Copyright Protection of Broadcasts in Australia

The intersections between originality, economic investment, and social-oriented perspectives

by **Kanchana Kariyawasam and Anubhav Dutt Tiwari***

Abstract: This article examines the copyright protection of broadcasts in Australia. It investigates the difference in the legal treatment of creative subject matter, in the form of original literary, dramatic, musical, and artistic works, versus productive subject matter, in the form of broadcasts. The analysis focuses on the social-oriented perspective of granting copyright protection to broadcasters, separately from that afforded to creators of original works. This paper also emphasises the social-oriented rationale for the protection of broadcasters' rights under copyright law in Australia; that is, the wider interests of the public to access original content and information through broadcasts. Finally, this paper argues that copyright law in Australia needs to protect the interests of original creators and broadcasters, while enabling the wider public to access original content and excluding others from unauthorised use of their respective contributions.

Keywords: Copyright; Broadcasters' Rights; Social-oriented rationale; Australia

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A. Introduction

1 Copyright was envisioned to protect the original and creative endeavours of human authorship, and to prevent others from reproducing or communicating such works without permission. To achieve this end, "a balance was conceived between exclusive control and freedom to enable future creativity".[1] In this context, a *creation* is understood as either a tangible or non-tangible embodiment of subject matter in the literary and artistic domains, which is the result of significant intellectual effort by the person who undertakes its *creation*.[2] Generally, the creator/author of a literary, dramatic, musical, or artistic work is the owner of any copyright subsisting in the work. Over time, however, copyright protection has also been granted to subject matter other than literary, dramatic, musical, or artistic works. For instance, a *production* is defined as either a tangible or non-tangible embodiment, other than a creation of subject matter in the literary and artistic domains, which is the result of time, effort, and resources by

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1 Christophe Geiger, 'Freedom of Artistic Creativity and Copyright Law: A Compatible Combination?' (2018) 8 UC Irvine Law Review 413.

2 Andrew Christie, 'Simplifying Australian Copyright Law - the Why and the How' (2000) 11 Australian Intellectual Property Journal 40, 45-47.

the person who undertakes its *production*.[3] Hence, the owner of the copyright in sound recordings, films, and broadcasts will generally be the maker, producer, or broadcaster. The focus of this article is specifically on 'broadcasts' as the subject matter of copyright where, similarly to a production, but specifically because of the huge institutional resources required, protection is afforded as an incentive to broadcasting organisations.

2 Unlike authors' rights, which reward authors for their creative effort by protecting their rights under the copyright law, the protection afforded to broadcasters safeguards the results of corporations' pure investments and entrepreneurial efforts to communicate such creative works to the public. Broadcasters produce and transmit audio or video content for the benefit of the general public, which requires major financial, technical and organisational investment in infrastructure and logistics so that the public can receive programs via a "signal" or "transmission".[4] The protection of broadcasting organisations, therefore, is not based on the creativity involved in creating such works, but on the utilitarian and economic justifications in communicating these works to the public.[5] Here, the utilitarian or social-oriented perspective is introduced as a rationale for copyright protection, which focuses on the interests of the public and society, and also embraces the technological strides in the dissemination of information and content to society.[6]

3 Consequent to the utilitarian rationale, the neighbouring right (rights neighbouring to copyright for authors) was conceptualised especially for people or entities who are not technically authors: performing artists, producers of phonograms, and *those involved in radio and television broadcasting*. Typically, it offered broadcasters derivative rights: existing authorial works are used or developed; the subject matter protected by such right is the product of technical and organisational skill, rather than authorial skill; and the rights are initially given to the body or person financially and organisationally responsible for the material's production and dissemination, rather than the human creator.[7] Hence, the economic rationale for granting neighbouring rights to broadcasters is to protect the substantial investments made by broadcasting organisations for the provision of program content and the transmission of that content *to the public*, especially by limiting the ability of third parties to exploit the products of such investments.[8]

4 According to the World Intellectual Property Organisation (WIPO), "the neighbouring right for broadcasters thus mainly exists to protect the broadcasting organisations' entrepreneurial effort and investment which materialize in the form of their broadcasts (or related online signals) as an end product".[9] The emphasis on the protection of broadcasting organisations also stems from its economic contribution which is more than twice that of the music sector and more than three times that of the film industry.[10] Similarly, the former Director-General of the European Broadcasting Union (EBU) argued that:

> (b)roadcasters pay billions of euros to produce or acquire and distribute the content of the highest technical quality and have paid tens of billions more to convert analog transmission systems to digital systems. Without appropriate protection of the broadcasting signal, the returns on this significant investment are under threat.[11]

5 Essentially, the EBU's argument states that broadcasters engage in planning, producing, acquiring, scheduling, and transmitting programs for the public benefit and these acts come at a significant cost and demand the broadcasters' financial, technical,

3 Ibid.

4 European Broadcasting Union, 'Legal and Policy Focus Broadcasters' Rights: Towards a New WIPO Treaty' [2021] 11 <https://www.ebu.ch/files/live/sites/ebu/files/Publications/strategic/open/legal--policy-focus-broadcasters-right-wipo-treaty.pdf > accessed 9 May 2022.

5 Mani Sakthivel, *Broadcasters' Rights in the Digital Era: Copyright Concerns on Live Streaming* (Brill 2020) 97.

6 See Gillian Davies *Copyright and the Public Interest* (2nd edn., Sweet & Maxwell 2002).

7 See Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, OUP 2014) 33. See also George H. C. Bodenhausen, 'Protection of 'Neighbouring Rights'' (Spring 1954) 19 Law and Contemporary Problems 156.

8 Sam Ricketson & Jane Ginsburg, *International Copyright and Neighbouring Rights* (2nd edn, Vol.II, OUP 2006) 1207. See also Stephen Stewart, *International Copyright and Neighbouring Rights* (Butterworths 1989) 190-191;

9 European Broadcasting Union, 'Legal and Policy Focus Broadcasters' Rights: Towards a New WIPO Treaty' [2021] 11 <https://www.ebu.ch/files/live/sites/ebu/files/Publications/strategic/open/legal--policy-focus-broadcasters-right-wipo-treaty.pdf > accessed 9 May 2022.

