory, the argument is that it is through commodification that two of copyright's main promises are realised (to the extent they are realised): providing an incentive to create and distribute works, and rewarding creators.

3.1. Tracing copyright's structural role in digital creative economies

Reproduction and distribution are two parts of creative economies which digitisation and platformisation have radically altered. Digital works can be reproduced at virtually no cost, and the introduction of the Internet and digital platforms has changed both the costs and structure of distribution. While it would be incorrect to claim that digital distribution is "free", its costs can now be borne by intermediary platforms (who can make a profit by providing the service through collecting data and advertising) or distributed across users (in the case of decentralised filesharing). The advent of digitisation—the use of digital files such as audio files, eBooks, and video files—as the format for creative works at the point of consumption removed the necessity for physical reproduction of works in order to bring them to market.[80] Copyright subsists, as it always has, in the intangible "work" rather than its physical form; however, the effects of digitisation revealed just how much the commodification process for creative works relied on the

[78] The "skill and labour" language is meant to echo similar language in copyright originality tests but not to imply a 1:1 relationship: see *CCH Canadian v Law Society of Upper Canada* [2004] SCC 13 at para 16 (clarifying that in order to attract copyright protection an expression must involve an "exercise of skill and judgment"). What should be emphasised is that copyright is a part of the commodification process, not the whole. Commodification can also be contrasted to terms like "monetisation" or "commercialisation", which merely focus on the bringing to market of (creative) work. Contrast this characterisation to Schiller, above n 7 at 21–22 (emphasising waged labour over production for the market as the primary feature of commodification). In the context of digital creative economies, as in the broader "gig economy", waged (creative) work seems to be the exception rather than the rule.

[79] See e.g., Morris, above n 7 at 9; Brown, above n 7 at 16; William Clare Roberts *Marx's Inferno* (University Press, Princeton, 2017) at 51-52 (describing the "fetish character of the commodity" as masking what are essentially social relations).

[80] It is not precisely correct to say that digital files are not physical reproductions of works. They are, of course, works manifested in a physical form—on a magnetic or optical disk, for example. But it is helpful to abstract away from the individual manifestations of digital works precisely because of the ease with which they are reproduced and distributed.

encumbrance of physical reproduction and distribution.[81] After the turn of the century, the rise of filesharing through applications and protocols like Napster and BitTorrent threatened the wholesale disruption of the commodification process.[82] By eating away at the market for copies of creative works, file sharing seemed to threaten creative work with decommodification in La Berge's sense of the term: depriving it of a saleable commodity.[83]

This was a crisis point for creative industries broadly, and publishers in particular. It was not clear how commodification of creative work could proceed—how could you make audiences pay for what they could get for free? It was also understood by some as a crisis specifically for copyright law, seen as now being violated with impunity. The music industry was one of those first and most deeply affected.[84] Publishers in different creative industries clearly saw the threat and responded with a variety of tactics, including copyright litigation. Lower prices and technological adaptation came later.[85] For creators as well, no clear alternative for getting paid for their work appeared, despite some early experiments in selling directly to audiences. The resolution of this crisis came with the move to digital platforms. First, platforms like Apple's iTunes offered mediated digital files for individual purchase. These were often encumbered with technological protection measures such as digital rights management software which functioned as digital locks to prevent copying and to control how audiences used the work. As Internet speeds increased and smartphones became ubiquitous, streaming video and audio through platforms like Netflix and Spotify became dominant. These platforms offered convenience and

[81] eBook lending, for example, emulates the lending of physical books by reproducing the physical limitations with legal and technological means. See Giorgio Spedicato "Digital lending and public access to knowledge" in Jessica C Lai and Antoinette Maget Dominicé (eds) *Intellectual property and access to im/material goods* (Edward Elgar, 2016) 149 at 152-53 (noting how the business and technological model of eBook licensing to public libraries "quite accurately mimics the constraints intrinsic to the lending of physical books").
[82] These developments were presaged by the rise of consumer recording equipment in the late 20th century like audio and video tape. Recordable physical media were also important in the context of 21st century filesharing, leading some governments such as Canada's to regulate blank media levies as a response to the crisis.
[83] La Berge, above n 24 at 24.
[84] These included music files being particularly shareable, as effective compression meant small file sizes that were suited to slower Internet speeds, and industry incumbents being slow to move toward new business models. See also Morris, above n 7, at 28.
[85] See João Quintais and Joost Poort "The decline of online piracy: How markets – not enforcement – drive down copyright infringement" (2019) 34 American University International L Rev 807; David Hesmondhalgh, Ellis Jones and Andreas Rauh "SoundCloud and Bandcamp as alternative music platforms" (2019) 5 Social Media + Society 1 at 10 (writing that "[m]ainstream consumer-oriented streaming services such as Spotify and Apple Music are undoubtedly the principal means by which the challenge to the recorded music industry once afforded by digital technologies has been contained").

choice to audiences, and reliable paid distribution and visibility to artists (and publishers). Some proportion of audiences were likely also swayed from piracy by the moral claims which publishers and their advocates made for getting creators paid and by increased hurdles to copyright infringement by shutdowns of various filesharing websites.

Focusing on commodification, we can see in this story a transformation of copyright's role. Historically, preventing unauthorised copiers in the context of the physical reproduction of works largely meant stopping those who had the means to reproduce those work at something like commercial scale.[86] This changed slowly over the 20th century with the introduction of consumer recording technologies like cassette and video tapes, then all at once with the introduction of digitisation. An important change to copyright law in the 21st century is that it now often regulates how audiences consume works.[87] One of copyright's major contributions to the commodification of creative work is now to provide legal backing to the idea that a song, book or movie is something one must pay for. This works both at a normative level and through enforcement actions on unauthorised intermediaries providing infringing access to works. With respect to piracy, not all of the holes in the creative industries' leaky ship have been plugged up by copyright enforcement, but enough that it can sail on.

At the point of consumption, law-abiding audiences are now largely governed by terms of service contracts. Platformisation means that accessing digital works lawfully nearly always entails agreeing to contractual terms set by a platform, terms which often exclude flexibilities granted in copyright law in the form of copyright exceptions, fair use, or fair dealing. Audiences are thus regulated from two sides: rightsholders wield copyright law to prohibit sharing files and threaten legal action for infringement, while platforms which provide legal access do so under

[86] See Kathy Bowrey *Copyright, creativity, big media and cultural value: Incorporating the author* (Routledge, Abingdon, UK, 2021) at 79-81 (discussing the availability of pirated British literature in the US in the 1880s); Severine Dusollier "Realigning Economic Rights With Exploitation of Works: The Control of Authors Over the Circulation of Works in the Public Sphere" in Bernt Hugenholtz (ed) *Copyright Reconstructed: Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change* (Kluwer Law International, 2018) 163. Dusollier writes that "[h]istorically the reproduction right enabled the author to control the number of copies that could be made and sold to readers, thereby giving a sense of the size of the potential public getting access to the work" while "mere reception or use of a copyrighted work was never considered to be a *prima facie* infringement".

[87] This is accomplished in part by regulating would-be intermediaries like bit locker services and sellers of TPM circumvention devices.

their non-negotiable contractual terms. Further, what audiences get for their money or attention from streaming platforms is merely access to works, which affords much less control than ownership of a physical manifestation of a work or possession of a digital file.

The digital technologies which provoked these changes were not fated to produce the outcomes that we see now, but nevertheless have some inherent characteristics. A telling example is copying. The operation of copying is essential to the operation of a digital computer.[88] There is simply no getting around the fact that in order to, for example, present an image to a user, a computer must make a copy of that image in memory. This does not lead inexorably to an outcome that everyone will be able to copy everything. The introduction of technological protection measures or "digital locks" and laws against circumventing digital locks has been effective in discouraging casual copying, although perhaps not as effective as the introduction of convenient and cost-effective legal streaming options.[89] Copying is, however, too deeply embedded in digital technologies to prevent in all cases without hobbling or transcending the technology. Law is not all-powerful and all-determining in this domain, but it does have an influence over how technologies are implemented. Chapter Three will explore this dynamic in more detail through case studies based around the digital copyright cases *ABC v Aereo* and *SOCAN v Bell*.[90] This is not to embrace technological determinism; rather, it is merely to state that the results that the digital transition engendered were not wholly determined by the underlying technology. Nevertheless the characteristics of that underlying technology constrained the limits of possibility of what law could realistically accomplish. The relevant limit here is on copying as an essential function of digital computing—in essence accessing and presenting data to the user is an act of copying. Constraining access to copying functionality can only go so far because works are still "copied" in a transitory way when they are accessed by the user. Streaming is a good example: streaming a work does not create a fixed copy that is accessible to the user but it is the same data being delivered as if it were a download rather a stream. But the implication from the underlying characteristics of the technology is that there

[88] Some recognition of this fact can be found in provisions of some copyright legislation which permit "transient copies" for the operation of digital devices or networks: Copyright Act 1994 (NZ), s 43A.
[89] See Quintais and Poort, above n 85.
[90] *American Broadcasting Company v Aereo* 134 S Ct 2498 (2014) [*ABC v Aereo*]; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada* [2012] 2 SCR 326 [*SOCAN v Bell*].

will always be some possibility of user copying (and thus some basis for content industries to call for stronger copyright protection). The digital shift may have been driven by technological functionality, but the changes felt by creators and users were shaped by how law-makers and various actors in the creative industries reacted, and how copyright conflicts were resolved. The "crisis" for creative industries discussed above may have passed, but the pressure on musical artists (among others) continues.

3.2. Commodification and the incentive model of copyright

The idea that copyright exists to provide an incentive for the production and distribution of creative works is an abstraction that is simple to understand and neatly individualises the purpose of the right. It is easy to picture oneself as a creator or publisher thinking about creating or distributing a work, and the understanding the legal recognition of a kind of ownership in the end product as important to realising financial gain (as well as, perhaps, personal satisfaction and recognition) from the end product. While it may be appealing, this individuated picture appears to be false. Creators create for many reasons, perhaps predominantly non-financial ones; the presence of a financial incentive for creativity does not require copyright; creative work is done and remunerated in contexts where copyright is absent or irrelevant; and even in so-called copyright industries, the actual models under which creators create vary from complete independence to employment relationships. This complexity could perhaps all be dealt with through (law and) economic analysis proceeding from the basic premise of copyright as an incentive. However, this still leaves a gap between the "copyright as incentive" justification and what were described above as "structural critiques": that copyright reproduces, perpetuates and is in complicit in ongoing exploitative or dominating power relations and the diminution of rights including freedom of expression.

This chapter has suggested to instead view copyright as an element of commodification processes. While this frames copyright differently from its more traditional justifications as an incentive or natural right, it is not necessarily incompatible, at least with the incentive view. working out how copyright in fact provides incentives to creators, publishers, and platforms arguably points in the direction of a commodification analysis. But the incentive model and commodification analysis suggest different things. To understand copyright as an element of a

set of structures that incentivise creativity means that it is necessary also to touch on other areas of law like contract and employment law. However, it is the whole system which does what copyright claims to do: incentivise creativity. This incentive works through processes of commodifying creative work under different business models, only some of which rely on the sale of creative works (accomplished through license). Other models rely on advertising, subscriptions, or the collection of user data (usually in service of advertising). These models are sometimes adopted by creators themselves, but more often than not are exercised by intermediaries such as digital platforms and traditional publishers.

In a sense, therefore, commodification as a copyright framework is a development of the incentives justification which incorporates the complexities of how creative economies work.[91] it does more than that as well: it defines a target for deeper critiques around freedom and justice that often come up in copyright scholarship, but which struggle to stay within a narrow copyright framework. In particular, commodification analysis helps bring attention to the distributive and relational consequences of current creative economy arrangements—in short, the political economy of copyright.

3.3. Implications of the commodification analysis for copyright law

Writing in the context of the music industry, Morris emphasises that commodification is "an ongoing cultural process . . . as dependent on users as it is on industries and institutions", and highlights how features and innovations in the digital age have originated from users as well as publishers and tech companies.[92] Following from this, he observes that the process of commodification for digital music has not been wholly guided by "rules and rule-makers". In practice, however, under the pressures of commodification, both the consumption of creative works and the creative process are increasingly subordinated to business considerations and profitability.[93] Commodification is omnivorous—but not necessarily co-operative. The development of copyright in the 21st century—and how creativity would be commodified—was in large part determined by conflicts between publishers and platforms, with a smaller role for

[91] However, this should not imply a necessary relationship—it may be contingent on the creative economy structures we actually have. For example, creators' control over the use of their work because of reputational concerns may not be simply reducible to concerns over their marketability.
[92] Morris, above n 7, at 28.
[93] Brown, above n 7.

creators and audiences as their proxies or auxiliaries. But the impacts of platformisation have been felt by both creators and users, as discussed above.

Some of the problems identified with digital creative economies in this chapter are declining revenues to music creators, disconnection between creators and audiences, and disappearing control over media libraries for audiences. These can be seen as distributive and relational issues. For distributive issues, the commodification analysis illustrates the importance of addressing the equitable distribution of benefits from creative industries as between intermediaries, including publishers and platforms, and creators (and perhaps also audiences). The increased intensity of commodification may disproportionately benefit intermediaries, while investment in big creators leads to superstar effects—where the most popular artists capture more of the audience and the revenues. Additionally, more well-resourced and business-focused creative processes (including e.g. data-driven creativity which relies on sophisticated data operations to shape content) may tend to outcompete less commodified creativity.[94]

The music streaming case shows the disruption of existing commodification processes resulting from the digital transformation and adoption of streaming media business models. Copyright is central to the new creative economy business models in which the remuneration of musical artists has emerged as a contentious issue. Further, intensifying commodification processes are inherently problematic in a relational understanding of copyright and creative works—commodification distorts and weakens the relationship between audiences, and between creators and between their works. Crowdfunding may provide a contrast. While in practice crowdfunding frequently mimics sale or subscription models, it relies on a more direct connection between the creator and audience. It still must rely on intermediaries: payment or crowdfunding platforms, and sometimes separate distribution platforms as well. It affects these relationships in new and innovative ways with new technologies—for example with Spotify's playlists. However, crowdfunding relies on audiences seeking out and supporting specific creators, and so perhaps provides a less mediated (and perhaps less commodified) way of funding creative work. Chapter Four will explore how crowdfunding works in podcasting through interviews with podcasters.

[94] Raustiala & Sprigman, above n 8.

The earlier discussion of Polanyian countermovements in the context of Cohen's book brings to mind this and other examples within creative economies that may cut against intensified commodification and its ills. These include unionisation efforts by podcasters[95] and musical artists.[96] Some open questions present themselves that can guide further research under this framework: can these efforts constitute an alternative to commodification or do they remain dependent on and indelibly connected to it? What are the limits to these efforts' potential for allaying distributive issues within creative economies?

Conclusion

This chapter has argued for a commodification analysis of copyright in the context of creative economies. It has also provided a sketch of how digital creative economies, particularly music and podcasting, look today, and the specifics of how commodification works in these contexts. Chapter Four will further draw out the commodification analysis in the context of podcasting. The sections above described how digitisation necessitated changes to the commodification process for creative works, even while copyright has always concerned the work—words in a book, rather than the physical book itself. The digital transition ultimately changed the role of copyright and reordered the relations in creative economies. Pre-existing industries like music felt this change in various ways: for example, much has been written about the plight of songwriters and performers in the streaming economy discussed above.

The so-called democratisation of creativity which platforms touted had some substance: with the advent of digital distribution platforms, creators with little means could freely participate in creative economies formerly gatekept by publishers and others. This freedom, however, was contingent on playing by the platforms' rules, and accepting their terms on distribution of ad revenue (which could be no participation in revenues at all). Further, this freedom was tempered by the particular market incentives of the attention economy for creators who wanted to reach a wide audience. This market was constructed and maintained by the platforms, who could be capricious hosts, as the relationship between news media and Facebook attests. A fuller engagement with the political dimensions of these relationships under a structural-relational view

[95] Pelly, above n 33.
[96] Josh Gabert-Doyon and David Turner "Interview: David Turner on streaming, private equity, and musicians' unions" (5 February 2021) Common Wealth <www.common-wealth.co.uk>.

of copyright could be fruitful for further research; this could involve comparing how publishers' and platforms' exercised control over cultural production in the digital age and historically. However, it is outside the scope of this thesis which focuses instead on the related economic aspects of these relationships under the commodification analysis.

Although the structures of creative economies are more obvious in traditional media like music, looking at new creative economies like podcasting can give different insights into the realities and possibilities of digital distribution. Findings here may still be relevant to other industries because the new industries share some of the same conditions—low cost reproduction and distribution—that have remade the old. Can new media make free distribution online work where others (such as news reporting) have struggled? How do business models based in advertising, crowdfunding, or support from secondary activities (in the context of both podcasting and music, activities like merchandise and live shows) fit with the commodification analysis above?

The commodification analysis informs the rest of this thesis. The following chapters will show that applying this framework to studying copyright law's effects in the world can produce valuable insights. Chapter Four brings the analysis of creative economy business models initiated above into an empirical study of podcasting circa 2021, and the developments in the industry up to that point. Seen in the light of the commodification framework, the relative absence of copyright law as an important factor in the creative work of podcasting is a consequence both of the relative lack of consolidation among the producers in this medium, and the specifics of advertising and subscription business models which rely less heavily on the control of copying. But first, the next chapter will take as a starting point the thumbnail sketch of digital disruption and copyright law advanced in this chapter to drill down further on specific instances of copyright law-making in the 2010s, with an eye to how the competing commodification interests of publishers and platforms shaped outcomes.

Chapter 3: Two commodification logics in the making of digital copyright

Introduction

Where the first two chapters of this thesis laid out a novel theoretical basis for understanding copyright law and began to consider its application in the context of the digital transition, this chapter steps down a level of theoretical abstraction, from the macro- to the meso-level. Chapter Two used a historical sketch to make the case that the crisis provoked by digital copying and the rise of the Internet fundamentally changed the role of copyright in creative economies. This chapter will develop this analysis further by considering through case studies how individual conflicts over the adaption of copyright to the rise of digital distribution and consumption were worked out by courts and legislatures. This will lay the groundwork for Chapter Four to step down still further, to the micro level, to look directly at the experiences of individual digital creators under the copyright system. The individual cases considered in this chapter consist of two supreme court-level cases—Canada's *SOCAN v Bell* and the US's *ABC v Aereo*—and a supranational legislative instrument—the EU's Directive on Copyright in the Digital Single Market—with some detailed consideration to their significance as legal doctrine.[1] In cases of platform-publisher conflicts like these, copyright's changing relationship to commodification of creative works was characterised by two competing "logics": a logic of property, and a logic of innovation. The deeper (as opposed to broader) view of this chapter will also enable consideration of commonalities and differences of copyright law-making between jurisdictions.

With the rise of digital distribution and consumption, the platforms described in Chapter Two came into conflict with traditional publishers in situations where creative works could be used profitably at zero marginal cost. These "zero marginal cost" conflicts were distinct from the kind that arose with flagrant infringers, such as file-sharing sites; platforms usually had a colourable argument that their use of works fell within a copyright exception or otherwise outside the bounds of infringement. It served the interests of both parties in these disputes—platforms and

[1] *Society of Composers, Authors and Music Publishers of Canada v Bell Canada* [2012] 2 SCR 326 [*SOCAN v Bell*]; *American Broadcasting Company v Aereo* 134 S Ct 2498 (2014) [*ABC v Aereo*]; Directive 2019/790 on copyright and related rights in the Digital Single Market (17 April 2019) [2019] OJ L130/92 [CDSM Directive].

publishers—to portray the other side's position as radical. The publishers' interest in strong intellectual property rights could be characterised as a mere defence of privilege, standing in the way of the utopia of free access to information that the digital age has opened up and keeping the bulk of the profits from creators. The platforms' arguments for stronger "user rights" meanwhile could be painted as mere pretence so they can continue to exploit creative work they did not help to produce, all the while collecting reams of data they can profit from through advertising.[2] These extreme positions each have a kernel of truth to them. They express the end-point of two distinct logics of commodification—accounts of how profit is to be made off of creative work. The point of this chapter, however, is instead to highlight what the two logics have in common: they are both committed to the commodification of creative works, albeit through different means.

How do these logics manifest in law-making? Two key cases in Canadian and US copyright law in the 2010s, *SOCAN v Bell* and *ABC v Aereo*, both engage "technological neutrality" as an organising idea for how copyright law should adapt to new technologies.[3] This chapter will take up the question of whether this is in fact a coherent concept, or merely a screen for interests expressed through competing logics. In *SOCAN v Bell*, the Supreme Court of Canada (SCC) considered whether short, streaming song previews were "fair dealing" for the purposes of the Copyright Act (Can).[4] This digital use of a copyrighted work did not precisely map onto pre-digital uses: one might compare listening to music in a record store, but digital previews are not time- and space-limited in the same way. To be "technologically neutral" here requires deciding that some aspect of the use is unimportant—in the case of *SOCAN v Bell*, it was the technological means of achieving a similar "end result". But this elides the distributional consequences of the decision: in holding that the previews were fair dealing, and thus not a use the platforms had to remunerate rightsholders for, the SCC handed a win to the logic of

[2] See Jessica Litman "What we don't see when we see copyright as property" (2018) 77 Cambridge Law Journal 536 at 536-38 (describing an "ugly" polarisation in US copyright law discourse between author and user advocates).
[3] See *SOCAN v Bell*, above n 1 at para 43. While the US Supreme Court in *Aereo* does not use the phrase "technological neutrality" it is a clear undercurrent in the case: see Brad A Greenberg "Rethinking technology neutrality" (2015–2016) 100 Minn L Rev 1495 at 1496; Rebecca Giblin and Jane C Ginsburg "Asking the right questions in copyright cases: lessons from Aereo and its international brethren" in Tana Pistorius (ed) *Intellectual Property Perspectives on the Regulation of New Technologies* (Elgar, 2018).
[4] Above n 1.

innovation and shut off one possibility for redistributing the benefits from the digital creative economy away from platforms and towards creators.

ABC v Aereo in contrast saw the United States Supreme Court (USSC) faced with a Gordian knot of their own making. The case involved a company which retransmitted television broadcasts over the Internet. In an effort to comply with precedents in US copyright law, the "innovation" of Aereo was to use individual antennae to capture the TV signals for each user. The Court found for the plaintiffs, US television network ABC and others, cutting the knot by allowing for a more functionalist interpretation of copyright law. This could perhaps have been done more cleanly, as some commentators have noted.[5] Nevertheless, this was a case where finding for the "innovation" side would have threatened the integrity of the copyright-commodification system, by allowing Aereo to effectively engineer its way past copyright law.

By the end of the 2010s, however, the distributional stakes in copyright disputes—how revenues from the copyright industries would be split between platforms and publishers—began to appear more clearly. The example of the EU Directive on Copyright in the Digital Single Market can be placed in a broader context of regulatory activity targeting platforms and the distribution of economic benefits from Internet technologies. While the impacts of the Directive have not been fully worked out, it is clear enough that it represents a redistribution from platforms toward publishers and, to some extent, creators.[6] In the well-documented law-making process around the directive, lobbying ensured that the property and innovation logics were front and centre in the debates. However, while it may be accurate to characterise the idea of a "value gap" as a rhetorical move which benefits publisher interests, it does at least serve to shift the conversation toward directly addressing the distributional consequences of copyright law.

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[5] See Giblin and Ginsburg, above n 3.

[6] Other comparable recent examples in the broad digital creative economy space include EU debate over a press publisher's right, Australian and now Canadian news bargaining codes, and movement towards regulation of large tech companies in the EU, US and elsewhere. On the Australian news bargaining code: see Karen Lee and Sacha Molitorisz "The Australian News Media Bargaining Code: Lessons for the UK, EU and beyond" (2021) 13 Journal of Media Law 36. On broader EU platform regulation: see Martin Eifert, Axel Metzger, Heike Schweitzer and Gerhard Wagner "Taming the giants: The DMA/DSA package" (2021) 58 Common Market L Rev 987. On the distributive questions at play in Canada's Bill C-18, see Ula Furgal "Regulating news media vs digital platforms: Canada throws its hat into the ring – CREATe" <www.create.ac.uk>. Finally, in the US context, the appointment of Lina Khan, a legal scholar critical of big technology companies' market power, as chair of the Federal Trade Commission has raised expectations for greater antitrust scrutiny of platforms: see Lina M Khan "Amazon's Antitrust Paradox" (2016–2017) 126 Yale L J 710; Stefania Palma and Dave Lee "'Here we go': FTC's Meta case puts Lina Khan's antitrust vision to the test" (29 July 2022) Financial Times <www.ft.com>.

1. Methodology of case analysis

The rise of the digital consumption of creative works described in Chapter Two required the adaptation of culture industries' business models to the new digital environment. Digitisation also made space for new intermediaries—digital platforms—which often took the place of physical storefronts in the new creative economies, as well as providing new services made possible by digital formats. These changes seeded conflicts, some of which were resolved by courts interpreting and adapting copyright law's application to digital technologies. This chapter will engage two such cases: *SOCAN v Bell* and *ABC v Aereo*. These cases are prime examples of judge-made copyright law adaptation in the digital age and both are concerned with technological neutrality as a principle for applying copyright law to new technological situations. *ABC v Aereo* continues a line of cases which addressed pre-digital technologies enabling re-use of works, showing that the issues presented in the digital transition were not without precedent. This chapter will also consider the European Union's CDSM Directive as a legislative intervention directly addressing distributive issues arising from digital copyright. Although flawed in both process and result, this example of explicit regulatory intervention into the distributive outcomes of copyright law nevertheless may point a way forward for fairer creative economies. Paying attention to legal doctrine in these cases means that a broader survey would be ungainly; while an empirical study of court decisions on copyright law in the context of digital technologies would provide a more comprehensive view of its adaptation to the new realities of consumption and distribution, it would have to sacrifice the nuanced analysis of doctrine which is one of the hallmarks of legal scholarship.

1.1. Copyright development as adaptation

The drafters and interpreters of copyright law have grappled with its application in light of technological changes throughout its history as new means for reproducing works proliferated: from printing presses to player pianos to file sharing. Legal conflicts over the application of copyright to new technologies often involve one party who owns copyright in works, and another party who makes use of those works using a novel technology without seeking a license for that use. In one set of examples from the 20th century, this type of conflict came up with respect to the retransmission of television programs over cable systems. In the 21st century, these conflicts

have centred on digital technologies: both *ABC v Aereo* and *SOCAN v Bell* can be categorised as one of these "owner/innovator" conflicts.[7]

Ronald Bettig, in examining US cases which arose out of retransmission of broadcast signals by cable and microwave, argues that these conflicts are fundamentally distributive: "how revenues . . . should be apportioned between the participating industries . . . . is the basic issue that must be dealt with each time a new communications technology is developed and deployed."[8] It would seem a fair assumption that the distribution of benefits from the copyright system is a large part of what the parties to these cases are fighting over, including in the newer digital copyright cases. This is not necessarily immediately evident in the text of legal decisions, however, and how courts go about resolving copyright conflicts is consequential both for the interests at stake in the particular conflict as well as in the rules each decision sets.

It is also important to note how the interests in these cases are characterised. Where courts often characterise conflicts as between the interests and rights of authors and users, this approach suggests that it is instead the interests of copyright owners and "innovators" who are actually represented in cases. These parties share an interest in advancing the commodification of copyright—because more commodification means more money to go around. Copyright decisionmakers are presented with the logic of assetisation or the logic of innovation to choose between, however they may be cloaked in social good or authors' rights arguments.

1.2. Theoretical framework

The cases below are discussed with a particular set of analytical tools in mind. First, and most obviously, the structural-relational approach and commodification framework for copyright that were developed in the two preceding chapters. It also draws on concepts from works by Susan Marks (the notion of "false contingency"), Ntina Tzouvala (the idea of a "structured indeterminacy"), and Duncan Kennedy (the "apologetic motive" concept from the *Structure of*

[7] See also Giblin and Ginsburg, above n 3 at 127-45 (discussing Aereo's "international brethren"—cases which dealt with a similar issue in different jurisdictions).
[8] Ronald V Bettig *Copyrighting culture: The political economy of intellectual property* (Westview Press, Boulder, Colo, 1996) at 121.

Blackstone's Commentaries).[9] There is a shared affinity here toward developing a broad and structural reading of cases as part of broader trends, and in arguing that what may appear to be isolated problems in the law in fact cohere as part of broader trends.

False contingency is the tendency to ignore "that possibilities are framed by circumstances"—that there are in fact bounds in which, for example, legal decisions could have come out.[10] The false contingency sometimes committed in copyright writing is that in fact the features of copyright which enable commodification are not seriously challenged.[11] Instead, the conflicts are over which features that allegedly impede commodification ought to remain intact (to safeguard "rights"—or distribution of benefits), and over what those features are. Commodification is the shared agenda of the big, moneyed participants in copyright debates, and in this way, commodification is determining.

But not wholly determining. Tzouvala introduces the concept of a "structured indeterminacy" where results are not determined but rather bounded to competing logics. Writing about the (ostensibly deprecated) public international law standard of civilisation, she writes "[t]he argumentative structure of 'civilisation' does not control the outcome of specific legal struggles, but it does control the range of arguments open to advocates, civil servants and judges."[12] She identifies two logics through which this structure plays out in the public international law sphere: a logic of improvement, and a logic of biology. This chapter suggests that the two logics at play in the "zero marginal cost" copyright cases could be called a logic of property and a logic of innovation. In the logic of property, the value of rights in works should be maximised by maximising the degree of exclusive exploitation afforded to the owner. In the logic of "innovation"—here referring to the creation and bringing to market of new distributional technologies and models—uses of works made possible by technological advancements should be workable without resort to licensing, so as to maximise the incentive to exploit (commodify) new sources of value. These logics compete, but are not opposed on the fundamental desirability of commodification—they simply disagree on who should benefit. Duncan Kennedy claims

[9] Susan Marks "False Contingency" (2009) 62 Current Legal Problems 1; Ntina Tzouvala *Capitalism as civilisation: A history of international law* (Cambridge University Press, Cambridge, UK, 2020); Duncan Kennedy "The structure of Blackstone's *Commentaries*" (1978–1979) 28 Buff L Rev 205.
[10] Marks, above n 9 at 2.
[11] At 17.
[12] Tzouvala, above n 9 At 42.

Blackstone in the *Commentaries* developed "the notion that the common law had changed to meet the needs of a modern, commercial society" while retaining rigidity where "necessary to the protection of civil liberties."[13] Likewise in the case of the judicial adaptations of copyright to the digital context considered in this chapter, balancing users' and authors' rights in copyright law and scholarship could be seen as the formal rationale disguising the apologetic motive of reconciling commodification with copyright's stated values.

1.3. Logics of "property" and "innovation"

This chapter argues that in cases of platform-publisher conflicts like those examined below, copyright's changing relationship to commodification of creative works was characterised by two competing "logics": a logic of property, and a logic of innovation. In the logic of property, the value of rights in works should be maximised by maximising the degree of exclusive exploitation afforded to the owner. In the logic of "innovation"—here referring to the creation and bringing to market of new distributional technologies and models—uses of works made possible by technological advancements should be workable without resort to negotiating licenses, so as to maximise the incentive to exploit (commodify) new sources of value. These logics compete, but are not opposed on the fundamental desirability of commodification. Rather, they simply disagree on who should benefit.

The property and innovation logics are materially grounded in the interests of technologists and copyright owners; "innovation" as a logic therefore is not referring to the concept of "innovation" as it is commonly employed, and likewise for "property". The logic of property is most obviously expressed by arguing that copyright should be treated expansively as a form property. As discussed in Chapter Two, this characterisation can cut two ways; however, for the advocates of the logic of property, it always means more rights for the rightholder. The logic of innovation is visible in copyright's "safe harbour" provisions, exceptions, and limitations which allow "innovative" business activity. The distributive consequences of which of these logics is favoured in a given case go in the first place to how surplus is split up between platforms and publishers. This raises the question of whether talking about courts adopting or considering logics is in fact merely describing their balancing of interests. In some sense, yes, but

[13] Kennedy, above n 9 at 244.

importantly they are not framed that way—in going to court one actually has to make an argument about why one's particular interest should prevail. (Although one can perhaps be less coy when lobbying legislators.)

