

**OPEN AND FREEMIUM MUSIC BUSINESS MODELS IN
AFRICA – COPYRIGHT AND COMPETITION
CONSEQUENCES**

by

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TABLE OF ABBREVIATIONS OR ACRONYMS

BRICS	Brazil, Russia, India, Canada, South Africa
CJEU	Court of Justice of the European Union
ECOWAS	Economic Community of West African States
EU	European Union
ICT	Information and Communication Technology
LDC	Least Developed Countries
OECD	Organisation for Economic Co-operation and Development
SADC	Southern African Development Community
TRIPS	Trade-Related aspects of Intellectual Property
UK	United Kingdom
UN	United Nations
US	United States
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

ABSTRACT

This thesis considers how South Africa and Nigeria can apply copyright and competition laws to regulate the open and freemium music business model that involves the use of copyright-protected music content to generate revenue from advertising.

To enhance their competitiveness and escape copyright infringement liability, the firms that deploy the business model impose contractual terms to explain their use of protected content and direct the actions of platform users. Using case law from the Court of Justice of the European Union (CJEU), the thesis argues that although these terms result in free and wider distribution of copyright content, some aspects of their implementation may be unaligned with the regulatory framework. The thesis finds that these misalignments exist because the non-payment of royalties to copyright owners and their exclusion from revenue-sharing arrangements may adversely affect their viability of copyright owners as small and medium-size enterprises (SMEs) while their inclusion necessitates the imposition of restrictions that may prevent innovative uses of copyright products. Further, the thesis finds that the misalignments are caused by legal uncertainties regarding the exclusive rights of the copyright holders and the scope of their limitations and exceptions, as well as unavailability of competition law enforcement criteria that protect the economic freedom of SMEs including copyright owners. Because of the copyright covering the music content and its use in the economic activity of advertising, which is regulated by competition law, the thesis argues for aligning the business model with the regulatory frameworks. Further, the thesis argues that by ratifying international copyright treaties in ways that provide exclusive rights limited by compulsory licensing, and by amending and enforcing competition law to recognise unconscionable conduct as

anticompetitive, copyright and competition laws may be used to regulate the open and freemium music business model.

By adopting a South African and Nigerian perspective and proposing competition law solutions, this study aims at filling a gap in the academic literature, which does not appear so far to have attempted a pro-Africa assessment of the business model and/or considered the complementary role of competition law in copyright-related industries in specific jurisdictions.

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Chapter One: Introduction

1.1 Background

A business model explains the processes and strategies adopted by a business entity (firm) to generate revenue in the business environment.¹ It is widely recognised that business models are tools with which firms compete with other firms to gain competitive advantage. Defined as a representation or description of the rationale of how a firm “creates, delivers and captures value”,² business models constitute a fundamental component of trading and economic behaviour.³ Economic behaviour is exhibited in the creation, production, distribution, provision and use of goods and services.

With the advent of the Internet and the development of information and communication technologies (ICTs), the discourse on the concept and deployment of the business model has expanded.⁴ For example, there is significant literature on the strategies, processes and activities constituting “internet-based business models” or “e-business models” which encompasses firms that rely on the Internet and ICTs to create, to deliver and to capture value.⁵ These internet-based business models have also

¹ See Weill, P, Malone, T and Apel, T (2011). The business models investors prefer. *MIT Sloan Management Review*, 52(4), 17-19 (hereinafter, “Weill, Malone and Apel).

² Osterwalder, A. and Pigneur, Y. (2010). *Business model generation: a handbook for visionaries, game changers, and challengers*. John Wiley & Sons, p.19 (hereinafter, Osterwalder and Pigneur). Value may involve what a firm delivers to the customer or the needs of the customer which the firm seeks to satisfy. Value may be created through offering new products, customization, price reduction etc. See p. 25.

³ See Teece, D.J. (2010). Business models, business strategy and innovation. *Long range planning*, 43(2), pp.172-194.

⁴ See Zott, C., Amit, R. and Massa, L. (2011). The business model: recent developments and future research. *Journal of management*, 37(4), p.1025 (hereafter, Zott, Amit and Massa 2011).

