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Kung-Chung Liu
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Remuneration of Copyright Owners

Regulatory Challenges of New Business Models

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Introduction

One of the core purposes of copyright law is to remunerate right holders for use of their works. This was not a particular challenge during the early years of copyright law. Remuneration was a contractual issue between right holders and exploiters (primarily publishers, phonogram producers, theaters, or concert houses) in the first place. From the middle of the nineteenth century on, collecting societies were established to ensure remuneration. These self-help organizations of right holders searched for public cultural activities, requested compensation from the organizers, and distributed the revenues to their members.

Technological development made the control of unauthorized uses increasingly difficult. In particular the emergence of sound recordings allowed performances of music without the consent of right holders, for instance, in a coffee house. The first fundamental change occurred with the emergence of copying devices, such as audiotapes, and later on photocopying machines, which allowed private reproduction of works on a large scale. Right holders faced substantial losses as more and more legitimate copies were substituted by private reproduction. One vinyl record could be reproduced on many tape cassettes; students no longer needed to buy overpriced books, but contented themselves with copying the relevant parts.

Legislators all over the world reacted differently. Some simply prohibited such forms of private use (e.g., USA, UK), while others (Germany or France as front runners), realizing that they could never effectively control private behavior, legalized it and established at the same time a compensation (levy) system, under which copying devices and blank media were charged with fees, respectively, and collecting societies were involved to distribute the revenues among the right holders.

Critics of both approaches never died down. Whereas it was obvious that prohibition could not be effectively enforced—private copying took place anyway without compensating right holders—it was also undeniable that remuneration through collecting societies hardly compensated actual losses of right holders. Nevertheless, the compensation system had one strong argument on its side: creators (the original right holders) could be compensated. Even after assigning

their rights to commercial exploiters, statutory provisions could oblige collecting societies to split revenues among different groups of right holders. For some creators, such compensation systems were the only source of compensation.

The rising digital technology combined with the possibility of disseminating works via the Internet changed the copyright economy dramatically. Not all right holders, however, took these developments as opportunities and transformed their previous business models into new ones. In particular the entertainment industries and above all the music industry delayed the breakthrough for roughly one decade by insisting on trade only with offline carriers, most importantly compact discs. They perceived the new technologies as threats and tried to criminalize independent providers of online business models, which used copyright-protected material without authorization. Right holders only slowly understood that technical protection measures could be implemented to gain back their control over the use of works.

In view of that possibility, optimists—or pessimists, depending on the perspective—proclaimed the incipient end of collecting societies. We know by now that this prediction was more than wrong. Although the copyright economy is about moving away from physical copies toward business models that rely on access to decentralized and hosted content, from downloading to cloud storage and streaming, collective rights management is not dead.

Now new forms of use have evolved and various business models coexist. However, the core questions remain the same as at the very beginning of copyright law: How can adequate remuneration to right holders for uses of their works be ensured? Has it become easier—or more difficult? Has compensation become fairer? Does copyright law also serve the economic interests of creators? Do consumers accept onerous payment systems—or are high prices fostering illegal behavior? Has the "burden" of complying with copyright law simply become unacceptable for the general public?

Many concerns in fact might be rooted in deficiencies and uncertainties connected with copyright law. One first—although not new—issue is that the whole remuneration system is hardly comprehensible. This is not least due to the complexity of substantive copyright law. In fact, payment mechanisms are strongly related to the structure of copyright law, which is largely unclear per se. One simple act of use can involve a whole bundle of overlapping economic rights (including neighboring rights) and various groups of right holders. Therefore, improving the transparency of payment systems is necessarily linked with a more streamlined copyright protection—but again how can such streamlining be achieved?

Secondly, collective rights management systems as such lack transparency. Certainly, collecting societies have mostly adapted their activities to new technological reality, and new administration structures have emerged. However, this is still an ongoing process, and alternative approaches might be necessary for simplifying the management of copyrights and legalizing usage activities in ways that are more efficient and legally watertight. The Scandinavian model of the "extended collective licenses" might be one approach, which legalizes uses of works from unknown right holders or right holders who are not members of collecting societies.

At the same time, collecting societies, to a large degree as monopolists in more or less shielded national markets, are organized as private entities and yet perform activities in public interests. Appropriate governance structure is a copyright as well as competition law issue. What role should states play in regulating that very specific branch of the copyright economy?

Large parts of the copyright industries, however, no longer rely on collective rights management systems. Equally important payment mechanisms based on individual licensing are on the rise. Thanks to business models enabled by technical measures, right holders are about to gain back control over the use of their works that they lost decades ago. Additional impetus is given by new actors who come into play, above all Internet service or mobile providers (ISPs/MP). ISPs/MPs are in fact in the best position not only to monitor usage activities but also to collect fees. From an economic point of view, it might even make sense to require ISP/MPs to pay copyright owners on behalf of their subscribers and charge the latter individually either a lump sum or per-use payment. The potential of ISP/MPs in lowering transaction costs is obvious.

As desirable as all these advancements may seem to be at first glance, they give rise to a third group of multifaceted concerns. Above all—and beyond the questions addressed here—copyright may be used (and abused) as a lever to control user activities beyond the scope covered and justified by copyright law. In particular, ISP/MPs are collecting not only fees from users but also data. Even from the mere remuneration perspective, business models that allow copyright industries and ISP/MP exclusive technological control, respectively, are a double-edged sword. Fair consumer prices are by no means ensured, since no independent price control applies (in contrast to legally disputable tariffs of collecting societies). At the same time nothing guarantees the participation of creators, especially after they have entered into sell-out agreements. If one core issue of copyright law is the adequate remuneration of creators, the field cannot be left entirely to such players. Special regulation may be required to protect the interests of other parties involved—but what should it look like?

