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"Are you sure/That we are Awake?":[1] European Media Policy and Copyright

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1. "Welcome, wanderer":[2] Introduction

This chapter argues that a number of the positive aspects of European media policy are compromised by its failure to take into account the seriously distorting effects of the global oligopolies, built on the back of the copyright monopoly, in the sector of media and entertainment production. Part 2 of the chapter considers the articulation of an interlocking web of human rights-based objectives in the Audiovisual Media Services Directive of 2010 in the context of their relationship to the international copyright system. The nature of the international copyright system and the obstacles that it poses to the realization of these objectives are considered in Parts 3 and 4, respectively. Part 3 focuses on the critical significance of copyright to the so-called cultural industries, particularly (but not only) in the form of independent exclusive rights granted by the copyright system to investors, such as film producers and broadcasters, in the distribution of creative works. It assesses the operation of the markets for entertainment products in the light of the monopoly rights enjoyed by copyright holders. The way in which the copyright system, and market that it sustains, interacts at the global and local levels with the values expressed in the Audiovisual Media Services Directive of 2010 is the subject matter of Part 4.

2. "If we offend it is with our good will"[3]: European media policy

European media policy seems to be remarkably well-basted with good intentions. European legislation on media regulation, which comprises an important part of this complex policy web, is chock-full of references to things that most people would consider occupy the moral high ground of the European landscape. This point most likely can be demonstrated by multiple references to such instruments, but by way of illustration this chapter will confine itself to a discussion of the Audiovisual Media Services Directive of 2010.[4] In explaining the policy basis for the substantive provisions of this directive, its recitals list a range of under-pinning principles that include: cultural diversity; freedom of speech, encompassing the freedom to receive information especially with respect to events of "high interest" (Recital 55), and the relationship of these principles to democracy; the avoidance of dominant positions in the market for audiovisual services; the importance of independent production; and, support for the production of "European audiovisual fiction films that are addressed to an international audience" (Recital 75). This list of the Directive's values and principles, while not comprehensive, is important in the context of this chapter because it has particular relevance to the relationship between media policy and

copyright law and policy. Before considering the copyright dimensions, however, some preliminary comments will be made on the contents of the list.

2.1 Cultural diversity

Of the Audiovisual Media Services Directive's good intentions, the importance of cultural diversity is arguably given pride of place. The concept of cultural diversity is mentioned in Recitals 4, 6, 7, 12, 19, and 69 as a value in its own right, as a legal principle mandated by Article 167(4) of the Treaty on the Functioning of the European Union (TFEU), and as a treaty obligation as a result of the EU's adherence to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. There is a small technical difference between the nature of the obligation under Article 167(4) TFEU, which is focused on the diversity of the cultures of European Union, and that under the UNESCO Convention, which cannot be understood to be limited to Europe alone. The UNESCO Convention is of particular importance here because it is the most developed international legal instrument with respect to the concept of cultural diversity. Accordingly, this concept can best be illustrated through a brief consideration of the Convention.

Even without the UNESCO Convention, it would be reasonably clear that a discourse exists in the instruments of public international law suggesting, at least, the valorization of cultural diversity. This discourse can be observed, for example, from the composite effect of a range of provisions found in the human rights Covenants to the Charter of the United Nations.[5] While these provisions are more properly concerned with questions of cultural self-determination, it is clear that this necessarily carries with it a concern to preserve diverse cultural identities. What the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005 brought was a more explicit engagement with the concept of cultural diversity.[6] While the relationship between the Covenants to the Charter of the United Nations and the UNESCO Convention is not made explicit, it is evident from both its Preamble and its operative provisions (especially Articles 2.1 and 5.1) that the UNESCO Convention firmly lodges itself within the camp of human rights conventions, even it does not go so far as to create a new human right.[7]

In order to lay the groundwork for the analysis in this chapter, it is necessary to put some flesh on the bones of the concept of "culture" with which the UNESCO convention is concerned. In fact, there is a great deal of flesh to play around with here: "culture" being a totalizing concept of enormous potential width and diversity (Sider, 1986, p. 6; Blake, 2000, pp. 67-68). The UNESCO Convention attempts to give form to the concept of culture with which it is concerned, although it is noticeable that its definitions, which are found in Article 4, involve some circularity because they all invoke the notion of culture in order to define it. This, possibly inevitable, circularity is not the only indication that the drafters of the Convention experienced considerable difficulty pinning down the central concept with which they were concerned.[8] It is also evident that each attempt at definition gives rise to other definitional problems that call for further elucidation (and circularity). Article 4 of the Convention defines its central concept of "cultural diversity" as "the manifold ways in which cultures and groups and societies find expression", including "diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used". "Cultural content" is "the symbolic meaning, artistic dimension, and cultural values that originate from or express cultural identities".