⁵ See generally, Ghaziani, A. and Ventresca, M.J. (2005). Keywords and cultural change: Frame analysis of business model public talk, 1975–2000. In *Sociological Forum* 20(4), pp. 523-559, Springer Netherlands; Yip, G.S. (2004). Using strategy to change your business model. *London Business School*

gained prominence in the distribution of music content.⁶ Instead of traditional tangible music distribution such as cassettes and CDs, the reproduction and distribution of music is presently undertaken largely in digital forms involving downloads and “streams”.⁷

This thesis focuses on one of these internet-based business models deployed in the distribution of music content - the open and freemium music business model.⁸ In the open and freemium music business model, firms⁹ which own and operate internet platforms¹⁰ (platform firms) offer music content on the Internet to the general public free-of-charge or at zero price, either on a revenue-based licence or based on a *gratis* licence, to create, deliver and capture value through advertising services.¹¹ Basically, platform firms in

Review, 15(2), pp.17-24; Shafer, S.M., Smith, H.J. and Linder, J.C. (2005). The power of business models. *Business horizons*, 48(3), pp.199-207.

⁶ “Music content” is used in this thesis to mean a collective of sound recordings and films embodying musical and/or literary works as defined in the applicable copyright laws of Nigeria and South Africa. As Rae-Hunter explains each music content comes with those categories and number of copyright owners. See Rae-Hunter, C. (2012). Better mousetraps: Licensing, access, and innovation in the new music marketplace. *J. Bus. & Tech. L.*, 7, pp.45-46 (“Rae-Hunter 2012”).

⁷ Streaming is the transmission of audio in real time over the Internet. See Kopp, S.W. and Suter, T.A. (1998). Developments in copyright policy and network technologies: The first generation. *Journal of Public Policy & Marketing*, p.306.

⁸ Other business models include the iTunes business model where songs are sold as ‘protected, non-interoperable files’ on online distribution platforms and the net label business model where music is sold on the internet and artists on the ‘net label’ are supported by a share in concert fees and merchandising revenue. For examples of music business models especially in the digital scene, see Bourreau, M., Gensollen, M. and Moreau, F. (2008). *The digitization of the recorded music industry: Impact on business models and scenarios of evolution*. 1st ed. France: Department of Economics and Social Sciences Telecom Paris, 14. (“Bourreau 2008”).

⁹ Examples include Google (owners of Youtube.com); Facebook.com; NotJustok.com; SoundCloud.com. See Fouché, J.A. (2015). *Crafting the commons: modern approaches to music as product* (Masters dissertation, University of Cape Town), pp. 20-24 (hereafter, Fouché 2015).

¹⁰ A platform may be defined as physical or virtual place such as a physical store, a website, a digital download website, a streaming website and even, a concert stage, that enables firms to sell their products. See Evans, D.S. (2016). Multisided platforms, dynamic competition and the assessment of market power for internet-based firms. *Competition Policy International Journal*, 10(2), p. 6 (hereafter, Evans 2016).

¹¹ As discussed in Chapter three of this study, the definition of the open and freemium music business model is the subject of intense debate. The definition adopted in this study is as stated here and is supported by the literature. Aspects

this context use copyright-protected music content as a tool to generate profits and increase the number of platform users for their advertising service.¹² Generally, users of the platform can access and consume music without the requirement or expectation of payment. The music consumption comes with specialised functions and services such as an unlimited music catalogue, advertisements alongside the music, and extended search features. The thesis explores the application of copyright law as complemented by competition law to regulate the open and freemium music business model. In promoting competition, copyright law strives to maintain a balance between the rights of copyright owners¹³ and those of users¹⁴ of copyright works.¹⁵ In regulating economic activities including those that involve the dissemination of copyright products, competition law complements copyright law.

To enable a focused examination in terms of copyright law,

of this definition are adapted from the definition of “open content” by Chitu Okoli and Ken Carillo. See Okoli, C. and Carillo, K. (2013). Beyond open source software: A framework, implications, and directions for researching open content, pp. 2 and 5. *SSRN Journal*. Available at <http://ssrn.com/abstract=1954869> accessed 3 March 2015. (hereafter, Okoli and Carillo 2013).

¹² See Evans 2016 supra at 7.

¹³ “Copyright owners” in this thesis refers to the person or entity who holds/owns the copyright, and may unless otherwise indicated, include not only authors such as artists), but also intermediaries or entities who have acquired rights from the authors.