Finally, since we increasingly live in a collaborative economy, right holders and disseminators of content are no longer necessarily identical. Independent market players, such as startups, quite often are more innovative in anticipating future consumer preferences. Even the most sophisticated and sought-after platforms need content to become meaningful. Voluntary licensing, however, is very often refused since new business models are seen as a threat to traditional ones. If right holders are not interested in using online technologies themselves, they most likely will also not grant licenses to independent platforms, including e-book producers, perceiving the latter as rivals in technology competition. A prominent example was the Google book scanning project. What Google wanted to accomplish was precisely what the modern information society is in need of—providing the world online access to the existing knowledge in printed form, some of which is quite often out of stock.

Book publishers, however, remonstrated all over the world. This is not without irony if we think back to one of the core purposes of copyright law, namely, to remunerate right holders for the use of their works. In fact, instead of prohibiting

Google's activities, publishers could have requested adequate compensation—also and not the least for the benefit of the authors of the books. Such cases suggest a fourth regulatory challenge for modern copyright economy: If voluntary licensing of independent suppliers of innovative business models does not happen, are we then in need of legal intervention, e.g., based on compulsory or statutory licenses? To what extent can competition law be a remedy?

Overall, the copyright economy is increasingly moving away from the world of physical copies (such as books, DVDs, or other storage media). New business models rely on access to decentralized hosted content instead. This evolution currently is speeding up with the rise of wireless and mobile Internet access (in China, for instance, mobile Internet access has surpassed that of PCs), and cloud computing, in particular, is replacing downloads with streaming activities. All this makes ubiquitous uses of copyright-protected works more widespread and instantaneous than ever before.

The question about how to make sure that copyright owners are reasonably remunerated for the use of their works has become far more complex and pressing. This insight prompted the editors of this book to devote the 6th "Conference on European and Asian Intellectual Property," a joint effort between the Institutum Iurisprudentiae of the Academia Sinica, Taiwan, and the Max Planck Institute for Innovation and Competition in Munich, Germany, that started in 1999, to the topic "Exploring Sensible Ways for Paying Copyright Owners." The conference took place from 11 to 12 June 2015 in Taipei, with the Applied Research Center for Intellectual Assets and the Law in Asia (ARCIALA), Singapore Management University, as the third co-host. More than 20 speakers, mainly from Asian and European countries, gathered together and reflected on the related questions. Different from many anthologies, the present book follows a structured approach similar to that of the conference. Experts in this specific field of copyright law were invited to study and explore predetermined issues in order to assemble a consistent whole.

The major concern of the present book is to evaluate existing mechanisms and find new ones for the adequate payment of copyright owners for the consumption of their works. The underlying assumption is that adequate rewards to creators and subsequent right holders will continue to be one goal of copyright law (particularly to incentivize further creation and investment). Searching for sensible ways in the first place focuses on the reduction of transaction costs. New technologies are promising in that respect, but further development and broader application of new mechanisms might be necessary to enhance adequacy and efficiency of payment systems. The more onerous payment systems are, the more irrelevant copyright risks become due to lack of acceptance, and the less they might fulfill their functions.

Finally, we would like to thank all the contributors for their support and cooperation. In addition, we'd like to thank the following institutions in Taiwan for sponsoring the conference: Institutum Iurisprudentiae Academia Sinica; the Judicial Yuan; the Ministry of Science and Technology; the Fair Trade Commission; College of Law, National Taiwan University; Research Center for Humanities

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Overlapping Rights in Different Business Models

Jyh-An Lee

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Abstract This chapter provides an overview of the problems stemming from the fragmented copyright system. The multitude of rights and right holders has led to huge transactions costs for the exploitation, license, dissemination, and enforcement of copyright. Copyright divisibility and fragmentation also result in legal issues surrounding overlapping exclusive rights in a single subject. This problem may not only bring about controversies over copyright license, but also generate uncertainties for startup companies that build their business models on digital content. This chapter then evaluates current policy proposals addressing the issues of fragmented copyright and overlapping exclusive rights. Those proposals include consolidating current bundles of exclusive rights, and adopting an implied license

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doctrine to the incidental use of copyrighted work based on one single exclusive right. Finally, this chapter assesses whether a more streamlined collective copyright management mechanism can solve the issue of overlapping rights.

1 Introduction

When we talk about copyright, there is not only one right involved. Copyright actually consists of a bundle of different exclusive rights. For example, in the United States, copyright includes rights of reproduction, adaptation, distribution, performance, display, and digital sound recording transmission rights.[1] In the United Kingdom, copyright consists of rights of reproduction, adaption, communication to the public, performance, and broadcasting.[2] Each of these rights can be owned, transacted, and enforced separately.[3] This is called copyright divisibility.[4] The exclusive rights sometimes overlap; therefore, the same act may infringe different exclusive rights simultaneously.[5] Copyright divisibility and overlapping exclusive rights have created enormous transaction costs for copyright clearance. Digital technologies and the Internet, however, have not ameliorated the problem, but made it more perplexing.[6] Compared to activities in the physical world, those in cyberspace are more often associated with different overlapping exclusive rights.[7]

This chapter provides an overview of the problems stemming from the fragmented copyright system. The multitude of rights and right holders has led to huge transactions costs for the exploitation, license, dissemination, and enforcement of copyright. Copyright divisibility and fragmentation have also resulted in legal issues surrounding overlapping exclusive rights in a single subject. This problem may not only bring about controversies over copyright license but also generate uncertainties for startup companies that build their business models on digital content.

This chapter then evaluates current policy proposals addressing the issues of fragmented copyright and overlapping exclusive rights. Those proposals include consolidating current bundles of exclusive rights and adopting an implied license

[1] 17 U.S.C. §106.

[2] CDPA 1988 ss. 16-23.

[3] 17 U.S.C. §201(d)(2); CDPA 1988 ss.90(2)(b).

[4] A. Kohn / B. Kohn (2000), 362; M.A. Lemley (1997), 570; J. Litman (2010), 20; J.W. Natke (2007), 486, 495.

[5] M.A. Leaffer (2010), 294.

[6] M.A. Lemley (1997), 574; J.W. Natke (2007), 486.