"Cultural expressions … result from the creativity of individuals, groups and societies, and … have cultural content". Article 4 also deals with the more concrete aspects of cultural expressions. It defines "cultural activities, goods and services" as those that "embody or convey cultural expressions, irrespective of the commercial value they may have". Cultural activities are, however, distinguished from cultural goods and services on the basis that they "may be an end in themselves, or they may contribute to the production of cultural goods and services". The production and distribution of these cultural goods and services may be undertaken by "cultural industries". Despite these definitional ambiguities, it is clear that the activities with which the Audiovisual Media Services Directive is concerned, namely production and distribution of audiovisual media products, falls within the Convention's notion of cultural goods and services distributed by cultural industries. Another thing that seems clear is that, from the points of view of both the Audiovisual Media Services Directive and the UNESCO Convention, cultural diversity is linked to other core values like freedom of speech, democracy and creativity.

2.2 Freedom of speech

Freedom of speech, including freedom to receive information, as a core value is mentioned in Recitals 5, 12, 16 and 49 of the Audiovisual Media Services Directive. Given the interlocking network of human rights based values contained in the Recitals generally, and in these Recitals specifically, the concept of freedom of speech in the Directive seems to be derived from the argument in favour of free speech focussing on its public importance. This theory argues that freedom of speech is essential to the preservation of democracy and concerns itself with the interests of speaker and audience in both factual material and in opinion (Barendt, 2005, ch. 1). Recital 5, which specifically mentions "freedom of information, diversity of opinion and media pluralism", links these concepts to that of democracy. The association between media pluralism and the right to information is also found in Recital 12, which puts them together with cultural diversity. The invocation of human rights law as a basis for the protection of "freedom of the press and freedom of expression in the media" is contained in Recital 16, which cites both the Charter of Fundamental Rights of the European Union, Article 11, and the constitutional rules of EU member states. In Recital 49 the protection of the right to information becomes the bed-fellow of ensuring "wide access by the public to television coverage of national or non-national events of major importance to society". This general statement is followed up in Recital 55, which is concerned with the need for a so-called short extracts rule. A short extract from the Recital itself explains that "[i]n order to safeguard the fundamental freedom to receive information and to ensure that the interests of viewers in the Union are fully and properly protected, those exercising exclusive television broadcasting rights to an event of high interest to the public should grant other broadcasters the right to use short extracts for the purposes of general news programmes on fair, reasonable and non-discriminatory terms taking due account of exclusive rights".

2.3 Avoidance of dominant positions

Superficially, the justification of free speech based on democratic participation might be regarded as implying a particular concern with the ability of the state to constrain free speech about its activities. However, it is not too difficult to make the argument that the ability of citizens to participate in the democratic or political process can also be impeded by powerful so-called "private" interests. Where the socio-economic

power of such interests is significant their power may be (at least) as relevant to constraining such participation as the power of the state. The phenomenon whereby private interests, especially media interests, seek to control the outcome of various political processes is well known. But other measures of control exercised by private interests may have a more insidious effect on the ability of individuals to participate in political processes. This argument, linking freedom of speech, democracy and the avoidance of dominant market positions, seems to have been accepted in the Audiovisual Media Services Directive. Recital 5 refers to the importance of media pluralism to democracy. More explicitly, Recital 8 notes the importance of avoiding "the creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and of the information sector as a whole".

2.4 Independent production

The importance of stimulating the independent production sector is another variation on the theme of ensuring diversity and plurality, even if the concept of independence in this context is not always easy to define.[9] Both Recitals 64 and 68 of the Directive refer to the importance of stimulating independent production. Recital 68 also links the question of independent production to the value of promoting creativity in the sector, which is, as noted above, linked into the whole notion of cultural diversity. The Recital reads as follows:

> A commitment, where practicable, to a certain proportion of broadcasts for independent productions, created by producers who are independent of broadcasters, will stimulate new sources of television production, especially the creation of small and medium-sized enterprises. It will offer new opportunities and marketing outlets to creative talents, to cultural professions and to employees in the cultural field.

2.5 European film-making

Another of the specific ways in which the Directive envisages offering the opportunities, mentioned in Recital 68, "to creative talents, to cultural professions and to employees in the cultural field" is, presumably, through support to European audio-visual production.[10] This objective is mentioned in Recitals 74 and 75. While Recital 74 is concerned with the question of what Member States should do in this respect, Recital 75 focuses on the question of encouraging "[m]edia service providers, programme makers, producers, authors and other experts … to develop more detailed concepts and strategies aimed at developing European audiovisual fiction films that are addressed to an international audience". The motivation for this sentiment is not stated, but one might infer that it is partly related to economics and the question of increasing the international market share of European films. Another possible explanation for this sudden interest in the international market, rather than the European one, could be related to the importance of protecting and promoting cultural diversity in the international film market.