¹⁴ “Users”, “users of copyright products” or “copyright users” are used interchangeably to include any person or entity, other than the copyright owner who may need the copyright work for any purpose. Accordingly, it envisages persons or entity that merely “consume” or enjoy the copyright work. However, the more appropriate term “consumer” is used where the relevant person or entity is merely enjoying or listening to the music, without more. See for example, Elkin-Koren, N. (2017). Copyright in a digital ecosystem: A user rights approach. In: R. Okediji, ed., *Copyright law in an age of limitations and exceptions*. New York: Cambridge University Press, p.137 (hereafter, Elkin-Koren 2017a).

¹⁵ “Copyright work” generally refers to any work eligible for copyright. See Section 1(1) of the Copyright Act, Cap. C28, Laws of the Federation of Nigeria, 2004. (hereafter, “Nigerian Copyright Act”), Section 2(1) and 3(1)(a) and (b) of the Copyright Act, 1978 (Act No. 98 of 1978) (hereafter, “South African Copyright Act”).

music content protected by copyright law in South Africa and Nigeria and used by platform firms has been selected as this thesis' focal point. The justification for, and significance of, this sectoral context is presented below (at section 1.4) after the description of the relationship between copyright law and competition law and the interaction with the open and freemium music business model at section 1.2 and 1.3, respectively. Suffice to emphasise, at this juncture, that platform firms are primarily users of music content authored and/or produced by others (copyright users). Therefore, although this thesis considers the use of the music content by producers and uploaders¹⁶ of music content, its principal focus is on the import of how the music content is used by the platform firms in generating revenue from advertising. As shown in this thesis, these platform firms [are multisided platforms, which create value by enabling interactions between two or more customer segments.](#)¹⁷ The focus of the literature on use of music content in advertising has largely been on platform users and their actions in reproducing the music content.¹⁸ Because such reproduction of music content is

¹⁶ To “upload” means “to transfer (data, files, etc.) from a computer to the memory of another device (such as a larger or remote computer)”. An uploader would be a person who carries out such action. See Merriam–Webster, (2017). [online] Available at: <https://www.merriam-webster.com/dictionary/upload> [Accessed 11 Nov. 2017].

¹⁷ See section 5.3.1, below. See also, Evans 2016 supra at 6. On the regulatory implications of multisided platforms, see Gürkaynak, G., İnanılır, Ö., Diniz, S. and Yaşar, A.G. (2017). Multisided markets and the challenge of incorporating multisided considerations into competition law analysis. *Journal of Antitrust Enforcement*, 5(1), pp.100-129.

¹⁸ See Högberg, S.K. (2006). The search for intent-based doctrines of secondary liability in copyright Law. *Columbia Law Review*, pp.909-958; Bartholomew, M. and Tehranian, J. (2006). The secret life of legal doctrine: The divergent evolution of secondary liability in trademark and copyright law. *Berkeley Technology Law Journal*, pp.1363-1419; Ginsburg, J.C. (2008). Separating the Sony sheep from the Grokster goats: Reckoning the future business plans of copyright-dependent technology entrepreneurs. *Ariz. L. Rev.*, 50, p.577; Bartholomew, M. and McArdle, P.F. (2011). Causing infringement. *Vand. L. Rev.*, 64, p.675; Llewelyn, D. (2012). Intellectual property liability of consumers, facilitators and intermediaries: concepts under common law. In: A Kamperman Sanders and C. Heath, eds., *Intellectual property liability of consumers, facilitators and intermediaries*. Kluwer Law International, p. 26; Elkin-Koren, N. (2014). After twenty years: Copyright liability of online intermediaries. In: S.

undertaken by a large number of anonymous and possibly indigent users, who are usually spread across multiple jurisdictions outside the easy reach of the copyright owner, it is difficult to enforce the reproduction rights against them. Accordingly, the copyright owners attempt to enforce the reproduction right against platform firms on the grounds that they authorized or induced the unlicensed reproduction by their users. In this regard, the argument or cause of action seems to be that the business model is based on users' actions *per se*. However, a different approach consists in looking at the platform firm's actions and the import of such actions. The use of copyright products in advertising affects the revenue that may accrue to the copyright owner by virtue of copyright protection and may also affect the uses of copyright-protected music content that may be outside the scope of copyright protection.