[7] J.W. Natke (2007), 486.

doctrine for the incidental use of copyrighted work based on one single exclusive right. Finally, this chapter assesses whether a more streamlined collective copyright management mechanism can solve the issue of overlapping rights.

2 Fragmented Copyright

2.1 The Multitude of Rights and Right Holders

Copyright involves a collection of exclusive rights in relation to creative works.[8] Different exclusive rights have been designed to cover new technological use.[9] Each sub-right underlying a copyrighted work can be transferred or licensed to different parties.[10] The benefit of copyright divisibility is that authors can exploit their works in different ways by different entities.[11] Divisibility was also recognized by the US Supreme Court.[12] When sub-rights of the same work are owned by different parties, users are required to obtain multiple authorizations from those rights holders.[13] Rights holders may have incentives to license different rights to different copyright management organizations (CMOs) whose businesses are designed to manage specific rights.[14] In practice, it is quite possible that unrelated parties own different exclusive rights to the same copyrighted work.[15]

Sometimes there are multiple copyrighted works on one single subject.[16] For example, a film contains a bundle of screenplay, characters, music, and other copyright works.[17] Producers, directors, and actors in some jurisdictions can claim their rights independently in the same film.[18] A pop song may include different copyrighted works owned by respective copyright holders, such as

[8]Text accompanying note 1-2.

[9]P. Goldstein (2003), 189.

[10]Text accompanying note 3; W. Cornish / D. Llwelyn / T.F. Aplin (2013), 525; D. Gervais (2010), 10.

[11]J. Litman (2004), 18.

[12]N.Y. Times Co. v. Tasini, 533 U.S. 483, 495-96 (2001).

[13]D. Gervais (2010), p. 10.

[14]*See, e.g.,* P. Mysoor (2013), 183-84; J.W. Natke (2007), 497.

[15]*See, e.g.*, M.A. Lemley (1997), 570.

[16]D. Gervais / A. Maurushat (2003), 15, 20.

[17]D. Gervais (2010), 13.

[18]*See, e.g.,* D. Gervais (2000), 81; D. Gervais / A. Maurushat (2003), 21. Some commentators argue that by allowing each contracting country to decide upon the relationship between audiovisual performers and film producers, Article 12 of the Beijing Treaty on Audiovisual Performances actually weakens the protection for performers, who are principally in an inferior bargaining position. G. Pessach (2014), 86-89. Similar criticisms are made on the "statutory presumptions," a proposal that copyrights are systematically transferred to corporate entities. T. Lüder (2007), 26-27.

producers, composers, lyricists, performers, and publishers.[19] Therefore, a single use of a song requires separate licenses from different right holders and CMOs, such as an author's society, a producer's society, and a performer's society.[20] Copyright clearance on occasion becomes challenging when rights holders, such as producers/performers[21] and composers/publishers[22] may have different views regarding how the subject work should be exploited. Even when there is only one author holding copyright over a work, he may still be represented by different copyright collecting societies for different types of rights.[23] Moreover, all these subdivisions may be co-owned by co-authors or their successors.[24] Digital technologies, however, have made copyright fragmentation more common and legally confusing.[25] One example is the Internet transmission of music in the US, which involves, at least, both license for public performance and license for distribution. However, the former is administered by the American Society of Composers, Authors, and Publishers (ASCAP) and BMI, whereas the latter is licensed by the Harry Fox Agency, a subsidiary of the National Music Publishers Association.[26]

From a user's perspective, if overlapping rights are administered by different CMOs, the costs of right clearance may increase significantly. Users need to identify who are the right holders and negotiate with them separately.[27] The transaction costs stemming from searching and negotiation are significant.[28] Whether multiple rights on a single work are administered by one single CMO may differ from jurisdiction to jurisdiction. For example, in some jurisdictions, the author's right of reproduction and right of communication to the public are managed by different CMOs, whereas in other jurisdictions, these rights are administered by one single CMO.[29]

2.2 *The Tragedy of the Anticommons*

The theory of the tragedy of the anticommons was first conceptualized by Michael Heller's 1998 Harvard Law Review article, in which he used the post-Soviet property system as an example to illustrate the market failure resulted from

[19] *See, e.g.*, D. Gervais (2010), 10, 12; T. Lüder (2007), 23-24, 41; W.W. Fisher III (2004), 59-67.
[20] *See, e.g.*, T. Lüder (2007), 23-24; W.W. Fisher III (2004), 46-59.
[21] *See, e.g.*, E. Vanheusden (2007), 47; S. Dusollier / C. Colin (2011), 834.
[22] Information Infrastructure Task Force (1995), 213-225.
[23] D. Gervais / A. Maurushat (2003), 22.
[24] *See, e.g.,* D. Gervais (2010), 2.
[25] *See, e.g.*, J. Litman (2007), 1917; J.W. Natke (2007), 495-498.
[26] Information Infrastructure Task Force (1995), 213-225.
[27] M.A. Lemley (1997), 570; J. Litman (2004), 21.
[28] R.P. Merges (1996), 1317; J.W. Natke (2007), 500.
[29] T. Lüder (2007), 24-25.

fragmented property rights and coordination breakdown.[30] Heller discovered that in the post-socialist economy, property rights of real estate were fragmented and distributed to multiple stakeholders in Russia.[31] As it was quite difficult to obtain permission from all the rights holders,[32] new entrepreneurs preferred to start up their businesses in kiosks, rather than stores.[33] Therefore, the significant amount of empty and underused stores in the market was viewed as an example of the tragedy of the anticommons by Heller.[34] He defined anticommons as[35]:

> [m]ultiple owners are each endowed with the right to exclude others from a scarce resource, and no one has an effective privilege of use. When there are too many owners holding rights of exclusion, the resource is prone to under use—a tragedy of the anticommons.