3. "So quick bright things come to confusion"[11]: Copyright

It would be simply wrong to say that despite all its good intentions the Audiovisual Media Services Directive ignores the fact that audiovisual production and distribution takes place in a market that is saturated with the monopoly rights conferred upon copyright holders. There are a number of places in the Recitals that make reference,

sometimes slightly obliquely, to this fact. Probably the most striking, and certainly the least oblique, reference to the pervasive effects of copyright appears in Recitals 55 and 56, and in Articles 14 and 15. These provisions deal with the so-called "short-extracts rule", which is designed to protect that aspect of the right to freedom of speech that is concerned with the right to receive information. In order to protect this "fundamental right", according to Recital 55, "those exercising exclusive television broadcasting rights to an event of high interest to the public should grant other broadcasters the right to use short extracts for the purposes of general news programmes on fair, reasonable and non-discriminatory terms taking account of excusive rights". The Recital then goes on to mention various conditions to which this short extracts rule is subject. Recital 56 makes the relationship of this rule to copyright law quite clear by providing that the short extracts rule is without prejudice both to Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society and to "the relevant international conventions in the field of copyright and neighbouring rights". However, while the Directive does not ignore the existence of copyright law at the national, regional and international levels, it does seem that it is oblivious to the significance – and potentially destructive effect - of this body of law for a number of its good policy intentions that have been discussed above.

The copyright system as it applies in the European Union and its member states is an interlocking multi-level affair comprising international treaties, European Union directives and the national law of member states. One of the consequences of this is that copyright law, like intellectual property law in general, exhibits an unusual degree of international harmonization for what is considered to be a private law right. The multilateral treaty that is widely regarded as having started the broad-based move towards international harmonization is the Berne Convention for the Protection of Literary and Artistic Works of 1886, which is now largely embedded in the international trading system as a consequence of the World Trade Organization Agreement on Trade-Related Aspects on Intellectual Property (TRIPs Agreement), Article 9.1, and therefore in the national law of all WTO member states. International harmonization of the protection for the rights of performers, producers of sound recordings and broadcasters (so-called related rights) arrived in the form of the Rome Convention for the Protection of Performers, Producers of Phonograms & Broadcasting Organisations of 1961.[12] Provisions on the protection of related rights are now also included in Article 14 of the TRIPs Agreement. At the European Union level there is plethora of directives that address themselves to copyright and related rights harmonization.[13] Despite this relatively extensive level of harmonization, there are still some differences in copyright protection at member state level. To some extent this is a product of the fact that what is now referred to as copyright protection in the European Union has evolved from two different systems, the civil law system of *droit d'auteur* and the common law system of copyright (see Ginsburg, 1990). Nevertheless, pressure at the international level, which has filtered down through the European Union directives, has resulted in a general trend towards the common law approach, which is also of course the system that operates under US law. The existence of some differences in protection, of both rights' holders and of users of copyright works, in European member states means that some of the arguments that follow may have less force in some jurisdictions. However, the assertion in this chapter is that the copyright system and the market in which it operates is so "internationalized" that, despite some local variations in law, there are general effects

at the global level which have inevitable consequences at the regional and national levels.

Essentially, the international copyright system has operated at least in relation to some types of copyright protected "cultural goods and services" as a fetter on things like cultural diversity, freedom of speech and creativity. This effect has been produced by certain aspects of copyright law itself, allied with aspects of behaviour in the market for cultural goods and services. So far as copyright law is concerned the threat that it poses to cultural diversity and self-determination is a consequence of the process by which it commodifies and instrumentalises the cultural outputs with which it is concerned. There are five interdependent aspects of copyright law that have been essential to this process.

The first and most basic tool of commodification is the alienability of the copyright interest. This is a critical factor in the context of this chapter and arises as a consequence of the fact that copyright law operates on the basis of a distinction between the author of copyright works and the owner of those works. While the author maintains some symbolic significance in copyright law,[14] the rights conferred by copyright are enjoyed by its owners. Sometimes authorship and ownership coincide. Authors of literary, dramatic, musical and artistic works are usually the first owners of the copyright in those works; and film directors typically have a share of the copyright interest.[15] However, at least in the Anglo-American system, these interests can be freely transferred by contract. Thus, it is frequently the case that authors of copyright works come under pressure to transfer their copyright to those who are making an investment in the distribution of the works, such as publishers, and music and film production companies. In other words, it is the practice of the cultural industries to take advantage of the alienability of the copyright interest to gather in as many copyright interests as they can. Since the transfer of copyright interests is a question of contract, the extent to which a publisher or production company will be successful in doing this is largely a matter of relative bargaining positions and market power. Nevertheless, where this process of "gathering in" is successful, it has the consequence of uniting in the same hands the copyright interests in primary creative works and the copyright interests already enjoyed by those who invest in the distribution of those same works.[16]