Previous research on the open and freemium music business model appear to have largely focused on the activities of platform users and how such may have been induced or authorised by the platform firm within the context of the European Union (EU) and the United States (US) laws.¹⁹ This has created a gap in the literature,²⁰ which has failed to, or neglected to examine the business model from the perspective of the actions or activities of the platform firms (as copyright users) instead and from a pro-Africa perspective. This is significant given that the money flow comes from the activities of the platform firms even though undertaken to attract the attention of potential and actual users of the platform. Also, greater attention has been paid to the application of copyright law to regulate the business model without

Frankel and D. J. Gervais, eds., *The evolution and equilibrium of copyright in the digital age*. Cambridge University Press, p.29.

¹⁹ Ibid. See also Aganga, O. (2013). *The indirect liability of mobile service providers in South Africa: a comparative study*. (Masters dissertation, University of Pretoria).

²⁰ Other gaps exist in the paucity of research that consider the role of competition law. See section 1.2, below.

recognising the complementary role of competition law in copyright-related industries. This thesis therefore seeks to address this gap in the literature by applying a jurisdiction-specific and copyright work-specific approach to the regulation of the open and freemium music business model. Further, it contributes to the literature by considering the role that competition law can play in the regulation of business models involving the use of and distribution of copyright-protected music content.²¹

1.2 The relationship between copyright and competition law

Copyright law grants copyright holders and authors an exclusive bundle of rights in their works upon fulfilment of specified criteria depending on the nature of the work.²² Further depending on the copyright work, copyright law defines an author to mean “the creator of the work” and “the person who made arrangements for the making of the work or in whose name the work was made”.²³ For music content, several categories of copyright works are protected - the lyrics of the song (eligible for protection as “literary work”), the music composition or the music of the song (eligible for protection as “musical work”), the sound recording embodied in a CD or other format and containing a reproduction of the musical work (eligible for protection as “sound recording”), the photographs

²¹ See Fagin, M., Pasquale, F. and Weatherall, K. (2002). Beyond Napster: using antitrust law to advance and enhance online music distribution. *BUJ Sci. & Tech. L.*, 8, p.451; Drexl, J. (2013). *Copyright, competition and development*. [online] World Intellectual Property Organization (WIPO). Available at: http://www.wipo.int/export/sites/www/ip-competition/en/studies/copyright_competition_development.pdf [Accessed 10 Nov. 2015] (hereafter, Drexl 2013). See also, Heinemann, A. (2017). *The competition law framework: Online platforms and intermediaries in copyright law, paper presented to the University of Munich & GRUR Munich*, 23-24 March, 2017. However, the focus was on the EU and/or international angle.

²² The expression of the idea encompassing the work must be original and the work must be in a fixed medium. The author of the work must also be eligible for protection in that country as a citizen or person domiciled in that country. Section 1(2)(a) and (b) and 2(1)(i) and (ii) of the Nigerian Copyright Act, Section 2(1) and 3(1)(a) and (b) of the South African Copyright Act.

²³ See Section 51(1) of the Nigerian Copyright Act, Section 1(1) of the South African Copyright Act.

and images used as cover art²⁴ (eligible for protection as “artistic work”) and the music videos and DVDs containing a reproduction of the sound recording and moving images (eligible for protection as “cinematograph film”).²⁵ The copyright holders, authors or assignees of these copyright works (collectively, “copyright owners”) enjoy the exclusive right to reproduce the work; perform the work in public; publish the work, make a cinematograph film or a record in respect of the work; distribute the work for commercial purposes and communicate or broadcast the work to the public.²⁶

Generally, the main purpose of copyright law in granting these exclusive rights to copyright owners is to provide them with a “commodity”²⁷ or “something to sell or licence”²⁸ to generate revenue. Put differently, the essence of rights granted exclusively under copyright law is to ensure that the copyright owner’s option to exploit his/her/its exclusive rights using its preferred business model is intact. The exercise or exploitation of these rights is expected to incentivise further creation by authors and thereby result in the dissemination of copyright works to the public.²⁹ Consequently, copyright law makes provisions for the copyright owner to exclusively exploit the protected work and balances this exclusivity with provisions aimed at ensuring that users are able to

²⁴ Cover art may be described as an artwork or photograph on the outside of a music single or album which is used to promote the music content it is displayed on. See Brochu, E., De Freitas, N. and Bao, K. (2003). The sound of an album cover: Probabilistic multimedia and information retrieval. In *Artificial Intelligence and Statistics (AISTATS)*.