When proposing the theory of anticommons in 1998, Heller was aware that this theory may have wide implications in the study of intellectual property (IP).[36] He and Rebecca Eisenberg further applied this theory to biomedical research and argued that patenting upstream biomedical research produced anticommons property where "too many owners hold rights in previous discoveries that constitute obstacles to future research."[37] Anticommons becomes a tragedy when it is too costly for users to obtain all essential licenses.[38]

The tragedy of the anticommons takes place in the context of divided copyrights as well. As Heller points out, "[g]overnments can create too many property rights and too many decision-makers who can block use."[39] When specific rights subsist in the same work are administered by different copyright collecting societies, the costs of copyright clearance will increase significantly.[40] Transaction costs, strategic behaviors, and cognitive biases may all hinder efficient negotiation.[41] However, it does not mean that CMOs or entities who obtain any of the subdivision right should be blamed for the tragedy. It is natural that "[a]fter initial entitlements are set, institutions and interests coalesce around them, with the result that the path to private property may be blocked and scarce resources may be wasted."[42]

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[30] M.A. Heller (1998), 621.
[31] *Id.,* 637-639.
[32] *Id.,* 39.
[33] *Id.,* 633-635.
[34] *Id.,* 633-635, 659.
[35] *Id.,* 624.
[36] M.A. Heller (1998), 626.
[37] M.A. Heller / R.S. Eisenberg (1998), 698, 700.
[38] *Id.,* 699.
[39] M.A. Heller (1998), 625.
[40] N. Elkin-Koren (2005), 381.
[41] M.A. Heller (1998), 625-626; M.A. Heller / R.S. Eisenberg (1998), 698.
[42] M.A. Heller (1998), 659.

The perverse result will be that every right holder has the exclusive right to prevent others from using the underlying work,[43] and eventually no single party can legally exploit the subject copyrighted work.[44] To put differently, gridlock in relevant industries and holdup behaviors would become a serious problem because of copyright divisibility.[45] Consequently, a single piece of exclusive right may become less valuable,[46] and the consumption of copyrighted works may come below the socially optimal level.[47] Copyright divisibility results in the tragedy of the anticommons.[48] In the end, the multitude of rights and right holders on the same copyrighted work leads to a classic example of market failure.[49] What is worse is that "[o]nce anticommons property is created, markets or governments may have difficulty in assembling rights into usable bundle."[50]

3 The Problem of Overlapping Rights

Traditionally every type of copyright use mostly fits nicely with individual subdivision of copyright.[51] If I make a copy of a book without a copyright owner's permission, I may infringe his right of reproduction. If I broadcast a song via radio, this involves the right of communication to the public. Nevertheless, a single act may also fall into the overlapping zones of different rights and violate all those rights at once.[52] The distinction between different economic rights is sometimes unclear, which create uncertainties for copyright enforcement or CRM. If a user gets license to make certain use of a work, it doesn't mean that his exploitation of the work is entirely legal. If other overlapping rights involved are incidental to or necessary to a certain use, the user may still need to get additional licenses associated with those overlapping rights.[53]

As the Internet and digital technologies have increasingly transformed the clear distinction between different uses and accompanying rights, issues concerning overlapping rights are increasingly common.[54] Professor Jessica Litman once asked: "When someone views a website or listens to a song over the Internet, is

[43]D. Gervais (2010), 13; J.W. Natke (2007), 500.
[44]M.A. Lemley (1997), 57-72.
[45]L.P. Loren (2003), 698.
[46]M.A. Lemley (1997), 571.
[47]L.P. Loren (2003), 700; L. Lessig (2004), 223.
[48]M. Heller (2008), 37-43.
[49]L.P. Loren (2003), 677.
[50]M.A. Heller (1998), 659.
[51]J.W. Natke (2007), 496.
[52]H.R. Rep. No. 94-1476 (1976), 61-62.
[53]J. Litman (2007), 1916-1917; M.A. Lemley (1997), 571.
[54]D. Gervais (2010), 10-11; M.A. Lemley (1997), 568; J.W. Natke (2007), 486.

she committing a reproduction, a distribution, a performance or display, or all of them at once?"[55] She indicated that every Internet related use of copyrighted works involves rights of reproduction, distribution, public performance, and public display in the United States.[56] Take the media-on-demand service for example; such a business model may be built upon all those rights, plus the right of communication to the public and right of making available in some other jurisdictions. It is, therefore, very easy for unwary users to infringe copyright even if they have already obtained a license for any of the single exclusive rights.[57] Some scholars have rightfully pointed out that the problem of overlapping rights in the digital space stems from the fact that the divisibility doctrine does not take Internet transmission into consideration.[58] Just like the anticommons in biomedical research, the spiral of overlapping rights in the hands of different owners may constitute obstacles to new product development and innovation.[59] In this section, we will discuss some cases and issues concerning overlapping rights in the physical world, and then turn to those in the digital arena.

3.1 Rights of Communication to the Public and Public Performance

The problem of overlapping rights may exist in traditional use of copyrighted work. For instance, the difference between the right of communication to the public and the right of public performance once troubled the British courts. In *Football Association Premier* League *v QC Leisure*, a number of publicans used a foreign decoder to show on television screens the broadcast of Premier League games in their pubs.[60] Kitchin J. gave a provisional view that the publicans had not communicated the broadcasts to the public, as there had been no further re-transmission by wire or otherwise.[61] However, the Court of Justice of the European Union (CJEU) had a different viewpoint, stating that transmitting the football matches on television screens did constitute a communication to the public.[62] Commentators suggested that the opinion held by the CJEU has substantially expanded the scope of the right of communication to the public and blurred the line between it and the right of public performance.[63] Kitchin, who later became Lord Justice, believed that

[55]J. Litman (2010), 42; D. Gervais (2010), 10.
[56]J. Litman (2004), 19-20; M.A. Lemley (1997), 567-68; J.W. Natke (2007), 486.
[57]M.A. Lemley (1997), 571; *see also* J.W. Natke (2007), 498, 501.
[58]M.A. Lemley (1997), 568; L.P. Loren (2003), 716; J.W. Natke (2007), 495-496.
[59]M.A. Heller / R.S. Eisenberg (1998), 698-699.
[60]FAPL EWHC 1411 (2008) (Ch); 3 C.M.L.R. 12 (2008).
[61]FAPL EWHC 1411 (2008) (Ch); 3 C.M.L.R. 12, 262 (2008).
[62]FAPL (C-403/08)(2011) E.C.D.R. 8, 202-203.
[63]P. Mysoor (2013), 173.