10 Ibid.

11 WIPO Magazine, 'Protecting Broadcasters in the Digital Era' [2013]. <https://www.wipo.int/wipo_magazine/en/2013/02/article_0001.html> accessed 7 May 2022.

and organisational investment.[12] The protection of the broadcast signal is thus based on the technical and organisational efforts made by the broadcaster for transmission purposes and on restricting third parties from benefiting from the broadcasters' investments.[13]

6 It is in this background that this article attempts to highlight a key intersection between broadcasters' rights under copyright law in Australia, the author's copyright in their original works that are broadcasted, as well as the social-oriented rights of the public in accessing such works through broadcasts. The article argues that in introducing a new aspect of copyright protection that sources its rationale on the public interest rather than originality, there has been a consequent fragmentation of copyright law. This inherent fragmentation requires a closer analysis and engagement from the lens of the interests of the various stakeholders—the broadcasters, the wider public and original creator (wherever applicable)—while at the same time anticipating conflict between the interests of such stakeholders.

7 This article is henceforth divided into three sections. Section 1 provides the historical background on the journey of *broadcasts,* from radio broadcasts to television and now digital broadcasts. Section 2 focuses on copyright law in Australia, particularly dealing with the copyright protection of broadcasters, to emphasise the foundational understandings of the protection afforded therein and the dichotomy with the *originality* requirement for authors. This section also sheds light on the judicial conception of broadcasters' rights in Australia which underlines such fragmentary nature of protection. Section 3 focuses on the public interest argument emphasising the evolving complexities that must be continually assessed. Finally, the article concludes that the cooperative underlying scheme among authors' and broadcasters' rights, as well as the social-oriented rights of the public to access works through broadcasts, need to be continually assessed and balanced in law, legal judgments, and policy decisions, particularly in light of technological advancements.

B. Background and Development of Broadcasts: The Journey from Radio, to Television and Digital Broadcasts

8 Before diving into the issues emerging from copyright protection of broadcasters, a brief discussion on the concept of a "broadcast", and its historical evolution, is relevant. In the *Cambridge Dictionary*, the broadcast has multiple definitions, including (a) "to send out a programme on television or radio", and/or (b) "to spread information to a lot of people", and/or (c) "to send out sounds or pictures that are carried over distances using radio waves".[14] Broadcasting is recognised as being a "key sector in modern society, not only economically but, more than most industries, culturally, socially and politically";[15] it is "the quintessential electronic mass medium".[16] As Glenn Withers identifies, "it is also a sector that is more than most linked to the digital revolution in technology at the core of the new global knowledge economy".[17] Broadcasting is also recognised as being "arguably the most influential and powerful industry operating today. The media impose an inescapable presence in contemporary life and infuse all areas of public communication".[18] Evidently, broadcasting encapsulates a number of services, at the heart of which lies the provision or delivery of sound and/or pictures to a viewer or listener.

9 Regarding the history of broadcasts, radio is the earliest mass broadcasting technology, with telegraphy and telephony appropriately being called the two "older sisters" of radio technology. Telegraphy involves sending coded electronic impulses over distance, whereas telephony involves sound transmissions. While these two technologies are point-

12 European Broadcasting Union, 'Legal and Policy Focus Broadcasters' Rights: Towards a New WIPO Treaty' [2021] 6 <https://www.ebu.ch/files/live/sites/ebu/files/Publications/strategic/open/legal--policy-focus-broadcasters-right-wipo-treaty.pdf > accessed 9 May 2022.

13 IRIS plus, 'New Services and Protection of Broadcasters in Copyright Law' (2010-5) 8 <https://rm.coe.int/1680783bb8> accessed 10 May 2022.

14 Cambridge Dictionary, 'Broadcast' (Cambridge 2020) <https://dictionary.cambridge.org/dictionary/English/broadcast> accessed 8 May 2022.

15 Glenn Withers, 'Economics and Regulation of Broadcasting' (2002) 93 Discussion Paper 2 <https://openresearch-repository.anu.edu.au/bitstream/1885/41411/3/No93Withers.pdf> accessed 9 May 2022.

16 James F. Hamilton, 'Excavating Concepts of Broadcasting: Developing a method of cultural research using digitized historical periodicals' (2018) 6 Digital Journalism 1136, 1138.

17 Glenn Withers, 'Economics and Regulation of Broadcasting' (2002) 93 Discussion Paper 2 < https://openresearch-repository.anu.edu.au/bitstream/1885/41411/3/No93Withers.pdf > accessed 9 May 2022.

18 Paolo Baldi & Uwe Hasebrink, *Broadcasters and Citizens in Europe: Trends in Media Accountability and Viewer Participation* (Intellect 2007) 117.

to-point transmissions, from a sender to a receiver, radio technology entails "broadcast transmissions, which take place between a sender and an indefinite number of receivers".[19] The receivers are invariably the general public, or a particular group within the public. Although the history of radio technology might seem primitive to those living in an era of high speed-internet, smartphones and 5G, at the time, these developments were nothing short of magic.

10 Further, the technological developments in broadcasting have been the brainchild of numerous outstanding inventors worldwide. Broadcasting gained prominence at the end of the 1890s when Guglielmo Marconi initiated the world's first commercial radio service. After the technology was developed to move images as well as sounds, the concept of broadcasting was further expanded. With the end of the First World War came what Andrew Crisell refers to as the "golden age of radio" and the "rise of television".[20] This latter improvement allowed listeners to see what they were hearing. In 1926, at Selfridge's department store in London, British inventor John Logie Baird held world's first public demonstration of a television system, using mechanical rotating discs to scan moving images into electrical impulses.[21] The prelude to television broadcasting began as early as 1928, when Charles Jenkins broadcasted silhouetted images under the name of "W3XK", which was an experimental television station in Washington, DC, in the United States of America (USA).[22] In 1939, while transmitting the inaugural telecast of the opening ceremonies at the New York "World's Fair", the USA's National Broadcasting Company became the first network to introduce regular television broadcasts.[23] Thus, the world entered an era of television broadcasting which took off in parallel to radio broadcasting. The global TV and radio broadcasting market was expected to grow from US$317.05 billion in 2020 to US$347.81 billion in 2021 at a compound annual growth rate of 9.7%.[24]