²⁵ See Section 1(a), (b) and (e) as well as Section 51 of the Nigerian Copyright Act. See also, Section 2(1)(a), (b) and (e) and Section 1 of the South African Copyright Act.

²⁶ For a delineation of each of the exclusive rights available for the mentioned categories of copyright works, see Sections 6, 7 and 8 of the Nigerian Copyright Act; Section 6(1)(a)-(g) South African Copyright Act.

²⁷ See Cross, J. and Yu, P. (2007). Competition law and copyright misuse. *Drake L. Rev.*, 56, 433. (henceforth, Cross and Yu 2007).

²⁸ See Kretschmer, M. (2010). Regulating creator contracts. *J. Intell. Prop. L.*, 18, 144 (hereafter, Kretschmer 2010); Watt, R. (2010). Copyright and contract Law: Economic theory of copyright contracts. *J. Intell. Prop. L.*, 18, 173 at p. 181.

²⁹ Cross and Yu 2007 supra at 429.

access and enjoy the works.³⁰ This approach ensures that copyright law promotes competition³¹ as authors and potential copyright owners strive to respectively create and procure the creation of new works to also enjoy the benefits of copyright protection. Further, the ability of copyright owners to restrict competition through the exclusive nature of their rights is constrained by provisions that limit the boundaries of exclusivity in the interests of competition.³² In this regard, the interests of competition is served by users who are able to operate outside the scope of the exclusive rights and within the copyright limitations and exceptions to deploy business models aimed at further creativity as well as wider dissemination of copyright products.

Competition law complements copyright law by creating and protecting competitive and efficient distribution markets for copyright-protected products. Its prohibition of restrictive agreements and abuse of dominance serve as tools that help to ensure the proper functioning of copyright markets. In recognition of this point, Drexl opined that³³:

Copyright law is designed to provide the author of works with fair remuneration for his or her creative work. Yet it is not the exclusive right in itself that produces such income but the willingness of consumers to pay. This requires that consumers actually have access to works they prefer. Hence, copyright law essentially depends on the functioning of

³⁰ See Schönwetter, T. (2009). *Safeguarding a fair copyright balance - contemporary challenges in a changing world: Lessons to be learnt from a developing country perspective*, p.31. PhD. University of Cape Town (hereafter, Schönwetter 2009).

³¹ The promotion of competition is the enhancement of the ability of firms to compete in a given market. Such is within the competence of competition policy. See Maskus, K.E. and Lahouel, M. (2000). Competition policy and intellectual property rights in developing countries. *The World Economy*, 23(4), pp.595-600 (hereafter, Maskus and Lahouel 2000). See also, Dimgba, N. (2006). *Introduction to competition law: a sine qua non to a liberalised economy*, pp. 7 – 8, Lecture delivered at Rules Watch: Competition Legislation & the New World Order (hereafter, Dimgba 2006). Competition policy covers copyright law, competition law, bankruptcy law, contract law etc.

³² Corbett, S. (2011). Creative Commons licences, the copyright regime and the online community: Is there a fatal disconnect?. *The Modern Law Review*, 74(4), 503 – 504, 528 (hereafter, Corbett 2011); Cross and Yu 2007 supra at 429-430. Drexl 2013 supra at 5-6.

³³ Drexl 2013 supra at 5-6.

the distribution channels and of copyright-related markets on different levels of distribution. If these markets for authorised use do not work properly, consumers will even be incited to switch from legal copies to illegal ones. Competition law plays a crucial role in creating and maintaining competitive and efficient distribution markets... Competition law practice is abundant with regard to distribution cases. This is mostly due to the fact that, while works are usually highly diverse and have the potential to compete most effectively for consumers, copyright-related markets often have to rely on the bundling of works in the form of attractive repertoires and the use of centralised platforms for licensing and distribution. Both needs produce the tendency of market power in the hands of the intermediaries that control such repertoires and platforms. ...competition law should not at all be understood as the “enemy” of copyright law but rather as a most important tool of a modern, more holistic copyright policy on the national and international level.