A second significant aspect of copyright law making it an important tool of trade and investment is its duration. There is much controversy over the question of copyright duration, which has increased exponentially over time. The original copyright period in the United Kingdom, for example, was 14 years (An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, during the Times therein mentioned of 1710 (Statute of Anne), 8 Anne c.19). Now, all WTO members are required to have a minimum period of copyright protection for literary and artistic works (including films) consisting of the life of the author of the work plus fifty years (WTO TRIPs Agreement, Arts 9 & 12). The period of protection for performers and producers of sound recordings is 50 years, and 20 years for broadcasters (WTO TRIPs Agreement, Art 14.5). In the European Union, as a consequence of the Copyright Term Directive (2006/116/EC), Article 1, copyright in literary and artistic works (including films) is for the life of the author plus 70 years, while related rights last for fifty years (Article 3). In the current context, the long period of copyright protection increases the asset value of individual copyright

interests (Towse, 1999) and makes it a very useful tool in the orchestration of global entertainment oligopolies, which are further discussed below. The market for filmed entertainment provides a particularly good example of this. In this market the copyright monopoly, allied with the vertical integration of the market, has allowed the major media and entertainment corporations to dominate, not only the market for first run cinema, but also the markets that have been created as a consequence of the development of new technologies for the distribution of filmed entertainment. That is, the same oligopolistic market structure controls the market for television feature films, cable transmission of films, videos, DVDs and their various technological successors (Bettig, 1996, pp.39-42).

Thirdly, copyright's horizontal expansion means that it is progressively covering more and more types of cultural production. The origins of copyright lie in the protection of printed works. Arguably, the precursor of modern copyright systems was the fifteenth century Venetian system of printing privileges (Stapleton, 2002, ch. 2), which was apparently agnostic on the question of what was printed, protecting both written works and images provided that they were reproducible through the new(ish) technique of printing (Landau & Parshall, 1994). The famous English Statute of Anne, to which reference has been made above, was even more limited as it functioned essentially for protection of printed literary works. In the interim, however, and with the creeping certainty of a cultural harvester, copyright has gathered more and more forms of cultural and creative output into its silo. It is now difficult to think of any creative, cultural or scholarly work constituting a discrete product that is not subject to copyright interests. More than this, copyright (and/or related rights) are also granted to those who make investments in the distribution of these works. The particular significance of this point, discussed further below, is that this horizontal expansion of the range of works over which copyright is granted augments the power of the entertainment industry oligopolies by allowing them to dominate the market across a wide range of cultural outputs.

Fourthly, the strong commercial distribution rights have put copyright owners in a particularly strong market position, especially in the global context. This is of course another manifestation of the expansionist tendencies of copyright law, which are evident not just in relation to duration and scope, as argued above, but also in relation to range of exclusive rights granted to copyright holders. As the name suggests, copyright was originally a right against copying. Now both treaties at the international level[17] and the European Union Directive on Copyright and Related Rights in the Information Society have expanded the exclusive right to copy into a general right to control reproduction; and they have added other exclusive rights in relation to things like communication to the public, making copyright works available to the public, and commercial distribution. As the discussion below seeks to demonstrate, the ability to control international and national markets - including the ability to carve up the international market along national lines and manipulate the availability of copyright works in different states (Macmillan, 1998) - is critically dependent on this saturating level of control.

Lastly, the power of the owners of copyright in relation to all those wishing to use copyright material has been bolstered by a contraction of some of the most significant user rights in relation to copyright works, in particular fair dealing/fair use and public interest rights. This has been accompanied by significant shifts in rhetoric. Not only

have the monopoly privileges of intellectual property owners become "rights", user rights have become "defences" or "exceptions". Thus "users" are protected by "exceptions" to "rights". Nothing could better encapsulate their current vulnerability. It is also of particular interest to note in this respect that while the Directive on Copyright and Related Rights in the Information Society makes the introduction of a broad range of exclusive rights for copyright owners obligatory, it leaves the introduction of most types of known "exceptions and limitations" at the discretion of the members states subject to constraints on the width of such "exceptions and limitations" (Art 5). The TRIPs Agreement also constrains the scope of its "limitations and exceptions through its (in)famous three step test (Art 13).[18] Finally, allied to these characteristics of copyright law is the development of associated rights, in particular, the right to prevent measures designed to circumvent technological protection,[19] which has no fair dealing type exceptions and which, as we know now, is capable of a quite repressive application.[20]

Viewed in isolation from the market conditions that characterise the cultural industries, copyright's commodification of cultural output might appear, not only benign, but justified by both the need for creators to be remunerated in order to encourage them to create[21] and the need for cultural works to be disseminated in order to reap the social benefits of their creation.[22] However, viewed in context the picture is somewhat different. Copyright law has contributed to, augmented, or created a range of market features that have resulted in a high degree of global concentration in the ownership of intellectual property in cultural goods and services. Five such market features, in particular, stand out. First, is the internationally harmonized nature of the relevant intellectual property rights.[23] This dovetails nicely with the second dominant market feature, which is the multinational operation of the corporate actors who acquire these harmonized intellectual property rights while at the same time exploiting the boundaries of national law to partition and control markets. The third relevant feature of the market is the high degree of horizontal and vertical integration that characterises these corporations. Their horizontal integration gives them control over a range of different types of cultural products. Their vertical integration allows them to control distribution, thanks to the strong distribution rights conferred on them by copyright law (Macmillan, 2002a). The fourth feature is the progressive integration in the ownership of rights over content and the ownership of rights over content-carrying technology. Finally, there is the ever increasing tendency since the 1970s for acquisition and merger in the global market for cultural products and services (Bettig, 1996, pp.37ff; Smiers, 2002). Besides being driven by the regular desires (both corporate and individual) for capital accumulation (Bettig, 1996, p. 37), this last feature has been produced by the movements towards horizontal and vertical integration, and integration of the ownership of rights over content and content-carrying technology (Macmillan, 2006).