11 Digital television is nothing less than a revolutionary new way to broadcast television content, replacing the National Television System Committee of USA analogue standard that had been in place since 1953.[25] With the advent of the internet, most broadcasting methods instigated digital broadcasting networks, which offer channels for distributing digital content. The digital era has given viewers control over where and how they watch content, and has made it difficult to overestimate the effects of these changes in television distribution on the diverse kinds of content, production, and viewer strategies.[26] For broadcasters, the increasing prevalence of digital technologies comes with a drawback— the option available to viewers to watch a rebroadcast, i.e., a simultaneous or subsequent broadcast of an initial broadcast, thus, leading to the increased ease of obtaining unauthorised access to copyrighted content.[27] Nevertheless, the journey from radio to television and now, digital broadcasting, shows the continuing technological strides in communicating sounds and pictures to the public *en masse.*

12 From the standpoint of legal and policy matters, a continuing focus on the ongoing evolution of the broadcasting industry is important because communication to the public entails standards and regulations, while balancing the interests of broadcasters and the authors of the works being broadcasted. It is also relevant from the perspective of understanding the manner of regulating the broadcasting industry in the interests of society, particularly in the present digital age, while anticipating further technological strides in the years to come. It is, therefore, crucial to engage with the underlying reason for which broadcasting has been encouraged until now; that is, the delivery of content and information to the wider public in the

19 Andrew Crisell, *An Introductory History of British Broadcasting* (2nd edn, Routledge 2002) 14.

20 *Ibid.*

21 Evolution of Television <https://opentext.wsu.edu/com101/chapter/9-1-the-evolution-of-television/> accessed 7 May 2022.

22 Broadcasting: The History Of Radio, The History Of Television, The Future Of Radio And Television, Cable Television <https://law.jrank.org/pages/4884/Broadcasting.html#ixzz6ZmaknDK4> accessed 5 May 2022.

23 Ibid.

24 GlobeNewswire, "Worldwide TV and Radio Broadcasting Industry to 2030 - Featuring Comcast, DISH Network and Viacom Among Others" at <https://www.globenewswire.com/news-release/2021/08/11/2278613/28124/en/Worldwide-TV-and-Radio-Broadcasting-Industry-to-2030-Featuring-Comcast-DISH-Network-and-Viacom-Among-Others.html> accessed 14 May 2022.

25 Television Broadcasting, History Of <https://www.encyclopedia.com/media/encyclopedias-almanacs-transcripts-and-maps/television-broadcasting-history> accessed 8 May 2022.

26 Laura Osur, 'Netflix and the Development of the Internet Television Network' 10 (Thesis, Syracuse University 2016) <https://surface.syr.edu/cgi/viewcontent.cgi?article=1448&context=etd> accessed 9 May 2022.

27 See WIPO, 'Draft Report of the Standing Committee on Copyright and Related Rights', (Thirtieth Session, 2015) <https://www.wipo.int/edocs/mdocs/copyright/en/sccr_30/sccr_30_6.pdf> accessed 8 May 2022.

larger interests of society, or its key social-oriented purpose and rationale.

C. Broadcasting rights under Australian copyright law

13 In Australia, Part III of the *Copyright Act 1968 (Cth)* provides copyright protection for works—original literary, dramatic, musical and artistic works—, while Part IV grants exclusive rights over subject matter other than such works, including sound recordings, cinematograph works, *broadcasts,* and published editions. In assessing the rationale behind the protection of broadcasters' rights under the *Copyright Act*, especially the separate neighbouring rights accorded to broadcasting organisations, it is necessary to begin with an analysis of the Spicer Committee Report.[28]

I. Protecting the 'other' subject matter – broadcasts: Early discussions under the Spicer Committee and the Gregory Committee

14 The Spicer Committee was formed to review the Australian copyright law in 1958. It observed that as a Dominion of Britain, the applicable law on copyright had followed the British law on copyright. An anomaly emerged, however, when the *Copyright Act of 1911 (UK)* was repealed by the *Copyright Act of 1956 (UK).* The 1956 Act included a provision that allowed for certain provisions of the 1911 Act to be applied in countries other than the UK. Thus, the need for a review of the Australian copyright law emerged, and relatedly, the need for a separate law.[29] The Spicer Committee was thus formed to recommend the features of the new copyright law in Australia. Effectively, it analysed the transition between the *Copyright Act 1911 (UK),* and the *Copyright Act of 1956 (UK)*; and in doing so, based its reasoning on the observations of a similar committee formed to provide recommendations culminating in the *Copyright Act of 1956 (UK)*—the Gregory Committee.[30]

15 The Spicer Committee identified its objective as to "balance the interests of the copyright owner with those of copyright users and the general public".[31] It recognised that the *Copyright Act of 1956 (UK)* had introduced new copyright subject matters including in the form of television broadcasts and sound broadcasts made by the British Broadcasting Corporation and the Independent Television Authority.[32] From an Australian perspective, the Spicer Committee also recognised the importance of granting similar protection to broadcasters. However, there were at least two critical issues before the Spicer Committee with respect to broadcasts. First, how must *broadcasts* be understood, particularly as a separate subject of protection from creative works? Second, should broadcasts be provided protection specifically under the new Australian copyright law, and why? At the outset, the Committee recognised that, in relation to broadcasts, a qualified person could only be a body corporate.[33] It also recommended that the broadcasters must be under legislative authority to function as such. This essentially means that while individuals can be original authors, they cannot become 'broadcasters'. Unlike broadcasters, however, they are not subject to legislative regulations to function as authors, artists, musicians, etc.