However, some competition statutes exempt intellectual property rights (IPRs) including copyright from the application of competition law.³⁴ In the case of South Africa, the Competition Act³⁵ provides that firms can apply to the Competition Commission to exempt “an agreement or practice, or category of agreements or practices, that relates to the exercise of intellectual property rights, including a right acquired or protected in terms of the...Copyright Act, 1978 (Act No. 98 of 1978)...”. An exemption granted by the Competition Commission ensures that even when an agreement or practice falls within the prohibited or restricted acts in Chapter two of the Act, such agreement or practices will be deemed not to have offended the provisions of the Competition Act, particularly Chapter two.³⁶ However, in the absence of the grant of an exemption either because an application was refused³⁷ or the specified term of

³⁴ Examples include Poland, Mexico, Peru. It is to be noted that even in these countries, there may be room to interpret the exemption provisions to permit competition law scrutiny on matters regarding the exercise of intellectual property rights. See Drexler 2013 *supra* at 45-47.

³⁵ Section 10(4) of the Competition Act 89 of 1998 (hereafter, “South African Competition Act”), Hartzberg, T. (2005). Competition policy and practice in South Africa: Promoting competition for development symposium on competition law and policy in Developing Countries. *Nw. J. Int'l L. & Bus.*, 26, 667 (hereafter, Hartzberg 2005).

³⁶ Chapter 2 of the South African Competition Act deals with situations where an agreement restricts competition to the extent prohibited by the Act as well as situations where a firm abuses its dominant position in a defined market.

³⁷ See s6 of the South African Competition Act.

exemption has lapsed³⁸ or an exemption granted was revoked,³⁹ the agreement or practices that fall within the prohibited or restricted acts will bear the brunt of the Competition Act. More importantly, the fact that an exemption needs to be specifically sought may be evidence that the Act is intended to apply in the first instance to agreements or practices relating to the exercise of copyright. Where intellectual property rights are not exempt, competition law plays a “restrictive” role by limiting the exercise of copyright.⁴⁰ In such cases, competition law may compel the copyright owner to grant a license.⁴¹

Competition law may apply its prohibition against restrictive agreements and abuse of dominance to prevent firms that control the distribution of copyright products from anticompetitive conduct. Such anticompetitive conduct may derail the dissemination of copyright products or adversely affect the economic freedom of small businesses such as copyright owners by unduly preventing them from generating revenue from the distribution of their works. As Chapter three of this thesis explains, there is a prevalence of copyright owners (independent record labels and music publishers), who are by virtue of their size, small businesses/small and medium-size enterprises (SMEs) in the South African and Nigerian music industry.⁴² Small businesses are separate and distinct business entities managed by one owner or more and are usually characterized according to industry, number of employees, total turnover and total asset value.⁴³ In South Africa, the National Small Business Act categorises small businesses into

³⁸ Section 10(4A) of the South African Competition Act.

³⁹ Section 10(5) of the South African Competition Act.

⁴⁰ See Drexl 2013 *supra* at 40.

⁴¹ *Ibid.*

⁴² See Section 3.5, below; Coetzer, B.L. (2009). *A business model for the digital distribution of music in the South African context* (Masters dissertation, University of Pretoria), p. 41 (hereafter, Coetzer 2009).

⁴³ See s1(xv) National Small Business Act (102 of 1996).

microenterprises, very small enterprises, small enterprises and medium enterprises. A cursory look at these categorisation and the size of majority of record companies and music publishers in the two countries reveal that most fall into the category of small and medium enterprises.⁴⁴ As much-needed drivers of industrial transformation and development in any given country,⁴⁵ small businesses are an important constituency for competition law in many jurisdictions.⁴⁶

The above point is imperative especially in regulating the use of copyright-protected music content within the open and freemium music business model. In this regard, copyright law ought not to be used as the sole platform to pursue the goals of incentivizing owners and providing access to users of copyright works. This thesis takes cognisance of this argument to address the gap in previous literature that has largely overlooked this role of competition law in copyright-related industries and/or analysed copyright works generally. Although this approach has been considered in some recent research,⁴⁷ it has not been applied to a specific business model within a specified copyright environment.

1.3 The open and freemium music business model

Like other business models used in the copyright industries, the open and freemium music business model highlights the significant role of copyright protection and competition law in providing regulation for business models. It serves as one of the mediums of exploitation of copyright and provides a mechanism for public

⁴⁴ See the Schedule to the Act. See also, Fouché 2015 supra at 50-5.