4. "It seems to me/That yet we sleep, we dream"[24]

As will be immediately evident this state of affairs has a number of implications for things like the protection of cultural diversity and freedom of speech, the avoidance of dominant positions, the stimulation of independent audiovisual production and European feature film production.

4.1 Cultural Diversity and Freedom of Speech

The UNESCO Convention on the Protection and Promotion of Cultural Diversity has nothing much to say about copyright law or the effects of the copyright system on the concept of the cultural diversity with which it is concerned. While the Audiovisual Media Services Directive is a little more forthcoming on this question, to a certain extent it shares the selective blindness of the UNESCO Convention to which it has so firmly hitched its wagon.

It seems strange that the UNESCO Convention is so unconcerned with copyright. The interest manifested by the Convention in the production of cultural goods and services by cultural industries suggests a clear, if unarticulated, link with copyright law. While it is clear that copyright would not apply to the full range of cultural expressions and activities with which the Convention is concerned, there is a reasonably marked overlap between those things that would appear to fall within the definition of cultural goods and services in the Convention and the range of works protected by copyright law. As is envisaged in the Convention, this also raises the question of the role of the cultural industries in the copyright arena. Of course, the cultural industries are not involved in the production of all the cultural goods and services protected by copyright. Indeed, on the creative side much production is done by individuals or groups that would hardly feel comfortable with the sobriquet "cultural industry".[25] On the other hand, there are some copyright cultural goods and services that are more obviously the product of the cultural industries, the clearest example of these being films and broadcasts, which rely on the collaboration of a wide range of creative activities under the auspices of a "cultural industry". Even where the cultural industries cannot be said to be involved in the production of copyright goods and services, they have a clear role in their distribution. These roles of the cultural industries in the production and distribution of certain types of cultural goods and services are subject to generous protection by copyright law. This protection sits alongside, often uncomfortably, the protection that copyright offers to individual creators. The ensuing tension between creative or cultural interests and business interests lies at the heart of copyright's relationship with the concept of cultural diversity.

The consequences of the copyright facilitated aggregation of private power over cultural goods and services on the global level are, from a cultural diversity perspective, not happy ones. Through their control of markets for cultural products the multimedia corporations have acquired the power to act as a cultural filter, controlling to some extent what we can see, hear and read (Capling, 1996; Abel, 1994a, p. 52; Abel 1994b, esp. p. 380). Closely associated with this filtering power is the tendency towards homogeneity in the character of available cultural products and services (Bettig, 1996). It makes good commercial sense in a globalized world to train taste along certain reliable routes, and the market for cultural goods and services is no different in this respect to any other (Levitt, 1983).[26] Of course, there is a vast market for cultural goods and services and, as a consequence, the volume of production is immense. However, it would obviously be a serious mistake to confuse volume with diversity.

Finally, cultural diversity is also adversely affected by copyright's constriction of what has been described as the intellectual commons or the intellectual public domain,[27] in which creativity, essential to cultural diversity, is said to flourish

(Macmillan, 2010). The impact on the intellectual commons manifests itself in various ways. For example, private control over a wide range of cultural goods and services has an adverse impact on freedom of speech (Macmillan, 1996; Macmillan, 2005). The ability to control speech, arguably objectionable in its own right (Barendt, 2005), facilitates a form of cultural domination by private interests. This may, for example, take the subtle form of control exercised over the way we construct images of our society and ourselves.[28] But this subtle form of control is reinforced by the industry's overt and aggressive assertion of control over the use of material assumed by most people to be in the intellectual commons and, thus, in the public domain. The irony is that the reason people assume such material to be in the commons is that the copyright owners have force-fed it to us as receivers of the mass culture disseminated by the mass media. The more powerful the copyright owner the more dominant the cultural image, but the more likely that the copyright owner will seek to protect the cultural power of the image through copyright enforcement. The result is that not only are individuals not able to use, develop or reflect upon dominant cultural images, they are also unable to challenge them by subverting them.[29] These constrictions of the intellectual commons (or public domain) affect its vibrancy and creative potential. As Waldron comments, "[t]he private appropriation of the public realm of cultural artifacts restricts and controls the moves that can be made therein by the rest of us" (Waldron, 1993, p. 885).