While framing these as "logics" is a new contribution, many copyright scholars have identified these two sides of copyright debates in the digital age.[14] To take one example, Brad Greenberg notes how the similarly utilitarian arguments of both sides "follow[] a general formula that puts author incentives and technological innovation at diametrically opposed poles."[15] It is key for the property advocates that "the author of a copyrighted work receives exclusive control over exploiting known *and* potential markets" while their opponents claim that overzealous application of copyright law to new technologies will threaten innovation: "technologists' concerns relate to potential liability hindering technological development or enjoining products already to market."[16] Greenberg's characterisation of the conflict is apt, but tied to the US context and copyright law's "constitutionally authorized incentive system" in that jurisdiction.[17] In contrast, this chapter argues that the underlying commonality between the property and innovation logics is not a common theoretical basis in utilitarianism but instead a materially-based imperative for copyright law to facilitate commodification.[18]

Furthermore, Greenberg has some sympathy for the innovation position, which is not uncommon among copyright-critical scholars up to at least the mid-2010s. As Amy Kapczynski notes, after the technology giants and platforms became subjects of intense criticism in the later 2010s, the realisation began to dawn on some copyright critics that their pro-"innovation" stances may have made them unintentional accomplices to the tech giants' rise in power.[19] For Greenberg's part, he notes that "courts evaluating claims that a new technology infringes copyright might overvalue

[14] See e.g., Greenberg, above n 3; Jessica Litman "What we don't see when we see copyright as property" (2018) 77 Cambridge Law Journal 536; Julie E Cohen *Between truth and power: The legal constructions of informational capitalism* (Oxford University Press, New York, New York, 2019) at 16-17.
[15] Greenberg, above n 3 at 1507.
[16] At 1507.
[17] At 1507.
[18] Noting that the technologist side of these conflicts has increasingly been taken over by large technology companies (rather than start-up innovators), Greenberg also raises normative concerns which this chapter will consider, namely: "whether it is good to refine copyright policy mainly through the judicial process; [and] whether deep-pocket technologists' interests sufficiently proxy those of the public at large". Greenberg, above n 3 at 1510, n 58.
[19] See Amy Kapczynski "Book Review: The Law of Informational Capitalism" [2020] Yale LJ 1460 at 1493.

the costs while undervaluing potential future uses, even identifiable uses."[20] But it is increasingly recognised that the market-driven innovation in the technology sector has had a more sinister side—the thrust of various platformisation accounts go to impacts on human rights, particularly privacy, and in the context of copyright industries, distributive issues around streaming.[21] In any case, the innovation "logic" considered here is not about "innovation" per se but rather the material interests of the same "deep-pocket technologists" that Greenberg himself expresses concern about.[22]

A further clarification on the logic of innovation is that it is not a position that is opposed to copyright per se, even though the reliance on limitations and exceptions may seem to suggest this. Copyright still has a place in the innovation logic: ownership determines who gets to monetise and license work. Copyright still provides the legal object around which licensing etc. is conducted, as will be discussed further in the context of digital business models in Chapters Four and Five. Some of the technology platforms—online video sites, livestreaming sites, and social networks—rely heavily on user-generated content. This includes, increasingly, content which is monetised in some way.[23] The business model of livestreaming sites like Twitch, for example, is based on revenue sharing with the streamers that are the platform's content creators. This means that copyright still plays a critical role here in allowing legal control of works. Even if the platforms' "innovation" logic wants to shrink copyright's footprint, the content creators who the platforms count as a constituency have an interest in retaining their control.[24]

2. Case studies

In Chapter Two, we saw that the transition to digital distribution and consumption of creative works was one which changed the role of copyright law in commodification. The digital

[20] Greenberg, above n 3 at 1510.
[21] See Shoshana Zuboff *The age of surveillance capitalism: The fight for the future at the new frontier of power* (Profile Books, London, 2019); Jathan Sadowski *Too smart: How digital capitalism is extracting data, controlling our lives, and taking over the world* (Cambridge: MIT Press, 2020); Daniel J Gervais *(Re)structuring copyright a comprehensive path to international copyright reform* (Edward Elgar Pub, Northampton, MA, 2017) at 191.
[22] Greenberg, above n 3 at 1510.
[23] See Xiaoren Wang "YouTube creativity and the regulator's dilemma: An assessment of factors shaping creative production on video-sharing platforms" (2022) 32 Albany Law Journal of Science and Technology; Mark R Johnson and Jamie Woodcock "'And Today's Top Donator is': How Live Streamers on Twitch.tv Monetize and Gamify Their Broadcasts" (2019) 5 Social Media + Society 1.
[24] At least to the extent that the content creators' interest is taken into account by platforms. These content creators might also align with the platforms' innovation logic on use of, for example, recorded music, insofar as copyright law creates a barrier here.

transition required copyright law to answer questions posed by new technologies. These manifested in different ways, and were often framed by commentators in terms of rights: copyright and freedom of expression, for instance.[25] However, the distributive impacts of these changes remain underexamined, a gap which this chapter will try to address.

A full accounting of all of the major digital copyright conflicts of the 2010s would be a huge undertaking. It would need to cover, at a minimum the failed copyright expansions in the United States' Stop Online Piracy and PROTECT IP Acts, the eventually abandoned copyright provisions of the Trans-Pacific Partnership, the Marrakesh Treaty, the *Google Books* and *HathiTrust* cases, in addition to the examples selected for this chapter.[26] Instead, this chapter will take a more narrow and focused approach on two major cases in Canadian and US copyright law, and one major legislative intervention into copyright law by the European Union.

SOCAN v Bell and *ABC v Aereo* share in common that the courts (respectively, the Canadian and US Supreme Courts) were required to determine whether a particular use of copyrighted works enabled by digital technologies was protected by copyright law. In *SOCAN v Bell*, the use under consideration was the streaming of short musical previews to consumers on digital storefronts which offered musical works for sale.[27] In *ABC v Aereo*, the use was the recording and playback of television signals picked up by radio antennae, offered as a service to consumers.[28] The mode of delivery for both uses was digital, and each was made economical by the near zero marginal cost of providing works digitally: it cost the digital storefronts in *SOCAN v Bell* very little to provide short audio previews, and while the bandwidth cost for streaming digital video for Aereo was likely much higher, the service provider in that case charged subscription fees. In both cases, the rightholders were not compensated directly for the use in question.

[25] See Graham Reynolds "The Limits of Statutory Interpretation: Towards Explicit Engagement, by the Supreme Court of Canada, with the Charter Right to Freedom of Expression in the Context of Copyright" (2015–2016) 41 Queen's LJ 455; Christophe Geiger and Elena Izyumenko "Towards a European 'fair use' grounded in freedom of expression" (2019) 35 Am U Int'l L Rev 1.
[26] See Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled (2013); *Authors Guild v HathiTrust* 755 F.3d 87, 101 (2d Cir. 2014); *Authors Guild v Google* 954 F Supp 2d 2282 (SDNY 2013).
[27] See *SOCAN v Bell*, above n 1 at paras 3-4.
[28] See *ABC v Aereo*, above n 1 at 2500.

2.1. Canada: *Society of Composers, Authors and Music Publishers of Canada v Bell*

SOCAN v Bell was one of five copyright cases handed down by the Supreme Court of Canada on the same day in 2012, a set of cases sometimes called the "copyright pentalogy".[29] The appeal concerned a decision by the Canadian Copyright Board not to grant royalties for the use of streaming music previews by streaming music platforms. The Society of Composers, Authors and Music Publishers of Canada (SOCAN) is the collecting society for songwriters in Canada, and was joined as an appellant by the collecting agency for musical reproduction rights (CMRRA-SODRAC) and the Canadian Recording Industry Association.[30] The respondents in the case (the "online service providers") included Apple Canada as well as four of the major Canadian telecommunications corporations: Bell, Rogers, Shaw, and TELUS. The respondents operated digital music storefronts which offered short, streamed musical previews of songs to prospective consumers.[31] The Copyright Board was asked to set a royalty rate for these previews to be paid to the collecting societies, but found that this use was "fair dealing" under section 29 of the Canadian *Copyright Act*.[32] This decision was upheld on appeal by the Federal Court of Appeal, and again in the SCC's decision.[33]

In determining whether the use of streamed musical previews constituted fair dealing, the SCC dealt with two issues: whether this use was "research" (which, at the time of the judgment, was one of the few allowable grounds for fair dealing in the *Copyright Act* (Can)), and whether the use was "fair". In finding that providing the previews qualified as "research", the court drew on an earlier fair dealing case, *CCH Canadian v Law Society of Upper Canada*, which similarly required the court to consider a situation in which an intermediary attempted to rely on the fair dealing defence for actions it undertook on behalf of users.[34] In that case, the appellant operated a law library which would take requests to provide judgments via fax.[35] The SCC held that this

[29] See Michael A Geist *The copyright pentalogy: How the Supreme Court of Canada shook the foundations of Canadian copyright law* (University of Ottawa Press, Ottawa, 2013).
[30] The Entertainment Software Association and Entertainment Software Association of Canada were also involved as appellants. These video game industry groups were involved in other Pentalogy cases, as well as a 2022 follow-up in which the SCC re-affirmed the principle of technological neutrality in copyright law: *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30.
[31] *SOCAN v Bell*, above n 1 at para 3.
[32] At paras 5-6.
[33] At para 7.
[34] *CCH Canadian Ltd v Law Society of Upper Canada* 2004 SCC 13.
[35] At para 1.

was fair dealing for the purpose of research.[36] In SOCAN v Bell, the SCC similarly found that the online service providers' made previews available for the purposes of the user's research, declining to recognise a distinction on the basis that the purpose here was commercial (as SOCAN argued).[37]

Regarding fairness, the SCC considered the provision of previews (the dealing) in terms of several factors, including the nature of the dealing, the quantity of the dealing, and the available alternatives to the dealing. Crucially for the online service providers, the Court evaluated the quantity of the dealing with respect to each work, rather than in aggregate.[38] The Court dismissed possible alternatives to the dealing which might serve the research purposes of potential consumers, including allowing returns of purchased music and advertising. Although some of the online service providers apparently already implemented a return policy, none of the alternatives discussed sufficiently fulfilled the research function of previews for the Court.[39] The Court also found that the nature of the dealings supported a finding of fairness: the previews were short, low-quality, and were streamed and therefore would not be kept by users.[40]

In considering "alternatives to the dealing" as part of the fair dealing analysis, the Court focused on SOCAN's submission that there were other ways users could "identify potential music for purchase", such as advertising, user-generated reviews, and returns. The Court dismissed returns as "expensive, technologically-complicated, and market-inhibiting", although some service providers apparently already offered returns for mistaken purchases.[41] As for the other alternatives, none allowed consumers to preview "what a musical work *sounds* like." Left unsaid,

[36] At para 6.
[37] *SOCAN v Bell*, above n 1 at para 33.
[38] Interestingly, the Court in *Rogers v SOCAN*, another pentalogy case, would opt to look at the aggregate effect of streaming music to put it within the right of communication to the public, rather than as many individual transactions. (*Rogers* dealt with streaming music in the form of whole songs rather than previews.) *Rogers Communications v Society of Composers, Authors and Music Publishers of Canada* 2012 SCC 35.
[39] *SOCAN v Bell*, above n 1 at para 46.
[40] At para 38 (noting that "[b]ecause of their short duration and degraded quality, it can hardly be said that previews are in competition with downloads of the work itself").
[41] At para 45.

however, was the alternative that the case actually sought: that the platform providers pay royalties for the use of previews.[42]

In the court's judgment, users' interests are effectively bound up with the interests of platforms and facilitating dissemination of works. The platform intermediary is treated as a user in themselves, or as a proxy or stand-in for the end-user: their purpose in providing previews is understood by the Court as facilitating user research, in the same way as the non-profit Great Library in *CCH Canadian* was facilitating legal research. That the purpose of facilitating user research is purely instrumental to the platform companies, and that they would surely stop providing previews if they felt it would positively impact their profits, seems to be immaterial to the fair dealing analysis for the Court in *SOCAN v Bell*. Platforms have a financial interest in facilitating purchases, but can still benefit from fair dealing. This is an interpretation of fair dealing which is amenable to "innovative" commodification.

In considering the argument that the court should look at the aggregate amount of music streamed through previews, rather than the length of the individual excerpts: "If, as SOCAN argues, large-scale organized dealings are inherently unfair, most of what online service providers do with musical works would be treated as copyright infringement."[43] This passage is puzzling: what else do platforms do with musical works? We can cross off previews, clearly, because that is the case at hand. Selling downloads to users is done under license, so fair dealing is not relevant. Making copies in order to facilitate those sales is, one would assume, either covered under platforms' licensing deals with rightholders or covered under implied license since required to effect sales. And even if it were the case that platforms' other activities constituted copyright infringement, could they not remedy this through negotiating new licenses or through the Copyright Board? This passage is suggestive of the Court declining to address a distributive question and showing deference to the status quo.

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[42] However, in another pentalogy case, *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada* 2012 SCC 34 [*ESA I*], the SCC addresses this alternative more directly, and dismisses it. For the majority, technological neutrality required that they "avoid[] imposing an additional layer of protections and fees based solely on the method of delivery of the work to the end user. To do otherwise would effectively impose a gratuitous cost for the use of more efficient, Internet-based technologies": at para 9. Technological neutrality is here interpreted as preserving an ostensibly already-existing balance between users' and authors' rights without stymying innovation.

[43] *SOCAN v Bell*, above n 1 at para 43.

The vision of "technological neutrality" put forward by the Court is one which is primarily concerned with the continued smooth operation of a commodity market for musical works. In turn, the rising tide will lift creators' boats as well: "the effect of previews is to *increase* the sale and therefore the dissemination of copyrighted musical works thereby generating remuneration to their creators".[44] The SCC returned to a question of how Canadian copyright law would apply to digital technologies in the 2022 *SOCAN v Entertainment Software Association* (*ESA II*) decision. The question in *ESA II* was whether a section added to the Copyright Act to comply with the WIPO Copyright Treaty Article 8 making available right meant that the communication to the public right was engaged both when the work was made available for streaming and when it was actually streamed (which would entail two separate royalties).[45] The Court reaffirmed *ESA I* by relying again on "technological neutrality" to find that making a work available for streaming is a performance, and only when it is actually streamed does that action engage the communication to the public right.[46] "Technological neutrality" shows its value here as a tool for achieving conceptual clarity between rights: the Court determines that downloads which create a permanent copy are covered by the reproduction right, while streams which do not create a permanent copy are covered by the communication to the public right.

The underlying technical reality is not so clean, however. "Downloads" and "streams" are less discrete technical categories (any stream of a song or video could be a download if the user records it) than the implementations of different business models. "Downloads" mimic the sale of media such as CDs or DVDs to consumers; "streams" provide only access, and are more analogous to library lending. The SCC's "technologically neutral" interpretation of copyright law is intended to be neutral toward different technological means of realising the same ends, which means that it is ultimately it is these ends which are controlling. Put simply, "technological neutrality" here is characterised by a concern for preserving the implementation of different business models enabled by copyright.

Where does "technological neutrality" fall then with respect to the property and innovation logics? In the Canadian cases, we see the concept used to restrict property claims in favour of

[44] At para 48 [emphasis in original].
[45] *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association* 2022 SCC 30 at para 2 [*ESA II*].
[46] At para 5.

predictability and parsimoniousness of law as it applies to new technologies. Fundamentally the promise of technological neutrality here is the new technological implementations will not be disadvantaged, and as such the concept plays a pro-innovation role. However, *ABC v Aereo* shows the limits of this tendency. In that case, this reading of technological neutrality (as well as the US Supreme Court's actual finding) cuts against a would-be "innovator" where they try to engineer a solution which achieves the same ends as copying without any actual copying. The usefulness of "technological neutrality" as an analytic concept, and in the Canadian case a legal principle, lies in its ability to cut through the different interests at play in these copyright fights to arrive at conclusions which preserve the relevance of copyright law to commodification.

2.2. United States: *American Broadcasting Company v Aereo*

In *ABC v Aereo* as in *SOCAN v Bell*, the distributive issue is a specific expression of Bettig's maxim that certain copyright conflicts are fundamentally disputes about distribution of benefits from improvements in communications technologies.[47] In this case, Aereo was a technology company which provided an online service whereby users could access the signal from an individual television antenna. With an array of thousands of "dime-sized" antennae, Aereo subscribers could view or record broadcast television programming, but the service did not duplicate signals—instead, every user would receive the output of a different antenna.[48] This took advantage of an apparent loophole in US copyright law whereby a service transmitting a signal to a single viewer was not performing the work to the public—on the interpretation of the law favoured by *Aereo*.[49] The copyright owners who challenged Aereo, "television producers, marketers, distributors, and broadcasters", argued that this activity infringed their exclusive right to perform their works publicly.[50]

The US Supreme Court considered two questions: whether Aereo "performed" the works; and whether it did so "publicly". The result, as summarised by commentators, recognised that Aereo's system was, in effect, "an attempt to exploit the contours of [US copyright] law to enable the service to deliver copyrighted content online without infringing any of the owners'

[47] Bettig, above n 8 at 143.
[48] *ABC v Aereo*, above n 1 at 2500.
[49] At 2503.
[50] At 2503.

exclusive rights."[51] In the majority judgment, the Court considered earlier cases *Fortnightly* and *Teleprompter* as relevant precedents, as well as the 1976 amendments to the Copyright Act which largely reversed *Fortnightly* and *Teleprompter*.[52] These amendments made three relevant changes, adding language which made it so "*both* the broadcaster *and* the viewer of a television program 'perform,' because they both show the program's images and make audible the program's sounds"; adding the "Transmit Clause" which "makes clear that an entity that acts like a [cable rebroadcaster] itself performs" even if it merely "enhances viewers' ability to receive broadcast television signals"; and adding a "complex, highly detailed compulsory licensing scheme".[53]

Within the schema adopted by this chapter, Aereo enters this case as an "innovator". But the type of innovation it pursued was not directed at delivering content to consumers in the most efficient way, but rather towards exploiting what was perceived as a legal loophole, what Rebecca Giblin and Jane Ginsburg call copyright "avoision".[54] Materially, Aereo's position was directly parasitic on the broadcast networks whose signal Aereo was in the business of transmitting to users. This position undermined the existing structures of creative content production while doing nothing to erect an alternative. However, it is not unique in this respect among the zero marginal cost cases; *Fortnightly* and *Teleprompter*, cable retransmission cases cited in the decision, could be characterised in this way as well.[55] Likewise, the facts of *ABC v Aereo* only arose because over-the-air television broadcasts remain spatially constrained due to the nature of the underlying (radio broadcast) technology. What then is the "technologically neutral" position in *ABC v Aereo*? While the US Supreme Court does not use the phrase "technological neutrality" in the text of the case, commentary on the case took the term up quickly.[56] Notably, Aereo made a kind of technological neutrality argument as well: that "[l]ike a home antenna and DVR, Aereo's equipment simply responds to its subscribers' directives."[57]

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[51] Giblin and Ginsburg, above n 3 at 110, 123.
[52] *ABC v Aereo*, above n 1 at 2505.
[53] At 2506.
[54] Giblin and Ginsburg, above n 3 at 111.
[55] Bettig, above n 8 at 131.
[56] See Kevin P Siu "Technological neutrality: Toward copyright convergence in the digital age" (2013) 71 U Toronto Fac L Rev 76 at 99 (discussing the Aereo case in the context of technological neutrality before it went to the US Supreme Court).
[57] *ABC v Aereo*, above n 1 at 2504.

Rebecca Giblin and Jane Ginsburg, writing on *ABC v Aereo* and similar cases internationally, frame the Court in this case as asking the "wrong" questions about copyright—in the sense that the ruling encourages avoision of copyright through business models which rely on manipulating or evading the law.[58] While Giblin and Ginsburg do not explicitly mention technological or media neutrality, they worry that future decisions following *ABC v Aereo* "will depend too heavily on the relationship of the design of technologies to the business models."[59] Asking the right questions would mean severing that connection; however, this critique ultimately still serves the commodifying logic of copyright. For Giblin and Ginsburg, the commodifying logic is imported into their argument through the invocation of the goal or purpose of copyright law.[60] This goal is not explicitly stated by the authors but the concern with avoision suggests that what is important is that activity not be structured around avoiding copyright. The copyright system's incentives, in this view, should treat equivalent business models the same regardless of the underlying technology. This may be an eminently reasonable demand to make of the design of the copyright system, but it does not challenge the purpose of that system—to facilitate business models which commodify creative labour.

Technological neutrality is not the only lens through which to view this case, however. Notably, the two cable retransmission cases, *Fortnightly* and *Teleprompter*, and the subsequent statutory revisions are also discussed a case study in Ronald Bettig's book.[61] Writing about *Fortnightly*, Bettig concludes that "[t]he primary long-term interest at this point in time, from the perspective of capital as a whole, was the preservation of the integrity of intellectual property rights in the face of new communications technology"; the Supreme Court's decision "threatened this integrity".[62] Bettig writes that capital's other long-term interest, was "to see the demolition of regulatory barriers protecting the monopoly positions of dominant companies (e.g., AT&T, CBS, and NBC)."

If *ABC v Aereo* saw the US Supreme Court muddle through a zero marginal cost case by gesturing towards technological neutrality without explicitly adopting it as a principle, then the

[58] Giblin and Ginsburg, above n 3 at 111.
[59] At 123.
[60] At 111, 151.
[61] Bettig, above n 8 at 117-44.
[62] At 132.

subsequent commentary from Giblin, Ginsburg, Greenberg, and others sought to perfect the application of the principle of technological neutrality for the Aereo facts. In contrast, Bettig, in writing about cases which would become important precedents in *ABC v Aereo*, drew very different conclusions, seeing the judicial and legislative history around cable retransmission as essentially one of conflict between different fractions of the capitalist class and the relationship of that class with the state. The result was that "broadcasters . . . lost some of their regulatory-based monopoly power in the face of the greater structural necessities of the capitalist class."[63] What can be gained by thinking about *ABC v Aereo* through a distributive lens?

The focus on distribution of benefits in this chapter is shared with Bettig: "The central question to be resolved in the cable case was: Who should benefit from the introduction of this new means of distributing broadcasts?"[64] However, what is not shared with Bettig for the purposes of the analysis in this chapter is his Marxist analysis of capitalist society at large and intellectual property law's relationship with it. Without remarking on whether that analysis is correct, putting commodification as the central imperative for copyright law is a more parsimonious way of arriving at similar conclusions. The commodification analysis requires a more expansive accounting of copyright to include the important structures of creative economies; but it does not necessitate a broader theory of capitalist society.

The link between the two logics of property and innovation and the principle of technological neutrality is that courts (and to some extent, copyright scholars) need to evaluate cases based on principles which are at least superficially independent of the interests of the parties. The critique of technological neutrality here is not that there is a right way to do it which courts have missed but rather that it is fundamentally bound up with commodification as a way to reconcile competing interests. For courts it is part of their social function as arbiter of disputes to be seen as impartial, so that the results of their arbitration are accepted by both sides. But in fact, court decisions (and scholarly writing) cannot avoid coming to conclusions which do favour the interests of one side or the other. Adjudication of copyright law necessarily goes to the author-user dichotomy because that is the distinction the law creates. To be clear, these are real disputes with real stakes; they might have been resolved privately or through legislation, but they ended

[63] At 144.
[64] At 143.

up in the courts. We end up back at the question of structure and contingency, with which Bettig, Tzouvala, and Marks are all concerned.[65]

In the cases in this chapter, the problems which arise (disputes between innovators and property holders) and the ways in which they are presented to the court (through the logics of innovation and property) arise structurally. The choice and application of legal principles by courts may be contingent, but the structural determination of the disputes which arise does a great deal to account for the results. As Bettig puts it, "the adoption and development of new communications technology can be contingent but still determined by economic structures."[66] The users' rights-authors' rights conflicts in these cases are real, but if we only view these cases in that way we risk missing the overlapping conflict between the public interest and that of the commodifiers. The parties coming to court in these disputes agree that creative work ought to be commodified; their disagreement is in who gets to profit off of it.

Aereo's solution to copyright as an impediment to their business model was to treat it as something which could be engineered around. Their mistake was to see the legal system as consisting of laws analogous to laws of physics—unchanging, out there in the world to be discovered, manipulated, and mastered. What they discovered was that law is a social creation which is constantly made and remade, and cannot be so easily sidestepped. The focus on avoision in Giblin and Ginsburg's critique of *ABC v Aereo* has an element of engineering to it too: they argue that the approach taken by the US Supreme Court was an insufficient fix for the copyright system to continue doing what it is supposed to do in, for example, guiding investment decisions in new communications technologies away from socially wasteful applications.

The structural constraints on judicial decision making in zero marginal cost cases suggest that because important distributive questions simply fall outside the scope of copyright adjudication distributive arguments will not prevail in courts; would they have more success in legislatures?. Towards the end of the 2010s, as criticism of the technology giants mounted, efforts were made to regulate these businesses. In some cases, these directly addressed distributive issues in copyright economies. The 2019 EU Copyright Directive was one of these.

[65] See Bettig, above n 8; Tzouvala, above n 9; Marks, above n 9.
[66] At 144.

2.3. European Union: Article 17 of the Directive on Copyright

The European Union's Directive on Copyright in the Digital Single Market (the Directive) passed by a narrow margin in the EU parliament in 2019, and obliged EU nations to implement its provisions by June 2021.[67] As Séverine Dusollier notes, the Directive constituted an "important turn" toward "direct regulatory intervention" of copyright industries. This section will focus on Article 17, which mandates that intermediaries for audiovisual content which host user content (such as Alphabet's YouTube, seen as a major target for the initiative) take several steps to prevent copyright infringing materials being (re)uploaded. The most controversial provision requires a degree of filtering of works uploaded to the service. Early commentary suggested that this would effectively mean a system like YouTube's ContentID which proactively scan uploads, which critics dubbed a requirement for "upload filters".[68] The Court of Justice of the European Union (CJEU) later clarified some of the provisions around filtering but it remains to be seen how national implementation will address these concerns.

On the other side, publishers wielded the notion of a "value gap" between the licensing fees paid by YouTube versus closed streaming platforms like Spotify—a result in part, they argued, of safe harbour provisions in copyright law which shield YouTube and similar platforms from copyright enforcement under certain conditions. Article 17 takes "online content-sharing service providers" (OCSSPs) out of the copyright "safe harbour" which protects them from liability for hosting infringing materials, and builds up a new regulatory regime around these platforms.[69] In Article 2(6) the Directive defines OCSSPs to include online service providers where one of their "main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-

[67] CDSM Directive, above n 1. See Séverine Dusollier "The 2019 Directive on Copyright in the Digital Single Market: Some progress, a few bad choices, and an overall failed ambition" (2020) 57 Common Market L Rev 979 at 979.

[68] See João Quintais "The new copyright in the Digital Single Market Directive: A critical look" [2019] SSRN Electronic Journal at 19 (noting that "[d]espite the directive explicitly rejecting this outcome in Article 17(8), it is hard to see how these obligations will not lead to the adoption of (re-)upload filters and, ultimately, result in general monitoring"); Martin Senftleben "Bermuda Triangle: Licensing, filtering and privileging user-generated content under the new Directive on Copyright in the Digital Single Market" (2019) 41 European Intellectual Property Review 480 at 482.

[69] See João Pedro Quintais and Sebastian Felix Schwemer "The Interplay between the Digital Services Act and Sector Regulation: How Special Is Copyright?" (2022) 13 European Journal of Risk Regulation 191 at 196

making purposes."[70] Expressly excepted from this provision are not-for-profit encyclopaedias, educational and scientific repositories, "open source software-developing and-sharing platforms" and several types of commercial online service provider including "online marketplaces, business-to-business cloud services" and cloud services for individuals' personal use.[71] New OCSSPs are shielded from the application of most of Article 17 for up to three years if their annual turnover is below €10 million and their monthly unique visitors do not exceed 5 million.

An intense lobbying fight between media companies and technology companies took place during the drafting process of the Directive.[72] The resulting text has been argued to favour entrenched big tech and media companies without doing enough to remedy underlying distributive issues with respect to paying creators.[73] Per Dusollier, Article 17 "places platforms in a new role, predicated on their active intervention to police the media they make available." In her assessment, the provision was a success for content industries, but implementation "might still fuel a rampant war, where ultimately copyright owners might not be victorious."[74] A challenge to the directive by the government of Poland has already resulted in a 2022 judgment from the CJEU confirming the validity of Article 17 but giving some guidance on its interpretation: *Republic of Poland v European Parliament* (*Poland*).[75] The implementation of the Directive by EU member states has resulted in divergent approaches, suggesting that further fights are likely to come.[76]

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[70] CDSM Directive, above n 1.
[71] At Preamble, para 62.
[72] See Corporate Europe Observatory "Copyright Directive: how competing big business lobbies drowned out critical voices" (December 2018) <https://corporateeurope.org>.
[73] See Annemarie Bridy "The price of closing the value gap: How the music industry hacked eu copyright reform" (2019–2020) 22 Vand J Ent & Tech L 323 at 328 (arguing that without copyright safe harbours, "UGC-based online business models would be unsustainable for all but megaservices like YouTube and Facebook, which have accrued sufficient wealth to withstand eight-figure legal judgments and the cost of taking whatever measures are necessary to avoid them").
[74] Dusollier, above n 67 at 1020–21.
[75] The judgment also affirms that copyright exceptions are users' rights: *Republic of Poland v European Parliament* (C-401/19) (26 April 2022) ECLI:EU:C:2022:297 CJEU [*Poland v European Parliament*] at para 87 (stating that "the exceptions and limitations to copyright . . . confer rights on the users of works or of other protected subject matter and . . . seek to ensure a fair balance between the fundamental rights of those users and of rightholders").
[76] See Paul Keller "Article 17, the year in review (2021 edition)" (24 January 2022) Kluwer Copyright Blog <copyrightblog.kluweriplaw.com>, who identifies three approaches taken by EU countries in implementing Article 17 in 2021: countries which adopt the bare text (France), "filter-first", user protection ex-post (Italy, Spain), and quantitative thresholds (Austria, Germany). European Commission guidance has favoured the user friendly approach

Before the *Poland* judgment clarified certain aspects of the directive, the responsibilities which Article 17 places on platforms gave rise to extensive criticism. While the directive "expressly declares that Article 17 does not create a general monitoring obligation on online content sharing sites"[77] it nevertheless "implicit[ly] require[s] that online content sharing sites must adopt automated content recognition technologies to prevent infringing uploads and reuploads of infringing contents".[78] This stood in apparent contradiction with earlier ECHR case law establishing that a general monitoring obligation was not consistent with EU law.[79] This was seen as a problem both because it arguably made the directive internally inconsistent, and also because, as several scholars noted, automated content recognition technologies are not presently able to evaluate the necessary context to determine whether content falls within an infringement exception such as parody or quotation.[80] This provoked serious concern about the impact of these technologies on freedom of expression.[81]

Further, the complaint and redress mechanisms available for users whose content is wrongly taken down were deemed by commentators to be unlikely to resolve these issues, given the analogous US experience with the redress mechanism of the Digital Millennium Copyright Act and the long wait times to be expected before complaints are actioned.[82] It could be added to this that these delays would likely have real material consequences for creators who get an income from their work on platforms, such as video makers on YouTube.

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taken by Austria and Germany. An interesting parallel here with *SOCAN v Bell* is that the quantitative limitations of the previews in that case were one factor in the court finding their use to be covered by fair dealing: above n 1 at para 46.

[77] Pamela Samuelson "Pushing back on stricter copyright ISP liability rules" (2021) 27 Mich Tech L Rev 299 at 315.

[78] At 317.

[79] See Senftleben, above n 68, citing *SABAM v Netlog BV* [2012] 2 CMLR 18 (EU).

[80] See Samuelson, above n 77 at 317; Dusollier, above n 67 at 1018; Senftleben, above n 68 at 484 (noting that "[i]t is conceivable that [cost and efficiency factors] will encourage the adoption of cheap and unsophisticated filtering tools that lead to excessive content blocking").

[81] See João Quintais, Giancarlo Frosio, Stef van Gompel, P Bernt Hugenholtz, Martin Husovec, Bernd Justin Jütte and Martin Senftleben "Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations From European Academics" [2019] SSRN Electronic Journal at para 5; Axel Metzger, Martin Senftleben, Estelle Derclaye, Thomas Dreier, Christophe Geiger, Jonathan Griffiths, Reto Hilty, P Bernt Hugenholtz, Thomas Riis, Ole Andreas Rognstad, Alain M Strowel, Tatiana Synodinou and Raquel Xalabarder "Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law – Comment of the European Copyright Society" [2020] SSRN Electronic Journal at 10-13.

[82] Senftleben, above n 68 at 484-85; Dusollier, above n 67 at 1020.

The fear expressed by critics was that the implementation of the Directive would have a chilling effect with respect to content which falls within copyright exceptions.[83] The 2022 *Poland* judgment addresses some of these concerns; however it is an open question as to what effects this will have in national implementations. The CJEU emphasised the importance of copyright exceptions, referred to in the judgment as "users' rights":[84]

> Furthermore, with the same objective of ensuring users' rights, the fourth subparagraph of Article 17(9) of Directive 2019/790 requires online content-sharing service providers to inform their users, in their terms and conditions, that they can use works and other protected subject matter under exceptions or limitations to copyright and related rights, provided for in EU law.

The Court in the *Poland* judgment further held that "[a] national transposition that mandated ex ante blocking of content in each and every case (with only the possibility of that content being reinstated further to a complaint) would not be compatible with EU law."[85] In the judgment, the CJEU establishes that in implementing the directive, "Member States must . . . take care to act on the basis of an interpretation of that provision which allows a fair balance to be struck between the various fundamental rights protected by the Charter."[86] In effect, the ruling establishes a hierarchy where copyright exceptions are on top because of their connection to fundamental rights.[87] Further, to comply with fundamental rights "Member States must ensure that users have access to out-of-court redress mechanisms that enable disputes to be settled impartially and to efficient judicial remedies" and avoid filtering systems which do not "distinguish adequately between unlawful content and lawful content".[88]

However, *Poland* did not do away with filtering requirements entirely. João Pedro Quintais and Sebastian Felix Schwemer, summarising the Advocate General's position in the *Poland* case, write that while the judgment does confirm that some filtering is required, it "must be proportionate and avoid the risk of chilling effects on freedom of expression through over-blocking; in order to do so, it must be applied only to manifestly infringing or 'equivalent' content."[89] Likewise, another commentator concluded from the judgment that "[a] national

[83] See Quintais and others, above n 81 at para 5; Metzger and others, above n 81 at 10-13.
[84] *Poland v European Parliament*, above n 75 at para 88.
[85] See Quintais and Schwemer, above n 69 at 198.
[86] *Poland v European Parliament*, above n 75 at para 98.
[87] Quintais and Schwemer, above n 69 at 198.
[88] *Poland v European Parliament*, above n 75 at paras 86, 95.
[89] Quintais and Schwemer, above n 69 at 199.

transposition that mandated *ex ante* blocking of content in each and every case (with only the possibility of that content being reinstated further to a complaint) would not be compatible with EU law."[90]

Even with the more narrow interpretation put forward by the CJEU, the requirement for automated recognition technologies nevertheless stands to benefit technology companies providing those services (such as the company Audible Magic), and place a lesser burden on those which already have content recognition systems in place (for example YouTube and its ContentID system). However, it remains to be seen whether the *Poland* judgment's cautions against over-filtering will cause the European Parliament or national governments to require changes to how YouTube's ContentID system operates in the EU. Introduced in 2008, ContentID has been criticised for over-enforcement of copyright including in cases where exceptions would seem to apply, relying on an often lengthy and ineffective appeals process.[91]

Beyond filtering, other issues have been raised with Article 17 which the *Poland* judgment does not directly address.[92] Content licensing between OCSSPs and rightholders or their assignees is one possible way out of the filtering obligation, but as commentators have emphasised, this presents significant practical difficulties.[93] In particular, in the EU context, blanket licensing for copyright works across the member states is an unrealistic proposition for many types of works given the patchwork of individual rightholders and collection societies across the Union, and the general industry pattern to license content for particular regions.[94] Further, as Martin Senftleben notes, where platform-publisher content licensing deals arise, they are likely to prioritise economic efficiency rather than privileging copyright limitations designed to protect freedom of expression and other rights.[95]

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[90] Eleonora Rosati "Article 17 of the DSM Directive is valid: an early take on today's Grand Chamber ruling" (26 April 2022) The IPKat <ipkitten.blogspot.com>.
[91] See Lauren D Shinn "Youtube's Content ID as a Case Study of Private Copyright Enforcement Systems" (2015) 43 AIPLA Q J 359 at 381-83 (describing problems with the claim dispute process for Content ID); Hannah Bloch-Wehba "Automation in Moderation" (2020) 53 Cornell Int'l LJ 41 at 67-68 (noting that the experience of ContentID shows that "[b]y creating a system in which takedowns are automated, but appeals are manual, Article 17 ensures that while takedowns occur at scale, appeals almost certainly cannot").
[92] See Quintais and others, above n 81; Metzger and others, above n 81.
[93] See Senftleben, above n 68 at 484-85.
[94] See Senftleben, above n 68 at 481 (noting that the collecting society landscape in Europe remains "highly fragmented"); Samuelson, above n 77 at 321.
[95] See Senftleben, above n 68 at 484.