16 Another important observation of the Spicer Committee was that it regarded broadcasts as a modern iteration of public performances or recitations. According to it, "(r)eproductions of performances by artists and others are often made by broadcasters for the purposes of subsequent broadcasting".[34] Therefore, the Committee understood broadcasts as being *reproductions* of creative works, which is an important distinction when it relates to creative works per se. Further, it was "the reproduction or dissemination to the public" that was to be the subject of separate protection, as was recommended by the Gregory Committee, and eventually found a place in the *Copyright Act of 1956 (UK).*[35] The Spicer Committee agreed with the Gregory Committee, recognising that "in a country such as Australia, with its different time zones and a limited number of co-axial cables, we think that this practice (reproduction) is necessary and

28 Copyright Law Review Committee, *Report to Consider what Alterations are Desirable in the Copyright Law of the Commonwealth* (1959).

29 Ibid 9-10.

30 Board of Trade, *Report of the Copyright Committee* (Cmd 8662, 1952) 41-2 (Gregory Committee).

31 Copyright Law Review Committee, *Report to Consider what Alterations are Desirable in the Copyright Law of the Commonwealth* (1959) 8.

32 Ibid 54.

33 Ibid 16.

34 Ibid 26.

35 Ibid.

desirable".[36] A significant aspect here is that the Spicer Committee recognised that the protection of copyright in broadcasts was important from a public interest perspective, and even envisaged the State's role in authorising or licensing broadcasting organisations.

II. The protection of broadcasts as distinct from the protection of original works

17 Eventually, the *Copyright Act* incorporated the Spicer Committee's recommendations and included "broadcasts" as a separate subject matter for protection. Under various provisions, the *Copyright Act* makes a clear distinction between the creator of a work, such as a sound recording or cinematographic film, and the broadcaster of such creations. For example, it provides protection for broadcasting organisations while defining a "broadcast" as "a communication to the public delivered by a broadcasting service within the meaning of the Broadcasting Services Act".[37] It also recognises copyright in "television broadcasts" and "sound broadcasts".[38] "Television broadcast" has been defined as "visual images broadcast by way of television, together with any sounds broadcast for the reception along with those images".[39] Sound broadcasts, conversely, refer to the broadcasting of sounds that are not part of television broadcasts.[40] Thus, reading these definitional provisions together, it can be inferred that "broadcasts" for the purposes of Australia's copyright law means the *communication to the public* in the form of visual images and sounds, and it is this *communication* that is envisaged as *broadcasting* and afforded protection. An extension of the discussion leads to the observation that "broadcasts" also refer to the dissemination to the public of *aggregates* of visual images and sounds, in the form of a cinematograph film or sound recording.[41]

18 With respect to the rights flowing from such copyright protection, the copyright that subsists in broadcasts is as follows: for images broadcast on television, the exclusive right "to make a cinematograph film of the broadcast, or a copy of such a film";[42] for a sound broadcast and the sound of a television broadcast, the exclusive right "to make a sound recording of the broadcast or a copy of such a sound recording";[43] and for a television broadcast or sound broadcast, the exclusive right "to re-broadcast it".[44] On the contrary, copyright in cinematograph films, for instance, grants exclusive rights to the creator to make copies of the film, to afford the film to be seen and heard in public, and *communicate the film to the public*.[45] Thus, a pertinent difference emerges here—as a creator of a cinematograph film it is not incumbent to exercise the exclusive right to communicate the film to the public. As a broadcaster, however, the broadcast or communication to the public is inherent to the copyright coming into existence. In other words, for broadcasters communicating to the public is not merely an exclusive right emanating from the broadcast, it is an essential *prerequisite* to the existence of copyright protection that grants exclusive rights.

19 In addition, an infringement in relation to a television or sound broadcast may occur when a copy of a cinematograph film of the broadcast or a record embodying a sound recording of the broadcast is produced.[46] Whereas, in relation to the film or recording itself, the infringement may occur simply when these are copied or recorded.[47] Finally, even when broadcasts are assessed from the perspective of the copyright owner, the *maker of the broadcasts* (broadcast of the cinematograph film, for instance) is regarded as the owner of the copyright;[48] whereas, in relation to a cinematograph film itself, the *maker of the film* owns the copyright.[49] Sections 22 (3) (b), 22 (4) (b), and 22 (5) of the *Copyright Act* define how the "maker" is identified in terms of sound recordings, cinematographic films, broadcasts, and other communications, respectively. In relation to a

36 Ibid.

37 Copyright Act 1968 (Cth) s 10.

38 Copyright Act 1968 (Cth) s 87.

39 Copyright Act 1968 (Cth) s 10.

40 Ibid.

41 Refer to the definitions of a 'cinematograph film' and a 'sound recording' under Copyright Act 1968 (Cth) s 10 (1).

42 Copyright Act 1968 (Cth) s 87(a).

43 Copyright Act 1968 (Cth) s 87(b).

44 Copyright Act 1968 (Cth) s 87(c).

45 Copyright Act 1968 (Cth) s 86.

46 Copyright Act 1968 (Cth) s10(1).

47 Ibid.

48 Copyright Act 1968 (Cth) s 99.

49 Copyright Act 1968 (Cth) s 98(2).

sound recording or cinematograph film, reference is made to the "maker", who must be a qualified person at the time the recording or film is made.[50]

20 From a theoretical perspective, the difference emanating from the above provisions lies between a natural law theory providing inherent rights to creators vis-à-vis a utilitarian justification, which protects broadcasting organisations that function to disseminate creative original works to the wider public.[51] Copyright protects all creations of the human mind and intellect, whatever their form or merit and regardless of the audience for which they are destined.[52] Copyright law has traditionally been the primary source of legal protection for original works, based on the requirement of originality.[53] The notion of originality is a requirement for copyright protection but does not extend to broadcast signals and transmissions. This is because broadcasters do not necessarily produce original works but distribute the information embodied in the created works.[54] Broadcasters, such as producers, serve a strictly technical role in copyright exploitation and do not necessarily add value in any artistic or creative capacity.[55] This lack of qualifying criteria relates to the fact that broadcasting is primarily a technical rather than creative or innovative act;[56] and hence, entrepreneurial rights have no requirement for originality. It is argued that:

> while this notion of 'originality as a fundamental aspect of eligibility criteria' is central to general copyright law, it appears not to extend to broadcast signals as unique subject matter. This is because.... Broadcasting organisations enjoy protection of their broadcasts by virtue of the mere technical act of transmission, without any application of de facto eligibility criteria. The result is therefore that there is no form of filter akin to an originality threshold or idea-expression dichotomy that prevents some broadcasts from being protected pursuant to balancing the goals of the intellectual property system. As such, it appears that broadcasters' rights hold a very unique place in the overall intellectual property landscape, as it is perhaps the only form of right in which there is no explicit and coherent application of the doctrine of functionality.[57]

21 The unique place enjoyed by broadcasters thus emerges from the social-oriented rationale that has often been referred to as the incentive theory. Proponents of the incentive theory aim "to encourage creative activities and by doing so, to disseminate cultural and economic benefit to the general public other than creators".[58] The emphasis is thus on the public or society, in conjunction with the protection afforded to creators or authors—while recognising the entrepreneurial and resource contribution involved in broadcasting.