the CEJU's opinion suggested that there is an overlap between the right of communication to the public and the right of public performance.[64]

3.2 *Right of Making Available to the Public*

Copyright in the digital environment occasionally involves three types of exclusive economic right:[65] right of reproduction,[66] right of communication to the public,[67] and the right of making available online.[68] New business models enabled by digital technologies, such as IPTV, music streaming, and other web-based content delivery services, have led to copyright controversies, mostly over which type of copyright is involved in a certain transaction. This issue is important for copyright practice, especially when different rights are owned by different right holders or administered by different CMOs. For example, whether digital transmission falls in the scope of right of distribution was once an issue.[69] Another instance is the creation of the "right of making available to the public," which originates from the inability of the Berne Convention for the Protection of Literary and Artistic Works to cover interactive or on-demand transmission of copyrighted works, enabled by the Internet.[70] As those interactive services may not fall into traditional public performance and recitation, broadcasting, and cable transmission[71] which cover only traditional "push" technology,[72] copyright holders had problems claiming rights over interactive and individualized use of their works.

In order to solve this difficulty, the WIPO Copyright Treaty (WCT) and the European Union Copyright Directive (the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society), classify the right of "making available to the public" as a type of more general right of communication to the public.[73] This right covers various interactive uses of copyright works, including offer for download, streaming music works, pay-per-view TV channels,

[64]FAPL EWHC 108 (2012) (Ch); 2 C.M.L.R. 16, 63 (2012).

[65]T. Lüder (2007), 14.

[66]WCT Art. 9(4); WPPT Art. 7, 11, and 16; E.C. Copyright in the Information Society Directive Art. 2.

[67]WCT Art. 8; E.C. Copyright in the Information Society Directive Art. 3.

[68]WCT Art. 8; WPPT Art. 10, 14, and 16; E.C. Copyright in the Information Society Directive Art. 3.

[69]D. Gervais (2000), 81.

[70]K.E. Beyer (2014), pp. 6-7; P. Goldstein / P.B. Hugenholtz (2010), 328.

[71]Berne Convention, 1971 Paris Text Art. 11, 11*bis*, and 11*ter*.

[72]P. Mysoor (2013), 168.

[73]WCT Art. 8; EU Copyright Directive Art. 3(1).

and file sharing over peer-to-peer networks.[74] Articles 10 and 14 of the WIPO Performers and Phonograms Treaty (WPPT) similarly provide performers and producers of phonograms with the right of "making available to the public." As this right of making available to the public is different from but sometimes overlapping with the right of reproduction, a legitimate interactive online service involving both rights may require two different clearance transactions.[75] In countries like the US that have not legislated the right of making available to the public, one common argument against such legislation is its potential overlap with the rights of performance and display.[76]

3.3 Rights of Reproduction and Public Performance

Rights of reproduction and public performance are two rights that tangle in a number of new business models,[77] especially when users have already obtained a license for pubic performance, but not for reproduction. Courts in different jurisdictions may have different approaches to the overlapping of these two rights. Here we provide examples from the US and Germany to illustrate the judicial heterogeneity.

3.3.1 The MP3.com Case in the US

In the early days of the digital music revolution, MP3.com purchased CDs and reproduced the music to facilitate its streaming business model. Although the company acquired public performance licenses from ASCAP and BMI,[78] it was held liable for willful infringement of the reproduction right.[79] MP3.com argued that the acquisition of CDs includes a performing right license, accompanied by an implied license for reproduction insofar as necessary to perform the music.[80] The US District Court for the Sothern District of New York disagreed and held that[81]:

[74]P. Goldstein / P.B. Hugenholtz (2010), 329; T. Lüder (2007), 33-36.

[75]D. Gervais (2000), 82; T. Lüder (2007), 26. There is one distinction between the right of making available to the public and the traditional right of communication to the public: the former is granted to authors, performers, and producers; whereas the latter is only accorded to authors. EU Copyright Directive Art. 3.

[76]K.E. Beyer (2014), 11.

[77]M.A. Lemley (1997), 574; W.W. Fisher III (2004), 160; D. Gervais (2010), 10.

[78]J. Litman (2004), 19.

[79]Country Road Music, Inc. v. MP3.com, Inc., 279 F. Supp. 2d 325, 333 (S.D.N.Y. 2003).

[80]*Id.,* 327.

[81]*Id.,* 327-328.

> "Performance" and "reproduction" are clearly and unambiguously separate rights under the Copyright Act of 1976. Here, the performing rights licenses themselves, as their name implies, explicitly authorize public performance only, do not purport to grant a reproduction right in music compositions. . .Moreover, the performing rights societies themselves do not, and do not purport to have, the authority to grant such a right.

In other words, even though MP3.com had secured performance rights licenses from the performing rights societies, the court held that the company still infringed copyright because such licenses did not include right of reproduction.

3.3.2 The MyVideo Case in Germany

In Germany, although an online service provider MyVideo already acquired a pan-European license from GEMA for public performance, it was still sued for the infringement of mechanical right (right of reproduction) by a CMO named CELAS, a joint venture of GEMA and PRS for Music. MyVideo then sought declaratory judgment against CELAS. Both the Munich District Court and Munich Court of Appeals ruled against CELAS because the courts opined that requesting a license purely for mechanical right does not make economic sense.[82] This decision was based on the German copyright rule that prevents rightholders from over-fragmenting exclusive rights.[83] Therefore, the courts ruled that rightholders can only license rights that are economically feasible.[84] This case illustrates a different approach than the US one coping with the overlapping reproduction right and public performance right.

