

The Making Available Right: A Framework for Analysis

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The WIPO “Internet Treaties” (1996)

- WIPO Copyright Treaty (WCT) and
WIPO Performances and Phonograms Treaty (WPPT)

- WCT Article 8:

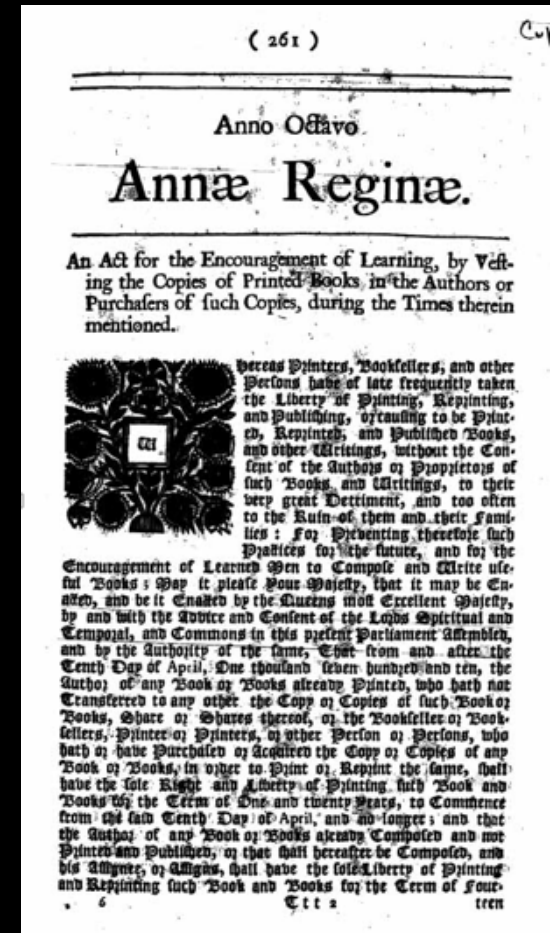
[1] An “act” of making available and [2] To “the public” enjoy the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

Copyright's TWO Key Functions

1. Incentivise Authorship
2. Encourage Dissemination of Knowledge

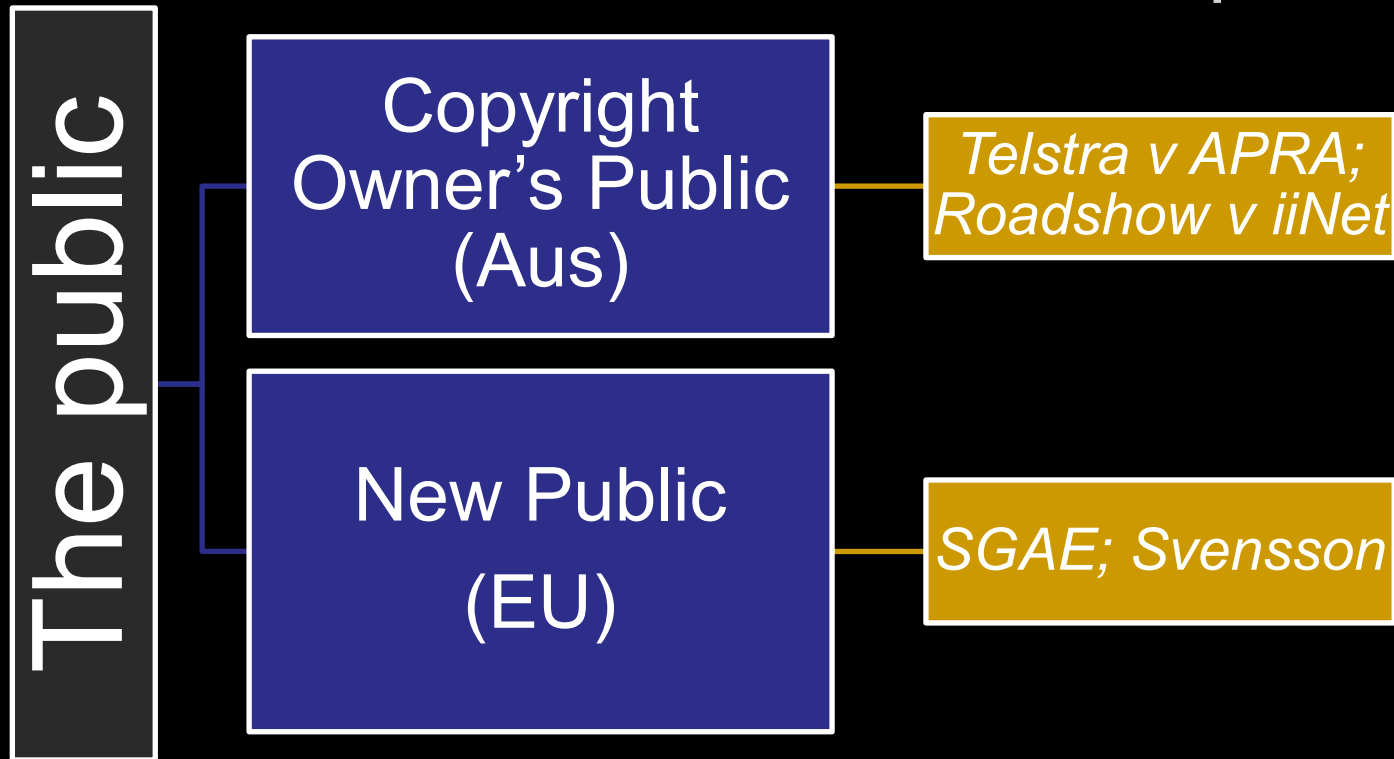


- Rivalries between disseminators, under ©'s “communications policy”