The limitations on the application of Article 17 to smaller, start-up platforms have also been criticised. Article 17 places a lower burden on platforms in operation for fewer than three years and with less than €10 million in annual turnover.[96] However, the limitations on these protections would make them very risky for an actual start-up to rely on. Pamela Samuelson provides a hypothetical example which illustrates this dynamic:

> If in the second year of a startup's operation, for example, some user uploads go viral, causing monthly visitors to exceed five million, then this limitation on the service provider's liability would no longer apply, even if the viral content was perfectly legal. An eligible service would, moreover, lose this limitation on liability at the start of its third year, even though it might remain as small in that third year as in the first two years of its operations.

Taking a step back from the specific critiques levelled at Article 17 of the Directive, we can make some fruitful comparisons with the *SOCAN v Bell* and *ABC v Aereo* decisions. First, it was a legislative intervention into copyright law which specifically targeted a (perceived) distributive issue: the publishers' "value gap" complaint against the platforms boiled down to a question of where to find the appropriate balance of benefits from the exploitation of copyright works. Whereas in the judicial decisions considered above the distributive question takes some excavating to reveal, for the Directive it was more or less explicitly the matter under consideration. This hints at a new direction for copyright policy directly engaging with those distributional questions.

What comes into focus with some of the specific problems around implementation of the Directive is the not the clash of interests between platforms and publishers, but rather the confluence of interests. What these case studies show is that this shared interest is in commodification—an implicit compact between publishers and platforms where both get to profit off of exploitation of copyright works. Both content filtering and blanket licensing as solutions point towards this, as neither protect users' rights in copyright works. The CJEU intervened in *Poland* to caution the overriding importance of fundamental rights which users' rights serve to protect, but the devil will be in the details of national implementations and how platforms and publishers respond.

If the Directive is indicative of where the publisher-platform digital copyright fights of the 2010s ended up, the result can therefore be viewed as a kind of compromise between the interests of

[96] CDSM Directive, above n 1 at Art 17(6).

entrenched platform and media companies—though a bigger win for the media companies, in the *de facto* requirement for monitoring systems like ContentID—there is some convergence in their interests (where established players like YouTube already have systems in place). But this is perhaps indicative of a growing cleavage between publisher-platform interests and those of users and creators. What does that mean for how copyright is going to develop in next decade? Do users and creators still have their champions?

Pushback to a copyright system which primarily benefits publishers and platforms has to come from democratic contestation, which can more effectively be brought to bear on national (or supra-national) legislatures than on courts. While the CJEU in *Poland* admirably emphasised the importance of users' rights to fundamental rights, the extensive regulatory role of copyright law in the digital age means it should not be relegated to specialists and experts. It should be recognised as a fundamental regulation of platforms which form the "means of socio-economic coordination" (in Cédric Durand's phrase).[97]

3. Commodification and the making of digital copyright

The case studies above described three instances of copyright law adaptation to digital technologies and their effects on creative economies. They showed how the *SOCAN v Bell* and *ABC v Aereo* cases were framed as questions of "technological neutrality", but with significant distributive consequences. As a term characterising law's orientation towards technology, technological neutrality is somewhat ambiguous, and has seen different applications depending on the situation and who is in the position to interpret it.[98] Does technological neutrality also have a blind spot when it comes to distribution? If we understand *ABC v Aereo* as an (imperfect) expression of technological neutrality, it embodies the position that copyright law should not be an arbitrary puzzle to work around with technologies designed for copyright "avoision". *SOCAN v Bell*, meanwhile, shows the Supreme Court of Canada shaping fair dealing around enabling functionality which assists users in purchasing licenses to works. (It is worth recalling here that the convenience of digital platforms is often cited as a decisive advantage over piracy.[99])

[97] Cédric Durand "Scouting capital's frontiers" (2022) 136 New Left Review.
[98] Greenberg, above n 3 at 1497 (noting that in the US context technologically neutral statutes "have magnified copyright's complexity by driving judicial inconsistency and increasing the role of uncertain ex post exceptions" and that judges have sometimes focused om design rather than output in their decisions).
[99] See Bettig, above n 8 at 144.

However, there is a distribution side to both of these cases as well. For both *ABC v Aereo* and *SOCAN v Bell*, the issue before the court centred on whether new, digitally-enabled functionality fell within the ambit of protection offered by copyright law. The effect of these cases determined who was to benefit off of uses of the new technology, in line with how Ronald Bettig characterised conflicts over new communication technologies while the digital age was still in its infancy.[100] When the US Congress amended the Copyright Act to reverse *Fortnightly* and *Teleprompter* and establish a compulsory licensing regime, it actively engaged with the distributive implications of copyright law, much like the European Parliament with respect to Article 17 of the *Directive*.

3.1. Characterising "technological neutrality"

How copyright law is to adapt to new technologies is often discussed in terms of "technological neutrality", a term which comes up in *SOCAN v Bell* as well as commentary around *ABC v Aereo*.[101] Technological neutrality is generally understood to mean that laws should apply similarly to equivalent transactions regardless of the technological means used to achieve them.[102] In contrast, law can be technology specific and apply differently to different technologies. "Technological neutrality" promises continuity—that commodification of creative works will go on as it always has, even if it has to change. But technological neutrality is not neutral towards the distribution of benefits—copyright law, through legislatures or courts, is always picking winners.

Brad Greenberg characterises the principle of technological neutrality as one which seeks to "regulate behavior, not technology; to worry about what occurs, not how it occurs."[103] In his formulation, the goals of technological neutrality are twofold: to "future-proof" the law such that it can continue to be applied without costly and time-consuming revisions; and to promote greater fairness in law's application with respect to age of technology, "to avoid limiting a right

[100] At 143.
[101] *SOCAN v Bell*, above n 1 at para 43; Greenberg, above n 3; Giblin and Ginsburg, above n 3.
[102] See Gervais, above n 21 at 211 (advocating that "copyright must be a right to authorize or prohibit uses that restrict the market or the possibilities for exploiting the product, not technical operations performed on the work or a copy thereof"); Gregory R Hagen "Technological Neutrality in Canadian Copyright Law" in Geist, above n 29, 307 at 309 (writing that "the principle of technological neutrality in the recent Supreme Court [of Canada] judgments . . . requires treating competing disseminators of works and other subject matter equally under copyright law").
[103] Greenberg, above n 3 at 1512.

only to its exercise in extant technology or discriminating against older technology simply because it existed when the law was enacted".[104]

However, adapting copyright law by using "technological neutrality" as a guiding principle inevitably leaves out distributive effects with respect to the benefits from creative works. When the SCC frames the problem in *ESA II* as whether digital transactions should be treated differently from physical transactions, this could be restated as "should copyright persist in the same relationship to digital business models as to physical ones?" Yet copyright law enables different things for digital service providers, and as such this obscures all the ways in which digital business models differ in practice. On the user side, various benefits of physical ownership are held back through, for example the lack of a digital first sale doctrine, greater control exercised over users through license terms and technological protection mechanisms, and a generalised shift away from even the denuded form of digital "ownership" enabled by licenses towards mere access through streaming. Creators lose out as well, through, among other things, lower royalty rates and opaque discovery mechanisms. Chapter Five will return to these distributive effects; for the present, the point here is that these changes redound to the benefit of publishers and platforms.

Naturally, these were not the issues directly before the courts in the Pentalogy cases, *ESA II*, or *ABC v Aereo*. In contrast, the lobbying and politicking around the EU *Directive* comes closer to acknowledging the distributive issues at play—a difference between a (far from perfect) legislative process and a judicial one. It bears noting as well that the removal of property rights from democratic contestation in favour of judicial bodies has been identified as a key intellectual feature of neoliberal thought.[105] Courts adjudicate claims with distributive impacts, but without accepting distributive arguments as such, those being outside their jurisdiction to interpret the relevant legislation and apply case law. If digital copyright law was largely made in the courts, this may account in part for its poor record on distributive issues.

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[104] At 1513.

[105] Quinn Slobodian *Globalists: The end of empire and the birth of neoliberalism* (Harvard University Press, Cambridge, MA, 2018) at 19. However, Slobodian has also written on how 20th century neoliberal thinkers disagreed on whether strong intellectual property rights were in fact desirable: see Quinn Slobodian, "The Law of the Sea of Ignorance: F. A. Hayek, Fritz Machlup, and other Neoliberals Confront the Intellectual Property Problem" in Dieter Plehwe, Quinn Slobodian and Philip Mirowski (eds) *Nine lives of neoliberalism* (Verso, Brooklyn, NY, 2020) 70.

3.2. *SOCAN v Bell*, *ABC v Aereo*, and commodification

SOCAN v Bell and *ABC v Aereo* are both examples of judicial adaptations of the copyright system to the realities of new technologies. Copyright law serves, with the involvement of other areas of law, to channel the commodification of creative labour in predictable ways; in order for copyright to continue to serve this function, its application to new technologies needs sometimes to be clarified by courts and legislatures.

Commodification tends toward maximal extraction of value from creative works. At the level of owner-publishers and distributor-platforms, this is a broadly shared goal. Conflicts between these two arise over the distribution of the proceeds from exploitation. When courts resolve these distributional conflicts, their chosen normative frame—whether it invokes property rights, balance, or technological neutrality—is not unimportant and may shape the result in other ways. However, it is separate from the distributional question, and may obscure it, as in *SOCAN v Bell*.

Further, in both *SOCAN v Bell* and *ABC v Aereo* the adaptation of the copyright system towards new possibilities for commodification of creative work and works is not incompatible with the court's differing choices of normative framework. For the SCC in *SOCAN v Bell*, their discussion of a copyright balance between author's interest and public interest still leads to a conclusion where the rising tide of commodification—more music sales—lifts all boats.[106] This is perhaps to be expected where the parties to the cases share an interest in commodification, even if they disagree on how the proceeds from that commodification are divided up. This result is the more surprising since, in *SOCAN v Bell*, the parties do not present uncomplicatedly as the copyright owners and innovators archetypes. On the ownership side were collecting societies as well as the recording and video game industry associations. The platforms involved were not disruptive tech start-ups, but rather incumbent Canadian telecommunications companies and hardware giant Apple, whose iTunes platform was itself arguably being disrupted by the rise of streaming. In *ABC v Aereo* the US Supreme Court safeguarded rightholders from Aereo's "innovative" end-run around copyright law. Notably this challenge did not come from an established platform but rather a start-up whose business model entirely depended on exploiting

[106] *SOCAN v Bell*, above n 1 at para 48 (noting in the context of the fair dealing analysis that "since the effect of previews is to *increase* the sale and therefore the dissemination of copyrighted musical works thereby generating remuneration to their creators, it cannot be said that they have a negative impact on the work" [emphasis in original]).

an apparent loophole. As such, while both of these cases were important in shaping in digital copyright, neither involved established interests on both sides of the publisher-platform divide. In this respect, the EU's Directive was different: a real political conflict between big platforms and publishers, with the distribution of benefits from copyright works explicitly at stake.

3.3. Article 17 as an explicitly distributive conflict

The impetus for Article 17 was another zero marginal cost use case: the debate centred on audiovisual works being uploaded to platforms such as YouTube, which make their business out of advertising on freely-provided, user-uploaded videos.[107] Music labels and others argued that the "safe harbour" provisions contributed to a "value gap" between what these platforms pay in licensing compared to other platforms like Spotify. The debate was in effect explicitly directed at the distributive question: how the benefits from digital uses of copyrighted works would be split between platforms and media companies. It is an important contrast with SOCAN *v Bell* and *ABC v* Aereo that the distributive question is relatively more explicit in this case.

If this is where the publisher-platform digital copyright fights of the 2010s ended up, the result can therefore be viewed as a kind of compromise between the interests of entrenched platform companies and media companies—though this constitutes a bigger win for the media companies, in the *de facto* requirement for content recognition systems there is some convergence in their interests.[108] The major antagonist in this drama, Alphabet's YouTube already has such a system in place, and this establishes another barrier to entry to potential start-ups which could challenge YouTube's dominance. (Though those barriers are arguably very high even in the absence of the *Directive*.) At the same time as the interests of platforms and publishers begin to converge, the cleavage between publisher-platform interests and those of users and creators grows: the changes

[107] However as Samuelson notes, the Article is written to apply more broadly to all copyrighted works including those which do not currently have standard technology to screen for copyrighted content (e.g., photographs): Samuelson, above n 77 at 321.

[108] The situation cannot quite be described as détente, however. Among other areas, news sharing remains contentious: on multiple occasions Meta and Alphabet have threatened to remove news from their platforms in response to proposed legislative redistribution schemes: see "Facebook threatens to block news content in Canada over revenue-sharing bill" (21 October 2022) CBC News <www.cbc.ca>; Jamie Smyth "Australia passes law to make Big Tech pay for news" (25 February 2021) Financial Times <www.ft.com>; Jamie Smyth and Hannah Murphy "Facebook agrees to pay News Corp for content in Australia" (15 March 2021) Financial Times <www.ft.com>.

brought in by the *Directive* stand to harm both users' expressive rights as well as creators' incomes.

The discussion around Article 17 hints at future copyright conflicts. Its contradictions will need to be resolved in practice—the *Directive* cannot both require and not require upload monitoring, as the CJEU recognised—but it is also easy to see where the compromise on commodification sacrifices other values like freedom of expression.[109] This is most apparent with respect to limitations on copyright/user rights covering parody, quotation, criticism, education, and other grounds.[110] A ContentID-like solution which combines automated takedowns with a manual appeal system has a high degree of impact on expressive rights and the income of digital creators on these platforms.[111] From the point of view of commodification (which is to say, the interests of publishers and platforms), this appears to be an acceptable trade-off. Ultimately, while Alphabet may have preferred a different outcome, a requirement for their YouTube platform to implement a content identification system does not seriously inconvenience them given that YouTube already has such a system. But this may more deeply affect the creators on their platform who share in their advertising income: these creators are often dependent on others' intellectual property for criticism and parody. Expanded use of content recognition could impact advertising incomes for these creators. In the context of video gaming related content in particular, a significant creative ecosystem exists effectively at the sufferance of video game intellectual property owners. While by and large these firms have exercised a light touch to date, one could not blame video game content creators for regarding this as a sword of Damocles over their livelihoods. Chapter Four will address a different group of digital creators who are also impacted by YouTube and its ContentID system: podcasters. YouTube is a popular platform for podcasts, but its copyright enforcement goes further than other podcast service providers.[112]

Further to the questions around Article 17 and user-generated content, Martin Senftleben proposes a solution which would pay authors and performers equitable remuneration for user-

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[109] Samuelson, above n 77 at 317-22 (outlining the "inherent contradictions" in Article 17).
[110] See Quintais and others, above n 81 at para 5; Metzger and others, above n 81 at 10-13.
[111] See Robyn Caplan and Tarleton Gillespie "Tiered Governance and Demonetization: The Shifting Terms of Labor and Compensation in the Platform Economy" (2020) 6 Social Media + Society 1 at 2 (noting that "[w]hat may have begun as a "partner" revenuesharing arrangement, a bonus offered to already motivated and prolific creators, has in practice set the terms for the labor of media production at YouTube, imposing specific expectations for users who count on that revenue").
[112] Interview segments R1, P1 and P10.

generated content use of works/performances which fall outside parody/quotation exceptions but within a "pastiche" exception. This ostensibly resolves "value gap" problem in favour of creators, but it is difficult to imagine how it would work in practice. Modern filtering technologies do not have the ability to even determine exception vs. non-exception uses, let alone distinguishing between different exceptions such as parody vs. pastiche). Senftleben addresses this by suggesting that such a regime will incentivise content ID systems which are able to contextualise—though he notes this may be practically difficult.[113] His proposal goes on to suggest one route as users separating "original" and copyright material to ease the burden on technological systems—but such a proposal presents its own difficulties. The example given of a "funny animal video" with a music soundtrack would seem to be on the far end of simplicity as far as use cases go—more complex examples might be longer videos or compilations of clips where presence of copyrighted music noticed by copyright holder might be scattered throughout. Furthermore, putting the burden on users is a questionable proposition—as both Dusollier and Senftleben note in the context of the efficacy of user-driven complaint mechanisms.[114]

Ultimately this may point to a deeper problem in some conceptualisations of "users" for the purposes of balancing users' rights and copyright owners'. At stake in the regulation of user-generated content are not only "funny animal videos" but the work of many independent creators such as YouTubers, podcasters, and Twitch streamers, for whom being compensated for their work is as important as it is to any musical artist or author.[115] One could also suggest that we should have greater ambitions for digital culture than "funny animal videos"—and financial support for creators doing more complex work ought to be a part of this.

Focusing exclusively on users of platforms for non-commercial communicative and creative activity may make for a more sympathetic subject than relatively more sophisticated actors who are consciously engaged in remunerative creative work—but it is hardly the case that the latter see their interests as creators represented in the traditional content industries' approach to copyright. Instead, they face a copyright minefield with any use of content which might fall to

[113] Senftleben, above n 68 at 489.
[114] At 484-85; Dusollier, above n 67 at 1020 (noting that under the US user-driven complaint mechanism the number of users making complaints is "overwhelmingly low compared to the number of notice-and-take-downs addressed to the platforms. The US experience might warn against putting too much confidence in the effectiveness of such tools to restore users' rights").
[115] See Caplan and Gillespie, above n 111 at 2.

YouTube or other services' content identification systems, regardless of whether they fall squarely within copyright exceptions. The SCC in *SOCAN v Bell* by explicitly affirming the application of user rights for commercial activities arguably takes the right approach here, and one that better accords with the stated objective of copyright law to protect the interests of creators. (Even when they appear in the guise of users.)

Where the implementation of technologies to comply with Article 17 impacts on expressive and other rights, they are sure to be contested in courts.[116] If European courts were to find ContentID and similar systems to infringe on fundamental rights, what would be the paths forward? Arguably, either reinforcing the logic of innovation or that of property: Absent the intervention of technology able to accurately gauge context (perhaps plausible, but not imminent), either the requirement for monitoring would have to give way (which would likely mean simply resurrecting the notice-and-takedown regime) or YouTube and other platforms would have to implement a vetting system with some human input for videos, and it is unclear whether this would be feasible at scale. Human input in the vetting process would furthermore be labour of a type with other kinds of very low-paid "microlabour", largely done in low-income countries, which many current technology platforms rely on.[117] Requiring human intervention would also threaten to place an even higher cost barrier to new entrants, compounding the competition problem and further entrenching existing platforms.

To be clear: the claim is not that commodification is the sole force shaping copyright; the concerns around freedom of expression and the limitations of copyright and of technology will certainly be weighed by the courts in these challenges. ContentID pre-existed Article 17 and its purported harms to rights and YouTube creators' incomes were already ongoing when the Directive was passed (and would persist unless YouTube was barred from continuing to use it). The solution arrived at by private ordering—while clearly not entirely satisfactory to media

[116] It is interesting to note that the challenge to Article 17 came from a state whose other recent disputes with the European Union have centred on their record on human rights and rule of law: see Henry Foy, Raphael Minder and Sam Fleming "Rule of law stand-off threatens new EU funding to Poland" (16 October 2022) Financial Times <www.ft.com>.

[117] See Sarah T Roberts *Behind the Screen: Content Moderation in the Shadows of Social Media* (Yale University Press, New Haven, 2019).

companies—was also one that had negative impacts on user and creator rights.[118] Commodification, then, seems to put us in a bind when it comes to copyright policy.

Conclusion

The result of these and other digital copyright cases has given us a world which has neither fully realised "innovation" or "property" visions of the digital future, but elements of both are more present than they were. In the model of intermediaries, authors, and audiences from Chapter One, the real winners of the last twenty years appear to have been intermediaries. How can we characterise the visions of the future of copyright and creative industries that were in play in these disputes? One might be characterised by strong intellectual property rights secured by technological protection measures and vigorous enforcement overseen by publishing industry. The opposing vision might see relatively weak intellectual property rights, where everything is available and searchable, new uses of old intellectual property encouraged, and data from all the above accumulated and monetised by tech companies. These map roughly onto the "authors' rights" and "users' rights" spectrum, but with both dependent on commodification process.

Considering the connection of these digital copyright disputes with the broader context of platformisation established in Chapter Two, we can suggest that technology companies in the copyright fights of the 2010s had a structural advantage in that their data gathering apparatus held promise for use in other industries and broader society as well.[119] Ultimately the content industries' interests were parochial: unlike the technology industries which promised increased profitability through extensive digitisation across the whole economy and society, the content industries only had their own constituents to draw on: movie studios, publishing houses, industry organisations, and so on. Those constituents were certainly powerful, willing, and able to lobby policymakers. But where copyright reforms backed by the content industries would have severely disrupted the growth of the data gathering apparatus, as in the US anti-piracy legislation SOPA/PIPPA, they failed. It was never the case that "information wants to be free", but rather that information being "free" (in a certain limited sense) was a precondition of the growth of data

[118] Quintais criticises the apparent affinity in the directive for private ordering over public policy: Quintais, above n 68 at 23.
[119] See Zuboff, above n 21; Cohen, above n 14; Sadowski, above n 21.

capitalism, so the beneficiaries of data capitalism had to work to make information free to the extent they needed it to be.

The overarching argument of this chapter has been that copyright disputes are constrained to come a conclusion within commodifying logic—whether favouring innovation or property. This is not to say that courts and commentators have characterised the interests of creators and users incorrectly, but rather that by foregrounding these interests something is missed of what the stakes are in copyright conflicts. In *SOCAN*, the platform intermediary is treated as a stand-in for the user for the fair dealing analysis, allowing the court to find that platforms' purpose in providing music previews is "research", rather than facilitating sales. The distributive question—who gets to share in the benefits from digital music sales—is side-lined.

If this analysis is correct, it provides insight into other copyright theory questions. For example, intrinsic motivations may be more important to individual creators than financial incentives, which stands in contrast to how the copyright system is actually organised.[120] The answer commodification analysis might give to this conundrum is that the non-financial motivations of creators are largely not what is driving the development of copyright law, so it is natural that these motivations get bleached out of the system. Ultimately the actors who fight copyright court cases are most concerned about the financial benefits, and the shared interest of copyright owners and innovators is in facilitating commodification. Whether the intervention of organisations which more directly represent the interests of creators—like collecting societies—in judicial proceedings and the legislative process provides enough of a counterweight to this tendency is worthy of further investigation. Further disentangling authors' and audiences' interests from those of publishers and platforms is another important task; the next chapter will make a contribution in this respect by looking at one particular subset of creators.

The distribution of benefits from the copyright system is determined by judicial outcomes combined with market and legislative intervention and the nature of new technologies. To address concerns about equitable distribution it is necessary to look at all of these in concert. The recent move toward tackling distributional issues head-on through legislative action is a positive development, but needs to be done while also separating out user and creator interests from

[120] See Chapter Four, section 2.3.1, below (discussing motivations of independent history podcasters).

platforms and publishers, and in a context where lobbying power of firms is limited and sufficiently counterbalanced by well-funded public interest organisations on user and creator side. The days of relying on platforms to advocate for users' rights should be put well behind us. Another valuable development would be structures for protecting interests these outside of competition between platforms and publishers. The following chapters will continue to develop the picture of the modern digital copyright ecosystem by focusing on the position of independent creators in the context of podcasting and their relationship with copyright law.

Chapter 4: Copyright and podcasting: Investigating a digital creative ecosystem

Introduction

Copyright has a special relationship with creative economies. From its inception as a replacement of the Stationers' Company monopoly in 17th century Britain to now, copyright has regulated and structured the relationships between authors, audiences, publishers, and now, platforms.[1] The digital transition in creative economies upended copyright's traditional, if underappreciated, reliance on the physical form of creative works. It also birthed new media forms, with varying degrees of relation to traditional counterparts: uploaded and livestreamed video, blogs, newsletters, and podcasts. It is worth studying these digital media forms separately from their physical antecedents because while traditional media structures have persisted and adapted in the digital age, the structures in which some of these born-digital media are produced are new. They emerged out of the digital transition described in Chapter Two, and have continued to evolve as copyright law was adapting to the new environment (a process recounted in part Chapter Three).

Copyright law scholarship should not overlook digital media forms like livestreaming and podcasts, which occupy an increasingly prominent place in the landscape of contemporary cultural production. It is important to understand the specifics of these media: they do not have the established publishing interests that traditional media like film, television, music, and books have, but neither are they predominantly non-commercial, unlike other digital creativity highlighted in the copyright literature like fan fiction.[2] The context of these kinds of remunerative digital media has elicited concern over income inequality, with the most popular creators far outpacing smaller creators.[3] At the same time, digital platforms large and small continue vie for dominance over these new forms of cultural expression.[4] A structural

[1] See Ronan Deazley "Commentary on the Statute of Anne 1710", in Lionel Bently & Martin Kretschmer (eds), (2008) *Primary Sources on Copyright (1450-1900)* <www.copyrighthistory.org> (describing the breakup of the monopoly, "[a]lso significant, and likewise anathema to the booksellers, was the fact that, for the first time since the incorporation of the Stationers' Company in 1557, not just the members of the company, but also any author, and indeed anyone else who was suitably inclined, was free to own and deal in the copies of books").
[2] See Casey Fiesler "Everything I Needed to Know: Empirical Investigations of Copyright Norms in Fandom" (2018–2019) 59 IDEA 65.
[3] See Brent Knepper "No one makes a living on Patreon" The Outline <https://theoutline.com> (highlighting the gulf between high income and low income Patreon projects).
[4] See Anna Nicolaou and Alex Barker "How podcasting became a new front in the streaming wars" (10 June 2020) Financial Times <www.ft.com>.

analysis of digital media economies can help deepen our understanding of these issues, both from a high-level perspective and from the perspective of individual creators. Looking specifically at copyright's role will reveal the extent to which that area of law continues to regulate creative production. This will ultimately go to the question: can we formulate solutions to digital media problems within the framework of copyright law, or are new regulatory models needed?

While many scholars have written about digital media from a copyright perspective, these tend to take an episodic or issue-based approach.[5] Other scholars have written about how copyright plays into the structures of creative production, but have focused on traditional media, where those structures are longer-standing and perhaps more visible.[6] In contrast, this chapter will investigate the digital creative economy of podcasting and copyright's role within its structures. This investigation will proceed in two parts: an overview of the main currents in the development of the podcasting industry, mainly covering the late 2010s through 2021, and the results of a series of interviews conducted with history podcasters in April through November 2021. Taken together, this high-level/low-level analysis of podcasting will provide a picture of a media form and an industry in transition. Podcasting has unique and distinctive features, but also important commonalities with other digital media forms, particularly with respect to how creative work is commodified, and copyright's role in that process.

Podcasts are relatively old as far as digital media is concerned, with the first uses of the term dating from the early 2000s.[7] The massive success of the NPR podcast *Serial* in 2014 is considered by some to be the coming-of-age moment for podcasting; however, importantly,

[5] For an example of an issue-based approach which focuses on the legal implications of a new technological or cultural form, see Anna-Lisa Tie "Copyright law issues in the context of video game Let's Plays and livestreams" (2020) 3 Interactive Entertainment L Rev 121. Others have focused on "free content" in the digital context: see Chris Jay Hoofnagle and Jan Whittington "Free: Accounting for the Costs of the Internet's Most Popular Price" (2014) 61 UCLA L Rev 606; Guy Pessach "Beyond IP - The Cost of Free: Informational Capitalism in a Post-IP Era" (2016–2017) 54 Osgoode Hall L J 225 at 234 (arguing that, with respect to free creative content online "[a]s a matter of law in action, intellectual property rights do not function as a mechanism to govern the production, exchange and distribution of such creative materials").

[6] See Tina Piper "Putting Copyright in Its Place" (2014) 29 Canadian Journal of Law and Society 345 (focusing on the music industry); Peter Lee "Autonomy, Copyright, and Structures of Creative Production" [2021] SSRN Electronic Journal (focusing on film production, music recording, and book publishing); Dong Han "Copyrighting Media Labor and Production" [2012] New Media 24 (focusing on copyright's role in the television industry in China). But see Robyn Caplan and Tarleton Gillespie "Tiered Governance and Demonetization: The Shifting Terms of Labor and Compensation in the Platform Economy" (2020) 6 Social Media + Society 1 (examining platform economy governance issues in the context of YouTube creators).

[7] See Ben Hammersley "Audible Revolution" (12 February 2004) The Guardian <www.theguardian.com>.

the technical aspects of podcasting distribution were already well in place by then.[8] The birth of podcasting predated the era of big platform expansion and competition which came to characterise the Internet of the 2010s. Although Apple's iTunes/Apple Podcasts platform was unquestionably dominant in podcasts for much of their history, the technical basis of podcasting remains the open RSS standard. The widespread use of this standard means that most podcasts are accessible to users of any podcast listening app. Podcast creators could use any number of hosting platforms, which proliferated in the 2010s, to house and distribute their podcasts, and could monetise their work through ads or subscriptions independently. As will be discussed below, podcasting's long- and medium-term future was uncertain as of 2021. The entrance of major technology and media companies into the podcasting space led some to question whether podcasting would continue to be an open medium.[9] As a counterfactual, had podcasting started in 2014 rather than 2006, would the medium have been quickly captured by one or more technology companies? One can contrast video livestreaming, which remains dominated by services from Amazon (Twitch), Meta (Facebook Gaming) and Alphabet (YouTube Live).[10] While Spotify and other platforms may aim to similarly dominate podcasting, the continued independence of many podcast creators makes it a particularly interesting area in which to test the assumptions of copyright law.

However, studying individual podcasts presents some issues with the size and diversity of the population. Apple's podcast directory lists millions of series in dozens of categories. Many of these series are no longer active.[11] Further, this study is based around interviews, which necessarily limits its reach. While this limitation is unavoidable, by targeting a specific group (such as independent history podcasters) can help to capture common experience. For these reasons and others, the study detailed in this chapter focused on history podcasters. This is a group which has not generally been at the forefront of podcasting's recent boom: it has some big successes, such as Mike Duncan and Dan Carlin, but is largely oriented around historical

[8] See John L Sullivan "The platforms of podcasting: Past and present" [2019] Social Media 1; Richard Berry, "A Golden Age of Podcasting? Evaluating Serial in the Context of Podcast Histories" (2015) 22:2 J Radio & Audio Media 170.
[9] See Ben Thompson "Dithering and Open Versus Free" (12 May 2020) Stratechery by Ben Thompson <https://stratechery.com>. But see Ben Thompson "Spotify's Surprise" (28 April 2021) Stratechery by Ben Thompson <https://stratechery.com> (noting that Spotify-owned Anchor's announcement of a subscription service for podcasts committed to supporting other podcatcher platforms).
[10] Rounding out this list of digital giants, Microsoft had a video game livestreaming service, Mixer, until it was shuttered in 2020: see Bijan Stephen "Mixer shuts down today" (22 July 2020) The Verge <www.theverge.com>.
[11] See Apple, "Podcasts Downloads on iTunes" <https://podcasts.apple.com>.

periods, peoples, and events rather than contemporary personalities.[12] It is not a genre with the massive popularity of, for example, true crime podcasting, but has an established fanbase and a loose community of creators. The results of this study confirm the main sources of revenue indicated by the industry-level review, but also provide valuable nuance and insight into how copyright and the structures of the podcasting economy affect independent creators.

The contrast between born-digital media (such as podcasts) and traditional media (such as music) which have made the digital transition raises other questions. If the role of copyright differs now between the two, will their respective business models nevertheless eventually converge? Or are the differences too fundamental, or the structures too entrenched? The answers to these questions should inform the regulatory response, and an operating model of how digital creative economies work is one important precursor to answering these questions.

1. Podcasting in context: The industry in 2021

To contextualise the results of the interviews that follow later in this chapter, it is important to understand the state of the podcasting industry more broadly at the time these interviews took place. The participants in the study naturally had their own perceptions about the contemporary podcasting landscape, particularly those who had been involved in the medium for some time. For those who had been podcasting for more than a decade, the medium had changed from primarily a hobbyist phenomenon in its early days to an industry in which tech and media companies were investing hundreds of millions of dollars in acquisitions and exclusive content deals. These companies began to assemble vertically integrated podcast operations covering everything from production to advertising to distribution.[13] The structures of the podcasting industry seemed to be taking shape, and it was unclear what space would be left for independent podcast producers when the dust settled.