3.3.3 Comparison

The similarity between the above two cases is that defendants in both cases obtained licenses for public performance. However, neither was licensed for reproduction. The US federal district court insisted on the doctrine of copyright divisibility and held that another license for reproduction is necessary. On the other hand, the German court approached this issue from an economic perspective and ruled that additional license for reproduction is pointless. Some scholars suggest that the case of CELAS presented the different practice of CMOs in continental-European countries and Anglo-American jurisdictions.[85] Continental-European CMOs normally require right holders to license both the reproduction right (or mechanical

[82] R.M. Hilty / S. Nérisson (2013), 229.
[83] J. Drexl (2014), 483.
[84] *Id.*
[85] J. Drexl / S. Nérisson / F. Trumpke / R.M. Hilty (2013), 328-329.

right) and public performance right; whereas Anglo-American CMOs typically only request public performance right.[86]

4 Possible Solutions to the Problem of Overlapping Rights

The enormous transaction costs for copyright clearance in a single use of any given work are not only bothersome for users but may also stifle new and innovative business models.[87] Startup companies may hesitate to develop innovative technologies or businesses if it is too costly to clear various exclusive rights. Therefore, it is worthwhile to explore the alternatives of bundling the fragmented rights in order to alleviate the tragedy of the anticommons.

4.1 Integration of Rights

Some scholars have criticized the overlapping layers of different rights as unnecessary and suggested that those rights should be consolidated from a policy perspective.[88] These reform proposals contained the redesigning of copyrights into one single right of commercial exploitation by eliminating divisibility.[89] Some others proposed to abolish divisibility in cyberspace while maintaining it in the real world.[90] However, incumbent copyright owners in the copyright market have opposed the reform of integrating the bundle of rights into one single right just to ensure their interests.[91] In fact, the U.S. Copyright Act adhered to the indivisibility principle before 1976, where copyright was "only a single incorporeal legal title or property."[92] In evaluating the reform proposal regarding rights integration, we need to reevaluate the factors influencing the change from indivisibility to divisibility in the 1976 Copyright Act.

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[86] *Id.*

[87] J. Litman (2007), 1917; M.A. Heller / R.S. Eisenberg (1998), 700; J. Litman (2010), 20.

[88] P.B. Hugenholtz / M. van Eechoud / S. van Gompel / L. Guibault / N. Helberger (2006), 164; T. Lüder (2007), 26; *see also* J. Litman (2010), 43.

[89] J. Litman (2006), 180-186; J. Litman (2010), 43-45.

[90] J.W. Natke (2007), 505.

[91] J. Litman (2007), 1917; *see also* J.W. Natke (2007), 504.

[92] H.G. Henn (1955), 418.

4.1.1 Evaluating Integration as a Solution

The main reason for the 1976 reform regarding divisibility is that indivisibility created a problem for the standing to sue for infringement. If copyright owners would like to transfer part of his right to a transferee, such transaction would mostly be viewed as a license by the court, rather than as an assignment.[93] Consequently, the licensee would not have standing to sue third-party infringers.[94] Even if the license were an exclusive one, he would still have difficulties in joining the copyright owner as a necessary party in the infringement litigation.[95] Moreover, the indivisibility principle could not reflect the real copyright practice, which demanded varieties of contractual arrangement.[96] It was also believed that CMOs with the expertise in one specific subdivision of right may operate more efficiently.[97] Indeed the indivisibility rule has created some negative impact on the flexibility and efficiency of copyright transactions.

However, the problem of standing, which is the main concern in the 1976 Copyright Act, can be easily solved by slight revision of the Federal Rules of Civil Procedure[98] that allows exclusive licensees to join the copyright owner as a necessary party in the infringement. Moreover, some scholars raise concerns about the introduction of the divisibility rule in the 1976 Copyright Act. For example, Nimmer suggested that divisibility may produce difficulties for copyright notice, *i.e.* whose name should appear on the published copies of the work.[99] However, such concerns do not seem to have been realized in the last few decades, not to mention the fact that current rights management information,[100] marking multiple right holders has become easy, clear, and costless. Therefore, the difficulty of copyright notice may not be a strong reason for the elimination of the divisibility rule.

The real challenge faced by the proposal to reassemble different exclusive rights into an indivisible mass is how to cope with the status quo, in which different rights holders hold individual sub-rights, and international treaties, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), WCP, and WPPT, recognize a number of economic rights. Lastly, even if all exclusive rights were integrated into one single right of commercial exploitation, policymakers and the courts would still need to delineate a reasonable boundary of such right and decide whether such right is infringed whenever there is any new technological use.

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[93] J.W. Natke (2007), 493-494.
[94] *Id.,* 494.
[95] *Id.*
[96] *Id.,* 492.
[97] J.W. Natke (2007), 503; R.C. Cooter / T. Ulen (2012), 165.
[98] J.W. Natke (2007), 505.
[99] M.B. Nimmer / D. Nimmer (1992), 14-121.
[100] 17 U.S.C. §1202(c).

4.1.2 Implications from the Anticommons Theory

Transaction costs are the main obstacles for market players to bundle the anticommons property through private ordering.[101] Bundling multiple rights by new laws, therefore, has been the most straightforward way to solve the anticommons problem.[102] With the integration of exclusive rights, users only need to seek one copyright holder, not several. The holdup problem can thus be avoided. However, whenever there is an anticommons problem, the integration of existing fragmented rights is "brutal and slow"[103] because it is difficult to deal with current rights holders and the existing contractual relationship. Just like rights holders who had "invested in reliance on current property regime" in post-Soviet Russia,[104] holders of any subdivision of the copyright may refuse to give up their rights, not to mention those who run their businesses primarily based on one particular right. Therefore, policymakers must design mechanisms to share the economic gain with existing rights holders or find other ways to adequately compensate them.[105] Given the high transaction costs in the anticommons scenario, copyright lawmakers should nevertheless try to simplify the variety of exclusive rights, although this may be hard to implement, and to avoid creating new exclusive rights for new technological use.[106]

4.2 Implied License

Another more modest proposal is to adopt the "implied license" approach to solve the fragmented copyright problem while maintaining the multiple exclusive rights regime.[107] By making an analogy to the concept of easement in property law, some researchers propose that if each distinct exclusive right in copyright is conveyed to separate entities, a licensed right should also include other rights incidental to the subject of use.[108] In other words, if licensee X only obtains the license of right A, but right B is incidental to the exercise of right A, then X should also get an implied license of right B, even though right B is not listed in the license agreement.[109] Implied license is not a new concept in copyright or IP law. Courts occasionally use

[101] M.A. Heller / R.S. Eisenberg (1998), 700.