Coombe describes this corporate control of the commons as monological and, accordingly, destroying the dialogical relationship between the individual and society:

> Culture is not embedded in abstract concepts that we internalize, but in the materiality of signs and texts over which we struggle and the imprint of those struggles in consciousness. This ongoing negotiation and struggle over meaning is the essence of dialogic practice. Many interpretations of intellectual property laws quash dialogue by affirming the power of corporate actors to monologically control meaning by appealing to an abstract concept of property. Laws of intellectual property privilege monologic forms against dialogic practice and create significant power differentials between social actors engaged in hegemonic struggle. If both subjective and objective realities are constituted culturally – through signifying forms to which we give meaning – then we must critically consider the relationship between law, culture, and the politics of commodifying cultural forms. (Coombe, 1998, p. 86)

Some remnants of a dialogical relationship ought to be preserved by copyright's fair dealing/fair use right. It is, after all, this aspect of copyright law that appears to be intended to permit resistance and critique (Gaines, 1991, p. 10). Yet the fair dealing defence is a weak tool for this purpose and becoming weaker (Macmillan, 2006).

Overall, there are good reasons for suspecting that the copyright system poses a serious threat to cultural diversity and freedom of speech in the cultural goods and services sector, generally, and there is no reason to think that this observation would not hold good specifically in its audiovisual sub-sector. Given that many of the potentially negative effects of the international copyright system on cultural diversity and freedom of speech are a consequence of the establishment of positions of dominance, a point which is clearly recognised by the Audiovisual Media Services

Directive, the extent to which the Directive's commitment to the avoidance of dominant positions ameliorates the situation is now considered.

4.2 Avoidance of dominant positions

Avoiding the creation of dominant positions is, as noted in paragraph 2.3 above, critical in any case to securing cultural diversity and freedom of speech. The particular problem that copyright creates is that its tendency is to promote the creation of dominant positions. Therefore taking account of the problem posed by the copyright system is essential. Otherwise the protection of cultural diversity and free speech really will just be a dream. While it might be argued that the short extracts rule (Recitals 55 and 56, and Articles 14 and 15) is aimed at addressing one of the potential consequences of dominance, the Directive is otherwise bereft of many ideas on how this might be done and certainly does not seem to face up to the impact of the copyright system in this area. Recital 8 states that "[i]t is essential for the Member States to ensure the prevention of any acts … which may promote the creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and of the information sector as a whole". So far as dominance arising from the operation of the copyright system is concerned, Recital 8 has the distinct air of someone shutting the stable door after the horse has bolted. There are, effectively, two problems here. One is that EU Member States have not managed to control copyright created dominance. The other is that, even if they had, they would still be faced by the problem that Europe – in this respect – is not a fortress. The distortions that are caused by copyright created dominance operate internationally, and not just in the European market for audiovisual services. In fact, in a copyright saturated sector, the avoidance of dominance almost sounds like an oxymoron.

A reasonable response to the argument in the paragraph above might be that there are other devices in the EU legal arsenal for dealing with the problem of dominance. For example, in the famous joined cases of *Football Association Premier League v QC Leisure* and *Karen Murphy v Media Protection Services Ltd*[30] the European Court of Justice held that copyright holders were not entitled to rely on their copyright interests to partition national markets for televised broadcasts of sporting events because such behaviour would amount to an impairment of the freedom to provide services under Article 56 of the EU Treaty and is not justified on the basis that it is necessary to protect the specific subject matter of the copyright in live football transmissions. The Advocate General, in an opinion with which the European Court of Justice agreed, noted that this type of impairment of the freedom to provide services not only affects live transmissions of sporting events but also the sale of things like computer software, musical works, e-books and films via the Internet. The decision clearly has some constraining effect on the way in which copyright holders exercise their power, particularly since the European Court of Justice also held that that the series of exclusive licences for transmission of the events in question, each for the territory of one member state, which precluded competition between member states, breached the EU Treaty rules on competition. However, the weight of the decision is clearly focussed on activities that partition the European market and so only addressed to abuse of dominance in this circumstance. One is left wondering about the extent to which this sort of approach can really make much impact on a global system of copyright-created dominance, the effects of which are liberally felt in the European Union, as in the rest of the world.

4.3 Independent production

The independent production sector is critical to the policy objectives of the Audiovisual Media Services Directive. Independent production, and the media plurality that comes with it, is vital to cultural diversity and extremely important in ensuring free speech. Stimulating independent production is an antidote to dominance. However, the sting in the tail here is that like all these other things, with which it is so closely associated, independent production is seriously threatened by the copyright induced dominance of the major international players in the audiovisual services sector. The tendency, in a copyright dominated world, towards the suppression of independent film production is part and parcel of the general tendency towards suppression of diversity and cultural filtering, which has already been noted in paragraph 4.1. The control over film distribution that is enjoyed by the major media and entertainment corporations means that these corporations can control to some extent what films are made, what films we can see, and our perception of what films there are for us to see. The expense involved in film production and distribution mean that without access to the deep pockets of the majors and their vertically integrated distribution networks, it is difficult, but not impossible, to finance independent film-making and distribution. This, naturally, reduces the volume of independent film-making. The high degree of vertical integration that characterises the film industry, especially the ownership of cinema chains, means that many independent films that are made find it difficult to make any impact on the film-going public. This is mainly because we don't know they exist. The control by the media and entertainment corporations of the films that are made is also a consequence of their habit of buying the film rights attached to the copyright in novels, plays, biographies and so on. There is no obligation on the film corporations to use these rights once they have acquired them but, of course, no-one else can do so without their permission. Similarly, the film corporations may choose not to release certain films in which they own the exclusive distribution rights or only to release certain films in certain jurisdictions or through certain media.[31]