By 2021, large parts of the podcasting industry were consolidating. Spotify inked exclusive podcast deals with high-profile names from outside podcasting—including Michelle Obama and Prince Harry Windsor[14]—as well as acquiring established podcast production companies

[12] Both Carlin (who produces the series Hardcore History) and Duncan (who produced the series "The History of Rome" and "Revolutions") were frequently cited as inspiration by the podcasters interviewed for this chapter. For Duncan's History of Rome series in particular, it calls to the mind the well-known exaggeration of the influence of the 1960s band The Velvet Underground: not everyone listened to The History of Rome, but it sometimes seems that everyone who did started a history podcast.
[13] See Forest Hunt "The New Podcast Oligopoly" (21 May 2021) FAIR <https://fair.org>.
[14] See John Gapper "Harry and Meghan learn to tell their own story with Spotify" (18 December 2020) Financial Times <www.ft.com>; Anna Nicolaou and Alex Barker "How podcasting became a new front in the streaming wars" (10 June 2020) Financial Times <www.ft.com>.

like The Ringer and Parcast.[15] The exclusive deal Spotify struck with popular (and controversial) podcast host Joe Rogan grabbed headlines with a reported value of US$100 million, later revealed to be as much as US$200 million.[16] At the same time, Spotify and other companies had acquired podcasting technology companies covering services like hosting, sponsorship, and targeted advertising.

Content exclusivity deals in particular seem to threaten the open character of podcasting which had been a feature of the medium from the start. A podcast, generally speaking, is distributed through download links propagated through a public RSS feed, which allow any podcast app ("podcatcher") or RSS feed reader to access it. Where content exclusivity deals bind popular series (such as the *Joe Rogan Experience*) to particular podcatchers (such as Spotify), it grants that podcatcher a competitive advantage against others which do not carry that series. While Apple's iTunes/Apple Podcasts app was unquestionably the dominant listening platform at least until Spotify entered the podcasting market, the open nature of podcast feeds meant there were always competitor apps for users to choose from.[17] While podcasts remain largely free to access, the format still saw the development of paid models for podcast distribution: podcast creators could use private RSS feeds to limit distribution to paying subscribers, or, after 2013, use Patreon, a crowdfunding platform which allowed creators to publish private RSS feeds for subscribers who paid a periodic (monthly or per-episode) fee.[18] However, these solutions were based on the same RSS standard that podcast apps used and as such did not lock users to a specific listening platform. This contrasts with exclusives on distribution platforms like Spotify and Stitcher, which are only accessible through whatever platform they are exclusive to.

Attracting users to a distribution platform may serve multiple business purposes. Some content exclusives also require users to subscribe to a paid service, like Stitcher's "Stitcher Premium", in order to access the podcast. Another purpose is targeted advertising: Spotify, for example, collects large amounts of data on listeners' age, location, gender, and other

[15] See Anna Nicolaou "Spotify to buy The Ringer as it steps up podcast push" (2 May 2020) Financial Times <www.ft.com>; Anna Nicolaou "Spotify continues podcast push with Megaphone deal" (11 October 2020) Financial Times <www.ft.com>.
[16] Matthew Strauss "Spotify Sources Say Joe Rogan's Deal Was $200 Million, Double What Was Originally Reported" (17 February 2022) Pitchfork <https://pitchfork.com>.
[17] In the story of podcasting's rise, it should be noted that Apple never fully capitalised on their dominance in the medium before they were usurped by Spotify's moves in the arena. Given that independent podcasting seems to have had a continued, robust existence, it might be fair to call this an instance of benign neglect. See n 45, below.
[18] See Patreon "About" <https://patreon.com>.

factors valuable to its targeted advertising operation. New listeners are both a further source of data and new ears to advertise to. Spotify's foray into podcasting in particular has also been seen as a way to lessen its dependence on deals with music publishers, though it is unclear whether this strategy will bear fruit.[19]

While the user-side distribution platforms are more visible, understanding the business-to-business side of podcasting platforms is at least as important to grasp the structure of the industry. This includes the advertising technology ("ad-tech") part of the podcast business, which provides services to dynamically place targeted advertisements in podcasts and matchmake podcasts with sponsors. Companies providing these services, such as Megaphone and Anchor, have been recent targets of acquisitions for platforms and media companies expanding into podcasting.[20] There have also been moves with respect to creator subscription platforms: Spotify (through its subsidiary Anchor) and Apple have both launched in 2021 services that bring podcast subscriptions to their platforms, effectively competing with independent subscription services like Patreon.[21] Note an important distinction here: these platforms handle paid subscriptions to individual podcast creators, out of which the platform takes a cut, rather than subscriptions to podcast libraries like Stitcher Premium (which is more akin to a streaming service like Netflix). The cut of revenue differs between services, and other details of they operate are important to creators as well. As tech commentator and podcaster Ben Thompson notes, the Anchor and Apple subscription services keep control of subscriber lists: "every subscriber that signs up is *Apple*'s customer, not mine, and while the revenue may be nice in the short run, it is fundamentally constraining in the long run. . . . Apple . . . won't even let me email folks to let them know about what is happening beyond the podcast."[22] This point was also brought up by one of the podcasters interviewed for this study, who remarked that an upside of Patreon's service was that it gave creators access to their "customers" or patrons.[23]

[19] See Jessica Bursztynsky "Spotify's big bet on podcasts is failing, Citi says" (15 January 2021) CNBC <www.cnbc.com>; Mark Sweeney, "Spotify expected to report subscriber slowdown" (25 April 2021) the Guardian <www.theguardian.com>.
[20] See Hunt, above n 13.
[21] See Sweeney, above n 19; Thompson, above n 9.
[22] Thompson, above n 9.
[23] See section 2.3.3, below.

2. Talking to history podcasters: Independent creators in a changing medium

The following sections will summarise the results of a series of interviews conducted in 2021 with independent history podcasters. These interviews are referred to as the "study"; they were used generated an empirical (in the sense of being based in observation or investigation) set of qualitative data. This data pertains to the experiences of these independent history podcasters, as well as the broader context of the podcasting industry (supplemented by research on publicly-available materials regarding the structure and history of this industry). The first set of subsections will discuss the aims and limitations of this study and situate the participants: how they were chosen and recruited, who they were, and the length of their experience podcasting. The second set of subsections will fill in the process of putting out a podcast through relationships with other parties, as recounted by the participants. The next two sections will draw towards conclusions about podcasting and broader digital creative economy issues, through podcasters' motivations, what barriers they faced in getting into the medium, how they make money off of their podcasts, and the roles copyright plays in their work. Finally, this section will conclude with three case studies drawn from the interviews, which give a more holistic idea of podcasters' individual experiences.

2.1. Methodology

This empirical case study consisted of a series of eleven semi-structured interviews conducted with twelve hosts of history podcasts, over online video calls or in person. Each of the participants was a host of one or more ongoing history podcast series, and one of the interviews was conducted with two participants who co-hosted a single series. Recruitment proceeded based on a list of iTunes top history podcasts, social media connections, and "snowball" recruitment—asking participants to recommend other history podcasters who might be interested in the project. The interviews took place from April to November 2021. In the following sections, quotes have been altered to preserve the anonymity of participants in order to comply with the ethics approval under which the study was conducted.[24]

[24] Ethics approval for this study was granted by the Victoria University of Wellington Human Ethics Committee, with the reference number 0000029002. The citations to the interviews in this chapter use unique identifiers for each interview segment in order to preserve anonymity. These identifiers are composed of a letter indicating the section of the interview and a randomly-assigned number. The letters correspond as follows: "C" for the portion of the interview establishing framing and context; "M" for questions around motivation; "P" for intellectual property questions; and "R" for questions dealing with the podcaster's relations with other parties,

2.1.1. Why history podcasts?

Several considerations went into the choice to limit the study to history podcasters. First, targeting a group of smaller, independent creators gives a different perspective on the medium. While the industry-level analysis above is revealing of how podcasting as a whole has developed, there is more to the experience of independent podcast creators. Even where the information gleaned from these interviews was publicly available elsewhere in reporting on the podcasting business—for example, that Spotify became an important podcast listening platform to rival Apple Podcasts/iTunes in the years leading up to 2021—the interviews provided valuable confirmation and nuance of how these changes have been experienced and affect creators' decision making. These recent developments are just that: recent. The influx of money into podcasting did not create the medium out of thin air, but rather entered a context in which independent creators had been working for over a decade, finding and growing their own audiences. To answer the question of how smaller creators have been affected by the changes to podcasting as an industry, it was necessary to talk to them.

Other studies of creator communities have also had defined boundaries (or limitations), often with respect to location.[25] With videoconference interviews, location was not a barrier: the study included participants from several different countries.[26] However, this compounded the obvious problem of scale—with millions of podcasts (an unknown percentage of which are currently active), a representative sample of podcasts generally was impossible. Further, any choice of podcasts would have a social context—whether a genre, podcast network, community, or social group. Consciously choosing one type of podcast, around which there is a loose community, this context becomes easier to discern and analyse. This community was also a boon to recruitment: history podcasters boost each other through social media, particularly Twitter, which made it easy to find more potential participants.

Some of the unique characteristics of history as a genre of podcast also make the community interesting to study. History podcasts frequently have something of an educational bent, and

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tools, etc., as well as any further responses after the main set of questions. See Appendix (setting out the general format of the questions asked in these interviews). The number following each letter for a given interview is unique to one interview, and was generated as part of a random sequence from 1-15. As an illustrative example, one interview might have the codes C2, M9, P2, and R13.

[25] See e.g., Zahr K Said "Craft beer and the rising tide effect: An empirical study of sharing and collaboration among Seattle's craft breweries" (2019) 23 Lewis & Clark L Rev 355 (focusing on craft beer brewing in Seattle); Piper, above n 6 ("explor[ing] how copyright law fits within the normative framework structuring the cultural production of independent music labels in Montreal").

[26] When asked where their podcast was produced, eight different countries were cited across the eleven participants. Interviews were all conducted in English, and all of the podcasts were English language.

so are likely to host a diversity of motivations in creating podcasts in the genre. Further, history podcasts have been around for a long time, and are less at the forefront of the increasing commercialisation of podcasting than, for example, true crime. A description of one of the most popular history podcasters, Mike Duncan, illustrates what some listeners appreciate in a history podcast: his presentation of historical facts and narratives is accessible without dumbing down the content, and "to listen to Duncan while washing dishes or folding laundry is to believe that facts are knowable, [and] that historical events of immense complexity can be made legible".[27] Good history podcasters blend education and entertainment. This might contrast with, for example, the emotive intensity of true crime podcasting, the of-the-moment timeliness of podcasting about current events, or the reliance on personalities in more conversational podcasting.

Additionally, history podcasting is interesting from a copyright angle because the creators generally must rely on other materials such as primary and secondary historical sources to write their scripts. This adds both a material requirement for producing a podcast as well as possible copyright concerns around use of these materials. Both of these issues were spoken to by participants, and the results are discussed below.

The choice of history podcasters comes at the expense of some generalisability, however; what is true for history podcasters may not be true for podcasters in other genres, let alone creators in other digital media. Nonetheless, many aspects of podcasting such as technical production process and options for monetisation are likely to be common across podcasting contexts. This is reinforced by the industry analysis above, which recounted the emergence of platforms in podcasting. The services provided by these platforms took over aspects of podcast distribution which otherwise podcasters would have to deal with themselves (such as web hosting and the technical work which that entailed), as well as going beyond what small-scale individual podcasters could achieve on their own (such as selling dynamic advertising space on podcasts to a diverse range of advertisers). In the results recounted below, some suggestions are made as to which findings are likely to be generalisable, to what extent, and why. For example, there is no particular reason to suppose that history podcasters use significantly different production tools from other podcasters, particularly other independent podcasters who are unlikely to have easy access to commercial audio production software.

[27] David Klion "Mike Duncan Takes on the Turmoil of History" (20 August 2021) The New Republic <newrepublic.com>.

On the other hand, some of the barriers to entry in history podcasting are clearly specific to this genre: having access to history texts is unlikely to be a prerequisite for other kinds of podcasts (though they may have similar material requirements depending on the subject matter).

2.1.2. Who were the participants?

This study was composed of interviews with twelve participants, all of whom were independent podcasters currently producing one or more podcast series. The podcasts approached to participate in the study (28 in total) were drawn from the "History" section of the iTunes directory, social media accounts, and suggestions from participants (snowball recruitment). Two of the participants produced and hosted their podcast series together; the remaining ten participants were primarily solo hosts.

None of the podcasts were affiliated with major podcast or media companies, but five mentioned affiliation with a podcast network.[28] (Due in part to a snowball recruitment effect, many of them were affiliated with the same podcast network.) All of the participants produced their shows at home or with recording equipment they transported with them; none described, for example, renting specialised recording facilities. Four podcasters explicitly described themselves as "independent", indicating that they produced their podcasts on their own and were not associated with a major podcast network or media company.[29] Indeed, one of those who had been engaged in podcasting since before the *Serial* boom expressed amusement that podcasts could be anything but.[30] When asked whether they had production help, one participant who had been producing their podcast for more than a decade responded that "[i]t's so funny now because podcasting has become, like, a thing, and there's all these different roles. . . . [W]hen I first started it, there [were] not that many podcasts, and it was just everybody doing it in their garage, and now it's this whole industry, [with] producers and editors."[31]

All but one of the podcasts included were hosted by one individual; one podcast had two hosts. Four had assistance with related activities like social media, script editing, production,

[28] Interview segments M8, R6, C15, R2, and R5. The interviewee in segment R5 was no longer part of a podcast network but had been in the past.
[29] Interview segments C5, M6, C8 and R5.
[30] Interview segment C1.
[31] Interview segment C1.

or maintaining their website.[32] Most of the podcasters had been involved in only one podcast as creators, however a significant minority had either concurrent series running alongside their "main" series, or ran more than one series consecutively.[33] Among the participants, several had some previous media experience before starting their podcast. This experience included digital media such as blogging (two participants) and making YouTube videos (one participant, who described only dabbling in it) as well as traditional media career experience such as TV and film production, publishing, and academia (one participant each). Four participants described very little or no previous media experience.

All of the podcasts also had a general history focus on specific geographical areas and/or time periods. The aim of this research was not the content or perspective of podcasts per se, but rather the structures that govern their production and distribution. These will be experienced differently depending on who one is and what one produces. There was an observable geographic bias to the podcasts, both in terms of where creators were situated (largely the US and Europe) and what areas of history they covered (largely European history). To some degree this probably comes with speaking to a sample of English-language podcasters. The sample also did not include any podcasters focusing specifically on, for example, feminist, Indigenous, or other minority (including gender and sexual minority) issues. This is not to say that the participants interviewed were not aware of or addressing these issues in their podcasts, but only that they were not the main focus. Creators who produce podcasts with these focuses would likely have unique experiences of the challenges (and possibly opportunities) of online distribution. In addition, the podcasters interviewed were largely white and male, possibly indicative of disproportionate representation within podcasting generally or history podcasts in particular—seeking out the experiences of a more diverse population would be a valuable direction for future research.

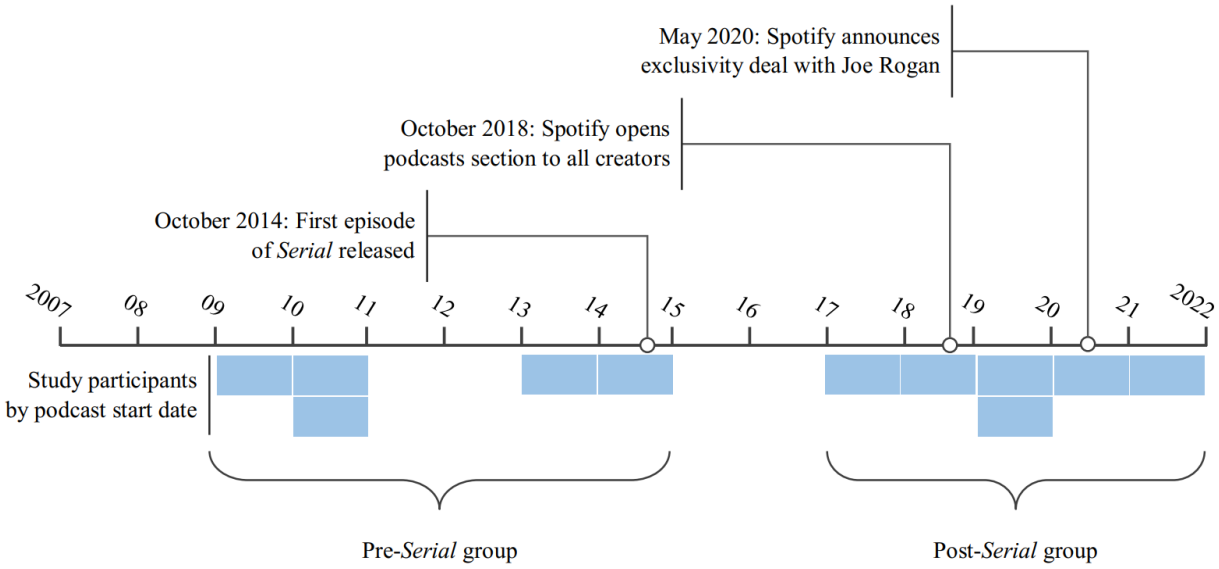
The audience for the participants' main podcasts ranged from 200 downloads per month at the low end to 500,000 downloads per month at the high end, over the entire catalogue. Direct comparison of audience numbers is somewhat difficult because there are multiple metrics by which to measure podcast audience. The number of downloads on new episodes within a given time period after release (such as two weeks or one month) is one such metric

[32] Interview segments R2 (social media), C5 (script editing), C3 (website maintenance and script editing), C2 (script editing).
[33] Six of the interviewees were involved with only a single series: interview segments C2, C3, C4, C6, C12, C15.

which captures current audience size, but does not indicate the number of downloads on the whole catalogue. As some of the podcasts were quite well-established at the time of the interviews (meaning there were more episodes which users could download), and because dynamic advertising allows monetisation of these "back catalogues", the total number of downloads is a valuable metric as well. Some of the podcasters interviewed either had little interest in audience metrics or were otherwise unable to provide precise numbers. Ultimately, the precise audience size of the podcasts involved in this research was important mainly to give context to the first-hand accounts of podcasting as an independent creator, so this lack of precision is not overly problematic.

2.1.3. When did the participants start podcasting?

One of the interview questions asked the podcasters to date their entry into podcasting. The sample was fairly evenly spread along the history of podcasting: the earliest had been produced since 2009 and the latest since early 2021. The release of the hit podcast *Serial* has been posited as a watershed for the podcasting industry.[34] In terms of the present study, it can serve in a similar capacity: of the eleven podcasts involved in this research, five began before October 2014 (when *Serial* released its first episode), and six began after, dividing the sample nearly in half.



[34] See Berry, above n 8.

Chart 1. Timeline of podcasting & study participants by podcast start date

This dividing line has analytical value because the podcasting landscape changed significantly after *Serial*'s release. Podcasts obtained a much more mainstream profile in the period from 2014. One participant explicitly cited *Serial* as the turning point in this respect, describing how, prior to *Serial*, "I was constantly having to describe what a podcast was. If I said I made a podcast, it was immediately followed by, I [would] need to explain what a podcast was. That really changed [after *Serial*]."[35] Spotify's full entry into podcasting in 2018 (after a trial period in which a limited number of podcasts were included on the platform) was followed by a series of high profile acquisitions and exclusivity deals. These included the much publicised US$200 million exclusivity deal struck with Joe Rogan, an immensely popular podcaster who would later bring significant controversy to the platform.[36]

Along with a greatly increased profile for podcasts, the period after *Serial*'s release and massive popularity saw podcasting undergo a deepening "platformisation" that opened up advertising opportunities for smaller podcasts, though it took some years for these services to emerge. The same participant quoted above noted that even as of mid-2016, it was necessary for smaller podcasters to collectively organise advertising through podcast networks: "That's how you had to do it back then because there weren't platforms . . . . And so it was hard as a small podcaster to get advertising. It was almost impossible. . . . [Some companies were] working with really big podcasts, but if you were small, under probably 500,000 downloads a month that just wasn't going to work."[37] In the following years, however, new services became available through hosting platforms like Spreaker and Anchor that allowed individual podcasters to sell advertisements without negotiating individually with advertisers or collectively as podcast networks.

A further development of advertising technology were dynamic or programmatic ads, through which an intermediary inserts ads into podcast audio when it is downloaded or streamed, similar to how most advertisements on web pages work. Podcasters indicate through metadata where in their podcast audio where ads can be inserted. This allows advertisers to place ads in podcast audio as it is accessed, meaning older podcast content will still have current ads. This can be of particular value, as some participants noted, where the back

[35] Interview segment R5.
[36] See Financial Times Editorial Board "The lessons in Joe Rogan's Spotify scandal" (2 March 2022) Financial Times <www.ft.com>.
[37] Interview segment R5.

catalogue of podcast episodes garners a large number of listeners, such as with chronological history podcasts where listeners want to catch up with the story.[38] Dynamic advertising also allows ads to be more precisely targeted, much like display ads on websites. In particular, as two participants mentioned, the entry of Spotify into podcasting has introduced a great deal of granularity in terms of the kinds of audience data available, including gender, age and income.[39]

2.2. Relationships with other parties

Several interview questions addressed the podcasters' relationships with other parties in the production, distribution, monetisation, and promotion of their series. The "relational" framing was not always easy to make clear in the interviews because the types of relationships being inquired about were quite different. For example, the use of software tools for tasks like editing audio are not obvious as "relationships", though there is a contractual relationship where the user agrees to a license agreement to use the software. However, ultimately the responses were quite revealing of what goes into putting out a history podcast.

2.2.1. Production: Software tools

The participants used free software tools to record and edit their podcasts. Six of the participants used Audacity, an open source sound editing application, and three used Garage Band, a free-to-use application for macOS distributed by Apple.[40] Two participants did not disclose their audio production software.

As noted above, none of the participants used specialised recording facilities, and all produced their audio themselves. Two participants noted that they were looking into some sound editing assistance, both offered by listeners, while another participant noted that they had a friend who edited their scripts. In general, the interviewees described that the work that went into creating their podcasts came largely from them alone. This arrangement is certainly not universal among podcasters, but the uniformity within this sample suggests that it is common among podcasters at this scale. With the low barrier to entry in podcasting, there is little stopping individuals from getting into the medium without other assistance.

[38] Interview segments M3 and M4.
[39] Interview segments R10 and R12.
[40] One participant used Audacity normally, but had to switch to Garage Band because of a compatibility issue—they are included in the Audacity number: interview segment R2.

2.2.2. Distribution: Podcast hosting and distribution platforms

Two kinds of platforms fall under "distribution" and are addressed here: podcast hosts, where podcasters upload their episodes; and consumer-facing platforms, where listeners download or stream episodes. With respect to hosting platforms, participants described a wide variety of available hosting companies, as well as the (more technically involved) option to host one's own series on a website. They spoke to the different services and payment tiers offered by different hosting platforms, such as Spreaker, Megaphone, Acast, and others. Four participants described how, once podcasts reach a certain level of popularity, the creators often get approached by services with the aim of monetising their shows and splitting ad revenue.[41] One participant reported from their conversations with other podcasters of similar popularity that "once you hit a certain level on the iTunes rankings, you will start getting emails . . . where they will actively try and recruit you . . . to try and bring you onto the platform."[42] Another participant, who was uninterested in monetising their podcast, described being "bombard[ed]" by offers after reaching a certain threshold of downloads per episode.[43]

In 2021, Spotify and Apple Podcasts/iTunes were the two dominant listening platforms for podcasts, though a range of smaller "podcatchers" (as podcast listening apps are called) served a large audience in aggregate. Spotify's rise was experienced as a recent phenomenon and was identified as a major recent sea change in the podcasting world by three participants.[44] The dominance of iTunes/Apple Podcasts, as the original platform for podcasts, was taken for granted for some time—including, perhaps, by Apple itself: one participant noted that Spotify may have succeeded in podcasts in part because it provided functionality, like personalised recommendations, that Apple had lagged in adopting.[45]

[41] Interview segments M5, M1, R5, and M12. One interviewee stated "once you hit a certain level on the iTunes rankings, you will start getting emails especially from places like Spreaker or [Spotify's podcast advertising service] where they will actively try and recruit you . . . and bring you onto the platform": interview segment R5.
[42] Interview segment R5.
[43] Interview segment M12.
[44] Interview segments R13, R14 and R5. One participant described it this way: "One of the really interesting trends in podcasting over the last year is the rise of Spotify and the fall of Apple Podcasts. . . . [A]t the beginning of 2020 Apple Podcasts was 60-65% of everybody's downloads and Spotify was essentially non-existent. And here were are a year, almost two years later and Spotify's got half the downloads of my podcast, and Apple's slipped to about a third": interview segment R5.
[45] Interview segment R13. This participant suggested that recommendations were one of the "major reasons Spotify has been as successful as it has been [because] it's doing the thing that Apple was told to do for years and years and years and never really did. So they left a hole in the market, and [in came] Spotify."

The technological structures of podcasting are such that podcasters do not have to choose between listening platforms unless they are approached with an exclusivity deal—not a likely prospect for podcasters with a small to medium-sized audience. Seven participants also mentioned uploading their podcasts to YouTube, which is a popular listening platform despite not being a traditional podcatcher—it does not read podcast RSS feeds or rely on a podcast directory.[46] For the most part, however, the big two podcatchers are Spotify and Apple Podcasts, and this is where podcasters find their listeners. One participant described this as, "[i]f you aren't on [Spotify and Apple Podcasts] for whatever reason, it's not going to work out for you. Unless you're Joe Rogan for example and they pay you 1.5 million dollars [for an exclusivity deal]."[47] Furthermore, the iTunes directory is structurally important because many podcatchers rely on it.[48] This dominance does not translate, however, to being the most important venue for promotion of a podcast.

With respect to relations with different parties in creating and disseminating podcasts, participants had few issues (and no direct contact) with distributors like iTunes and Spotify. However, these platforms were not cited as particularly important for visibility/discovery in the current podcasting context—audience growth was instead attributed to word-of-mouth, cross-pollination with other podcasts (e.g., the host appearing as a guest on other podcasts), or advertising. iTunes may have been more important for discovery when podcasting was significantly smaller: in the early days a new podcast without celebrity voices or backing from a major publisher could appear on the front page of iTunes' podcasting storefront.

For the participants in this study, being specifically featured on the dominant platforms was not an important factor in their audience growth, at least in the present day. Two participants mentioned being featured in the prominent iTunes "New and Noteworthy" section for podcasts early on; however, both of these were podcasts which started in the early period of podcasting, before the *Serial* boom discussed above. According to one of these participants, "I was on the iTunes New and [Noteworthy] three weeks in, which you never would get now. Because my sound sucked and I didn't know how to edit, and there's like a million podcasts now, millions, many millions. So I think that there were fewer barriers for me in 2009 than

[46] Interview segments M13, R14, P13, R3, R1, R10, P1 and P10.
[47] Interview segment R10.
[48] Interview segments R12, R10 and R5. See also Sullivan, above n 8 at 6 (noting that "[p]opular mobile podcast consumption apps such as Overcast, Pocket Casts, Downcast, and Podcast Addict all utilize Apple's directory for listing podcasts by linking their apps to the Apple Podcasts API").

there are for people now."[49] One participant with a newer podcast did, however, note having a relatively high placement in iTunes' history podcast rankings.[50]

In a few instances, participants highlighted relationships with individual websites, but in general major websites and apps were not seen as important for their audience growth. With the rise in podcasts of Spotify, however, its opaque recommendation algorithm may drive more audience growth in future: participants asked about whether Spotify's recommendations were helping to grow their audience were unsure, but largely did not think so. One participant did note, however, "I know Spotify does a pretty good job of recommending, saying, hey you like [Dan Carlin's] *Hardcore History*, well, maybe you'll also like this other thing and sometimes a show like mine will pop up."[51] However, the same participant was not sure about how much of their audience growth was actually being driven by Spotify's recommendations. For another participant, the growth in Spotify listenership seemed to consist mostly of existing listeners changing platforms: "when I look at my Spotify data, it is proportional, it's going up as much as it is declining or flattening out [on other platforms]".[52]

2.2.3. Reception: Audiences, promotion and social media

An element of podcasters' relationship with their audiences is the closeness that some audiences feel to creators (and sometimes vice versa):[53]

> I feel as though I'm talking to individuals out there who I've interacted with on social media . . . because it's intimate, I'm in my shed, I'm talking about things I care about. And they feel a bit the same. So, people will often say, "I feel you're a friend", and obviously this is barking mad, the whole thing, but it's true! It is actually true.

The same participant connects this to promotion on podcasts:[54]

> So the recommendation thing therefore, is important [for promotion], and advertisers are trying to play off that. But every time they depersonalise it, it gets a little less effective. What is most effective is I say, look, "Sam Hume does *Pax Britannica*, and . . . it's a great podcast," and people know Sam isn't a commercial organisation, he's just a fully independent [podcaster]. That makes a difference, and that really works. And quite often somebody's come to me and said, "look, I'm listening to your podcast because I heard [about] it on Mike

[49] Interview segment M13.
[50] Interview segment R10. This may have been connected to location: the podcast was about the history of a relatively small country and was produced in that country, and the ranking may have been specific to that country.
[51] Interview segment R13.
[52] Interview segment R14.
[53] Interview segment R6.
[54] Interview segment R6.

> Duncan or whatever" . . . So I think that is the most effective, that kind of word-of-mouth . . . is the most powerful.

Another participant discussed these elements with respect to community-building:[55]

> It's very cliché and everybody says it, but it's actually true, so the interactions, actually having people send in emails, write on Facebook saying I'm enjoying this or asking a question, just creating this community, and the opportunities it's also opened besides just interacting with the people that listen to you.

The same participant went on to describe further personal connections and creative opportunities that have come with connecting with a broad audience. Another participant highlighted promotion through a community of other podcasters:[56]

> The biggest thing I find [with social media] is that it allows you to network with other podcasting communities, once you weave yourself in there, it really expands your growth. Not only because it means you're more likely to pop up in people's recommended feeds but also the unquantifiable goodwill of other podcasters willing to share your show, spread your word.

While social media was described by some participants primarily as a way to connect with audiences and other podcasters, other participants were less sanguine. One participant felt conflicted between the importance of Facebook to one of their secondary activities related to the podcast and their opinion of the platform.[57] The same participant closed a Facebook group related to their podcast due to controversy, and kept a page for their podcast the management of which was delegated to their assistant. Another participant remarked, discussing the spread of their podcast by word of mouth, "Some people actually talk about [the podcast] on Facebook or Twitter [etc.], so I guess those platforms can do more than just subvert democracy and promote genocide."[58] At the same time, word of mouth on social media does not seem to work for everyone, even as promotion. Per one participant, "I've really pulled back on [social media] over the last two years. . . . It didn't feel like I was gathering a whole lot of new listeners because I was just talking to the same people within whatever my follow bubble was, over and over again."[59]

[55] Interview segment M7.
[56] Interview segment R14.
[57] See section 2.5.3, below.
[58] Interview segment P7.
[59] Interview segment R5.

2.3. Motivations, barriers to entry and monetisation

2.3.1. Motivations

All but one participant cited some medium-specific inspiration: they started out as podcast listeners to one degree or another.[60] Many were inspired by other history podcasters like Mike Duncan or Dan Carlin. Four participants described finding a niche that was not being filled by other history podcasts.[61] Asked about their motivations in starting a podcast, one participant replied, "the long story short is I noticed a gap in the podcast market if you will for [history about a particular country]. I listened to a lot of history podcasts myself and basically went, surely someone has done [this] before . . . . Turns out, no!"[62] Another participant from the pre-*Serial* group described this:[63]

> I got in early as a listener and liked that history genre, there were a few good shows and you know back then in the early days of podcasting when I got in, 2008, 9, 10, 11, around those years, it was mostly independent guys like me. The big media companies hadn't jumped in yet. . . . So I figured, these guys doing this, I could do that. My college background's in [the history of a particular country], I speak [the language], so I liked these history shows but there was nothing on [country] out yet, so I sort of jumped in, and started my show.

Surprisingly, these were not confined to the older podcasts in the sample: four of the post-*Serial* series mentioned this factor. One of these participants described how they "wanted to listen to a sort of Mike Duncan, *History of Rome*, chronological history type thing about [a particular country] in English, and there wasn't one. So we said, well, why don't we do it. So that was it."[64] Duncan's *The History of Rome* was an important precedent for several of these podcasts doing a chronological history of a particular country, polity or region.[65]

Three participants also cited personal or professional reasons to start a podcast, such as to contribute to an existing career or in anticipation of a future one.[66] For some, podcasting had become a significant part of their income; the strongest statement in this respect was one participant for whom "the reason to keep [my podcast] going is because at this point the ads and the Patreon [are] I guess I would say a non-insignificant percentage of my family's

[60] Interview segments M9, M10, M7, M1, M8, M3, M4, C1, M5, and M6.
[61] The country names have been omitted in these quotes to preserve the anonymity of the responses. For participants who found a niche for their area of history: interview segments M9, M10, R4, and M1.
[62] Interview segment M1.
[63] Interview segment M6.
[64] Interview segment M9.
[65] Interview segments M4, M5, M9, C8, M3, C1, M1 and M8 all cite Duncan or his "History of Rome" series as inspirations. Interview segments R4 and P9 mention Duncan in other contexts.
[66] Interview segments M7, M12 and M13.

income every month."[67] However, none of the participants described financial motivations as the reason why they *initially* started their podcasts. Rather, they largely described themselves as being driven by an interest in their topic area, in educating listeners, or in disseminating historical work. For the same participant, they highlighted personal interest and other podcasts in describing how they started their podcast:[68]

> I disliked the job I had at the time, and I'd always liked history and I was hoping to engage with it in a more meaningful way than just consuming content. And I had been listening to a lot of solo independent history podcasts at that time, things like Mike Duncan's podcast, also the British History Podcast and there were several others that made me believe that maybe I could do this thing.