22 In furtherance of this point, the regulatory scheme on broadcasting in Australia itself points to the importance of dissemination to the public of creative works and information in various visual and sound forms. Earlier, it was noted that the definition under the *Copyright Act* directs to that of a "broadcasting service" under the *Broadcasting Services Act 1992* (Cth) (Broadcasting Act).[59] According to the Broadcasting Act, "broadcasting service" refers to "a service that delivers television programs

50 Copyright Act 1968 (Cth) s 89(1) (sound recordings) and s 90(1) (cinematograph films). 'Maker' is defined in relation to cinematograph films only, as the director, producer, and screenwriter of the film: Copyright Act 1968 (Cth) s 10(1).

51 Gillian Davies, *Copyright and the Public Interest* (2nd edn, Sweet & Maxwell 2002) Chap 1.

52 European Space Agency, 'About copyright and neighbouring rights' <https://www.esa.int/About_Us/Law_at_ESA/Intellectual_Property_Rights/About_copyright_and_neighbouring_rights> accessed 9 May 2022.

53 Peter S Menell, 'An Analysis of the Scope of Copyright Protection for Application Programs' (1989) 45 Stanford Law Review 1045, 1046.

54 See WIPO, "Study on the Social and Economic Effects of the Proposed Treaty on the Protection of Broadcasting Organizations' (2010) at <https://www.wipo.int/edocs/mdocs/copyright/en/sccr_21/sccr_21_2.pdf> accessed 12 May 2022.

55 Bryan Kareem Khan, 'An Economic Analysis of the Intellectual Property Rights of Broadcasting Organisations' (Thesis, Erasmus University 2019) 75 <http://amsdottorato.unibo.it/8781/1/Khan_Bryan_tesi.pdf> accessed 8 May 2022.

56 Ibid 80.

57 Ibid. See also, Anne, Fitzgerald and Tim, Seidenspinner, '*Copyright and Computer Generated Materials* - Is it *Time to Reboot the Discussion About Authorship*?' (2013) 3 Victoria University Law and Justice Journal 47, 50.

58 Megumi Ogawa, *Protection of Broadcasters' Rights* (Martinus Nijhoff Publishers 2006) 5.

59 It is important to note that the law on broadcasters and their rights is found in various legal regimes. According to Megumi Ogawa, broadcasters' rights are commonly under the telecommunications law, broadcasting law and intellectual property rights law, specifically, the copyright law. However, it may also be found in other regimes such as competition law, contract law, etc. This is also an instance of legal fragmentation though not the subject of this article. Megumi Ogawa, *Protection of Broadcasters' Rights* (Martinus Nijhoff Publishers 2006) Chap 2.

or radio programs to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means".[60] The Broadcasting Act also recognises various categories of broadcasters that signify the scale of resources associated with broadcasting.[61] Moreover, the Broadcasting Act provides for the distribution of broadcasting bands as well as licensing that form the basis of the regulatory scheme applicable to broadcasting in Australia.[62] Thus, the legal landscape recognises that broadcasting involves the delivery of content through a resourceful structure and an elaborate technological system established and facilitated by broadcasters.

III. The judicial perspective on the fragmentary scheme of copyright law vis-à-vis broadcasts and original works

23 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [63] (Panel case) is the first Australian case on the issue of infringement of copyright in broadcasts. The respondent, Network Ten, a commercial broadcasting organisation in Australia, aired program excerpts from the applicant, TCN Channel Nine, another commercial broadcasting station. The excerpts were made up of twenty segments ranging in length from eight seconds to forty-two seconds from sixteen different programs. The applicant had not given the respondent permission to do so. The applicant filed a claim against the respondent in the Federal Court of Australia, alleging that taping segments of the applicant's programs and broadcasting excerpts of the applicant's programs constituted an infringement of copyright in broadcasts owned by the applicant in violation of sections 87(a) and 87(c) of the *Copyright Act*. The respondent denied any infringement of copyright.

24 The Panel Case resolved for the first time the issue of the definition of a television broadcast with respect to copyright law in Australia. Among other things, the Panel Case considered the issue of *originality*. The Court discussed the differences between protections under Part III of the *Copyright Act* which covers "works" and Part IV of the same which covers "subject matter other than works" in examining whether the principles which apply to the former also apply to the latter. According to the primary judge, Justice Conti, there is "considerable conceptual difficulty" in such application.[64] Instead, he determined that the case of *Nationwide New Pty Lid v Copyright Agency Ltd* [65], which dealt with a published edition, was of assistance to determine the principles that apply to television broadcasts because both a published edition and a television broadcast are copyright materials in which the "originality of expression is not involved in the establishment of copyright so protected".[66] The Court noted that "television broadcast copyright is attributable not to originality, as in the case with Part III works, *but to technical considerations associated with the infrastructure of production. Nevertheless, technical considerations involve notions of quality....*" (author's emphasis).[67]

25 The primary judge referred to the historical background of broadcasts to justify the position that a television broadcast was comprised of several images, which together constituted a "program". In so doing, there is a reference to why copyright protection should be granted to broadcasters, and it is clear that *this is not due to originality*. The focus here is on protecting the broadcasts against piracy, because of the "considerable cost and skill involved".[68] Hely J in the Federal Court, expressly finds that "the requirement of originality which is imposed by s 32 of the *Copyright Act 1968* in the case of works does not apply in relation to a television broadcast".[69] Callinan J, was more emphatic in his position that there was "blatant commercial exploitation"[70] by Network Ten. In siding with the Federal Court's broad interpretation of a television broadcast, he admitted that such construction would confer higher-level protection for copyright in such subject matter but did not oppose such higher protection. To buttress his point, he elaborated on the nature of the interests that broadcasts seek to protect:

60 The Broadcasting Services Act 1992 (Cth), s 6(1).

61 The Broadcasting Services Act 1992 (Cth), s 11.

62 See, for instance, the Broadcasting Services Act 1992 (Cth), Parts 3-5.

63 (2001) 108 FCR 235.