4.4 European film-making

It is unclear where this state of affairs might leave the stated objective of encouraging the production of "European audiovisual fiction films that are addressed to an international audience" (Recital 75). The issue of US dominance of the international market for "fiction films" has long been a running sore in Europe, particularly in certain of its constituent parts (Grantham, 2000; De Valck, 2007, esp. chs. 1 & 2). The European enthusiasm for the UNESCO Convention on the Promotion and Protection of Cultural Diversity was motivated by an attempt to compensate for the fact that, consistently with the US negotiating position, the WTO agreements contain no general cultural exception (Graber, 2006). As is well-known, European discontent on this matter was focussed on its consequences for the European, especially French, film production sector (Grantham, 2000, Part 2). However, cultural concerns about US dominance in the film (and audiovisual) production sector and the potential of the WTO agreements to sustain this are widespread. As Dunkley remarks:

> In a world where even culture and entertainment are commodified and mass-marketed, free trade in these sectors is likely to mean that only countries possessing comparative advantage can have the privilege of retaining their national identities, which in my view is socially outrageous and should be resisted. (Dunkley, 2001, pp. 184-185)

There continues to be much concern (outside the US) that the sort of devices that governments may wish to employ in order to ameliorate the effects of the oligopolistic market for cultural goods and services, including film production, run the risk of falling foul of WTO rules. So far as film production (and audio-visual production, in general) is concerned, the Agreement which has the capacity to be the particular culprit is the General Agreement on Trade in Services (GATS).[32] Due to the somewhat unusual nature of the GATS as a bottom-up liberalising agreement, WTO members are only bound by the liberalising provisions of GATS if, and to the extent that, they have accepted obligations in the relevant sector.[33] There is not yet any general agreement or protocol on liberalization of obligations in the audio-visual sector,[34] which is the sector in which the cultural effects of the copyright-induced oligopolies are most keenly experienced (Dunkley, 2001, pp. 183-187; Macmillan, 2002b; Macmillan, 2006; Grantham, 2000). However, some WTO members have undertaken relevant obligations and there is considerable international political pressure for more liberalization in this sector (Graber, 2006, pp. 569-570; Dunkley, 2001; Grantham, 2000; Hahn, 2006, p. 526). In the European Union, the effect of the coming into force of the UNESCO Convention has been to harden political resistance to undertaking liberalization obligations in sectors such as film production. This position is explicitly embraced in Recital 7 of the Audiovisual Media Services Directive, referring to various resolutions of the European Parliament on the matter. Thus European member states remain relatively free to support European film-making. However, assuming the expression "addressing an international audience" in Recital 75 of the Audiovisual Media Services Directive means penetrating the international market, the question of how European films can be made to do this in a market that is under the control of the copyright-induced oligopolies is left hanging.

5. "But what of that?"[35]

European media policy, when viewed through the lens of its blindness to the global effects of the copyright system, starts to resemble random quotations from famous literary works. The sentiments are striking and pithy, but the whole story is obscured. In this case, the consequence is that many of the good intentions laid out in instruments like the Audiovisual Media Services Directive are destined to remain as no more than just that. It is important to understand that this state of affairs is not just a result of a global system over which the EU has no control. To start off with, EU Member States were the founding members of the Berne Convention on the Protection of Literary and Artistic Works, upon which the international copyright system continues to be based.[36] They were also all founding members of the WTO and, in general, supporters of the TRIPs Agreement. However, importantly, the situation is in no way improved, and arguably worsened, by the intellectual property maximalist position of the European Union. The Directive on Copyright and Related Rights in the Information Society (Directive 2001/29/EU) is characterised by the absence of much in the way of serious exceptions to the copyright monopoly; and the Directive on Enforcement of Intellectual Property Rights (Directive 2004/48/EU) reads the like the midsummer's night dream of the global media and entertainment oligopolies come true. The EU is not some powerless victim of forces beyond its control. It is an active participant in the legal architecture that sustains the international copyright system. It is here then, at the blind heart of the matter, that the

EU needs to begin to address the contradiction between its media policy and the effects of that system.