One participant whose series was centred on interviews with history authors had a philosophical take on podcasts as communication:[69]

> One of my kind of abiding, almost philosophical . . . anxieties is the ability of human beings to communicate and the extent to which we can actually do so. . . . And this podcast medium has really tremendously validated, for me, the belief that human beings can actually communicate and that we're not trapped in these incommensurate bubbles . . . that we can actually understand each other. And so I read something, and I address the author . . . and we can actually communicate. And convey that to a general audience so more people can get a more or less accurate idea of what is being said. And, you know, it might be wrong, but at least we know what we're saying. So that has been validating for me.

A few participants explicitly mentioned podcasting's low barrier to entry as an important part of their decision, but given the general sense of a low barrier to entry it was implicit in other answers as well. One participant, asked why they chose podcasting rather another medium, responded: "[W]hat other media is there? Because, radio or writing books there's overhead, there's costs associated with that. I know this is a cynical comment but nobody reads today. . . . So podcasting [has a] very low barrier to entry . . . but a potentially huge, worldwide audience."[70] This leads into the responses to the interview questions on barriers to entry in podcasting.

2.3.2. Barriers to entry

The participants uniformly described the financial barriers to entry in podcasting as very low: at minimum, a phone or a laptop with recording capability suffices, but most take on some additional costs.[71] These could include a quality microphone and sound equipment to

[67] Interview segment M3.
[68] Interview segment M3.
[69] Interview segment M12.
[70] Interview segment M6.
[71] Interview segments M9, M7, C12, M8, M3, M4, M13, M5, and M6.

improve the recording quality, and paid hosting for greater control over the podcast feed (e.g. no ads) or better services. (The cost of accessing relevant copyrighted materials for a history podcast is dealt with separately in section 2.4.2, below.) Start-up costs, largely associated with equipment, were cited variously as €200, £300, "less than [US]$1,000", down to a US$20 USB microphone.[72] Other participants noted that it was possible to get started with just the built-in microphone on a phone or laptop. However, in the period before monetisation became easier for small podcasters, even small ongoing financial costs could be a deterrent: one participant noted how "early on I'd say that when some minor costs did start accruing for paying for server stuff and I wasn't making any money off of it, I had a listener base but there still was no real way to easily make money off of this thing, that was, I wouldn't say it was off-putting, but it was kind of like, 'oh man, I wish there was a way.'"[73]

Some participants described the time and labour required to put out a history podcast regularly as a barrier: one participant stated that "just maintaining the workload and figuring out what is a reasonable pace for you is a huge thing".[74] Another participant noted that because of the study and preparation required, their podcast took "about six months [of work] to get to the point where I had enough material to say, 'OK, I can launch a podcast and have some sort of regularity.' And then since then I've been chasing after my own tail trying to keep up to date with the weekly release schedule."[75] Another important barrier to entry specific to history podcasts is that, along with access to materials, the genre tends to require some degree of knowledge and expertise: either in history in particular or in the general research skills that come with a university education. While this was not explicitly cited in any of the responses, several of the participants discussed these aspects obliquely: one participant said that podcasting had a low barrier to entry for them precisely because "it was just basically an application of what I kind of carried from university work, which is writing, researching, and then just presenting . . . . So it was an easier transition than other mediums like video making, for instance."[76] It would seem plausible based on this to suggest that history podcasting, on the production side at least, skews towards the university-educated compared to podcasts generally.

[72] Interview segments M7, M9, M6, and C1.
[73] Interview segment M8.
[74] Interview segment M5.
[75] Interview segment M7.
[76] Interview segment M5.

Technical barriers to start-up, including difficulties in getting a podcast set up and understanding the underlying technology, were more salient for the older podcasts in the sample. Both older and newer podcasters remarked on how much easier the process of starting a podcast is now: a participant whose podcast started in 2009 described how they had to "try[] to figure everything out using not a lot of information . . . because there just wasn't a lot out there then."[77] Podcast hosts now provide an easier experience for podcasters starting out. One participant recalls the difficult process of "building one's own technical knowledge when there was relatively little how-to manuals for it. And nowadays it's kind of just plug-and-go for a lot of people, I'm kind of jealous. At the same time, that building up the understanding of the inner workings was really nice when I have to fix my own problems and stuff."[78]

The differences between starting a podcast in 2010 and 2020 are also apparent in the different barriers to being discovered and growing a podcast audience. On the one hand, the diffusion of technical knowledge through online guides and other resources, and the availability and sophistication of hosting services has all made it much easier to start a podcast. However, the greater popularity and variety of podcasts (including within the field of history podcasts) means that it is more difficult now to make an impact and stand out in a crowded market. This difficulty was sometimes connected with the entrance of large firms into podcasting generally, with the much-publicised Joe Rogan-Spotify deal cited by some as an example of the "high-end" of podcasting that small scale podcasters could not reasonably hope to reach.[79]

Regarding changes in the podcasting industry, those participants who had been involved in podcasting for longer expressed that it was now both easier and more difficult to start a podcast. In recent years, from about 2017 on, participants describe much more competition for exposure in the podcasting market. The entry of celebrities and institutional brands into podcasting means that being featured on the front page of a platform is an unlikely proposition for an independent history podcast with no backing. At the same time, however, the audience for podcasts has also grown, and when asked some participants displayed a guarded optimism about the future of podcasting for independents. As one participant put it:

> You benefit as an independent podcaster you benefit from people listening to podcasts. Because the more people who are listening, the more people who are searching for a new podcast to listen to and the more people you might be able to find. So I would say overall that

[77] Interview segment M13.
[78] Interview segment M8.
[79] Interview segments R14 and R10.

> at this point, and this may change in the future, at this point [the entry of large firms and brands into podcasting] is still a net positive for independent podcast creators of any level.[80]

2.3.3. Monetisation

Most of the interviewees described making money off their podcasts in some way. Regarding methods of monetisation, six of the interviewees monetised their podcasts through advertising, seven were monetised through Patreon or similar recurring subscriptions, three discussed accepting one-off donations from listeners, and four discussed income from secondary activities such as merchandise.[81] In terms of relative importance of each revenue stream: subscriptions and advertising were described by the podcasters who used them as the most significant; secondary activity such as merchandise was noted as a major source of revenue for only one participant; and some participants described a small but persistent flow of one-off donations.[82]

Subscription services were described as appealing because they were easy to set up and provide a reliable stream of income.[83] These services allow podcasters and other content creators to receive recurring payments from subscribers, either scheduled (usually monthly) or upon a piece of content's release (such as a podcast episode). Platforms like Patreon also allow creators to provide subscribers with bonus content, or otherwise "paywall" their content to restrict it to paying subscribers. All of the podcasters interviewed released their primary series for free, but three also released paid bonus content in the form of other series, bonus episodes, or ad-free episodes.[84] Since podcast series can run for a significant length of time (as noted above, three of the podcasters had been active for over a decade at the time of the interviews), bonus content provided for subscribers can accrue into a significant "back catalogue" or archive of episodes; for example, one interviewee estimated they had put out over eighty hours of bonus content that would become available to new subscribers.[85] The value of this back catalogue to listeners might differ based on the content of the podcast, but history podcasting is likely a genre in which archive content is reasonably evergreen.

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[80] Interview segment R5.
[81] One of these podcasts accepted something like in-kind donations from listeners through an Amazon wishlist of research books for the podcast, which the participant described as a more direct and transparent way to support their work.
[82] Interview segment M13 (speaking to significant income from merchandise); interview segments M4, M5, and M8 (speaking to one-off donations).
[83] Interview segments M6, M7, M1, M8 and M3.
[84] Interview segments M4, M7 and M3.
[85] Interview segment M4.

Patreon was by far the most popular platform for podcasters to manage their subscriptions. In the sample, only one participant monetised through subscriptions without using Patreon. This participant, who managed the financial side of subscriptions themselves, expressed that they may have chosen differently if they had been aware of Patreon when they set up their monetisation:[86]

> By and large intermediaries keep in between you and your customers, and they're a bad thing, capital B. But Patreon will actually work very well in that regard, you get access to all the customers, and you could email them all if you wanted to. And they shuffle quite a lot of the shit, so they take all the VAT and they deal with all that stuff, which is a dream. Because doing VAT every month makes me want to eat my liver. . . . So, [Patreon is] really a good service, and actually going back if I had thought about it again, I might have just done Patreon and not my own thing because it would have made life much simpler.

Although several participants described the process of setting up subscriptions through Patreon as relatively painless, one participant who chose not to monetise through subscriptions mentioned as a trade-off that there these services create an expectation to continually release content:[87]

> I found that Patreon, as much as people swear by it . . . I didn't know how to structure it personally. . . . [I]f you've made a Patreon out of [your podcast] it almost becomes a job, which is what I don't want to happen. I don't want to feel . . . beholden to my listeners because they're paying me money per month . . . and I don't want to feel like I'm giving them [something of] inferior quality.

Three out of the eleven participating podcasts were not monetised at all. These three were all started post-2014—composing half of the six in this group. One of these participants signalled an intention to monetise the podcast through subscriptions at a later date. The other two non-monetised podcasts cited sufficient income from their non-podcast careers. Five podcasts in the set did not use advertising to monetise their podcast; notably, all of the podcasters who monetised their shows with advertisements also monetised with subscriptions. One of the participants talked about their principled reasons for avoiding advertising:[88]

> [W]e're both very BBC in the sense that in the UK on TV, BBC doesn't have any adverts ever, for anything, and the commercial channels have adverts all the time. So you're just watching something, you're watching a 40 minute programme and there's three advert breaks, and it's just frustrating for us as listeners, as viewers. . . . We don't want our listeners to go through that. . . . [W]e're probably like ideologically against it, in that sense, at the moment.

[86] Interview segment M4.
[87] Interview segment M5.
[88] Interview segment M9.

All of the podcasts which did not advertise were in the post-2014 group, comprising a supermajority of that group (5/6). On its face this looks like a surprising and counterintuitive result: by all accounts, podcast advertising has become much easier for smaller podcasts in the years since 2014, but that has not translated into newer podcasts in this set actually using advertising. Along with the reasons recounted in the quotes above, a few possible explanations could be posited here: the newer podcasters may find that the increased barriers to growing an audience make advertising less appealing; or, it may be an example of survival bias, where the older podcasts continued to the present day precisely because they monetised through ads and were able to make their work an ongoing source of income. Alternatively, the newer podcasters may have come into podcasting with different motivations or expectations, or it may be that the older podcasters' motivations and expectations changed over time. One of the podcasters in the pre-*Serial* group said that they decided to monetise their podcast "because the monetisation [through advertising and Patreon] is so easy, I'm figuring—why be an idiot? Everyone else is doing it. Why shouldn't I? So that's why it's in there."[89]

2.4. Podcasting and copyright

There are essentially three aspects of copyright relevant to creators of history podcasts: copyright as a danger to be avoided in the use in their work of other authors' materials, copyright as a barrier to accessing works needed to produce their works and copyright as a means for controlling the sharing and use of their own work.

On copyright, although participants expressed lack of knowledge and discomfort about the topic of intellectual property rights, they nevertheless gave thoughtful answers. The questions went to copyright both as a concern in using others' work, and as a possible mechanism to protect one's own work; however, few of the participants thought about copyright in the latter, positive way. One participant summarised this sentiment:[90]

> I don't know if I've ever thought of copyright in a positive sense of "it can protect me," "it can do something for me." I think I've only ever thought of copyright as . . . preventing me from doing something, or, in terms of other people, has actually had legal ramifications for them because some big scary faceless company has come after them because they accidentally put one minute of their music into this YouTube video or something like that. . . . I've never really thought of copyright as a positive thing for me.

[89] Interview segment M6.
[90] Interview segment R10.

Predictably, the responses to these questions around intellectual property often blurred the lines between copyright and other areas: for example, the podcasters' citation practices often came up in reference to books and other textual resources used in the writing of episode scripts.

2.4.1. Use of other authors' materials

Participants described differing practices with respect to using copyrighted material in the production of their series. Overall, participants evinced a somewhat vague sense of where the line was for copyright infringement, but were often anxious about the possible consequences of crossing it. Some sought permission for using materials they understood to be copyright protected, others considered their uses to fall under some form of fair use or fair dealing, relied on norms of citation and attribution common, such as those familiar in academic contexts, or considered that their small footprint as creators would mean legal consequences were unlikely.[91]

One of the interview questions asked what if any materials by other authors the podcasters used in the production of their shows. The main categories of works that they used were:

1. primary and secondary historical textual sources used as research materials;
2. images, sometimes of primary historical sources such as historical figures or artifacts, usually used for podcast "cover art";
3. music, most often used for intro/outro to podcast episodes, but sometimes also for mid-episode; and
4. other audio recordings such as speeches, sounds (e.g. of instruments), etc.

The participants were alive to the possibility of copyright issues arising from the use of visual or audio works.[92] Although the sample was small, the creators with past experience in copyright industries seemed to be particularly attuned to copyright issues.

Textual sources were often approached with academic citation in mind as a standard, albeit a standard that participants largely did not feel they could realistically meet given constraints of the medium. One participant said of referencing that "if I did proper, full academic referencing in my script I'd be dead before I got an episode out. But I make sure that I do

[91] Interview segments P1, P5, P6, P7 and P9 (discussing relying on fair use and/or low profile of podcast).
[92] All of the interview segments discussed copyright issues.

reference those sources at some point so people know where I've got them, who I've used."[93] The citation practices of other participants included listing sources with each episode, or on a single page on their podcast website. Norms around quotation and citation were seen as more relevant to the use of textual sources than copyright law since such use would likely fall under some regime of permitted uses of copyright works like fair use or fair dealing.[94]

Textual sources were also the most important to the creation of podcasts, while visual and audio works were largely seen as supplementary. Most podcasts have introductory music, but as several participants indicated, it is not particularly difficult to find royalty-free or open license music, or even commission music for this purpose.[95] Cover art for a podcast is necessary and can be a valuable part of the branding; however, similar open license content is often available. Additional audio was used demonstratively, such as the sounds of musical instruments or historical speeches—neither use absolutely essential to the production of a history podcast. However, ultimately, without access to history writing—books, articles, and other sources—it is not possible to produce a history podcast. This introduces the second way the copyright system is relevant here: mediating access to materials.

2.4.2. Access to materials

Five participants discussed access to materials as a barrier for history podcasts. One of these participants described how, without access to university resources, "getting access to online papers and like JSTOR or anything along those lines [requires] a huge financial investment" which would be unrealistic for many would-be history podcasters. University access effectively lowers the barrier to entry, as noted in one response:[96]

> [W]e're lucky in the sense that [in our first location] . . . I had alumni access to uni libraries, and here all the uni libraries are free for regular citizens to go into. . . . [W]e get a lot of online sources from my alumni stuff and we get lots of real physical things for free here. So effectively we haven't found it a problem. And that's why we haven't done anything like a Patreon program . . .

[93] Interview segment P6.
[94] See Lionel Bently and Tanya Aplin "Whatever became of global, mandatory, fair use? A case study in dysfunctional pluralism" in Susy Frankel (ed) *Is Intellectual Property Pluralism Functional?* (Elgar, Cheltenham, Gloucestershire, UK, 2019) 8 (arguing that quotation is a mandatory exception under Berne Convention article 10(1)); Tanya Aplin and Lionel Bently Global Mandatory Fair Use (Cambridge University Press, Cambridge, UK, 2020) at 168-76 (discussing the possible role of custom and norms in defining fair practice for the purpose of defining the quotation exception).
[95] Interview segments P7, M13, P13, P4 and P9.
[96] Interview segment M9.

Whereas for podcasters without this kind of access, sources can become a major cost: one podcaster just starting out described books as the biggest financial cost to their podcast, having spent "over [US$]200 on [nine] books".[97] Other participants cited the cost and difficulty of accessing academic articles as a major barrier:[98]

> One of the [barriers] that I've come up against is, again somewhat specific to history is what is actually out there in terms of what people have researched . . . some of it is quite inaccessible . . . it's all hidden behind all different sorts of paywalls depending on who you go looking for. So that's quite a big barrier, trying to find something that is easily accessible, [and] doesn't cost me $300 per year to try and access this one article I want for this one very specific thing.

Another participant discussed the pricing of academic research texts being tailored to academic institutions:[99]

> [F]or instance, a lot of the research . . . the books, the book sellers and retailers, things like the Cambridge publications, those are not meant for someone like me to go out and buy, it's really quite difficult. They're priced at this insane price that's only supposed to be for academic institutions.

However, the same participant described the situation improving in recent years due to responses to the COVID pandemic and other developments:[100]

> [The academic database JSTOR] because of COVID . . . redid their policies where you can go and check out a bunch of articles a month. Didn't used to be like that, though, it used to be a lockbox if you didn't have an institutionally based account. And then the Internet Archive, in the last couple of years that has become this treasure trove of free books that you can just get legally, and you check it out like you would from a library, and it's just amazing. But it's always been whack-a-mole in terms of trying to find sources that are affordable to a person of no academic means.

While the problem of access to materials is an issue specific to history podcasts, it is intimately tied to the copyright system and how academic publishers extract value from copyrighted works. There also may be something self-defeating here: as one participant (an academic historian) noted, talking about their use of academic works, "scholarly texts don't rake in the cash to such a degree that some minor quotation would infringe on any profit-making. Quite the contrary, it usually acts as an advertisement for a whopping one or two other people who maybe buy the book."[101] Quotation of works is a different issue than

[97] Interview segment M10.
[98] Interview segment M1.
[99] Interview segment R13.
[100] Interview segment R13.
[101] Interview segment P7.

access, but for the interviewees without access to academic libraries the point made by the interviewee above, not being able to access a work implicitly means being unable to quote it.

2.4.3. Control of works

With respect to relationship with audience and unauthorised sharing, controlling distribution was not of much concern for the podcasters in this group. Seven participants expressed that being shared and spreading their work around was good for their growth and in some instances a part of why they got into podcasts in the first place.[102] One aspect of this was specific to podcasts being a spoken medium where the creator's voice is immediately identifiable: as one participant put it, "I think I would probably be a lot more concerned if it wasn't my voice talking into a microphone". Three participants described being more protective of their scripts or episode transcripts than of the episode audio because of this.[103]

One participant had actually experienced having their podcast audio stolen and made available in an app: "I don't know if they were monetising it, I don't remember if the app was free or how much he was selling it for. But just the very notion that it was there, that it was my stuff, that it was really just a rip off of my material. Whether or not they were making money was beside the point. I just didn't like it."[104] (This podcaster was able to get the app using their content taken down by contacting Apple.) Three participants echoed the sentiment that, while they did not mind if their work was shared widely, they wanted credit.[105] For some participants this was rooted in a belief in free information and open access, as one participant noted, "since I don't monetise the podcast, I'm not interested in clamping down on use of it that might somehow evade a profit structure. If people want to disseminate it, that's fine. I believe in the free and open dissemination of knowledge."[106] The trade-off with easy sharing highlighted by some of the participants' responses is the unknowability of whether their work was being shared or copied somewhere on the internet—that such copying was perhaps inevitable and impossible to control. Ultimately, however, this seemed to be a trade-off that they had accepted as part of what podcasting is.

[102] Interview segments P5, P11, P9, P10, P7, P6, and P1. One participanted expressed that they "joined the medium because it was free and open, I regularly get other podcasters and let them do a guest episode so they can get access to my customers. It is important to me that there is an element of openness here": interview segment P9.
[103] Interview segments P4, P9 and P10.
[104] Interview segment P13.
[105] Interview segments P1, P5, and P9.
[106] Interview segment P7.

Some participants expressed concern about losing control with respect to business relationships either through issues with "shady" companies or advertisements or general trepidation about being beholden to advertisers.[107] Talking about free hosting options for podcasts, one participant said "the problem that I have with having a free host, just like using a free [website host] is that whole idea that when you're not paying for the product you become the product. So they put ads in that you can't control, and all of that, which I would be very concerned about."[108] For another participant, this concern was present for podcast networks as well: "I have talked to people who have joined networks and then they do lose a certain amount of control on their own copyright and what the episode has to contain and that sort of stuff".[109] In such a situation, it would seem that rather than copyright emerging onto the scene to protect creators, it is instead used as the legal vehicle to disempower them by signing away control through license.

Other salient aspects of control were around political issues, for example sensitivity to politicising history. One participant described being "very aware of the politicising history and especially the right-wing politicising history" and how they shaped the content of their show to try to avoid these issues.[110] Another participant described being careful about their promotion relationships for this reason: "Potentially, a grounds for conflict for me, say with medievalists, in general, would be if they were, what you might call toxic medievalists. In other words, white nationalists, Christian nationalists, this kind of pro-Crusade nonsense which is in fact a very strong contingent of medievalism, or interest in the middle ages. I will have no business with them at all."[111]

These examples indicate that, to the extent that the participants in this study wanted to control their work, their reasons for wanting to do so were largely directed at reputational and integrity concerns rather than maximising the income from their podcasts. Further, where control was exercised, it was through the mechanisms provided by online platforms. These

[107] Interview segments M1, P11 and R12. One participant described how advertising platforms make big promises to podcasters they are attempting to court: "They try to get you, it's very competitive! The 20, 30 big platforms out there, they all make it sound like you're going to be richer than Elon Musk, and it's very opaque how you make money. You just see the dollars going up every day, but you have no idea what it's coming from, what you're being paid, how many listens you're getting. That's my only issue with these guys is they're very very opaque": interview segment R12.
[108] Interview segment M13.
[109] Interview segment P11.
[110] Interview segment P12.
[111] Interview segment R9.

findings are revealing of where copyright sits in podcasting and other digital creative economies.

2.5. Case studies

This section concludes the interview results with a set of three case studies drawn from individual interviews. These case studies provide a more holistic picture of the motivations and experiences of some of the podcast creators interviewed for this study. They are valuable to consider in this context to extract how different perspectives arise from similar structural positions. They cover M4, an early podcaster who grew a large audience and whose changing life circumstances were an important part of their decision to dedicate more energy to podcasting; M1, a newer podcaster who was able to find a niche for their own work, and who was particularly attentive to the differences between history podcasts and other types of podcasts; and S1, another early entrant into podcasting who has expanded to doing other independent digital and non-digital projects related to their series.

2.5.1. Case study: M4

While the interviews generally supported the contention that the use of platforms for hosting and monetisation are widespread in podcasting, the medium's openness means that some creators go their own way. One participant, a well-established podcaster with a large audience, monetised their podcast through a bespoke donation and membership system hosted on Amazon Web Services.[112] However, in this case the decision was made before the current platforms were available. Their major revenue streams were donations, memberships, and advertising/sponsorships. As an inducement for members, they offer bonus episodes of their podcast:[113]

> I offer 90 minutes of new podcasts every month for members, and also they get access to a library now which is quite substantial because I've been doing it for four years. There's about 80 hours' worth of podcasts. So literally you could probably die of old age before you get to the end of my podcasts, if that's something you want to do.

[112] Interview segment M4. Amazon Web Services is a general cloud computing platform: see "Cloud Computing Services—Amazon Web Services (AWS)" Amazon Web Services, Inc. <https://aws.amazon.com>. It is worth noting that even a custom solution here requires relying on a platform, albeit one higher in the "stack". Podcasters going this route would also have to deal with as payment processors and other administrative burdens.
[113] Interview segment M4.

Their hosting was through a podcast company, which provided support in securing advertising and sponsorships:[114]

> [T]he other major revenue stream is advertising that [company] organises, and sponsorship that [company] organises. And that's another very good thing, is that there are these organisations that, you know, I could never do that on my own, I could never phone up people. It would just be impossible and I would never get it. I would never have the time. Sales is hard.

This participant described the growth of their podcast as something which serendipitously fit with their life:[115]

> [P]eople started to listen [to the podcast], and it took quite a while for people to start to listen, in any number. Two or three years, probably. But my expectations were always very low . . . . So, I kept going. And I had—there's a word I'm searching for—I had the space to do it. I was working in a job, where, I was . . . either completely, madly busy, or actually [] had nothing to do. It fit into my life, if that's the right phrase.
>
> And then I built up quite a listenership, and I got made redundant in 2016. By the time I got made redundant, I had an audience and I thought, look, I was tired of the corporate life. I had a fantastic time, but 30 years is enough of anything, really. . . And so I decided that look, I could maybe have a go. I had some redundancy money because I'd been there awhile. So, I had space. I could eke that out for 18 months, I though. So I had a chance to try and do it myself.
>
> And by that stage, widgets had grown up, and hosting services were much more sophisticated, and they were offering better deals. So, I had the opportunity, I had the time and space, I had the money, and it worked. So it became about money later, it became about my life. But it never stopped being my hobby. So I am in that—I hate to sound smug—but I'm in a position where I'm making money from what I love doing.

They felt strongly that their success was in part because they got into podcasting early, and that the present state of podcasting requires new entrants to have or join an existing "brand" if they want to make money out of it:

> But of course the podcasting world has changed, people are no longer in that position. If you're a small independent, forget making money unless you're incredibly lucky. You now go in if you're part of a network, or if you've got a brand name in any way, you know, you get corporations getting involved. The market has changed out of all recognition. So now I think you can only go into it if your expectations, again, are very low, and you think, this is a hobby, this is something I want to do for the love of it, and if some people listen that's great, is my view.

2.5.2. Case study: M1

Newer podcasters described facing a more competitive landscape starting out. This participant found a moderately sized audience at the time of their interview, within a few

[114] Interview segment M4.
[115] Interview segment M4.

years of starting their series. They described how finding a "niche" was important to growing their audience:[116]

> [QUESTION: in terms of growing a following, have you faced any particular challenges in the current podcasting environment?] There's a lot of stuff out there. But I have quite thankfully, what I think is reasonably well. Because . . . I identified a gap in the market. And I've had other podcasters come to me, another podcaster I'm quite good mates with is a movie podcast. And they are a dime a dozen when it comes to even just, movie review podcasts and all that sort of stuff. And so, they said to me, "how have you been doing so well, I've noticed your numbers are really good, what's going on?" And I said honestly I haven't really been doing anything which I would say is different, I've just hit my niche and that's where I am. . . .
>
> But it is still difficult to grow, I have noticed my numbers have somewhat stagnated over the last year, which in some ways is a bit like, oh jeez that's kind of bad, but also in other ways, it's like a lot of people particularly since COVID have said that their numbers have dipped somewhat.

A relatively active promoter of their podcast, this participant mentioned appealing to other podcasters to promote their show, using Facebook ads, and even getting their series on an airline's inflight entertainment system. However, while this participant described having "a mild amount of success" with Facebook ads, they also related a difficult situation arising this promotion:[117]

> [I] advertised one of my early episodes which was a dramatic retelling of . . . . a[n Indigenous] myth, which, that wording in particular is quite key to what happened. . . . And so in the episode I call the story [described above] a myth. And some people took offense to that, saying it's not a myth, it's real it's what we believe in the same way that I guess a lot of people take issue with if you call Adam and Eve from the Christian Bible, if you call that Christian mythology, a lot of people take issue with that as well.
>
> So people took a similar issue with that as well, because to a lot of [Indigenous people] that sort of sits in the same space. So a lot of people took issue with that, and that's when I kind of realised, maybe I should be a bit more specific about who I'm trying to target, I should try and do something a bit different here. So that was one of the big problems I had with Facebook, was it, perhaps it was the way that I did it, or not, not sure, but I cast my net perhaps a bit too wide, and it perhaps reached people who it shouldn't've. And perhaps my wording at the time, again it was early on in the podcast, so that wasn't something I was perhaps aware of that I should have been more careful with my wording there.

They had particular concerns about advertising given the specific content of their series:[118]

> [Advertising] for me is a big no-no. . . . [I]t's specific to the area that I'm in and the thing that I'm trying to do, which is education rather than entertainment per se. . . . [F]or me, particularly when I'm trying to tell stories as a [white] man, telling stories of [colonisation of

[116] Interview segment M1.
[117] Interview segment M1.
[118] Interview segment M1.

> Indigenous peoples] . . . and by the way hey do you want to buy some stuff, didn't gel well with me and so there was that kind of moral thing.

While they did not monetise through ads for principled reasons, they run an apparently successful Patreon crowdfunding page which they set up to offset the costs of production:[119]

> [QUESTION: How do you make money off of your podcast?] Yeah, well, the intention was not to. But I have a Patreon which was initially set up to alleviate the costs . . . . I started out with a Blue [Yeti] Snowball [microphone], and then I eventually moved onto some slightly more upmarket microphones. . . . Patreon was a way to alleviate that.
>
> But it's actually grown beyond that point a little bit, where I actually do make a little bit of money from it, because I actually don't spend all that much money once you've bought microphones and you buy that odd fifty dollar textbook or whatever. So yeah, that'd be the main way I do it. I don't think there's any other—oh no, I do have a merch store, which I keep forgetting about because no one ever buys anything from it. So I kind of gave up on it. It was an interesting experiment, but as it turns out that's not what people are interested in.

They described how they chose to monetise through Patreon:[120]

> [The choice of] Patreon itself was mainly because it was popular, I kind of knew how it worked, and I knew a lot of other people were using it as well. I scoped out, you know, asking people what do you think, what have you done before. And most people said Patreon because it's easy, it works, and there are other options obviously but yeah Patreon was just like, set it all up and it just kind of goes.

2.5.3. Case study: S1[121]

While some podcasters find themselves in a niche of their own, others, such as this long-time history podcaster, have found the space growing increasingly crowded:

> [QUESTION: What is the most difficult part of podcasting?] I don't know that there is a difficult part, I wouldn't do it if it was difficult. Life's too short to do difficult things. . . . No, I think something that's difficult, could be difficult if your mindset was a little bit different now was just standing out. Now there's six or seven other shows [on this topic] and it's hard for me to not go into the rabbit hole of comparing and thinking, like oh I did that first, look at them they're copying, and all that kind of stuff. But you can't go down that rabbit hole and everybody's different and there's no other [participant's name] and that's all there is to that.
>
> But I could see if you were somebody especially in a more crowded field, of like personal development or coaching or something like that, where there's a hundred gazillion shows like standing out might be difficult. But I don't really ever see that because I just think you have to do what you do because you love it, and people will find you or they won't and you should keep doing it because you love it. And that's why you should do it.

[119] Interview segment M1.
[120] Interview segment M1.
[121] This case study drew from two separate interview segments in the original schema; to preserve anonymity the special code S1 was assigned for this section.

This participant, like other interviewees, was motivated in large part by personal interest in the subject area their podcast covered. However, for this podcaster and others, this did not preclude making money off their work. Along with Patreon subscriptions and ads, this participant highlighted another source of revenue: the sale of merchandise and other materials more or less related to the podcast. This participant described how they make money off of these activities:[122]

> I also make money in a lot of other ways that are related. So I have a shop, a merch shop, and it's not on—I actually do it myself so I make money off it. The people who do like Teespring and stuff you make like $2 off of every t-shirt, so I actually researched how to do it myself and I host it on Shopify and I own the infrastructure, I'm really big on owning the infrastructure that I use, rather than using the free stuff and all of that because I want to control everything because I'm a control freak. . . . And I have events, so I do [a convention] which is a three-day event . . . so I make money off of that, in theory, although that just kind of barely pays for itself. But those are my revenue streams.

These other revenue streams included an annual merchandise sale organised through an online (one-off) crowdfunding platform that was described as being quite successful at fundraising. This participant also engaged in other distribution channels aside from podcasting:

> I have a YouTube channel, which is not huge, but there's that, I think it has about 2,000 subscribers or so, and I do a daily little [show] that goes out on that. And that's, the [show] started out as an Amazon Alexa skill and it was just on Alexa for a long time. So that's a different, I don't know if you'd count that as the same kind of media or not. But then since I was doing it anyway, why am I just putting it out here to Alexa where like 50 people listen to it, I might as well put it in all the other places too so I started a feed with it.

Despite these other projects, this participant still described themselves as first and foremost a podcaster:[123]

> [QUESTION: Would you say you primarily identify as a podcaster?] Absolutely, absolutely. Yeah not even a question about that, I'm a podcaster. And it's funny because again there's a lot of other [topic] podcasts but they all started out as people who were [topic] bloggers and now they've gone into podcasting. And for me, I just like to talk and tell stories. And I've been a blogger, but I haven't been a [topic] blogger, and I am a podcaster who just happens to podcast on [topic] history, but I don't consider myself a [topic] person, I don't consider myself a [topic] blogger, I don't consider myself a [topic] historian, I don't consider myself any of that stuff, I'm a podcaster.

[122] Interview segment S1.
[123] Interview segment S1.

This participant also discussed how they used Facebook ads to promote their podcast-adjacent projects, and expressed ambivalence about working with a company they described this way:[124]

> I personally believe that social media is destroying the fabric of society, because it sucks and there's no nuance and you can't have any conversations you're either pro or against, or bad or good and I really really think it's terrible and I could go off for ages on that. . . . I actually had a group that had 8,000 people and I closed and archived the group, I kind of went on a little rant about it, because I was like this is just like, there was, over the summer there was a [historian] who said some really stupid things and got cancelled for it, and the amount of conversation that was going on in my group about it, oh, and the name calling and the you're a racist, and no you're a racist, and you're this, and I was just like, my job is not to monitor all y'all talking, that's not why we're here, so this is destroying society, I'm done with this group and I archived it. So there was that. But I kept my page just for credibility, really. So I have a [virtual assistant] who handles that.

However, they found that Facebook ads work for their purposes better than search advertising:[125]

> I'm a bit of hypocrite, and I'm trying to figure out how I can square this as my next [fundraising project] time comes up because I have made a lot of money and built a lot of business off of Facebook ads, and I'm really struggling with this because I feel like it's really out of integrity for me to be doing Facebook ads at the moment because I'm so anti-Facebook at the moment. And it's really hard because Facebook ads work, when you do them right . . . I've done well with my Facebook ads, so I feel like I'm really struggling with that. Because once a year I do this big [fundraising project] I do a ton of ads, and it's very successful. So there's that. And I don't know how I'm going to do that this year.
>
> [QUESTION: So you don't really care for Facebook, but you still have use it because there aren't alternatives?] No, I used Google AdWords but the big difference, and this is why Facebook ads work, is that Facebook shows your ad to people who don't even know that they want your product but they want your product. And I've gotten so many comments on my ads, and because I do my ads well and they're targeted well, I've gotten so many comments on my ads with people saying like, "How did I not know that this was a thing?" and "Oh my god this is why I love Facebook ads." They go to the right people and that's why they're successful. Whereas with Google AdWords, somebody has to be searching . . . maybe somebody will search [topic] gifts, but if they don't know what to search for they're not going to search for it. So that's why Google AdWords aren't as successful for me, and this is why I'm kind of talking myself into going back to doing Facebook ads because they go to the people who are interested in your products but don't know to search for it. So, yeah. It's a real deal with the devil which I'm not sure what I'm going to do this year.