[102] M.A. Heller (1998), 626, 640.

[103] M.A. Heller / R.S. Eisenberg (1998), 698.

[104] M.A. Heller (1998), 641.

[105] M.A. Heller (1998), 655.

[106] R.C. Cooter / T. Ulen (2012), 166.

[107] J. Litman (2007), 1917.

[108] *Id.*

[109] Copyright reform can even go further to implement the concept of "implied license" in other transactions concerning any single exclusive right, *see* J. Litman (2010), 46-47.

this concept to cope with disputes where contracts do not explicitly regulate whether licensees were licensed for a specific use of the work.[110]

The approach adopted by German courts in the CELAS case is, to some extent, similar to the "implied license" theory. Although the courts did not mention "implied license" in the decisions, they held that it did not make any economic sense if users need to secure another license for reproduction.[111] In other words, we may interpret such rules as: in the digital environment, reproduction of copyrighted work is incidental to its public performance. Therefore, users shall be deemed to have obtained an implied license for reproduction if they are licensed for public performance. Any additional request for license would be redundant.

Different from the integration approach based on legislation, the "implied license" represents the approach that the judiciary is capable of solving the anticommons problem. Implied license can avoid the legislative costs of pushing through the bundling of various exclusive rights.[112] Nonetheless, there are some problems underlying the implied license approach. First, compared to some bright-line rules, there are always some uncertainties regarding whether specific rights should be covered by implied licenses.[113] Second, it would be natural for holders of specific rights to object to this approach if their exclusive rights are covered by previous transactions with implied licenses. Some CMOs and rightholders have been relying on one single or a few types of exclusive rights. Implied license may thus impose negative effect on their revenues. Therefore, some commentators suggest that courts should consider the commercial reality and adopt a minimalist approach to grant the least amount of rights in implied licenses.[114]

4.3 Collaborations Between CMOs

The problem related to overlapping fragmented copyrights can also be addressed from a downstream perspective by the standardization of practice and cooperation between copyright collecting organizations. CRM has been conceived as a solution to the inefficiency caused by copyright enforcement on an individual basis.[115] CRM help users save an enormous amount of transaction costs in obtaining permission from copyright owners for the use of the latter's work.[116] CRM has also become a

[110] *See, e.g.,* Effects Associates, Inc. v. Cohen, 908 F.2d 555 (9th Cir. 1990).

[111] *See* text accompanying note 87.

[112] G. Calabresi (1982); R. Oman (1994), 21-22, n.8 (describing the difficulty of changing the IP law).

[113] D.J. Bainbridge (2007), 87.

[114] *Id.*

[115] D. Gervais / A. Maurushat (2003), 15.

[116] M. Heller (2008), p. 72; R. Aoki / A. Schiff (2008), 199; S. Dusollier / C. Colin (2011), 817-818; J. Drexl / S. Nérisson / F. Trumpke / R.M. Hilty (2013), 18-19; R.P. Merges (1996), 1295.

practical way for authors to be compensated appropriately.[117] Although some commentators believe that CRM is the most workable solution for copyright enforcement amid new technologies,[118] CRM does face new challenges in clearing rights in digital products and new business models with divided copyright ownership,[119] such as Internet radio, webcasting, podcasting, and pay-per-download services. If CMOs are not able to grant the complete set of rights that users need, the value of their services will decrease markedly.[120]

4.3.1 Evaluating CRM as a Solution

CRM is organized based on the traditional divisibility of copyright.[121] Among others, one of the most challenging tasks for CMOs and users in the digital age is to identify various rights associated with different right holders.[122] If different CMOs can agree that one CMO is to grant licenses on behalf of all other CMOs,[123] copyright users may save a great deal of costs in copyright clearance. In countries like the U.K., different collective societies have started to cooperate to provide a "one-stop" shop for clearing various copyrights.[124] From a policy perspective, governments or lawmakers may consider forcing CMOs to work together to solve the copyright anticommons problem. For example, the Copyright Board in Canada is empowered to legally force CMOs to work together to offer a single license fee.[125]

In addition to the cooperation agreements between CMOs, some researchers propose that various rights on one single object, especially the public performance rights and mechanical reproduction rights, owned by different right holders should be administered by one entity and under one license.[126] Moreover, the Canadian Private Copying Collective (CPCC) was incorporated in Canada as an umbrella collective for the benefit of other CMOs.[127] However, it should be noted that given the difficulty of harmonizing the differences between different works and the

[117] D. Gervais / A. Maurushat (2003), 16.
[118] J.H. Cohen (2001), 135; M.A. Lemley (1997), 571.
[119] M. Heller (2008), 190.
[120] M.A. Lemley (1997), 571.
[121] D. Gervais (2010), 11; M. Bouchard (2010), 311.
[122] D. Gervais / A. Maurushat (2003), 20; J. Litman (2010), 20.
[123] D. Gervais (2010), 12.
[124] S. Stoke (2002), 169-170.
[125] M. Bouchard (2010), 320.
[126] A. Gowers (2006), 45; R.P. Merges (1996), 1377.
[127] However, CPCC only focuses on royalties associated with music works. M. Bouchard (2010), 314.

interests of various right holders,[128] the centralized umbrella model has not yet become a widespread success.