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[1] William Shakespeare, *A Midsummer Night's Dream* (Act IV, Scene 1).
[2] William Shakespeare, *A Midsummer Night's Dream* (Act II, Scene 1)
[3] William Shakespeare, *A Midsummer Night's Dream* (Act V, Scene 1).
[4] Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.
[5] See the Covenant on Civil & Political Rights, Arts 1, 19 & 27; Covenant on Economic, Social & Cultural Rights, Art 15.
[6] In accordance with the UNESCO Convention, Art 29, which provides that it enters into force three months after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession, the Convention entered into force on 18 March 2007.
[7] For an assessment of the relationship between the UNESCO Convention & existing international human rights obligations, see Graber, 2006, pp. 560-563.
[8] However, for a more generous assessment of Art 4, see Graber, 2006, p. 558.
[9] According to Recital 71, relevant criteria in defining independence include "the ownership of the production company, the amount of programmes supplied to the same broadcaster & the ownership of secondary rights".
[10] A "European work" for the purposes of the operative provisions of the directive is defined in Article 1(1)(n)-(4).
[11] William Shakespeare, *A Midsummer Night's Dream* (Act I, Scene 1).
[12] Further copyright & related rights harmonization obligations at the international level are included in, eg: Geneva Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms of 1971; WIPO Copyright Treaty of 1996; WIPO Performances and Phonograms Treaty of 1996.
[13] Including: Directive 91/250/EEC on the legal protection of computer programs; Directive 96/9/EC on the legal protection of databases; Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society; Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art; Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property; Directive 2006/116/EC on the term of protection of copyright and certain related rights.
[14] Eg, duration of copyright in literary, dramatic, musical & artistic works is calculated according to the life of the author: see, eg, EU Copyright Term Directive 93/98/EEC.
[15] See, eg, UK Copyright, Designs and Patents Act 1988, s 11.
[16] Ie. copyright in the sound recording or film, copyright in the typographical arrangement of the published edition, copyright in the broadcast.

[17] See esp the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement), Arts 11 & 14(4), which enshrine rental rights in relation to computer programmes, films & phonograms; WIPO Copyright Treaty 1996, Article 7, & WIPO Performances & Phonograms Treaty 1996, Arts 9 & 13.
[18] For an example of the application of this test in the copyright context, see *US – Section 110(5) of US Copyright Act*, WT/DS/160/R, 15/6/2000; & see further the discussion in Macmillan, 2008.
[19] See, eg: WIPO Copyright Treaty 1996, Art 11; Directive on Copyright in the Information Society (2001/29/EU), Art 6; US Copyright Act of 1976, s 1201.
[20] See, eg, *Universal City Studios, Inc v Corley*, US Court of Appeals for the Second Circuit, 28 November 2001, & the discussion of this case in Macmillan, 2002a.
[21] See, however, Towse, 2001, esp chs.6 & 8, in which it is argued that copyright generates little income for most creative artists. Nevertheless, Towse suggests that copyright is valuable to creative artists for reasons of status & control of their work.
[22] For arguments about the importance of copyright in securing communication of works, see van Caenegem, 1995 & Netanel, 1996.
[23] Through, eg, Berne Convention for the Protection of Literary & Artistic Works of 1886, the TRIPs Agreement, Arts 9-14, the WIPO Copyright Treaty, & the WIPO Performances & Phonograms Treaty.
[24] William Shakespeare, *A Midsummer Night's Dream* (Act IV, Scene 1).
[25] For a discussion of the expression "cultural industry", see Throsby, 2008.
[26] Cf Gray, 1998, pp. 57-58. However, Gray's view seems to be that diversity stimulates globalization, which must be distinguished from the idea that globalization might stimulate diversity.
[27] This is a concept that has become, unsurprisingly, a central concern of intellectual property scholarship: see, eg, Waelde & MacQueen, 2007.
[2828] See further, eg, Coombe, 1998, pp. 100-129, which demonstrates how even the creation of alternative identities on the basis of class, sexuality, gender & race is constrained & homogenised through the celebrity or star system.
[29] See, eg, *Walt Disney Prods v Air Pirates*, 581 F 2d 751 (9th Cir, 1978), *cert denied*, 439 US 1132 (1979). On this case, see Waldron, 1993. See also Chon, 1993 & Koenig, 1994.
[30] European Court of Justice, 4 October 2011.
[31] For further discussion of the issue of cultural filtering & homogenisation in the film industry, see Macmillan, 2002a, pp. 488-489.
[32] Although the WTO General Agreement & Trade and Tariffs (GATT) & the WTO Agreement on Subsidies & Countervailing Measures may also have a part to play. The difficulties posed by these agreements are comparable, if not identical, to those posed by the GATS. In relation to the GATT, it should be noted that it has, in Art IV, a special regime in relation to films permitting internal quantitative measures, however pressure has been applied by the US to force other WTO members to abandon Art IV regimes: see Hahn, 2006, pp. 522-523.
[33] GATS, Articles VI & XVI. In relation to the process of progressive liberalization, see Art XIX.
[34] Cf the GATS Annexes on Air Transport Services, Financial Services, Negotiations on Maritime Transport Services, Telecommunications, and Negotiations on Basic Telecommunications.
[35] William Shakespeare, *A Midsummer Night's Dream* (Act I, Scene 1).
[36] Partly as a result of the incorporation by reference into the WTO TRIPs Agreement of the major part of its operative provisions: TRIPs Agreement, Art 9.1.