3. Copyright and business models in podcasting and beyond

Some themes can be seen to emerge from the interviews described above. For the interviewees, a changing and consolidating podcast industry did not necessarily lead to an increased salience of copyright law in their own day-to-day work. To the extent that

[124] Interview segment S1.
[125] Interview segment S1.

copyright law did affect them, it was as a more or less vaguely understood danger for them as creators rather than a boon. To be sure, a positive, protective role for intellectual property may be more prominent in other contexts within podcasting, particularly at the top of the market for "blockbuster" podcasts.[126] This suggests that the role for copyright in podcasting depends on two things: how much emphasis there is on creating work for the market (i.e., intensity of commodification), and whether the business models in use require it. Independent podcast producers may have little need of copyright for their subscription models, and both independents and bigger publishers in podcasting rely on ad-tech for monetisation, where the reach of podcasts is more important (commodifying audiences). It is worth emphasising here that ad-tech and subscription models are both bigger than podcasts: most of the free internet is based on ad-tech, and subscription models are used by, on the one hand big library services like Netflix and Spotify, and on the independent creator side by platforms like Substack and Twitch, as well as Patreon, which has media other than podcasts. This is where podcasts overlap with a broader digital context.

3.1. Three digital media business models: Ad-tech, content exclusivity, and subscriptions

Out of the discussion of the podcasting industry at the beginning of this chapter and the interviews, we can identify three related models or strategies being operated by podcasting businesses and creators: advertising technology (or "ad-tech"), content exclusivity, and subscriptions. These three models' relationship with commodification could be shorthanded as, respectively, commodifying *audiences* (ad-tech), commodifying *creators* (content exclusivity), and commodifying *works* (subscriptions). This should not be taken too far—clearly each model requires audiences, creators, and works as parts of the transaction—but this framing can help make clear what each model is doing. Ad-tech and subscriptions both inherently involve monetisation: ad-tech is a model where advertisers pay to access audiences, while subscriptions require audiences to pay to access works. Content exclusivity does not imply a monetisation scheme, it only draws audience attention, to be monetised through one of the other two models.

The similarity between content exclusivity and subscriptions is apparent in the accompanying chart, but they are distinct because content exclusivity does not imply paid subscriptions: for

[126] See Nicholas Quah "Podcasting Is Just Radio Now" (22 September 2022) Vulture <www.vulture.com> (describing the phenomenon of blockbuster podcasts).

example, the prominent content exclusivity deal which brought the *Joe Rogan Experience* to Spotify as part of their free service.[127] Likewise subscriptions do not necessarily imply content exclusivity to a particular user-side platform. Donation or subscription platforms like Patreon and Substack allow independent creators to make private RSS feeds available to subscribers through whatever compatible podcast listening app they prefer.[128]

While the models are distinct, they are not mutually exclusive. As already described, the content exclusivity model in fact must rely on one of the other two models if the podcast producer wishes to realise a financial return on the work. Subscriptions and advertising can co-exist as well, though some podcasters offer "ad-free" versions of their podcasts as a benefit for subscribing listeners.

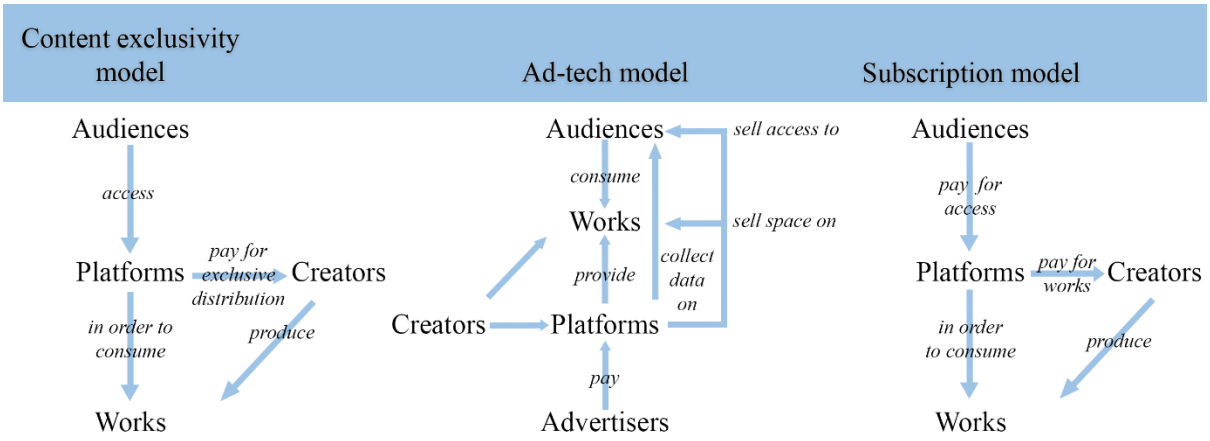

Chart 2. Digital media commodification models

These models are defined in terms which make them potentially portable across other digital media contexts. Ad-tech and to a lesser extent subscriptions are ubiquitous across the Internet: Google and Facebook's online display advertising duopoly has been written about extensively, while various online platforms, creators and media companies rely on subscriptions.[129] Content exclusivity deals can be found in other digital media like

[127] See Strauss, above n 16.
[128] See Patreon "Creativity powered by membership" <https://www.patreon.com/c/podcasts>; Substack "Substack for podcasts" <https://substack.com/podcasts>.
[129] See Tim Hwang *Subprime attention crisis: Advertising and the time bomb at the heart of the Internet* (Farrar, Strauss and Groux, New York, NY, 2020); Shoshana Zuboff *The age of surveillance capitalism: The fight for the future at the new frontier of power* (Profile Books, London, 2019).

livestreaming.[130] These appearances are not definitive proof, however, and these models would likely require further elaboration or variation to fit other digital media contexts.

The three models introduced here should not be taken as a comprehensive account of how podcasters make money. Rather, they sketch out three dominant models for commodifying podcasts as creative works in themselves.[131] An interview-based study conducted with podcast creators helps to elaborate on how these models work in practice.

3.2. Podcasts and advertising

The increasing availability of dynamic ad insertion for podcasts over the latter half of the 2010s was one of the most significant changes podcasting saw in that period. This added another monetisation option for smaller podcasts for whom it would be impractical to negotiate sponsorship deals with specific advertisers. Sponsorships (meaning advertisements read by a podcast host rather than pre-recorded audio from an advertiser) continue to be relevant in podcasting, but dynamic ad insertion has made podcast advertising more like web advertising.

The online ad economy has come in for scrutiny elsewhere, with a number of concerns driving recent scholarship and regulatory attention. These include Facebook and Google's effective duopoly in web advertising; the privacy implications of targeted ads; and insufficient vetting of online ads for fraud, propaganda, and misinformation.[132] Podcasting has seen its own period of consolidation but as yet nothing like the market concentration in web advertising.[133] While some of the interviews for this study highlighted the much more granular detail Spotify's podcast platform provided about audiences, a backlash against targeted podcast ads has not yet materialised.[134] Some podcasters in the study were, however, concerned about the content of ads and reputational risk.[135]

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[130] Before Microsoft shuttered the service in July 2020, the video game streaming website Mixer had an exclusive contract with the popular streamer Tyler "Ninja" Blevins—an attempt to shore up the market share of that service by poaching the streamer from his previous platform, Twitch: see Jacob Kastrenakes "Ninja returns to Twitch for first time since Mixer shut down" (8 May 2020) The Verge <www.theverge.com>.

[131] As a contrast, in some instances the intellectual property in podcasts may be valuable for adaptation into other media as well, like television shows or movies.

[132] Hwang, above n 129; Zuboff, above n 129.

[133] See Hunt, above n 13.

[134] Interview segments R10 and R12.

[135] Although some advertising platforms allow creators a degree of control over what kinds of ads to feature: see Spreaker "Make money podcasting easily and consistently" Spreaker <www.spreaker.com> (noting in its frequently asked questions section for prospective podcaster customers that "[a]s a Publisher plan subscriber and you have enabled our revenue sharing program, you have the option to block certain IAB categories ensuring that listeners don't receive unwanted programmatic ads").

Regarding the relationship between advertising and copyright, independent producers who rely on ad-tech platforms for their income still control their works through copyright, but aside from this basic condition, copyright has very little influence in creators getting paid—more important are the relationships between creators and platforms, mediated largely through boiler-plate, clickthrough contracts. On the more commodified side of podcasting, creators' intellectual property rights may be important in negotiating content exclusivity agreements with publishers, but this still affects a small set of podcast creators on the whole. If the concern of copyright law is to get creators paid, the context of podcasting (and perhaps other digital media) requires looking beyond copyright to the relationships between creators and platforms.

3.3. Subscription models: Patronage, Netflix or something else?

Whether it would be accurate to describe subscriptions as a "patronage" model depends on what the most important characteristic of such a model is. To start it is important to note that different podcasters use these models differently, by charging per-episode or per-month (or other time period), and by offering different kinds of rewards (e.g., ad-free versions of regular episodes, "bonus" content of various sorts). In the interviews, some participants described their work as a library—for which subscriptions may be the price of access, at least for bonus content.[136] Subscriptions which directly support creators are used as a model in other digital media as well: the live-streaming platform Twitch is one example, as is the newsletter platform Substack (which also supports podcasts).

If there is a fundamental distinction between subscriptions as a kind of patronage and subscriptions of the sort Netflix or Spotify sell, it is an ongoing relationship between the audience and the creator: the payments go directly to the creator (albeit with a cut taken by service providers), and it is up to the creator to cultivate and maintain their audience. This is clearly distinct from the kinds of relationships creators and audiences have with library services like Spotify or Netflix. Simply put, there is a lower degree of intermediation. It is also arguably less an impersonal and transactional market relationship: several podcasters talked about their relationships with their audiences in terms that support this interpretation.[137] However there is a question of scale—whether "patronage" can really scale to audiences in the hundreds of thousands or more.

[136] Interview segments M3 and M4.
[137] See s 2.2.3 above.

Subscriptions suit podcasts in particular because they are a good match for a medium based around the regular release of content that is, at the level of an individual episode, fairly easy and low-cost to make. An independent producer like those interviewed for this research can start out making very little off their work until they build an audience. Continuous crowdfunding may however, put a particular kind of pressure on creators to be continually productive, as well as potentially to focus more on paywalled content at the expense of the free content.

This is not, however, the only way to make a podcast. Productions with greater costs—such as investigative journalism podcasts like the watershed *Serial*—require a degree of capitalisation to produce a season of content before releasing it. This serves to highlight different models within podcasting and why they exist. It suggests that intellectual property rights would be more important in podcasting if the models were different and more like the kind of commodification copyright favours.

3.4. Takeaways for copyright and digital creative economies

How do history podcasters and other digital creators view and interact with copyright law? This chapter has covered the barriers it presents to accessing historical materials and how it creates risks in using audio and visual materials. These are mediated through platform policies, particularly YouTube for audio, which may not have the flexibility provided by copyright for fair use/fair dealing or other permitted uses. These negative aspects might lead to a chilling effect and conservative use of other works. On the other hand, copyright's positive role in providing control over distribution is not necessarily of interest—rather, these independent creators seem to generally accept the trade-offs that come with letting their work go out in the world to be shared broadly. Where enforcement is needed, it goes through platforms like Apple's App Store or YouTube. Similarly, it is the technological structure of podcasting rather than copyright which dictates that wide distribution is a fact of the medium: publishing to a single directory allows an untold number of listeners to follow a podcast through their podcatcher apps. However, that structure is not an immutable fact, as podcast exclusives on platforms like Spotify and Stitcher show.[138]

Content exclusivity can work to draw users to platforms and is based around contractual relationships between publishers and creators which very likely address licensing of

[138] See section 3.1, above.

copyright. But the publisher-platform distinction is not borne out on the facts in podcasting: platforms like Spotify and Stitcher are also publishers to exclusive shows, driving users into their ad-tech ecosystems and subscription services. Any distinction between platforms and publishers is contingent—and increasingly in podcasting as well as in digitised traditional media (Netflix as film producer; Amazon as book publisher), the distinction is being collapsed.

In general, the participants in this study seemed to be wary about copyright law with respect to works by other authors. This echoes the concerns discussed in previous chapters around the possible chilling effects of overbroad copyright enforcement on user-generated content, for example in the context of YouTube's ContentID system in Chapter Three.[139] Eight participants addressed YouTube in particular: while not a podcatcher app in the sense that it does not read podcast RSS feeds or rely on a podcast directory, podcasts are sometimes uploaded to YouTube because some users prefer it as a listening platform.[140] Podcast creators want to find audiences wherever they might listen to podcasts. As one participant put it: "My opinion is the more places that [my podcast] is [the] more people will discover it. If [YouTube is] a preferred listening platform for someone, I personally disagree with doing it on YouTube, but I may as well put it there it requires no extra effort from me." But as one participant found out, this meant submitting to a more stringent copyright enforcement regime than that prevailing for podcasts generally:[141]

> So I was just going to put [in my podcast] a random [culture] song but it got flagged for copyright on YouTube. And then I was looking up laws . . . and it said it was all fair use, but I reported that to YouTube and they said they'll need to take it down or mute the whole audio anyways because it's some small private guy compared to a big company. So I decided that was a battle I didn't even want to fight and just changed the song I was going to use instead, so I wouldn't have any problems in the future. And just found a free-use song and put it on there.

Another participant likewise noted that they refrained from including audio clips in their podcast to avoid copyright claims on YouTube: "it's a real pain if you use any kind of half-way sounding song from anybody because it triggers copyright even if perhaps it shouldn't."[142]

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[139] See Chapter 3, sections 2.3, 3.3, above.
[140] Interview segments M13, R14, P13, R3, R1, R10, P1 and P10. Two of these, R1 and P10, specifically mentioned issues arising from YouTube's ContentID system matching copyrighted audio on their podcasts.
[141] Interview segment R1.
[142] Interview segment P10.

The scope of copyright protection—what works are protected, who owns the rights, what uses are permitted—was not always clear, and this lack of clarity tends to redound to the benefit of rightsholders who assert maximal rights over their works. Likewise, platforms to a large degree set their own copyright rules with respect to user content. Outside of podcasting, the discourse around a platform "value gap" focuses on how platforms profit off of copyrighted works while benefitting from safe harbour provisions which allow them to negotiate more favourable licensing deals from the publishers; there is, however, another gap where the fair use/dealing rights of individual creators are stymied by overly restrictive platform policies (enacted in partial response to publisher pressure.) Copyright from this perspective looks like a system whose complexity deters smaller players from understanding and asserting their own rights as users, undermining any attempt to "balance" user and creator rights within the system.

With respect to relationships with other podcasters the theme which emerged was collaboration rather than competition. This included the importance of cross-promotion to podcasts' audience growth that was attested to by multiple participants. Neither is the full suite of options for controlling distribution which copyright offers necessary for monetising podcasts in the present (excluding possible future value of intellectual property rights). Donations, subscriptions, and advertisements require at most minimal control of copying (and this ties into the distribution point above). Copyright is effectively superseded by platform rules where enforcement is needed because independent creators have much easier access to remedies through platforms than through the legal system.[143]

Intellectual property rights, copyright as well as neighbouring rights and trade-mark, are important as the basis of publisher-driven production in other media, where they underlie business models and the contracts which determine distribution of benefits between creators and publishers. Rain follows the plough: the existence of intellectual property rights which provide the legal basis for future exploitation of works (e.g., developing a true crime podcast into a television series or a history podcast into a book) mean there is something there for publishers to buy into. This is consistent with the view of copyright as a mechanism for commodification, as advanced in previous chapters. With respect to the history podcasters in the sample, this kind of further exploitation of their work in other formats was not flagged as

[143] In one example from the study where a participant's work was being copied by an app developer, the podcaster appealed to Apple to remove the app: see section 2.4.3, above.

a consideration.[144] Secondary activity like merchandise might engage copyright for example in images for t-shirt or mug prints, but this has little to do with copyright in the podcasts themselves, and was not brought up as an issue by any of the participants.

At the same time, the apparent absence of copyright from the business dealings of the independent podcasters in this study does not imply its complete irrelevance, because copyright still undergirds other media industry structures which podcasting and podcasters have relationships with. History podcasting in particular depends on materials which are copyrighted: history books and general scholarship. Access to these materials is a real barrier, particularly for those without access through a university or similar institution. Further, as discussed above, intellectual property generated in the context of podcasting may be valuable as a basis for other media.

The relationship that emerges from this discussion is that absence of intensifying commodification in this context is the reason for the absence of copyright as important in a positive sense—but copyright as an "invisible fence" preventing the use of others' works is always there. It is with the introduction and intensification of commodity production of creative works that copyright becomes important in this first sense. Copyright arrives to mediate, provide rules and something to bargain over, when distributive conflicts arise in the relationships between creators, publishers, and distributors. But the intensifying commodification that comes with these structures may ultimately end up crowding out independent podcast creators, even if for now the rising tide seems to be lifting all boats.

Conclusion

One trend that podcasting shows in microcosm is the breakdown of the distinction between publishers and platforms. The conflict that seemed to characterise earlier developments in digital copyright—with tech companies representing user freedoms and media companies the incumbent interests of copyright holders—was contingent on their interests running in particular directions. With tech platforms now enmeshed in the content creation business and

[144] Even in history podcasting, though, work in other media formats sometimes follows. Mike Duncan and other history podcasters have gone on to write and publish books which are informed by their podcasts: see Mike Duncan, *Hero of two worlds: The Marquis de Lafayette in the Age of Revolutions* (Public Affairs, New York, 2021); Patrick Wyman *The verge: Reformation, renaissance, and forty years that shook the world* (Hachette UK, 2021). In Duncan's case, his books go well beyond his podcast series, and being based on historical materials it would be difficult to make a case for them as adaptations in copyright law: they share similar ideas but not expression. Where podcasters have a more established "brand" and release other works sharing this, copyright law is likely less relevant than trade-mark.

otherwise tied up with media companies (e.g. Spotify's deals with music publishers), the rhetorical identification of tech companies with copyright freedoms for users and of publishers with getting a better financial return for creators breaks down, whether or not it was ever accurate to begin with.

To conclude, for independent podcasters, it seems that a much more minimal copyright regime would be adequate and perhaps a boon to them. Specific changes like stronger orphan works rules and more definite and enforceable fair use-type provisions would also benefit them. Of course, the copyright regime must serve many interests—what else can we take from this? If copyright isn't for independent podcasters, why not? This ties into the claim that copyright is for a particular form of commodification most amenable to an "industrial" model of creative production which is not what independent podcasters are engaged in. Copyright is not neutral: it doesn't just "incentivise creativity", rather it does so for particular kinds of creativity or ways of organising creative production. This argument will be addressed in more detail in the next chapter.

Chapter 5: The present and future of digital copyright

Introduction

The first chapter in this thesis identified weaknesses in the incentive approach to copyright theory and a set of "structural" critiques which point towards a new approach. The second chapter answered this challenge by articulating a theory of copyright law as part of larger structures that enable the commodification of creative labour. The third and fourth chapters took this approach and applied it—through case analysis in the context of the adaptations of copyright to the realities of the age of digital distribution (Chapter Three) and through an empirical case study conducted in one particular digital media context, history podcasting (Chapter Four). Chapter Three showed copyright in two models for commodifying creative work—uniting the logics of property and innovation. Chapter Four showed copyright at the fringes of a less-commodified domain of creative production in history podcasting, calling into question the incentive rationale for copyright law discussed in Chapter Two in this area of creative work.

With these explorations complete, the present chapter will come to some conclusions on the roles copyright plays in contemporary digital media economies, before looking to the future. This chapter will emphasise that multiple business models in creative production exist which are underpinned to a greater or lesser extent by commodification based on copyright. This is a policy choice, and not a neutral one: it benefits some forms of creative production over others. If copyright is just one element of the structure of creative economies—one whose importance is contingent—prescribing policy remedies to creative economy issues should look beyond copyright as well. And what should those remedies be directed at? This chapter presents a normative case for greater distributive justice within creative economies that would require pushing back against commodification to realise. This pushback could include copyright law reform, but in concert with broader policy attention to the sector.

At the same time, it is important to take seriously possible alternative models which might arise from social and technological developments. This chapter will conclude by considering emerging alternatives, including the blockchain technology of "non-fungible tokens" (NFTs) and the decentralised Internet movement in the context of digital creative economies.

Discussion around these topics tends to be coloured by either excessive hype or excessive cynicism; in contrast, this chapter will attempt to articulate the challenge that new commodification models based on these technologies might pose to existing creative economies, and the conditions which would need to prevail in order for them to be successful as more than mere vehicles for speculation. While business models based on these technologies may well be part of the future of creative economies, solving the knotty equitable and distributive issues brought about by the commodification of creative labour will prove to be more difficult than merely "putting it on the blockchain".

1. Elaborating on the commodification critique and digital creative economies

The two tasks of this chapter are to bring together the theoretical (Chapters One and Two), jurisprudential (Chapter Three), and empirical (Chapter Four) strands of this thesis, and add an explicitly normative contribution. This section will address the first of these tasks by revisiting the platformisation account in Chapter Two and further elaborating on the commodification analysis before re-engaging with critical perspectives on copyright described in Chapter One. The following section will move on to characterise three roles played by copyright in the digital age, drawing on the empirical and jurisprudential accounts of Chapters Three and Four.

Chapters One and Two elaborated, respectively, a structural-relational approach, and a framework for understanding copyright law as a mechanism for commodifying creative work. These are two steps in the same theoretical project. Chapter Three moved on to examining instances of copyright law-making through this theoretical lens. The commodification framework provided the tools to understand two important supreme court-level digital copyright cases of the 2010s, in which platforms and publishers contested the distribution of benefits from the copyright law regime. While direct representatives of creators and users had some input in these decisions (such as through the Canadian collection society SOCAN), the constraints of judicial decision-making meant that distributive questions were not addressed head-on, unlike in the (admittedly flawed) European Union Copyright Directive.

Chapter Four moved onto an empirical study involving independent history podcasters. This chapter made use of the theoretical framing of Chapters One and Two by showing the structural elements of podcasting as an industry, including the technologies and platforms which it relies on, as well as how creators in this medium relate to other elements within that structure: how they came to be a part of it, how they interact with it on a day-to-day basis,

and why they continue. Chapter Four posits that the indifference or antipathy shown by independent creators in copyright as a positive measure to protect and incentivise their work is connected with less of an interest in commodifying creative work, supporting the contention from Chapter Two that copyright and commodification are intimately linked.

The connection between the subject matter of Chapters Three and Four is less direct, but the discussion of the development of digital copyright law in Chapter Three former provides important context for the on-the-ground experience of podcasters in Chapter Four. Neither of the judicial decisions recounted in Chapter Three dealt directly with podcasting; while the Supreme Court of Canada's ruling on the scope of fair dealing in *SOCAN v Bell* extending to song previews on a commercial digital music storefront might have some bearing on podcasters, it is difficult to see any direct effect on the industry.[1] The United States Supreme Court's judgment in *ABC v Aereo*, concerning digital retransmission of broadcast television, is yet more remote.[2] With respect to Article 17 of the European Union's Directive on Copyright in the Digital Single Market, there may be some knock-on effects to podcasting in that YouTube—a major target of the legislation—is a platform which many podcasters use to host their work, secondary to regular podcast feeds.[3] If the implementation of the Directive leads to changes to the platform's ContentID system for identifying copyright-protected music and allowing rightholders to take take-down or other actions with respect to it, it could expand the effective scope of copyright exceptions for podcasters as well. But this is ultimately speculative; what is clear is that both the law-making recounted in Chapter Three and the experiences of podcasters in a changing industry described in Chapter Four took place in the context of the rise of platforms in creative economies.

1.1. Platformisation and digital creative economies

In a broader, environmental sense, the decisions that shaped digital copyright in the 2010s, of which Chapter Three provided a sample, shaped also the digital world that podcasting grew up in. Chapter Two employed the idea of "platformisation" (and various critical responses to it) to describe the broader context of the shift in copyright industries from a model of analogue distribution to digital distribution, and then from downloads to streaming. By the

[1] *Society of Composers, Authors and Music Publishers of Canada v Bell Canada* [2012] 2 SCR 326 [*SOCAN v Bell*].
[2] *American Broadcasting Company v Aereo* 134 S Ct 2498 (2014) [*ABC v Aereo*].
[3] Directive 2019/790 on copyright and related rights in the Digital Single Market (17 April 2019) [2019] OJ L130/92 [CDSM Directive]. Regarding YouTube as a podcasting platform, see Chapter Four, section 2.2.2, above.

time of the *ABC v Aereo* and *SOCAN v Bell* decisions, platformisation was already well underway in other areas of the digital economy.[4] Both of these decisions had real impacts on platforms, however, and speak to their emerging importance in creative industries. *SOCAN v Bell* dealt with online digital music storefronts, which, before streaming began to take over, were in the front line of the digital transition in recorded music. (One of *SOCAN v Bell*'s Pentalogy siblings, *Rogers v SOCAN*, dealt specifically with streaming, and held that streaming the same work to numerous different recipients can constitute a "communication to the public".[5]) The result, that the short music previews provided by digital storefronts were within the scope of Canadian fair dealing, was favourable to the platforms in a distributional sense.

In contrast, the court in the *ABC v Aereo* decision found against the putative platform. However, it does not present as a defeat for platforms generally: had Aereo been victorious, it would have been able to offer its users a product, live-streamed television programming, which would have been in competition with other streaming platforms and at a significant cost advantage. Had Aereo's interpretation of the law prevailed, they would have been able to rebroadcast over-the-air television broadcasts to a wide audience without paying licensing fees for the content. (Unless, as in the cable retransmission cases, the United States imposed a legislative fix such as a compulsory license.)

Finally, Article 17 of the European Union's Directive on Copyright in the Digital Single Market was explicitly directed at platforms such as YouTube. While it certainly represents a major shift towards platform regulation which began to gather steam in the late 2010s, its effects may be to further entrench existing platforms in the digital creative economy. Article 17's exemptions for start-up platforms have been criticised for being poorly targeted and a potential liability for companies which try to rely on them. Further, the Directive recognises in principle the continued importance of platforms in creative economies, by providing for, inter alia, "measures to facilitate certain licensing practices . . . [with respect to] the online

[4] See Raphael Leung, Martin Kretschmer and Bartolomeo Meletti "Streaming Culture" CREATe Working Paper 2020/3 (University of Glasgow, 2020); Wall Communications "Study on the economic impacts of music streaming platforms on Canadian creators" (Canadian Heritage, 2019) <https://www.canada.ca/en/canadian-heritage/> at Table 5 (showing digital download revenues exceeding those from physical media in 2012).
[5] *Rogers Communications v Society of Composers, Authors and Music Publishers of Canada* 2012 SCC 35 at para 52.

availability of audiovisual works on video-on-demand platforms, with a view to ensuring wider access to content."[6]

The story of platformisation loomed large in Chapter Four as well. Participants, many of them long-time podcasters, described how the podcasting industry had seen enormous changes with its growth in popularity and the emergence of new podcasting platforms over the 2010s. These included both a new major player in the user-oriented podcast app ("podcatcher") space—Spotify—and the proliferation of creator-focused platforms for hosting, distributing, and monetising podcast content. Podcasting cannot really be said to have a pre-platformisation phase; by any reasonable definition, iTunes/Apple Podcasts, the dominant podcatcher for most of podcasting's history, is a platform. However, the podcasting platforms which came to prominence in the mid-to-late 2010s opened new possibilities and new avenues for monetising creative work. Spotify adding podcasts opened them up to algorithmic discovery, while their acquisitions of podcast studios and series threatened to begin a process of closing off the historically open environment of podcasting.[7] With the advent of dynamic advertising, podcasting became more integrated into the online advertising ecosystem, while also extending this mode of monetisation to independent podcasters.[8] The technical barriers to entry in podcasting may have never been lower; yet the prospects for success in an increasingly crowded marketplace seem to skew more towards established brands and well-resourced media companies.

The pictures of platformisation presented in Chapters Three and Four differ both because they cover different industries but also because they considered this process in more or less constrained ways. Chapter Three dealt with judicial treatments which were necessarily limited to the facts at hand in a given dispute, as well as part of the European Union's legislative response to platformisation. This response, while more comprehensive and systematic than the judicial decisions, came to a result which generalised across industries in its implementation of copyright reform.[9] Chapter Four considered the more holistic perspectives of individual creators in a particular medium, that of podcasting. What they

[6] Directive 2019/790 on copyright and related rights in the Digital Single Market (17 April 2019), Preamble at para 3 [CDSM Directive].
[7] See Ben Thompson "Dithering and Open Versus Free" (12 May 2020) Stratechery by Ben Thompson <https://stratechery.com>.
[8] See Chapter Three, section 2.3.3, above.
[9] See Pamela Samuelson "Pushing back on stricter copyright ISP liability rules" (2021) 27 299 at 321.

share in common is that they are responses to platformisation; but what underlies platformisation?

In Chapter Three, we saw cable retransmission cases which far predated the digital transition in creative economies, yet which arguably engaged the same fundamental question as *Aereo* and *SOCAN*: how are the benefits from new (uses of) communications technologies to be distributed? Some characteristic aspects of platformisation certainly flow from the particular nature of digital technologies and the Internet, and the near-zero cost of copying and distributing works they enable. But perhaps what connects the platformisation cases with their historical precedents is something more fundamental to copyright law: its role in commodifying creative labour.

1.2. Commodity or commodification? The nature of creative works

One possible objection to the commodification account of copyright is raised by Severine Dusollier: "works are not mere commodities"—which is of course true.[10] Drawing on Jürgen Habermas, Dusollier observes how, with the simultaneous emergence of a market for cultural commodities and the public sphere in the 18th century, "[w]orks become marketable commodities and objects of discussion at the same time, losing their uniqueness or sacred character".[11] She goes on to advocate that "[c]opyright should aim at ensuring the autonomy of the author by giving her the means to control the circulation of works in the public sphere and to obtain revenue from it."[12] This is a normative position on what the role of copyright should be (and which accords with some arguments made later in this chapter). However, the point being made here is that for a descriptive account of copyright law, first we need to understand the commodification process. This means understanding how the copyright law system makes it possible for creative works to be treated as commodities, even if we think they are more than that.

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[10] Séverine Dusollier "Realigning Economic Rights With Exploitation of Works: The Control of Authors Over the Circulation of Works in the Public Sphere" in Hugenholtz Bernt (ed) *Copyright Reconstructed: Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change* (Kluwer Law International, 2018) 163.

[11] At 17. Although neither Habermas nor Dusollier cite Walter Benjamin here, this proposition clearly mirrors one made in his noted 1935 essay on art and mechanical reproduction: "One might subsume the eliminated element in the term 'aura' and go on to say: That which withers in the age of mechanical reproduction is the aura of the work of art. This is a symptomatic process whose significance points beyond the realm of art." Walter Benjamin "The work of art in the age of mechanical reproduction" in David Goldblatt, Lee B Brown and Stephanie Patridge (eds) Aesthetics: A Reader in Philosophy of the Arts (Taylor & Francis Group, Milton, UK, 2017) 66 at 67.

[12] Dusollier, above n 10 at 20.

Another wrinkle to the commodification account arises when we consider that works are not homogenous in the way that commodities are usually understood to be. The "work" as protected by copyright is not the commodity per se—in a given commodification process, what is sold might be audiences (to advertisers), access to works (to users), or even the experience of listening to music.[13] In these commodification processes, the "work" as protected by copyright is not just the product of creative labour but a simplification that hides the things that make creative works unique—technique, passion, point of view—imparted by the creator or creators. The distortions introduced by the commodification process may be what are behind some of the critiqued aspects of copyright.

Unlike homogeneous commodities, works have differing economic value between them.[14] The work that the copyright system does to enable commodification is to establish property rights in (some of) what the economic value subsists in: the original creativity of the work's creator(s)—rights which can then be bought, sold, and licensed. But the reality is this will only happen if it seems to be a profitable work to exploit. In this way publishers can "skim the cream" of creative production. Ultimately it is *because* works are not homogenous that copyright law has a role to play: if works were more like oil or wheat, they would not need to be individually protected.