64 Ibid 12.

65 *Nationwide News Pty Ltd v Copyright Agency Ltd* (1996) 34 IPR 53.

66 (2001) 108 FCR 235, 15.

67 Ibid 44.

68 Board of Trade, *Report of the Copyright Committee* (Cmd 8662, 1952) 41 (Gregory Committee).

69 (2001) 108 FCR 235 at 34.

70 Ibid 28.

> (t)he production of any programme, indeed each and every frame and segment of it, comes at a cost. It is produced in order to make money by inducing advertisers to pay to have their activities advertised in association with its broadcast one or more times. Further value may arise from the isolation, reproduction and broadcasting of an image or images, with or without sound, from it, and the licensing of it or an isolated image or images from it, whether by and in a photograph, a film or a video film. What is clear in this case is that value did lie in the copying, reproduction and rebroadcasting of segments, albeit generally fairly brief segments, of the respondents' programmes. That value had two aspects: it enabled the appellant to gain revenue from advertising associated with The Panel; and it relieved the appellant of the cost *of buying or producing other matter to occupy the time taken by the rebroadcasting, during The Panel, of the copied and reproduced segments...*" (own emphasis) [71]

26 Moreover, the Panel case demonstrated that originality was not a requirement in the establishment of copyright in broadcasting:

27 (i)n the case of Part IV copyright, 'originality' is not a touchstone for the assessment of substantiality as originality forms no part of the identification of the interest protected by the copyright. For that reason, the notion that reproduction of non-original matter will not ordinarily involve a reproduction of a substantial part of a copyright work can have no application in the case of Part IV copyright. Nonetheless, the High Court's observation that the element of 'quality' bears on the substantiality question, and may involve consideration of the 'potency of particular images or sounds, or both', invites an assessment of the relative significance in terms of story, impact and theme conveyed by the taken sounds and images relative to the source broadcast as a whole.[72]

28 The significance of the Panel case is thus immense since as noted from the above-stated observations of the judges, there is not necessarily a clash with the notion of *originality*, rather, the Court is recognising a separate justification for providing copyright protection to broadcasters. The Federal Court expressly applied the utilitarian justification of dissemination to the public through broadcasts, which is undertaken by the broadcasters while employing significant resources and skills, other than authorial skills.

71 Ibid 27.

72 *TCN Channel Nine v Network Ten* [2005] FCAFC 53, [55].

IV. Copyright law in Australia: a fragmented reality comprising many rationales

29 From the previous discussion, it is evident that there is a clear recognition of the social-oriented perspective of granting copyright protection to broadcasters in Australia. This contrasts with the creator-oriented perspective, which excludes copyright protection for broadcasters to inhibit the creators' rights. In essence, there is a fragmentation within the copyright law in Australia with varied underlying justifications and orientations, which is due to the difference in the treatment of protection to the original content and its broadcast. Both may enjoy copyright protection separately, but it is important to underscore that such protection is because of the fragmentation under the law. This fragmentation has occurred with the introduction of protection to broadcasts that has, in turn, introduced the social-oriented perspective as a primary reason for copyright protection. The purpose here is not to criticise the fragmentation under the law itself, but to emphasise the need to anticipate clashes and disputes arising thereof, and revisit the underlying rationales in addressing these issues.

30 While the two streams of protection rationales—to the original authors and the broadcasters—may appear to be competing, Professor Ginsburg notes that, in fact, both are trying to achieve the betterment of society but through different methods.[73] Similarly, Simone Schroff highlights that there must be a balancing of any competing rationales and a continued emphasis on the various stakeholders' perspectives, rather than exclusively relying on normative theories propounding the basis of protection.[74] Effectively, a critical engagement within the existing framework of copyright protection to broadcasts is the current need, especially with the emergence of digital modes of broadcasting.

31 Jani McCutcheon also enunciates the above point, saying, it is difficult to discuss authorship in isolation because the requirement of originality is correlative and an "author is most remarkably the source of originality, a foundation of copyright subsistence".[75] However, the term "authorship" is

73 Jane C. Ginsburg, 'A Tale of two copyrights: Literary Property in Revolutionary France and America' (1990) 64 Tulane Law Review 990-1031.

74 Simone Schroff, 'The Purpose of Copyright-moving Beyond Theory' (2021) 16 Journal of Intellectual Property Law & Practice 1262–1272.

75 Jani McCutcheon, 'The Vanishing Author in Computer-Generated Works – A Critical Analysis of Recent Australian

not adopted for "subject matter other than works". Hence, "the existence of a human author is not a requirement for copyright protection of 'other subject matter' under Part IV of the *Copyright Act*".[76] Although "subject matter other than works" has not been treated through the classical "authorship–originality", the *Copyright Act* permits vesting copyright in the "maker" of the work.[77] When Part IV of the *Copyright Act* assigns copyright to a producer or broadcaster it disdains the requirement of originality. It is not necessarily a clash that is envisaged here; rather, a balance between originality and economic justifications in a complementary way. In the emerging technological and digital advancements, however, there may still be a need to refer to the balancing between the creator's and broadcasters' rights from a utilitarian perspective. Thus, the important takeaway is that, regardless of an implicit distinction in the protection granted to broadcasts as a subject matter and in favour of the broadcasting organisations, there is an important link among the creator of the content, the broadcasting organisations and the *public*. Such linkage needs persistent revisiting on occasions of perceived clashes among the stakeholders.