Timothy Wu, 'Copyright's Communications Policy' (2004) 103 *Michigan Law Review* 278

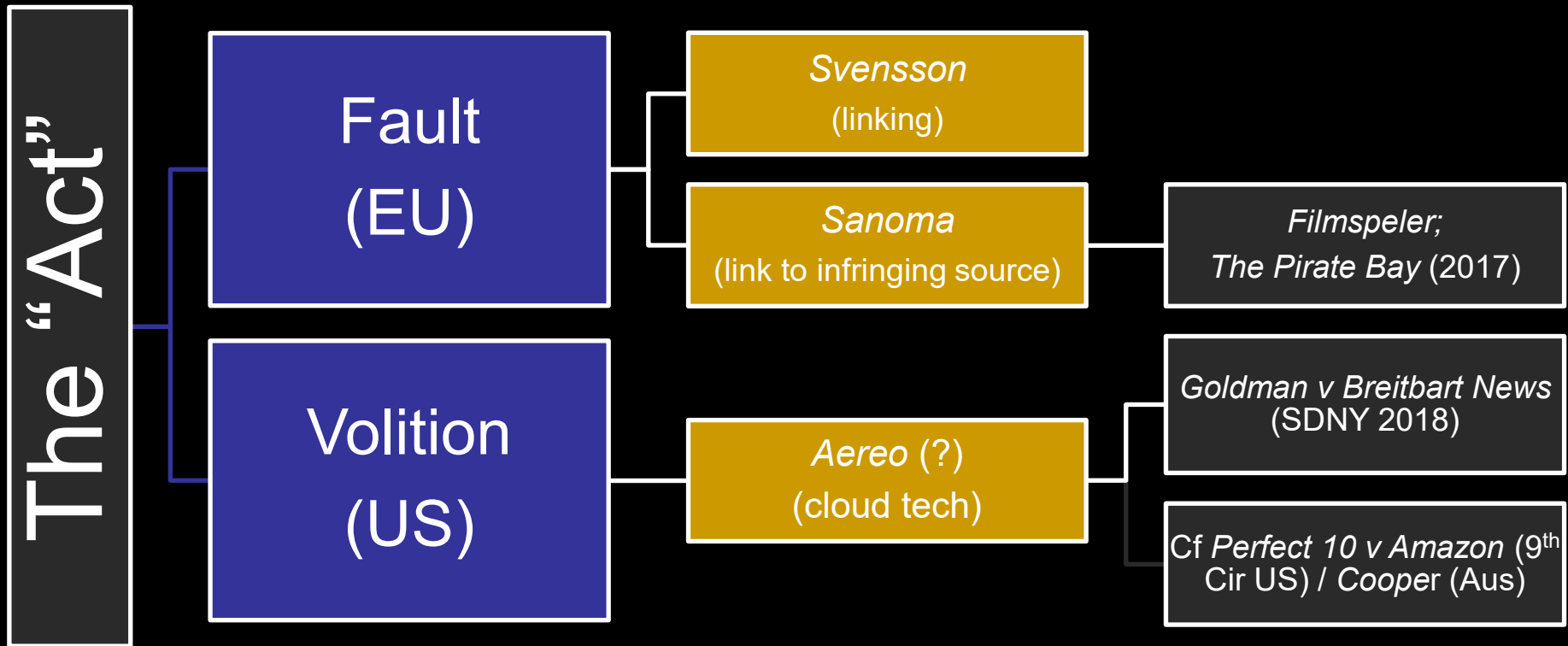
Licensable sectors of the public



Neglects dissemination

1. Focus on the copyright owner's perspective
2. Ignores "creative destruction" of dissemination markets

Broad approach including mental factors



1. Overlooks "act" as limit on primary infringement
2. Fault considerations overtake the analysis

Missing perspectives...

- Role of disseminators
- Judicial interpretation

Dissemination rivalries

© consumers

- Autonomy interest
- Active, not passive

Joseph P Liu, 'Copyright Law's Theory of the Consumer' (2003) 44(2) *Boston College Law Review* 397

Technological Innovation

The Interpretive Matrix

Four interrelated principles

- **Principle 1 – Dissemination rivalries**
- **Principle 2 – Technological innovation**
- **Principle 3 – Copyright consumers' autonomy**
- **Principle 4 – Authorship incentives**



Thank you

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Forthcoming

- C Foong, *The Making Available Right: Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Edward Elgar, 2019) <<https://www.e-elgar.com/shop/the-making-available-right>>

Related publications:

- C Foong, 'The Making Available Right: Problems with "the Public"', in B Fitzgerald and J Gilchrist (eds), *Copyright, Property and the Social Contract* (Springer, 2018) <<https://www.springer.com/us/book/9783319956893>>
- C Foong, 'Making Copyright Content Available in the Cloud vs the Making of Copies: Revisiting Optus TV and Aereo' (2015) 41(3) *Monash University Law Review* <<https://ssrn.com/abstract=2759158>>