But have things changed with the move to streaming? Chapter Two described the transition to digital distribution and consumption of creative works taking place over the first two decades of the 21st century. Streaming creative works meant that a fixed "copy" was no longer a requirement for a user to enjoy a work. How does that impact the commodity nature of works? In a 2017 article, Rasmus Fleischer considers the changing nature of music consumption and the substance of the music commodity in the streaming age. The title of his article asks, "[i]f the song has no price, is it still a commodity?"[15] This question can be seen

[13] See Rasmus Fleischer "If the Song has No Price, is it Still a Commodity? : Rethinking the Commodification of Digital Music" (2017) 9 Culture Unbound: Journal of Current Cultural Research 146.
[14] This is unlike physical commodities like oil, although even those can be further differentiated into different grades which are priced differently. Digital storefronts for copyright works also tend to have a set pricing structure: see Jeremy Wade Morris *Selling digital music, formatting culture* (University of California Press, Oakland, California, USA, 2015) at 151 (commenting on iTunes' "99 cent solution" which set the price of tracks on the storefront to just under one dollar). The pricing structure of streaming services sometimes includes a free or lower-cost ad-supported tier--reflecting the parallel commodification of user attention as advertising space: see Christopher Grimes and Anna Nicolaou "Hollywood seeks a cut as Netflix debuts ad-supported streaming" (11 February 2022) Financial Times <www.ft.com>.
[15] Fleischer, above note 13 at 146. See also Liz Pelly, "Big mood machine", *The Baffler* <thebaffler.com/downstream/big-mood-machine-pelly> (noting that "the commodity [for Spotify] is no longer *music*. The commodity is *listening*. The commodity is *users* and their *moods*. The commodity is *listening habits* as *behavioral data*").

as a specific instance of a broader debate around what, if anything, internet platforms produce. If they produce nothing and merely subsist off of rents from providing access to things that others produce, this hints towards a change in the broader economic structure, towards what is sometimes called "techno-feudalism".[16] Jodi Dean, for example, characterises platforms as "destructive" agents which "insert themselves into exchange relations, rather than production."[17] For another prominent scholar of techno-feudalism, Cédric Durand, it is the platforms' users (rather than anything produced by the platforms) who "become a new asset class because they are the raw material through which the tech giants create and control the data that allow them to generate revenues."[18] Fleischer, Evgeny Morozov, and others have argued, however, that internet platforms in fact do produce commodities of different types—whether services, experiences, or user data.[19]

For Fleischer, a song streamed through an "all-you-can-eat" style streaming service is not a "commodity" in the Marxian sense because it does not have a price to the consumer; however, it is still part of a process of commodification.[20] Applying this commodification frame to the business of internet platforms requires something of a definitional leap—one has to go looking for how commodification is happening with the assumption that it is happening somewhere. But this leap can be justified insofar as it is clear that all this activity is taking place in the context of markets: streaming services have become dominant in part because they have convinced consumers to adopt consumption practices in line with their business models, in a market where other choices (physical media and downloads) were still available.[21]

The precise nature of the commodification process has implications for the development of business models where internet platforms dominate. Fleischer observes that price discrimination in works on the consumer side (e.g., by charging different amounts for different songs/CDs) is not possible given the different dynamics of "all-you-can eat"

[16] For two contrasting contributions to this debate see Evgeny Morozov "Critique of Techno-Feudal Reason" (2022) 133/134 New Left Review; Jodi Dean "Same as it ever was?" [2022] Sidecar (New Left Review).
[17] Dean, above n 16.
[18] Cédric Durand "Scouting capital's frontiers" (2022) 136 New Left Review.
[19] See Fleischer, above n 13; Morozov, above n 16; Pelly, "Big mood machine", above n 15.
[20] See Fleischer, above n 13 at 155-56.
[21] Advertising markets based around collection and processing of user data are another example. See Niva Elkin-Koren *The law and economics of intellectual property in the digital age* (Routledge, Abingdon, Oxon [England] ; New York, 2013) at 82 (noting, in 2013, that the "new online intermediaries" based their business models around maximising traffic and selling audiences to advertisers).

subscription models.[22] Looking outside of music, the video streamers including Netflix, Apple, and Amazon, do engage in some price discrimination (for example, Amazon Prime offering "add-on" services, and their existing rental service for content not available on the streaming platform)—nevertheless Fleischer's prediction that streamers would turn to ratcheting up the exploitation of the streaming commodity has been borne out. Taking the example of Netflix, this has come in the form of price increases, cracking down on account sharing, and differentiating service offerings.[23] The former straightforwardly increases the revenue from streaming (as long as it is not outpaced by users quitting the service) while the latter is presumably intended to gain new subscribers who can no longer share with their friends or family, or push users towards Netflix's higher priced plans which offer more simultaneous users per account, better video quality and other features.

We could also extend the Marxian line of reasoning here and contrast the use and exchange value of works as opposed to other commodities. A barrel of oil has a use value because of what it is and what can be done with it. A film's use value depends on its content and the subjective desires and behaviour of an audience. It is therefore much more difficult to estimate exchange value and whether it is enough to profitably produce a creative work: e.g., will a given movie make its budget back? Creative production is therefore an inherently more speculative business because producers (or publishers) can only guess at the possible exchange value that could be realised by putting out a specific work. The other wrinkle is duplication, where copyright plays an obvious role: works that can be duplicated have no effective upper limit on how much exchange value they could generate—as long as there is a business model which can effectively monetise them.

To clarify further, the claim here is not that commodification is exhaustive of copyright's role or nature, but rather that commodification is a deeply important function it serves. This goes back to the economic right/author's right distinction explored in Chapter One: most obviously, the bundle of economic rights that come with copyright are separated from the largely non-economic moral right.[24] Aspects of copyright as an author's right are still commodified, though, for example when an author exchanges control over how their work is

[22] See Fleischer, above n 13 at 158.
[23] See Grimes and Nicolaou, above n 14.
[24] Although where moral rights can be waived by contract (such as in Canada) they may acquire an economic character as part of bargaining, for example if the desired exploitation requires that the right to attribution be waived. See Copyright Act, RSC 1985, s 14.1(1) (setting out the content of the moral right as including a right to attribution and a right to integrity of the work), and s 14.1(2) (stating thata "[m]oral rights may not be assigned but may be waived in whole or in part").

used for payment.[25] In the context of independent podcasting discussed in Chapter Four, copyright played a background role in structuring podcasting distribution, but the terms were set by platforms through terms of service contracts.[26] Where the podcasters discussed the possibility of losing control of their work in the interviews, it was as much facilitated by copyright (through undesirable or exploitative deals with podcasting companies or advertisers) as it was prevented by copyright (through enforcing their copyright against infringing parties). In copyright's structural role more broadly, it is the economic or commodifying aspect of copyright which is the most expressed has the most causal importance in copyright's role in mediating relationships. Commodification is not necessarily incompatible with audience meaning-making as part of copyright law's social purpose—sharing and speaking with common cultural reference points—but its structural impacts may tend to shrink the space for this activity in pursuit of a profit-making imperative.

1.3. Critical perspectives on copyright and the commodification critique

This section will clarify the relationship between the commodification model elaborated in this thesis and a certain set of equality critiques of copyright. While they describe different things, they are complementary; furthermore, this commodification theory is more amenable to intersectional critiques of copyright than law and economics, another basic theory of what copyright does, because commodification theory focuses on relationships.

The "structural critiques" introduced in chapter one can be categorised in three broad and overlapping schools of thought: the expressivists (primarily concerned about the impact of copyright on communication and freedom of expression issues); the structuralists (primarily concerned about the structures of creative production that copyright is part of and the inequities which flow out of them); and the intersectional critiques (primarily concerned about copyright contributing to inequitable treatment of identifiable groups such as language minorities, racialised peoples, women and gender diverse people). The theoretical approach advocated here is primarily structuralist, although it tries to avoid the tendency of copyright structuralism to give too much credit to copyright—as alluded to in section 1 above, copyright is only a contingent part of commodification processes. The commodification critique can be useful to these critiques without displacing any of their main claims or priorities.

[25] See Dusollier, above n 10 at 20.
[26] See Chapter Four, section 2.2.2, above.

The commodification account is fundamentally a structural theory of what copyright does, and is general rather than specific—perhaps more directly comparable to the law and economics account of copyright law than these more specific critiques because it focuses on the system as a whole. What the commodification account needs to be able to do is to provide terms to discuss each of these critiques. In this respect, it is arguably better than the law and economics account because commodification focuses on relationships, where power relations come in. The relational basis of this theory means a focus on inequalities comes in naturally; the structural aspect contributes to a focus on patterns of discrimination between different groups. The structural-relational whole shows how actor's place in the system informs their incentives and choices available to them. In this way it diverges from law and economics' focus on individual market actors.

The focus of the commodification analysis is on individuals' structural positions vis-à-vis creative economy structures, whether these are independent creators, employed artists, publishers, platforms, or audiences. However, this is just a starting point. Race, gender, sexuality and other characteristics all affect position, outcomes, relationships in deep ways—but just as it is not possible to understand individuals' positions without these attributes (which are themselves products of other structural configurations at the societal level[27])—that we need a good structural understanding of the specifics of creative economy structures to paint the full picture. And just as the structures of race, gender, etc. are not fixed categories, neither are things static at the layer of creative economy structure.[28]

A final contrast to law and economics is that while individual market actors' outcomes can be seen to be affected by these intersectional attributes, market outcomes are not what those attributes describe—rather, race, gender, and so on describe relationships other people, society, the self. The commodification model is also focused on relationships in a highly specialised context—and so more easily enters into conversation with these other attributes.

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[27] On women earning less than men in music, see Metka Potocnik "Neutral is the new blind: Calling for gender segregated evidence in UK legislative inquiries regarding the music industries" [2021] SSRN Electronic Journal; David Hesmondhalgh, Richard Osborne, Hyojung Sun, and Kenny Barr, "Music Creators' Earnings in the Digital Era" (Intellectual Property Office, United Kingdom, 2021) at 18 (noting that in the UK "[f]emale music creators earn less than male music creators. Median reported income for women in 2019 was £13,057, whereas for men it was £20,160").

[28] For an example of structuralist writing on race and representation in media see Stuart Hall "Black men, white media [1974]" in Paul Gilroy and Ruth Wilson Gilmore (eds) *Selected writings on race and difference* (Duke University Press, 2021) 51 at 51 (writing that, with respect to discriminatory representations of black immigrants to the United Kingdom, the "roots lie deep within the broadcasting structures themselves, and good liberal broadcasters, as well as bad racialist ones, are both constrained by these structures").

There is a limited priority of identities here—the identity of an actor within copyright system only has priority in the context of discussing that system—and this priority does not mean other attributes cannot drastically change position, choices available and so on, nor take away from systemic observations around inequalities.

This is a way of seeing copyright's social justice-type problems as, in part, commodification problems. The commodification model is helpful because it can separate creator-protective elements of copyright from market-oriented aspects. Economic accounts often focus on whether copyright as an incentive is maximising economic value, but fundamentally, many problems with copyright are distributive problems. As the discussion of *ABC v Aereo*, *SOCAN v Bell*, and EU Directive on Copyright in Chapter Three articulated, the basic question in these disputes was how the benefits from creative work would be distributed. Focusing on the economic aspect of this distributive question should not foreclose recognising that economic benefits are not the only ones which derive from creative work.[29] But if we fail to consider the economic distributive implications of copyright law, these inequalities are bound to persist.[30]

2. What does copyright regulate, and how? Copyright's role in digital creative economies

This section will bring back the question from an earlier chapter—what does copyright regulate?—and consider how the findings from the interviews in Chapter Four can help

[29] See Lea Shaver "Copyright and inequality" (2014) 92 Washington University L Rev 117 (discussing examples of small language markets where more educational benefits would from restraining economic exploitation of works).

[30] Cf. the case made by Robert Merges for copyright as distributively just: see *Justifying Intellectual Property*. Briefly, Merges considers the question of whether copyright is distributively just and answers this in the affirmative. However, he proceeds solely from the perspective of users/consumers and focuses further only on the effects on the "neediest" segment of the population. One of the observations he relies on is "Many people in the lower income distributions of the United States are big fans of television shows": at 118. This focus excludes the people arguably most directly in the crosshairs of copyright's regulatory and distributive effects, creators. Merges relies heavily on John Rawls' theory of distributive justice; however, his focus on only the neediest elides the political dimension of inequality discussed by Rawls, whereby the disproportionate control of resources by the wealthy undermines the real value of political liberties in a way that is unacceptable to Rawls' theory of justice as fairness: see William A Edmundson *John Rawls: Reticent socialist* (Cambridge University Press, 2017) at 55. Moreover, Merges' case for copyright as distributively just does not have a detailed account of the copyright system to rely on, nor does it propose any alternative ways that this system could be organised; rather, he assumes that our choice is either to have copyright law with all the consequences it currently produces, or no copyright law and no television, films, or other media. Finally, his assessments of the realities of distributive justice at the time of writing are dubious. To take one extreme example, Merges claims that modern societies have moved beyond the need "to choose between respecting property and providing for the neediest": at 109. If this were true it would seem to require some further explanation of the poverty and homelessness which persist to this day even in the richest countries in the world.

answer formulate a more detailed answer to this question. In the context of independent podcasting, copyright seems to play a structural role which is relatively limited; aside from being a limitation on what creators can use, it also underlies contractual terms of service for online platforms. A similar situation may well extend to other independent digital creators. Even if this is the case, however, it does not mean that we should not look at copyright structurally, but rather that we should use that perspective to understand the limitations of copyright's regulatory reach. Instead we should be looking to the underlying commodification processes and directing regulation towards fixing the problems that come out of these.

Copyright plays a role in creating an environment in which creators can, sometimes, make money from their work, and publishers (and platforms) can build their businesses. But looking at this broader structure through which creative labour is remunerated, copyright is only one element whose importance has waxed and waned. Copyright also does not perform its functions in isolation: as the discussion of the digital transition in Chapter Two showed, removing the constraints of physical copying and distribution showed that preventing unauthorised copying was a function as much performed by those physical constraints as by copyright law itself. Another change was an increasing role for copyright directed towards regulating user behaviour. This was framed in response to the piracy crisis of the 2000s but had broader implications for the freedoms which users enjoy with respect to works in the digital age.

Copyright's regulatory focus in digital creative economies is more significantly on *users*, including creators *as* users. In the context of podcasting, mirroring other digital creative contexts, the main thing podcasters think about copyright in the context of is the possibility of infringing someone else's copyright—and not other podcasters. Control, to some extent enabled by copyright, is important to some, including control over economic exploitation. But the positive sense of copyright as a benefit—as a way to make money off of creative work—is largely missing from independent podcasting. Where copyright (and other intellectual property) is more important is where the podcast industry is consolidating and bringing production into larger corporate structures—and this is where intellectual property becomes an object for creators and publishers (or to use more industrial language, labour and capital) to fight and negotiate over.

In Chapter One, sections 1.1-1.3 surveyed three ways of looking at copyright; a similar structure is adopted here. Where the Chapter One sections identified copyright's intended roles, as an incentive, property right, and regulation, the three roles examined here focus on observations of copyright's effects. The three roles considered, copyright as control, copyright as asset, and copyright as structure, may end up more or less consistent with the "copyright as incentive" justification because the financial returns from creative work enabled by copyright flow in large part from these functions. The argument is rather that commodification provides an explanatory framework to look at the roles of copyright and critique their impacts.

2.1. Copyright as control: Regulating users and creators

Copyright law has always functioned by providing rightholders with the ability to control what other can do with the works in which they hold rights. In particular, the ability to stop others from copying a work without permission or a licence has been a fundamental aspect of copyright law from the beginning; this is how the economic function of copyright was accomplished in the age of the printing press. Other rights were added over the 19th and 20th centuries, such that modern copyright law would also provide control over adaptations and translations of a variety of kinds of works.[31] Control is obviously related to the economic interest copyright protects: consider a situation of compulsory licensing for a fee where a rightholder's economic interest is maintained in a curtailed form but control is vacated. Copyright further goes into non-economic areas beyond that which is justified by creators' "moral rights" (using that term to mean a category of interests rather than the distinct legal right—exercise of economic rights might be motivated by moral considerations e.g. an artist refusing to license a song for a political purpose). This is a fundamental part of the "expressivist" critique of copyright—that rightholders can and do use copyright to quash critical, dissenting or otherwise undesirable (to them) expression, either in individual cases or systematically, in ways that offend freedom of expression (either as a broad notion or, as some have argued, as a contravention of a constitutional right).

The transition to digital distribution led to a greater degree of aftermarket control exercised by rightholders over users after they had purchased a work. As we saw in Chapter Two, the centrality of copying to copyright law was challenged when copying became a much more

[31] See Kathy Bowrey *Copyright, creativity, big media and cultural value: Incorporating the author* (Routledge, Abingdon, UK, 2021) at 1-2.

difficult activity to control with the advent of digital technologies and the Internet. Digital computers put the power of the printing press on users' desks, and later in their pockets, making copying easy to do and hard to stop. Rightholders responded by adopting technological protection measures (TPMs) on digital versions of copyright works (protections for which would be added to copyright laws), and mandatory contractual terms of service for access to those works. These measures constituted a hybrid legal-technological response which sought to reimpose the scope of rightholder control lost in the digital transition, justified as a response to the piracy crisis. But the effects of these measures did not merely deter piracy: they also went further in reducing user freedoms with respect to copyright works.[32] This happened through attempts to constrain copyright exceptions, fair use, and fair dealing, as well as through functional constraints imposed through licenses and TPMs. A reader of physical books can lend their copy to a friend or sell it on to used bookstore; an eBook reader generally cannot do either of these things. These may never have been instantiated as "rights"—but in a Hohfeldian sense they were freedoms which the owners of copyright could not practically interfere with.[33] Digital distribution and digital locks changed that.

The next step in the development of the distribution of digital copyright works was a move away from providing copies of works and towards providing access on-demand. Users who purchase "digital copies" usually do not "own" files in a legal sense but only license them; nevertheless compared with streams they exercise a large degree of control—sometimes attenuated by TPM software.[34] Compounding with the effects of TPMs and terms of service (both of which commercial streaming platforms generally make use of), the move from copies to access meant an effective diminution of the temporal dimension of users' rights over works: in this model, users can no longer expect to continue to have access to a given work because it is provided as part of a commercial library. The streaming provider may cease to carry a work when its license expires; or the provider may cease to exist itself, as numerous failed streaming services have done. Taken together, the shifts from a sale of physical copies model, to a digital copies, and then finally a subscription for access model fundamentally shift the conditions of consumption for creative works. This shift is an aspect

[32] Morris, above n 14 at 158.
[33] See Joseph William Singer "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld" [1982] Wisconsin L Rev 975 at 994 (summarising Hohfeld, "[s]ince liberties are not necessarily accompanied by rights, A's liberty might, in some cases, be exercised in ways that interfered with B's exercise of her liberty. Such interference represents a special case of damage for which the victim has no legal recourse").
[34] Morris, above n 14 at 158.

of the changing commodity nature of creative works; or, more accurately, characteristic of new or newly-prominent commodities, since both physical copies and digital copies continue to be sold.

A retort to this critique is that these changes have been an expression of consumer choice. Digital copies were preferred to physical copies, so they won out in the market; streaming works were preferred to digital copies, so they won out. The continued existence of digital and physical copy sales might be seen to support this; where ownership of copies is valued more by consumers, the streaming model has been less quick to catch on (such as in books). However, copyright law is meant to serve the public good, a purpose which is certainly not exhausted by a wide range of consumer choice. Further, this "democracy" of consumer choice, which has been criticised elsewhere, effectively differentiates access to goods based on capacity and willingness to pay.[35]

In the advertising and subscription business models which predominate online, we might see a process of differentiation between freely-available, ad-supported content which vary hugely in quality, and subscription services providing higher quality cultural commodities (such as Amazon Prime Video's *Rings of Power* series, with its record-breaking budget).[36] This differentiation is proceeding differently in different media: book publishing remains largely based on the sale of copies, while Spotify blends advertising and subscription models.

In the context of podcasting, we likewise see advertising and subscription models sharing space. Podcasts are largely free to consume, and usage of TPMs is not widespread; although, listening platforms which pursue content exclusivity strategies, as Spotify has done, are arguably doing something analogous. An important caveat here is that this focuses on the commodity production of creative works, as opposed to less commercially-motivated production. As Chapter Four showed, however, the effects of price differentiation in copyright works is also felt by independent history podcasters, who are affected by the cost and accessibility of research texts priced for the academic market. The independent podcasters interviewed for Chapter Four also necessarily participate in a market for works in which other actors are largely profit-motivated—it can be difficult therefore to escape the pressures of commodification.

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[35] See generally C Edwin Baker *Media, Markets, and Democracy* (Cambridge University Press, Cambridge, UK, 2001).
[36] Dave Lee "Amazon shares fall 10% after weak holiday sales forecast" (27 October 2022) Financial Times <www.ft.com> (noting that the Rings of Power series "cost a reported $1bn to produce").

Treating copyright works as commodities implies a certain indifference to their content. This commodification perspective was attributed to platforms and publishers in Chapter Three, where it was a structural determinant of the shape of copyright law's adaptation to the digital age. But content does matter: in shaping worldviews, imparting information, and generally in fulfilling the ends of human flourishing which freedom of expression is intended to promote.[37] Without opening the Pandora's box of content regulation directed towards these ends, we can still look critically at how the structure of creative economies determines, to a great extent, what is produced and who has access to it.

2.2. Copyright as asset: Extracting value from works

Copyright as asset or the assetisation of copyright describes how copyright commodities are treated as more or less predictable sources of future revenue.[38] The exploitation of creative work as copyright assets takes different forms: in music, for example, so-called "catalogue" music takes in a large proportion of revenues from streaming. Catalogue music is defined as music released more than eighteen months prior.[39] This dominance of catalogue has been taken to indicate that streaming revenues largely go to older music, although the definition of "catalogue" means that it likely captures many currently working artists as well. Perhaps a more convincing example of the assetisation of music are the major acquisitions of song catalogues as investment vehicles: a report for France's *Centre national de la musique* on the surge of music catalogue purchases in the 2000s describes it as a "return to music as an asset class with a predictable rate of return".[40] These sales have tended to focus on an "elite tier" of music artists, "catalogs which have proven track records and chart-topping success, with which they hope to extract more value via anniversary box sets, viral mashups and blockbuster sync placements."[41] Examples include the sales of music catalogues from David Bowie and Bob Dylan.[42] The knock-on effects described by the authors disadvantage smaller

[37] Craig, above n 10 at 52.
[38] Rochelle Dreyfuss and Susy Frankel "Reconceptualizing ISDS: When Is IP an Investment and How Much Can States Regulate It" (2018–2019) 21 Vand J Ent & Tech L 377 (making a conceptually related but distinct point about treatment of intellectual property under international economic law as an investment asset). This is similar, but distinct from the "logic of property" discussed in Chapter Three; assetisation is about the forward-looking prospect of returns from works rather than complete control over them.
[39] See Murray Stassen "Is old music really exploding on TikTok, or has our definition of 'catalog' become outdated?" (1 August 2022) Music Business Worldwide <www.musicbusinessworldwide.com> (noting that, in the context of TikTok, most "catalog" music tracks trending in the first half of 2022 were from 2020, just inside the industry definition of catalogue music).
[40] Kaitlyn Davies, Henderson Cole and David Turner "Understanding two decades of music catalog purchases" (Centre national de la musique, France, 2022) <cnmlab.fr>.
[41] Davies, Cole and Turner, above n 40.
[42] Davies, Cole and Turner, above n 40.

artists insofar as they create an "illusion of a prosperous industry" which provides support for platforms like Spotify and Apple negotiating for lower royalty rates.[43] In other contexts, copyright as an asset appears in the widespread utilisation of established "IPs" (used in its sense as industry parlance denoting bundles of intellectual property rights around works, characters, fictional universes, and so on) as opposed to original concepts in, for example, new releases of franchise films and video games. Even podcasting has seen the adaptation of podcast series to television as a sort of IP "pipeline".[44]

In a 2020 book, Kean Birch and Fabian Muniesa describe a phenomenon of "assetisation".[45] Their account contrasts assets (which generate returns) from commodities (which are bought and sold). However, as discussed above, the commodification analysis described in this thesis focuses on commodification processes rather than works as commodities as such. Indeed, the commodification processes identified are precisely what allow copyrights to be treated as assets: there would be no steady income to be derived from a song catalogue, for example, without some way of making that income, and in the present day that largely means exploiting it through the streaming commodity. Other revenue streams exist as well—in the case of music, licensing for use in other works such as commercials, for example. All of these commodification processes together are what make those song catalogues an attractive asset class, and those processes would not be possible without copyright law, which creates the need to license a work in order to use it. A different point which could be taken from Birch and Muniesa which does push up against these claims with respect to commodification as an imperative for copyright, would highlight assetisation as now the more salient imperative. But again, if assetisation is accomplished through commodification processes, the analysis can stay much the same.[46]

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[43] Davies, Cole and Turner, above n 40.

[44] See Douglas Carruthers "The 10 Best Television Adaptations Of Podcasts" (14 June 2022) ScreenRant <https://screenrant.com>. See also Reggie Ugwu "Brittany Luse and Eric Eddings of 'For Colored Nerds' Play for Keeps" New York Times (17 November 2021) <www.nytimes.com> (noting how two podcasters who left Spotify-owned Gimlet "made ownership of the show's distribution feed and intellectual property a mandatory condition of their [subsequent] agreement with Stitcher").

[45] Kean Birch and Fabian Muniesa *Assetization: Turning things into assets in technoscientific capitalism* (The MIT Press, 2020).

[46] See also Rochelle Dreyfuss and Susy Frankel "From incentive to commodity to asset: How international law is reconceptualizing intellectual property" (2014–2015) 36 Mich J Int'l L 557 at 565-66 (describing how assetisation and "linkage between IP and investment regimes" constrain flexibility for national governments in their intellectual property policy, even moreso than a move to a commodity understanding of intellectual property under TRIPS).

With respect to the big deals being made for song catalogues recently from point of view of investors the position of record labels are seen as risky or unpredictable as opposed to publishers (music catalogues) which are seen as more stable.[47] The "estate argument" that the incentive to create should provide for descendants is unconvincing here because these purchases represent a very thin band of the most successful musical artists—a lottery ticket, not an investment. The song catalogues which are valuable as assets are valuable precisely because they occupy this thin strata of cultural cachet which is assumed to retain its value into the future. These "superstar effects" create a system that might be described as "copyright as lottery". Musical artists' careers were made in the past through in-person touring and club and radio DJs; now, playlists like those on Spotify play a much larger role and one in which platforms control access to the audience.[48] This combines with Spotify's pro-rata compensation model, which directs streaming revenues towards the biggest artists, to create a truly unforgiving environment where new and working artists below star level are squeezed from two sides with respect to revenue from streaming.[49] Without adequate support in the present day, how can new artists pursue creative work without independent means? Another possible effect of this is a kind of "creative stagflation"—creative industries still bringing in lots of money but stagnating with same intellectual properties being constantly milked for more profit.[50] For example, in the context of the video game industry, Kate Oakley has written about how big budget game development changed towards being less reliant on new IP.[51] Copyright is at the root of these problems, because these are the creative industries

[47] Josh Gabert-Doyon and David Turner "Interview: David Turner on streaming, private equity, and musicians' unions" (5 February 2021) Common Wealth <www.common-wealth.co.uk>.

[48] On commodification of audiences, see also Bowrey, above n 31 at 32 (discussing that in the context of 19th century detective fiction, "[t]he form and content of [Sir Arthur Conan Doyle's] stories produced a copyright value that exceeded confinement to any particular material form or cultural product. *The potential readership became the commodity*." [emphasis in original).

[49] See Wall Communications, above n 4; Hesmondhalgh and others, above n 27; David Hesmondhalgh "Is music streaming bad for musicians? Problems of evidence and argument" (2021) 23 New Media & Society 3593 at 7-8 (describing the pro-rata apportionment of streaming revenues employed by Spotify). Hesmondlagh also notes, however, that as in the past "in practice a great many musicians have the opportunity to make money from various other musical sources" and that the low per-stream rates which are often cited as evidence of musical artists' struggles are not on their own "a sufficient basis for arguing that [streaming services] are unfair to musicians": at 10.

[50] See Adam Mastroianni "Pop Culture Has Become an Oligopoly" <https://experimentalhistory.substack.com> (analysing data on the film, television, music and book industries which shows "a smaller and smaller cartel of superstars . . . claiming a larger and larger share of the market").

[51] See Kate Oakley "Good work? Rethinking cultural entrepreneurship" in *Handbook of Management and Creativity* (Edward Elgar Publishing, 2013) 145 at 149-150. Oakley also addresses diversity issues throughout, noting that in the context of work in the cultural sectors "social contacts, including family links, play an important role in 'getting in', which obviously has undesirable consequences for the social and ethnic mix of the labour market. Similarly, the ability to sustain unpaid work, sometimes for lengthy periods, is clearly greater if one can draw on family resources": at 150.

which copyright law has such a deep involvement in, but copyright reform on its own will not be enough to resolve them.

If we go back to the first principles justifying copyright law, discussed in Chapter One, we should ask: what incentive role is played by channelling streaming and other copyright license revenues towards song catalogues from legacy artists and away from new and working artists? If the disproportionate economic weight of established IP behind big budget film, video games, and other media crowds out investment in development of new ideas, is copyright really serving its role as an incentive for the creation of new work? These effects are not the consequences of specific copyright law protections, but rather of the broader structures of creative economies; therefore, if it is through these structures that copyright law is intended to achieve its aims, then "copyright reform" limited to merely tweaking how copyright law works is unlikely to be a sufficient response. The sector instead needs structural reform directed towards distribution of copyright law's benefits. As Chapter Three considered, the European Union's Directive on Copyright in the Digital Single Market may represent a halting step in this direction. But it is also important to consider that the interests of creators and publishers, and those of users and platforms, align imperfectly at best. We should emphasise where, to better achieve copyright law's aims, structural reform should rebalance away from platforms and publishers and towards users and creators. Chapter Four showed independent history podcasters as small-scale creators, empowered by the Internet, but in an industry which increasingly tended towards consolidation and commodity production. Perhaps if it is the bigness of platforms and publishers that is the problem, the task for structural copyright reform should be to create a world where small things can flourish.

2.3. Copyright as structure: The commodification and decommodification of creative work

It is implicit in the above two points that copyright is deeply involved in some commodification processes for creative works. Copyright as structure captures the role that copyright plays as something which can be contracted around. For example, Chapter Three discussed how the "logic of innovation" which platforms aligned themselves with still relied on copyright—though a weaker version of it. While this vision of copyright was not as favourable to rightholders as the "logic of property" copyright, it still provides a degree of certainty to business around copyright works: production, distribution and consumption. The

aspect of copyright as structure would likely have survived the (purportedly) mortal challenge of piracy in the 2000s, considered in the context of the digital transition in Chapter Two. There would still be a need to license music for (for example) car commercials even if anyone can download them off of a file-sharing network. But the structural role of copyright as a way of disciplining consumer-users into legitimate channels—which took on a larger role with the piracy crisis—is now front and centre. Piracy is just one extreme on a spectrum of legitimate to illegitimate uses: the uses of works on platforms, which includes uses colourable as covered by user rights, are the focus of Article 17 of the EU's Directive on Copyright precisely because of the structural effect of allowing a safe harbour—the "value gap" argument of imbalanced bargaining positions for publishers. This is disciplining consumer-users through platform intermediaries, who, as Chapters Three and Four emphasised, do not have all their interests aligned.

The "superstar effects" alluded to in the previous section are important to copyright as structure as well: the winners in creative industries win big, but this represents a small fraction of creators. These effects are visible in figures from music streaming, the current state of the film industry, and even on crowdfunding platforms.[52] In podcasting, the US$200 million Joe Rogan deal is the example of the highest heights of compensation in this medium.[53] With Spotify's entrance into podcasting, their playlists are newly important for getting podcasts out to new listeners, giving Spotify a lever as to which podcasts succeed—goes to barriers to entry as well as reinforcing superstar effects.[54] As the discussion in Chapter 4 noted, being featured prominently on an app like iTunes or Spotify is not likely to happen for independent podcasters without a personal brand or affiliation with a major media company—a major change from podcasting's early days, but one that is perhaps inevitable with the medium's growing profile. Another aspect of Spotify's presentation of podcasts and music and playlists is a light form of behavioural training—getting listeners to consume podcasts and music by clicking on playlists, minimising their direct connection with

[52] See See Brent Knepper "No one makes a living on Patreon" The Outline <https://theoutline.com> (highlighting the gulf between high income and low income Patreon projects); Forest Hunt "The New Podcast Oligopoly" (21 May 2021) FAIR <https://fair.org>; Mastroianni, above n 50.
[53] See Matthew Strauss "Spotify Sources Say Joe Rogan's Deal Was $200 Million, Double What Was Originally Reported" (17 February 2022) Pitchfork <https://pitchfork.com> (on the Rogan deal); Nicholas Quah "Podcasting Is Just Radio Now" (22 September 2022) Vulture <www.vulture.com> (on blockbuster podcasts generally).
[54] Liz Pelly "Podcast Overlords" (10 November 2020) The Baffler <https://thebaffler.com> (noting that Spotify does not compensate artists for valuable fan set data gathered through the platform which describes who is listening to them).

individual creators.[55] This method of distribution also shapes what is produced if playlists tend to favour shorter, more attention-grabbing podcasts.[56]

Another structural effect of intensifying commodification is pressure to minimise costs at the expense of creators or audiences (and perhaps with a detrimental effect on quality of works and sustainability of business). The streaming platform Netflix has, in its own productions "normalized the use of what are known as mini rooms" in which television writers are treated as freelancers rather than kept on through the run of series (the previous industry norm).[57] These writers are effectively gig workers "hoping to stitch together enough work to make a living and secure their union health insurance."

Why might this squeeze on the bottom of the income distribution of creative economies be a problem? We can certainly look at the consequences of this shift in terms of decreasing variety of creative content and viewpoints, although perhaps more evidence is needed to back those suppositions up. However, considering the copyright system structurally suggests something a more concrete economic criticism. The structural question to ask is: what is the relation between successes and failures in the creative economy?

In John Huston's 1941 film *The Treasure of the Sierra Madre*, an experienced gold prospector (played by the director's father, Walter Huston), says this about the value of the precious metal:[58]

> A thousand men, say, go searchin' for gold. After six months, one of them's lucky: one out of a thousand. His find represents not only his own labor, but that of nine hundred and ninety-nine others to boot. That's six thousand months, five hundred years, scramblin' over a mountain, goin' hungry and thirsty. An ounce of gold, mister, is worth what it is because of the human labor that went into the findin' and the gettin' of it.