32 In the next section, we discuss some legislative and policy developments aimed at broadcasting and its protection under the copyright law in Australia to contextualise the discussion so far.

D. Constant need for balancing competing rationales for the protection of broadcasters' rights under copyright law

33 It is pertinent to note that discussions on enhancing the protection for broadcasters due to technological advancements have often invoked the public interest argument. For instance, the *Copyright Amendment (Digital Agenda) Act 2000* was introduced to extend broadcasting rights to cable transmission and online access to broadcasts. Within this Act, it is stated that the objective (among other things) is "promoting the creation of copyright material and the exploitation of new online technologies by allowing financial rewards for creators and investors".[78] The importance of encouraging broadcasters as *investors* was also mentioned in the *Copyright Amendment (Digital Agenda) Bill 1999*.[79] When the *Digital Agenda Act 2000* was implemented, it was based on the recommendations of the Copyright Convergence Group (CCG) appointed by the Minister for Justice in 1993. A careful analysis of the CCG's recommendations reveals that the CCG attempted to address the acts in which new technologies enable the material to be used, particularly electronic forms. While recommending new laws, including laws relating to broadcasts, the CCG has emphasised the "urgent need to provide a copyright framework to support *investment* in new Australian audio-visual enterprises that requires immediate and specific legislative change" (author's emphasis).[80]

34 Similarly, in January 2004, Phillips Fox (now absorbed by global law firm DLA Piper) released a report titled 'Digital Agenda Review: Report and Recommendations'. According to it, the objectives of the amendment of 2000 were "to ensure the efficient operation of copyright industries in the online environment through *promoting financial rewards for creators and investors*, providing a practical enforcement regime, and providing access to copyright material online" (author's emphasis).[81] Alex Malik's submission to the Digital Agenda report stated that "rights owners have the right to offer their products in the way in which they believe will maximise the return on their investment…" and further, "if IP rights holders are forced to offer their product in an alternate format for a lower return, the incentive for further investment and innovation

Case Law' (2013) 36 Melbourne University Law Review 915–969.

76 See *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCAFC 149, at [135] per Yates J. See also Anne, Fitzgerald and Tim, Seidenspinner, '*Copyright and Computer Generated Materials* - Is it *Time to Reboot the Discussion About Authorship*?' (2013) 3 Victoria University Law and Justice Journal 47, 50; Andrew Stewart, Philip Griffith, Judith Bannister, and Adam Liberman, *Intellectual Property in Australia* (5th ed, CCH Australia 2014) 168; Mark James Davison, Ann Louise Monotti & Leanne Wiseman, *Australian Intellectual Property Law* (Cambridge University Press 2008) 238.

77 Lasantha Ariyarathne, PhD thesis 2020 (Unpublished).

78 Copyright Amendment (Digital Agenda) Act 2000 (Cth), s 3.

79 Explanatory Memorandum, circulated by authority of the Attorney-General, the honourable Daryl Williams, Copyright Amendment (Digital Agenda) Bill 1999 at <http://www5.austlii.edu.au/au/legis/cth/bill_em/caab1999304/memo1.html> accessed 8 May 2022.

80 Copyright Convergence Group, 'Report on Copyright in the New communications Environment' [1994] <https://static-copyright-com-au.s3.amazonaws.com/uploads/2015/05/R00505-Highway-to-change.pdf> accessed 9 May 2022.

81 Phillips Fox, 'Digital Agenda Review: Report and Recommendations' (2004) 12 <https://static-copyright-com-au.s3.amazonaws.com/uploads/2015/05/R00345-FOX-Final-reportpassword.pdf> accessed 9 May 2022.

would decrease to the detriment of the community at large".[82]

35 In recent times, the discussion on enlarging protection for broadcasters has continued. In their 2016 submission to the Productivity Commission, FreeTV Australia stated that to encourage investment and innovation in Australia's creative sectors, it is critical that Australia's IP system:

> a) provides appropriate protection of broadcasters' rights;
>
> b) provides legal certainty in relation to access to copyright material; and
>
> c) does not impose [sic] unnecessary additional costs on broadcasters.[83]

36 Essentially, these submissions encouraging incentives to broadcasters, through the protection of the rights associated with the copyright on broadcasts, are based on the importance of communicating creative works to the public. It is an acknowledgment that such dissemination requires dedicated protection with a view to attaining certain social ends.[84] The underlying social-oriented rationale is thus at the centre of protective arguments for broadcasters; however, recent issues of content dissemination on the internet and retransmission have posed significant challenges to this justificatory framing.

37 In 2013, the Australian Law Reform Commission (ALRC) presented a comprehensive report on Copyright and the Digital Economy (ALRC Report).[85] This report addressed the emerging challenges for the broadcasting industry in the digital era, in which media and communication policies were seen to be converging. The ALRC noted the challenges faced by the industry with the emergence of content dissemination on the internet. Referring to a 2012 report by the Australian Communication and Media Authority, the ALRC Report highlights the inherent distinctions between traditional broadcasting and emerging technologies, including the internet:

> digitisation of content, as well as standards and technologies for the carriage and display of digital content, are blurring the traditional distinctions between broadcasting and other media across all elements of the supply chain, for content generation, aggregation, distribution and audiences.[86]

38 Consequently, the ALRC has suggested that the Australian Government should consider whether certain exceptions to broadcasters' protection under the *Copyright Act* must be repealed or amended, particularly under section 45 (broadcast of extracts of works), sections 47, 70 and 107 (reproduction of broadcasting), sections 65 and 67 (incidental broadcast of artistic works), section 199 (reception of broadcasts), section 47A (sound broadcasting by holders of a print disability radio license), and part VA (copying of broadcasts by educational institutions).[87] It must be noted that the ALRC was not concerned with any perceived clash between broadcasters' protection versus that afforded to original creators. It was effectively concerned with protecting the balance between the original creators' rights, and the broadcasters' rights in a digital era, which facilitated piracy in several forms. However, from a different perspective, it is essentially a clash between broadcasters' rights and the right of the public to access content on the internet in an easier, more affordable, and more convenient manner.