4.3.2 Implications from the Anticommons Theory

Collaboration between CMOs represents a market route to solve the tragedy of the anticommons. Such an approach may fail if the transaction costs exceed the gains from collaboration.[129] Just like kiosk merchants who want to assemble fragmented rights by transactions, while reducing the pressure to overcome anticommons by *ex post* contracting, collaboration between CMOs does not change the property regime itself.[130] Similar to the problem caused by copyright divisibility, the free or open source software (F/OSS) and Wikipedia communities also encounter the tragedy of the anticommons concerning copyright management. Because contributors to F/OSS or Wikipedia are always scattered and the number of contributions is huge, the transaction costs of IP clearance for those commons projects are enormous.[131] Robert P. Merges proposed to solve such problem by having representatives administer multiple IP rights on behalf of the communities by contractual arrangement.[132] In reality, a number of commons organizations, such as the Free Software Foundation, Apache Software Foundation, and Wikimania Foundation, have aggregated scattered IP rights and alleviated the anticommons problem effectively.[133] Akin to the role of those F/OSS and Wikimania foundations, if CMOs can cooperate with each other, they shall be able to help ease the anticommons tragedies resulting from copyright divisibility. Ronald H. Coase has argued that organizations function to internalize the transaction costs stemming from imperfect markets and, as a result, firms increase the market's overall efficiency.[134] The theory can be applied in the context of commons organizations and CMOs as well. By internalizing the transaction costs of assembling fragmented copyrights, both commons organizations and CMOs provide solutions to the tragedy of the anticommons.

Empirical research has indicated that close-knit communities may develop norms and institutions to manage resources efficiently and avoid the tragedy of the anticommons.[135] Communities of IP owners with repeat-play features have also developed "institutions to reduce transaction costs of bundling multiple licenses,"

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[128] *See* text accompanying *supra* note 139 and note 21.

[129] *Cf.* R.C. Cooter / T. Ulen (2012), 140; M.A. Heller (1998), 760; *Id.,* 657.

[130] M.A. Heller (1998), 642-643.

[131] J.-A. Lee (2010), 291-292.

[132] R.P. Merges (2008), 1187-1188.

[133] J.-A. Lee (2010), 292-293.

[134] R.H. Coase (1937), 386.

[135] R.C. Ellickson (1991), 64-166; E. Ostrom (1990), 182-184; M.A. Heller / R.S. Eisenberg (1998), 698; C. Rose (1986), 711.

such as patent pools.[136] Traditionally, different CMOs focus on different types of exclusive right and may not cooperate with one another frequently. Nonetheless, as the overlapping rights issue becomes increasingly common, CMOs that used to operate on different subdivision of rights may be forced to develop into a closer community. Consequently, the holdup problem becomes less important in the repeat-play setting.[137] In other words, by creating an environment with more overlapping rights, digital technologies may also push various CMOs to form a close-knit community, which will eventually develop a private-ordering solution to the anticommons problem.

4.4 Summary

The proposed solutions may help reduce transaction costs and correct market failure resulting from overlapping rights. They represent different approaches to the tragedy of the anticommons in the context of copyright divisibility. The integration of rights needs legislative action,[138] whereas implied license denotes a judicial treatment of the fragmented copyright. However, for regular incidental use of relevant exclusive rights in the digital realm, policymakers may consider legislating implied license as statutory license. It should also be noted that some other copyright reform proposals may alleviate the anticommons problem as well, for example, the extended collective licensing used in Nordic countries, a centralized one-stop-shop licensing agent, or compulsory licensing.[139] Different from those public initiatives, the collaboration between CMOs exemplifies how the market responds to the fragmented and overlapping copyright system. Nonetheless, these three proposals are not mutually exclusive. It is possible for these solutions to work together to ease the tragedy of the anticommons.

In addition to the proposed solutions analyzed above, private copyright practice has started to address the costs associated with royalty collection in new business models. As clearance of various rights involves enormous transaction costs, some users of multimedia works would rather use the materials in the public domain if they have such a choice, or even create everything from scratch, than obtaining permission to use other people's work.[140] On the other hand, copyright owners may rely on sophisticated digital rights? management (DRM) technology, rather than

[136]M.A. Heller / R.S. Eisenberg (1998), 700; R.P. Merges (1996), 1319, 1340-1342.

[137]R.P. Merges (1996), 1321.

[138]J.W. Natke (2007), 504 (predicting that "the Supreme Court is not likely to revive indivisibility in the absence of legislative action").

[139]D. Gervais / A. Maurushat (2003), 23-25; D. Gervais (2010), 17.

[140]D. Gervais / A. Maurushat (2003), 24.

various CMOs, to collect royalties.[141] The combination of those public and private orderings may, to some extent, reduce the transaction costs brought by copyright divisibility.

5 Conclusion

Although divisibility has provided flexibility for copyright owners' utilization of their works, it creates significant costs for copyright transactions and enforcement. The fragmentation of copyright occurs on various levels, such as national laws, the nature of copyrighted works, market structure, licensing practices, the interoperability of rights clearance systems, etc. The anticommons problem has become more serious in the Internet arena as digital technologies have enabled new ways of exploiting and distributing copyrighted works. Such new development has led to controversy over how new technological use should be classified into copyright law's traditional taxonomy of entitlements. A number of approaches have been suggested or implemented to solve the overlapping or fragmented issues in copyright clearance from a policy perspective.

A streamlined licensing process can not only reduce transaction costs for right holders and users, but also foster innovative business models.[142] CMOs may cooperate to facilitate streamlined copyright clearance, although not all of them have incentive to do so. Nonetheless, a centralized approach or collaboration between CMOs is not always easily implemented. Given that the nature, duration, and royalty rates of different rights cannot be easily harmonized, it is very likely that various rights holders may challenge the neutrality of the centralized authorities or mechanisms. Therefore, another yet-to-be-explored policy question is how to balance the diverse interests of rights holders and stakeholders of various copyrighted works.

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[141] M. Ricolfi (2007), 297-301; R.P. Merges (1996), 1298 (proposing the "electronic clearinghouses" where all copyright transactions can take place in one electronic marketplace).

[142] T. Lüder (2007), 19.