This makes for a revealing analogy with the creative sector. For every successful artist, how many artists fail to make it or barely scrape by? The figures from music streaming cited above make it clear that the main beneficiaries of current music licensing practices (at least as far as creators go) are in the absolute highest and narrowest stratum of artists. What this amounts to is a great deal of creative labour which is expended without being decently

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[55] See Liz Pelly "Big Mood Machine", above n 15. Similarly, Morris describes how "DRM technology was important but ultimately less significant than the digital lifestyle management [digital music storefronts] incorporated . . . through [their] interface, navigation, pricing strategies, and modes of organizing music for consumption": Morris, above n 14 at 145.
[56] See Pelly, "Podcast overlords", above n 54.
[57] Joy Press "Netflix Stumbles and Hollywood Gloats: 'The Days of the Blank Check Are Over'" (12 May 2022) Vanity Fair <www.vanityfair.com>.
[58] *The treasure of the Sierra Madre* (Warner Bros. Pictures, 1948).

rewarded. Like Huston's prospectors, the market only rewards those who strike gold—but this only works because so many go out to seek their fortune.

Publishers and platforms receive the benefit of much of this creative labour. The flip side to the lowering of "barriers to entry" is that many platforms take all the creative content they can get. Publishers take more of a risk with creators, but can draw from known successes—such as musical artists who have "gone viral" on their own. (Though those known stars might have more bargaining power as result of their success.) In music, "independent" labels often function as a "farm team" for major labels, where the majors go to look for promising new talent.[59]

This situation is not new in itself: the "starving artist" stereotype far predates the internet and digital platforms. In the words of the UK Intellectual Property Office's report on music creators incomes, it is a "dubious idea[] that there was ever a golden era where substantial numbers of music creators could earn a sustainable living from recordings."[60] However, the superstar effects we see now appear to be larger in scale than before, meaning the distribution among creators of benefits from the creative economy is more lopsided than ever, while the consolidation of platforms and publishers increases the relative bargaining power of that side of the table.

3. Towards distributive justice in creative economies: Possible futures for digital copyright

This section argues for an idea of distributive justice in creative economies that explicitly mitigates "superstar effects" as well as rebalancing between creators and intermediaries, and considers some possible futures for digital copyright and creative economies on this basis. This section will argue that it is important to consider what is sometimes called the "creative middle class": working artists who have an audience but are not in the highest tiers of success within the creative industries.[61] A well-balanced creative economy ought to provide space and adequate compensation for these creators; in many instances the creative economies we

[59] See David Turner, "What's Lost If Sony Owns AWAL" (23 February 2022) Penny Fractions <https://pennyfractions.ghost.io>; David Turner, "The Rise of the Digital Music Distributor" (3 March 2021) Penny Fractions <https://pennyfractions.ghost.io>.
[60] David Hesmondhalgh, Richard Osborne, Hyojung Sun and Kenny Barr "Music creators' earnings in the digital era" (Intellectual Property Office, UK, 2021) at 214.
[61] See Nicole Laporte "The death of Hollywood's middle class" [2018] Fast Company, online: <www.fastcompany.com/90250828/the-death-of-hollywoods-middle-class>. Some of the study participants in Chapter Four might fall in this demographic, although few interviewees mentioned their being reliant on podcasting as a primary or major source of income: see Chapter Four, section 2.3.3, above.

in fact have do not.[62] To the extent that commodification pushes smaller creators and different models out, it may have a homogenising effect. A commodification lens can also help in reconsidering the deserts-based rewards of creative economies, suggesting that the market does not reward merit or contribution but how well creative output fits into commodity channels. Ultimately, the question is who benefits from this arrangement.

3.1. Critiquing inegalitarian copyright

There is an overarching critique of copyright based on the bifurcation of its ethical imperative to consumers and its structural character underpinned by law. The message is that copyright piracy is wrong because it hurts artists, but piracy is illegal whether that is true in a given case. The message is that one should support artists through the existing systems of compensation—which do not seem to actually support artists all that much. It does not require adopting a full philosophical egalitarianism to critique these aspects of copyright: a dwindling basis for making a living doing creative work goes against the stated goals of copyright law, and likewise the superstar incomes at the top end may be so extreme as to undermine those goals as well.[63]

From the other side, however, it is wrong to paint copyright writ large as a mere front for large publishers. First, as discussed in Chapter Three, the present state of copyright law has been influenced as well by the platforms, who have put forward their own vision for the (curtailed) role of copyright in digital creative economies. These platforms benefit from copyright as well, if not from the ownership of copyright, then from the certainty (structure) it provides. Google would not have a search engine business without access to the pages that make up the web.[64] Likewise, a focus on their exploitation should not obscure that artists see some benefits from the copyright system, as patchy and inadequate as these might be. Further, the construction of modern copyright law bears the imprint of creator and user

[62] This analysis does not commit to a particular conception of distributive justice; however, objections to the unfairness of the creative economies described could, on economic terms alone, be made out in terms of a Rawlsian account or a stronger egalitarian account: see n 30, above. A deeper engagement with theories of distributive justice is not possible here, but subjecting the relationship between creators and platforms to critique through a distributive justice lens would be fertile ground for further research.

[63] Analogies to other forms of inequality may be helpful here, such as spatial inequality: see Pepijn Bergsen, Leah Downey, Max Krahé, Hans Kundani, Manuela Moschella and Quinn Slobodian The economic basis of democracy in Europe (Chatham House, 2022) <www.chathamhouse.org/2022/09/economic-basis-democracy-europe> at 7 (discussing spatial inequality "defined as uneven levels of economic development and opportunities between regions within a country").

[64] Morozov, above n 16.

advocacy as well, through jurisprudence, legislation, advocacy, and lobbying, going back to Victor Hugo.[65]

This can all be true and one can still be left with deeply unequal and unfair creative economies underpinned by copyright. Do the background conditions of neoliberal capitalism make this an inevitability? Are remedies better suited to purely economic redistribution, i.e. taxation? These are hard questions—but some measures directed at copyright and creative economies are both potentially helpful and not replaceable by a broad-based scheme of taxation and redistribution.[66] Before considering regulatory responses, however, we should be aware of private ordering responses to these problems which are already underway.

3.2. Alternative business models

Some proposed alternatives to the dominant streaming business models which are community- or crowdfunding-based. A for-profit example of an alternative "crowdfunding" business model is Substack, through which writers, journalists, and podcasters can charge subscription fees for access to content—a similar business model to Patreon which was discussed in Chapter 4 and is widely used by podcasters. Substack has made a more explicit overture towards journalists, although some have been critical of its funding model and its ability to replicate the benefits of traditional newsrooms, as well as its relationship with legacy media.[67] Some local libraries have also experimented with music streaming services; as examples of alternative platforms, these engage local community by building on recognising local music communities as a positive aspect.[68] However, none of these initiatives on their own has garnered the same degree of attention as blockchain—nor have they been as polarising.

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[65] See Ronan Deazley "Commentary on International Copyright Act 1886" in Lionel Bently & Martin Kretschmer (eds) *Primary Sources on Copyright (1450-1900)* <www.copyrighthistory.org> (noting the origins of the Berne Convention in "the foundation of the International Literary Association in Paris in June 1878, under the presidency of Victor Hugo").

[66] Though there may be some fruitful tax/copyright collaborations to be had, e.g. a tax on intellectual property franchising or a progressive tax on intellectual property profits—see section 3.3 below.

[67] See Clio Chang "The Substackerati" (2020) Columbia Journalism Review <www.cjr.org/special_report/substackerati.php> (questioning whether the incentives of venture capital, which Substack is backed by, are compatible with the public good goals of journalism). Chang also addresses censorship, the question of who gets to speak, or alternatively "who is engaged in this cultural production?" These are related because who gets to speak depends in part on who can make a living doing it (or at least enough to justify the time and effort).

[68] See Sam Backer and Liz Pelly "Liz Pelly on alternative platforms and possible futures" (8 February 2021) Money 4 Nothing (Podcast).

At the present moment, there is perhaps no emerging technology in cultural production as polarising as blockchain-based non-fungible tokens (NFTs). The blockchain is a distributed ledger which verifies ownership; NFTs are "minted" to demonstrate an ostensibly incontrovertible claim to ownership over their contents, which can be just about anything, but which may or may not have actual legal rights attached. Criticisms levelled at the NFT economy have included: widespread theft and fraud, unlicensed use of art, and environmental impacts.[69] With changing economic and financial conditions in 2021–22, NFT marketplaces saw a major decline in transfers in late 2022.[70] Challenges and questions about the utility and future of NFTs abound, but the phenomenon can nevertheless be seen as a curious form of blowback to the "end of ownership" brought by the digital transition.[71] The promise of this technology is to bring what advocates refer to as "property rights" to digital objects. While this promise may never actually be delivered upon (and may be deeply misapprehended in the first place), it does at least speak to a felt desire to "own" creative works in the digital age.

The question that should be asked is: are NFTs merely attempting to recreate the past of creative economies in a denuded form that does not fix underlying structural issues? There have been proposals to use NFTs at the structural level to reshape digital creative economies such as music—addressed at some of the distributive issues noted in the sections above.[72] However, even the more distribution-sensitive arguments/plans face the problem of "how do we get there" with respect to actually-existing structural NFT use cases.[73]

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[69] On environmental impacts, the Ethereum blockchain (on which many NFT projects rely) was based on energy-intensive "proof-of-work" until September 2022: see Hilary Allen "The 'Merge' did not fix Ethereum" (19 October 2022) Financial Times <www.ft.com>; Joshua Oliver "Ethereum 'Merge' concludes in key moment for crypto market" (15 September 2022) Financial Times <www.ft.com>. Instances of art theft, fraud, and other malfeasance in the crypto space are numerous, and have been helpfully compiled by the blog "Web3 is going just great": see Molly White, "Web3 is going just great – theme: art theft" <web3isgoinggreat.com/?theme=artTheft>; Molly White, "Web3 is going just great – theme: hack or scam" <web3isgoinggreat.com/?theme=hack>. See also Elizabeth Howcroft "Marketplace suspends most NFT sales, citing 'rampant' fakes and plagiarism" (2 December 2022) Reuters <www.reuters.com>; Jordan Pearson "More than 80% of NFTs created for free on OpenSea are fraud or spam, company says" <www.vice.com>.

[70] See "NFTs: regulators go ape amid market downturn" (13 October 2022) Financial Times <www.ft.com>.

[71] See Aaron Perzanowski *The end of ownership: Personal property in the digital economy* (The MIT Press, Cambridge, Massachusetts, 2016).

[72] See e.g., Matthew Chaim "Open Questions re: The Future of Music NFTs" (4 December 2021) <chaim.mirror.xyz>; Dan Fowler "The case for a post-royalties music industry" (8 January 2022) The Liminal Space <danfowler.substack.com>.

[73] See Water & Music Community "Music NFT sales in 2021: What we learned - Water & Music" (2022) <www.waterandmusic.com> (considering a number of different use cases for music NFTs, including royalty-bearing NFTs, NFTs which grant specific rights to use the underlying music and community building through real-life events and Discord servers).

We should not confuse what NFTs are or look like now with their potential, even if we should remain sceptical of both. The speculative NFT economy could perish and yet the technology could still become deeply integrated into digital creative economies. Many use cases for the technology have been speculated on. For example, digital ownership of video games is currently based around licensing through individual storefronts, two of the largest of which are Valve's Steam and Epic Games Store. Video game purchases are, for the most part, locked to the storefront from which they were purchased; if instead NFTs were used to demonstrate ownership of a license, it could allow for consumer portability—they would no longer be locked into using one particular platform. This may be a plausible use case; but it inevitably raises the question: why would any platform give up the advantage of having users locked to their platform without outside intervention? Even if it is plausible that one distributor pioneers this application despite the apparent lack of incentive, it is not clear that NFTs have any advantages over a centralised database, from the perspective of either the user or the platform. And, in fact, where existing creative industry companies are adopting NFTs, they are doing so in ways to supplement rather than displace existing business models.[74]

Outside of specific use cases, we should consider how by instantiating "property"-like rules in code—"code is law", borrowing from Lawrence Lessig, is a crypto and NFT *cri de coeur*—it introduces problems even without the exploitation angle.[75] The usage of "code is law" in the context of blockchain technology undersells both: contra the word's connotation, law is in fact more interpretive and flexible than code. So when exploits and fraud occur in the crypto world, those affected often must turn back to law. If someone steals your property you can take them to court; if someone steals your NFT, the law of code will not help you. (Although you might be able to convince the law to help.) Examples of this have plagued blockchain-related projects even before the mid-2022 crash; specialised vocabulary even developed around it—for example the "rug pull" where a project is abandoned by its creators,

[74] Japanese video game company Square Enix announced plans to integrate blockchain into its games in early 2022, and not long after sold off some of its most popular video game IPs: see Sean Hollister "Square Enix promises 'decentralized games' in 2022" (1 January 2022) The Verge <www.theverge.com>; Andrew Webster "Square Enix is selling Tomb Raider, Deus Ex, and its Western studios" (5 February 2022) The Verge <www.theverge.com>. Notably the video game industry has seen significant pushback on NFT adoption: see Mitchell Clark "Valve bans blockchain games and NFTs on Steam, Epic will try to make it work" (15 October 2021) The Verge <www.theverge.com>.

[75] Lawrence Lessig *Code v2.0* (version 2.0 ed, Basic Books, New York, 2006) at 1. Similarly Rebecca Giblin describes the coders behind P2P software "routinely seeking to code their software in ways that sidestepped the limits of the existing law while nonetheless still facilitating vast amounts of infringement." Rebecca Giblin *Code wars: 10 years of P2P software litigation* (Edward Elgar Publishing, 2011) at 4-5.

taking any money invested in it by users.[76] While this type of investment fraud is by no means unique to blockchain-related projects, the slow pace of regulatory intervention in the space has allowed these scams to flourish.[77]

There is also the criticism that what NFTs do could be accomplished by a centralised database and existing copyright law and licensing. The difficulty this runs into is then, how to explain how this technology has managed to attract as much excitement and investment as it has. To quote a film which recounts the founding myth of a Web 2.0 company: "If you had invented Facebook, *you would have invented Facebook*."[78] The significance of NFTs is that they are essentially a social technology, one which has been successful in organising people around a movement, regardless of whether its substantive promises will ever be realised. It has, perhaps, captured strains of discontent with the current copyright system; alloying various criticisms of creative economy together with a substantial dose of financial speculation.

What this means is that the value of NFTs comes in the first place from social recognition of ownership, and the item's transferability. But along with interfacing with copyright as in the Green example mentioned above, ownership can also be recognised through technological systems—platforms. Feeding into the aspect of their value as social recognition, platforms like Twitter offer distinctive avatars for "owners" of the underlying NFT (as verified through an NFT platform).[79] It is worth noting here that platforms still occupy a central role. This use case of NFTs therefore relies on the continued dominance of these platforms as well as their choice to adopt (and adapt to) this new technology. (It is also worth noting that Discord and

[76] See Molly White, "Web3 is going just great – theme: rug pull" <web3isgoinggreat.com/?theme=rugPull>.
[77] Supposing that fraud and theft can be tamed, there are fundamental distributive issues apparent with various aspects of the Web3 project. For example, in "metaverse" contexts—which explicitly aspire to be "virtual worlds"—where speculative land grabs by wealthy individuals and companies. One journalist described a metaverse project as "effectively com[ing] with a baked-in class of landed elites": see Will Gottsegen "Otherside and the Future of NFT Consolidation" (2 May 2022) Coindesk <www.coindesk.com>. It is difficult to take this too seriously at the moment when the stakes seem relatively low, but were the promises of Web3 ever to be actually borne out, they could potentially have real-world impacts. These critiques are not exhaustive of those levelled at crypto projects, which also include their environmental impact, the false face of crypto as "apolitical" money, and the continued high transaction costs (time and money) of existing crypto networks. Here it should be noted that the stakes in NFTs are small potatoes compared to crypto as money/financial instruments—but important locally, that is specifically to creative economies.
[78] *The social network* (Columbia Pictures, 2010).
[79] See Richard Lawler "Twitter brings NFTs to the timeline as hexagon-shaped profile pictures" (20 January 2022) The Verge <www.theverge.com>.

other technologies companies which made moves towards NFTs faced significant backlash from users and other stakeholders.[80])

Looked at in a certain light, NFTs also represent an odd fusion of the "property" and "innovation" logics discussed in Chapter Three. To own an NFT is to have absolute "property rights" without necessarily owning the exclusive exploitation rights. (Except where a copyright license or transfer follows the NFT.[81]) They can allow unrestricted copying of the work to which the NFT refers while retaining something that at least some people consider ownership. Some of the more well-thought-out cases for NFTs as part of creative economies recognise this explicitly.[82] The name "Web3" is an explicit reference to Web 2.0—dominated by platforms and disempowering to users and creators—and a promise of something new and better. Yet this also takes from the innovation logic familiar from the Web 2.0 context the forward-looking, positive connotations of "innovation". The ultimate problem for the potential of NFTs and Web3 as a structural alternative is that, to be effective beyond the dimensions of social recognition and financial speculation, these technologies need to be either integrated into existing systems or else displace them with new ones.

This insight comes directly out of a structural understanding of copyright and creative economies. In this light, part of what NFTs promise is an alternative commodification process in which this technology plays a similar role to copyright but through a different mechanism. Discussing NFTs' interface or conflicts with the copyright system should proceed on the basis that they are, in some sense, competitors in the same field. NFTs could form the basis of new creative economy business models. The structural point is not that structures are immutable and Web3 is destined to fail, but that looking at structures gives a better picture of what they are up against and what they would need to accomplish. It also highlights that, despite the "decentralising" rhetoric, platforms and publishers might very well win Web3 as they did Web 2.0—by co-optation.

There is a dismissive criticism of applications of blockchain technology that they do not need the blockchain, the hyperbolic form of which is that they could be implemented with a spreadsheet. It has also been argued that centralised solutions may be more efficient or more realisable in specific instances—assuming an actor with the incentives to pursue these

[80] See Ash Parrish "Discord fans are worried NFTs might be on the way" (11 September 2021) The Verge <www.theverge.com>.
[81] See Water & Music Community, above n 73 (discussing rights- and royalty-bearing NFTs).
[82] See Fowler, above n 72.

solutions exists. However, it is wrong to suggest that NFTs do not do anything. Leaving aside the technological implementation, what NFTs have done is convince many people, including musical artists, to structure their behaviour around them. In this sense, NFTs are a social technology, like law. "Code is law" carries another meaning: like law, these technologies have an effect in the world because people use them and believe in them. We do not know what the NFT ecosystem will look like, whether it will remediate some of the ills of the current music and other creative economies or merely serve as a vehicle for speculation. Some projects put forward a positive vision of an NFT ecosystem which they believe is genuinely better for artists and audiences. This vision may never come to pass; we may even be able to see and describe the forces which will defeat it or co-opt it. But we should recognise where projects are responding to real issues in a clear-eyed way, looking beyond the hype and with a critical eye to the new problems that come with any new system.

3.3. Space for regulatory solutions

There are other paths available. Various efforts at platform regulation are a reality—what form could more ambitious structural reforms aimed at the creative economies take? This section discusses proposals which could mitigate the distributive inequities in digital creative economies, but which will require looking of copyright law to the broader regulation of those economies. The solutions to these problems must come from outside copyright law because the commodification processes in digital creative economies, embodied in the subscription and advertising business models discussed in Chapter Four, are not as deeply regulated by copyright law.

This can go further to suggest that we need entirely novel frames of reference to describe the processes underway in the modern digital economy and society.[83] As Chapter Two discussed, despite the changes wrought by the transition to digital distribution and consumption, there is significant continuity with how copyright law operated in earlier organisations of "knowledge production" in culture and the arts. We should not be too quick to discard "yesterday's methods" (such as competition law, public funding, and arts sector unionisation) when we

[83] Julie E Cohen *Between truth and power: The legal constructions of informational capitalism* (Oxford University Press, New York, New York, 2019). But see Cohen at 38 (describing "continuity as well as change" in rise of platforms). See also the technofeudalism discussion referenced above, section 1.2.

have not seriously tried them yet.[84] While this thesis cannot make recommendations on the basis of economic studies, but it can add some novel options to the conversation, if the identified distributive problems are real. The status quo may threaten the creative industries as well if it means the prospect of economic subsistence through creative work is evaporating.

We do not need NFTs to remake creative economies in a more equitable form; instead we could attack these problems directly with regulatory intervention. Some possible solutions include a proposed "creator basic income", the exercise of competition law to break up or regulate platforms and publishers, and taxation and public funding.[85] The point is that there will be no turning back the clock and it will not happen unless something is done. To encourage creativity independent of big publishers/platforms, we might consider regulatory support for alternative business models such as crowdfunding. Interventions here could include tax incentives, or a different scheme of platform regulation from the big platforms.[86]

Crowdfunding as an alternative model presents some promise. However, private crowdfunding platforms may share problems with other technology companies—such as unrealistic investor expectations regarding future profitability.[87] Questions also remain regarding whether "crowdfunding" as a model is scalable, and whether, at larger scales, its effects in terms of equity of distribution would be substantively different than commodification through other intermediaries. While "cutting out the middleman" is usually presented as an efficiency in economic terms, disintermediation between creators and audiences may have relational as well as economic effects: creators who produce for and

[84] Cf Cohen above n 83 at 270 (concluding that "[w]hat seems certain is that reforms that simply adopt yesterday's methods are unlikely to succeed. Just as the most effective institutional changes of a previous era engaged directly with the logics of commodification and marketization, so institutional changes for the current era will need to engage directly with the logics of dematerialization, datafication, and platformization").
[85] See Li Jin and Lila Shroff "The Case for Universal Creative Income" (22 April 2021) Li's Newsletter <li.substack.com>; Li Jin "The Creator Economy Needs a Middle Class" Harvard Business Review 15.
[86] Unfortunately, some of the distributional interventions to date may have disproportionately benefitted large media conglomerates rather than smaller companies or independents: see Nic Fildes "Australia's media thrives after forcing Big Tech to pay for content" (3 October 2022) Financial Times <www.ft.com>; Karen Lee and Sacha Molitorisz "The Australian News Media Bargaining Code: lessons for the UK, EU and beyond" (2021) 13 Journal of Media Law 36 at 52 (suggesting that countries looking to follow Australia's example "should anticipate the need to develop additional measures that support smaller, but registrable, news media businesses in parallel with a code in the event they are forced to bargain in its shadow" but also noting that some of the first deals struck under the code involved "mid-tier" media companies).
[87] Competitor subscription platforms to Substack and Patreon have had a difficult time gaining traction: see Mitchell Clark "Meta's shutting down its Substack competitor after less than two years" (10 April 2022) The Verge <www.theverge.com>; Andrew Liptak "XOXO shut down its subscription platform before it launched" (15 June 2019) The Verge <www.theverge.com> (noting that the failed subscription platform was itself meant to succeed crowdfunding platform Kickstarter's failed subscription platform, Drip).

communicate with audiences directly are also directly accountable to them. Crowdfunding-based creative work is an area in which further research would be valuable; the interviews conducted for Chapter Three only scratch the surface. If crowdfunding is in fact an effective solution for some kinds of arts funding, regulatory support could further enhance its efficacy. These might include, for example, matching funds for crowdfunded creative work as a form of arts grant, tax deductions, or utility regulation. These are speculative, but present opportunities for further research.

The authors of the French CSM report on music catalogue purchases make another suggestion: for governments to invest in music catalogues and use those incomes to reinvest in artists:[88]

> If music can be valued not only as a capital investment, but also a civic and cultural investment, the acquisition of music catalogues could prove a means of stimulating production and preserving heritage. If the financial gains generated by song catalogues were to then be invested back into local or regional musical artists and industries, value would be accumulated both monetarily and culturally on a scale which would serve to benefit artists outside of the global mainstream.

This would be one way to redistribute benefits of copyright system from big corporations to smaller creators. Taxation could also play a role. If these economies are indeed grossly unequal, taxing and redistributing within the context of creative economies ought to be considered. Taxing copyright works which are turned into film franchises, or taxation based on lifetime income attributable to copyright works.[89] This has the benefit of not incurring further direct expense to the public, the intent being to place the burden on the beneficiaries of the copyright system: platforms and publishers. While these suggestions may be overly ambitious, they directly attack the distributive problems described here. A media environment with one hundred medium sized film productions is more vibrant than one with ten blockbusters; one hundred musical acts who can actually feed themselves off the money they make from their work is better than ten acts getting fabulously rich; and so on. And perhaps this is an instance where it actually makes more sense to treat copyright like property—after all, we sometimes tax property.[90]

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[88] Davies, Cole and Turner, above n 40.
[89] Canada's recent introduction of a digital services tax is a similar initiative, but it focuses solely on large online platforms rather than broader "creative economy" issues: see Government of Canada, "Digital Services Tax Act Backgrounder" (14 February 2022), online: <www.canada.ca>.
[90] Copyright royalties can of course be taxed as income but property taxation is a different model.

Continuing on the tax theme, the oft-quoted line that copyright is a tax on the public for the benefit of writers has been shown to be a half-truth.[91] Rather it would be more accurate to call it a tax on the public and authors for the benefit of publishers and platforms, and some lucky authors. Creators have legitimate rights and expectations about being able to control the works they make; but if we focus on the copyright system rather than copyright law, we see that not all creators benefit equally.

Conclusion

One way to look at platformisation is as a frontier story. The internet and digital media start out as non-commodified "open space" with many possibilities and possible futures, but constrained by its origins. They are then is gradually taken over and heavily commodified by combination of traditional publishing capital and new platform capital. It is similarly easy to reach for a "wild west" metaphor for the disorderly rise of crypto, Web3, and NFTs. After what all, what could be more typical of a Western than a space in which fortunes are made and lost, gambled and stolen—and where the basis of these fortunes are "new" property claims. The metaphor breaks down here because there is no real comparison between the history of dispossession and genocide in the westward expansion of settler societies in North America and digital transformation. However, the contradiction between egalitarian promises and propertisation is real: the proposition that anyone can own a piece of the future is a large part of Web3's rhetorical appeal. But the prospects that this future will actually be substantively equitable are unclear at best. The space for regulatory interventions aimed both at "old" and "new" solutions to distributive problems is there; this chapter has surveyed some possibilities. Historically, the unrestrained capitalism which succeeded the "Wild West" was itself overtaken by the Progressive era and later the New Deal (both common touchstones for US critical legal academics today[92])—perhaps we will see a similar series of events in the digital age.

[91] "The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures": Thomas Babington Macaulay "First Speech to the House of Commons on Copyright" (5 February 1842).
[92] See William Novak "Unpacking the Anti-Monopoly Toolkit I: 'The Progressive Tradition of Antimonopoly & Public Utility'" (5 March 2022) LPE Project <https://lpeproject.org>; Christopher Ali "The Legacy of the Rural Electrification Act and the Promise of Rural Broadband" (7 December 2021) LPE Project <https://lpeproject.org>.

Conclusion

This thesis makes a case for looking at copyright law differently: not merely as an area of law, but as a structural part of complex and intertwined creative economies. This started from first principles: the justifications offered for protecting creative works with a limited, exclusive right. Chapter One argued that neither of the dominant justifications for copyright—that it reflects a natural right of creators, or an incentive to create and distribute works—sufficiently describe how copyright works in practice. They may serve very well as idealised, intellectual justifications for copyright, and certainly shaped the formation and expansion of copyright over its history. However, there is much to be gained from looking at how copyright works in the world as a structural piece of creative economies involved in the relations between parties in those economies, and forming a different theory of copyright from that. This derives from the incentive justification, inasmuch as that justification is also consequentialist and oriented towards copyright's economics: it requires a concern for the impact copyright actually has.

Looking at the digital transformation of the early 2000s, Chapter Two argued that copyright's structural role is to enable the process of *commodification* of creative works. This is the process by which creative work is turned into something that can generate returns in a market. Classical copyright provided a bulwark against commercial pirates who owned or had access to capital-intensive copying: for example, printing presses, record presses, or facilities to copy films.[1] This meant that publishers could be assured that their investments in creative work would not be undercut by competitors selling the same product at a lower price—as the basic economic incentive model describes. As consumer technologies around the consumption of creative work changed, however, the precise role of copyright changed too. Starting with the introduction of home video and audio taping, wholesale copying of works became much easier for consumers, culminating in the digital transformation whereby copying became essentially costless. The introduction of the Internet completed the *coup*: now distribution costs ran to zero as well. This induced a crisis in creative economies with which we are all familiar: the rise of filesharing-based consumer piracy.

[1] See Rebecca Giblin *Code wars: 10 years of P2P software litigation* (Edward Elgar Publishing, 2011) at 9-11.

Chapter Two argued that this was a crisis, not precisely for copyright, but for commodification. It was a crisis that was resolved in part by changing copyright's role. The challenge of commodifying creative works changed from stymying piratical competitive behaviour to discouraging piratical consumer behaviour. The publishers did this through multiple avenues, notably litigation against consumer pirates, lobbying for stronger laws against filesharing and, eventually, adapting to different business models based around streaming. In these initiatives, the publishers butted up against a new rival: digital platforms. Through cases and legislative battles, the boundaries of digital copyright were meted out. From the major players, the courts and legislatures heard two versions of what copyright should do: copyright should protect the rights of creators and the profits of publishers; or, copyright should be limited to promote wide dissemination and user creativity, with increased returns from the proliferation of works monetised through streaming, sales and advertising. Chapter Three dubbed these two stories the logic of property and the logic of innovation. They disagree on the character and extent copyright's ideal role in creative economies, but they do not disagree that copyright should ultimately serve *commodification*. This common interest has become more apparent as courts and legislatures have resolved more of the outstanding digital copyright issues and the publishers and platforms work out their *modus vivendi* for the digital age.

But this is only one side of the copyright story. If we move off the mountain, away from the Olympian struggle of publishers versus platforms, we get a very different perspective on copyright and commodification. Chapter Four looked at how the digital medium of podcasting grew from a hobbyist phenomenon to a significant cultural force. Interviews with independent creators in this new creative economy showed varied experiences, and a valuable supplement to the picture of creative work that comes out of looking at more established media. The medium of podcasting exploded in popularity in the 2010s, particularly with the smash-hit success of *Serial* in 2014. Although the format of podcasting has roots in radio (particularly talk radio, audio documentaries and journalism) and audiobooks, it emerged as a distinct medium with creators and a history of its own. In the early days of podcasting, it was largely a space for independent creators; since 2014, podcasting has attracted high-profile celebrities as well as large investments from media and technology companies. This chapter also considered how business models based around advertising and subscriptions—familiar in other media as well—took root in podcasting, and became widely available to independent podcasters. The podcasting industry continues to

develop, and with the mainstreaming of podcasts comes a greater emphasis on commodification. The future for independent podcasters is not certain, but the advertising and subscription business models seem likely to persist.

In contrast to the less well-known field of podcasting, the struggles of working musical artists in the new digital cultural economy is well-known: paltry streaming revenues and difficulty in finding exposure through platform "discovery". Various structural factors around how streaming revenues are distributed mean that artists outside the very top echelon of creators simply cannot make a living off of streaming. While it has never been easy for these artists, the restructuring of creative economies following the digital crisis has brought their struggles to the fore. Chapter Five re-engaged with the theoretical underpinnings of this thesis to further consider how copyright relates to the commodification process. Drawing on the empirical and jurisprudential work of Chapters Three and Four, this final chapter elaborated on some of the roles copyright law plays in the digital economy: as a means of control over users' behaviour; as an asset from which a predictable return can be generated; and as a broader structure which allows intermediaries to profit off of creative work. All of these roles are essentially tied up with copyright's role in commodification, and to the distributive problems in creative economies in which copyright law is complicit. To mitigate these problems, copyright reform is only one piece of the puzzle. Chapter Five concluded by considering how private ordering responses in the form of alternative business models respond to some of the challenges which creative economies face. In particular, it posited that the fervent activity around NFTs could be seen as a backlash against the "end of ownership" which streaming digital creative works seems to some to have ushered in. However, structural features of the incipient NFT ecosystem raise serious doubts about whether it will be a positive development on the whole. Instead, we should consider regulatory responses which go directly to the distributive problems in creative digital economies. Copyright law is regulation, and it is a choice what it regulates, how it regulates, and to what ends. If we want a more equitable creative economy it is something we must pursue; it will not come about on its own.

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Appendix: Interview questions

Framing/context questions

How long have you been podcasting?

Where is your podcast produced?

How many podcast series have you been involved with as a creator/host? As a guest?

- Follow-up: How long has each podcast you've been involved with as a creator/host run for?
- Follow-up: What was your listenership like for each of your podcasts? About how many downloads and streams did you average per episode?

Are you a host, a producer, or both on your podcast(s)?

Motivation questions

What motivated you to start a podcast? Why choose podcasting as the format rather than other media?

- Follow-up: Have you been involved with projects in other media, (for example, writing for print or the web, radio, or television)?

What were the biggest barriers in starting your podcast?

- Follow-up: What were your major financial costs, if any?
- Follow-up: Were there other, non-financial barriers to starting or carrying on your podcast?

Do you make money off your podcast? (Follow-ups: If yes, how? Why did you choose these methods/platforms/etc.? Do you make enough to cover your production costs? If no, why not?)

Intellectual property questions

Do you use material by other authors? (For example: primary or secondary historical materials, music or other audio clips, or images.)

Follow-up: how do you use these materials? (For example for textual materials, quotation, summary, as background research.)

Follow-up: do you seek permission for materials that you understand to be copyrighted? Why/why not?

Do you have any concerns about losing control of your own work by putting it online?

- Follow-up: Have you had any experiences of losing control of your work? To whom?

Relational questions

Who are the key parties (including persons as well as platform companies and software tools) that you work with or use to:

- produce your podcast?
- distribute your podcast?
- monetise your podcast?
- promote your podcast?

(For example, podcast networks, distribution platforms, payment platforms, advertisers, guests or other podcasts.)

Follow-ups for each of above (where [xxx] stands in for the party in question):

- What is your relationship with them?
    - Follow-up: Do you deal with anyone personally? Do you have a give-and-take relationship or is it more one-sided?
    - Follow-up: Is your relationship formalised in a written contract? Have you had any contract issues in this relationship?
- Are there alternatives to dealing with [xxx]? How important are they to your work and business?
- [Where relevant] Has being featured on [xxx]'s app or website been important for promoting your podcast to new audiences?

- Have you experienced any conflicts or issues in dealing with [xxx]? (If yes, dig down on nature of conflict etc.)