39 A related issue impinging on further protection for broadcasters in the digital age is the issue of retransmission. The ALRC report does not comprehensively address this aspect, partly due to an earlier report of the Australian Government's Convergence Review 2012. The Convergence Review had recommended a major overhaul in the current system of licensing of broadcasters and had suggested removing it altogether and replacing it with the regulation of "content service enterprises".[88] The ALRC noted that this may require "significant rewriting, and perhaps rethinking of Australian copyright law. Links with the *Broadcasting Services Act* would need to be removed from the *Copyright Act* and decisions made about extending copyright protection and exceptions beyond licensed broadcasters, for example, to all 'content service

82 Ibid.

83 FreeTV Australia, 'Submission by FreeTV Australia to Productivity Commission, [2016] 2 <https://www.pc.gov.au/__data/assets/pdf_file/0006/195693/sub129-intellectual-property.pdf> accessed 9 May 2022.

84 Megumi Ogawa, *Protection of Broadcasters' Rights* (Martinus Nijhoff Publishers 2006) 5.

85 ALRC, 'Copyright and the Digital Economy' (2013) <https://www.alrc.gov.au/publication/copyright-and-the-digital-economy-alrc-report-122/19-broadcasting-2/exceptions-for-broadcasters-2/> accessed 10 May 2022.

86 Ibid 409.

87 Ibid 432-3.

88 Convergence Review Committee, 'Convergence Review Final Report' (March 2012) <https://apo.org.au/sites/default/files/resource-files/2012-04/apo-nid29219_5.pdf> accessed 9 May 2022.

enterprises' otherwise subject to communications and media regulation".[89] In light of this, the ALRC noted that:

> (t)he retransmission scheme raises significant communications and competition policy questions. These should not necessarily be determined by decisions made about copyright law, but in the context of a more comprehensive review of issues at the intersection of copyright and broadcasting – including in relation to the concept of a broadcast as protected subject matter, as an exclusive right and in exceptions.[90]

40 Kimberlee Weatherall sheds important light on the challenge of retransmission for broadcasters. Referring to the issue of whether the contentious future WIPO Treaty on the Protection of Broadcasting Organizations was sufficient or desirable in respect of the predicaments of the broadcasting industry, Weatherall notes that the issue of retransmission, also noted in the submission of FreeTV discussed earlier, was set to be an impediment in ascertaining the future course of copyright protection for broadcasts.[91] Interestingly, her analysis points to the critique of giving into the demands from broadcasters to disallow retransmission of broadcasts, which have been put forth by NGOs on public interest grounds.[92] Thus, whereas the role of broadcasters was envisaged as being geared towards the social-oriented purpose and thus eligible for protection, their demands today, especially relating to designating retransmission as infringement, are being opposed on the same grounds.[93]

41 In order to understand this dichotomy better, Weatherall suggests that broadcast policy must be a key determining factor. What should be paramount is how flexible it is to mould broadcast policy for the State after considering the huge technological strides that might be in store. Weatherall suggests that before taking any legislative steps, this aspect of broadcast policy must be considered because regulation would be an important part of the protection of broadcasters' copyright due to the socio-public interests involved.[94] The situation that is envisaged here, and is, in fact, coming into the picture, is a critical engagement with the social-oriented public interest. This is a welcome aspect in the future that will determine that the technological strides in broadcasting and the consequent protection continue to adhere to its original rationale, i.e., the *availability* of content to the wider public.

E. Conclusion

42 The costs involved in making broadcasts are high. It is argued, therefore, that broadcasters' rights under copyright law are the acknowledgment of the social importance of their work and the financial compensation they are owed. The neighbouring rights which have been specifically introduced to provide protection to subject matters other than original works are a treasure for broadcasters to deal with unauthorised use and distribution of their broadcast signals because, should this right not be available, they would bear substantial losses and be unable to recoup their investments.

43 Considering this critical reason for granting copyright protection to broadcasters that arise out of the foundational rationale of social-oriented rights of the public to access information and original works, it is nevertheless pertinent to acknowledge the tremendous technological developments that keep the broadcasting sector on its toes. Moreover, while the focus of legislators, judges and policymakers has been on the potential conflict of interests between original creators and broadcasters, there is also an emerging conflict between broadcasters and the public through 'infringement' of broadcasters' copyright. The recent debates in Australia on retransmission and on enhanced protections for broadcasters have brought the spotlight back on such clashes. Whether such conflicts can be resolved through a focus on the inherent fragmentation within the copyright law—between the protection offered to original creators and broadcasters—will largely depend on the enhanced recognition and engagement with the underlying social-oriented purpose of granting special copyright protection to broadcasters.

89 ALRC, 'Copyright and the Digital Economy' (2013) 378 <digital-economy-alrc-report-122/19-broadcasting-2/exceptions-for-broadcasters-2/>accessed 10 May 2022.

90 Ibid 379.

91 Kimberlee Weatherall, 'The Impact of Copyright Treaties on Broadcast Policy' in Andrew T Kenyon (ed), *TV Futures: Digital Television Policy in Australia* (Melbourne University Publishing, 2007). See also Ysolde Gendreau, *The Retransmission Right: Copyright and the Redifussion of Works by Cable* (ESC Publishing 1990).

92 Ibid 243.

93 See Proposals by NGOs for a Treaty on the Protection of Broadcasts and Broadcasting Organizations (2004) <http://www.cptech.org/ip/wipo/ngo-broadcast-proposal-v2.8.pdf> accessed 9 May 2022.

94 Kimberlee Weatherall, 'The Impact of Copyright Treaties on Broadcast Policy' in Andrew T Kenyon (ed), *TV Futures: Digital Television Policy in Australia* (Melbourne University Publishing, 2007) 264-5.

44 This article has, therefore, argued that policymakers and judges will, in relation to the copyright law in Australia, need to strike a fair balance between the interests of original creators and broadcasters to reconcile the interests of both, and must, in parallel, critically engage with the right of the public to access the original content. Technological challenges will continue with further developments impacting all stakeholders, which will require a persistent (re) engagement with copyright laws, principles, and the underlying rationales.