⁴⁵ Abor, J. and Quartey, P. (2010). Issues in SME development in Ghana and South Africa. *International research journal of finance and economics*, 39(6), pp.223-4 (hereafter, Abor and Quartey 2010).

⁴⁶ See Section 3.5 and Chapter 5, below.

⁴⁷ For instance, Drexl 2013 supra, Correa, C. (2007). Intellectual property and competition law: exploration of some issues of relevance to developing countries. *ICTSD IPRs and sustainable development programme issue paper*, (21) (hereafter, Correa 2007).

access to or dissemination of copyright works in the marketplace.⁴⁸ Firms deploying the open and freemium music business model generate revenue directly and indirectly through the use of music content as a tool to serve advertisement purposes.⁴⁹ Accordingly, the open and freemium music business model also generates employment opportunities that positively influence other standard-of-living metrics in a country such as the poverty rate and personal disposable income. Music content has generated much socially beneficial and culturally significant interaction amongst nations⁵⁰ and in that context, the open and freemium music business model enhances these public interests.

In the copyright ecosystem,⁵¹ the open and freemium music business model operates within the vagaries of the national copyright and related regulatory frameworks applicable to the music content industry. Conversely, the open and freemium music business model is deployed based on advertising and consumer demands and the peculiarities of the environment where the business model is deployed. Accordingly, in relation to copyright works, the nature of deployment of business models in each

⁴⁸ For example, YouTube has over one billion users with music content making up a large proportion of their use. See International Federation of the Phonographic Industry (IFPI), (2015). *Charting the Path to Sustainable Growth*, 7. Digital Music Report. (hereafter, IFPI 2015). See also, Viswanath, B., Mislove, A., Cha, M. and Gummadi, K.P. (2009). On the evolution of user interaction in Facebook. In *2nd ACM Workshop on Online Social Networks*, pp. 37-42.

⁴⁹ See IFPI (2017). *Global music report 2017*. [online] IFPI, p.24. Available at: <http://www.ifpi.org/downloads/GMR2017.pdf> [Accessed 5 Aug. 2017]; International Federation of the Phonographic Industry (IFPI), (2014). *Lighting up new markets*, 7. Digital Music Report. (hereafter, "IFPI 2014"). Also, see IFPI 2015 supra at 7.

⁵⁰ For instance, music was the theme of the World Intellectual Property Organisation's IP Day 2015. See WIPO (2015). World IP Day 2015 – Get up, Stand up. For music. Available at <http://www.wipo.int/ip-outreach/en/ipday/> [Accessed 1 May 2015].

⁵¹ This term is inspired by Professor Tussey's book, Tussey, D. (2012). *Complex copyright: Mapping the information ecosystem*. Burlington, VT: Ashgate, pp.24 to 25. "Copyright ecosystem" includes the whole environment in which copyright law operates, taking in publishers, authors and consumers—a realization should that should inform policy and condition the way in which future research is conducted.

jurisdiction as well as the unique norms of the industry where they are deployed should significantly align with the copyright law regime and other complementary law regimes. No matter how prevalent, a business model that is not properly aligned with the objectives of its regulatory framework may have adverse effects on copyright and related investment decisions.⁵² In such a case, there is need to regulate the business model to ensure a fit with the overarching purposes of the regulatory framework.⁵³

As earlier stated, a business model is a description of how a business entity or an individual engaged in a business activity, derives revenue from providing solution(s) to an identified need or problem.⁵⁴ A business model deployed by a copyright owner in the distribution of copyright works will describe how the copyright owner derives revenue by exploiting his exclusive rights and also resolving the demand for the relevant copyright works. For instance, the business model of the copyright owner of a sound recording may involve the production and sale of music CDs embodying the sound recording.⁵⁵ Business models involving the use and distribution of copyright-protected products will therefore affect the author of the copyright work, copyright owners and the users of the copyright work. Business models will determine the revenue (if any) that authors and owners of copyright works derive from exploiting their rights. They can also indicate and/or determine the level of access that users of copyright works may have to any given work. Copyright owners will understandably be keen on extracting as much as they can from the deployment of the business models while consumers are equally keen to have as

⁵² Corbett 2011 *supra* at 527-8.

⁵³ *Ibid* at 530- 531.

⁵⁴ See Weill, Malone and Apel 2011 *supra* at 17-19.

⁵⁵ This is the traditional business model of the music industry especially prior to the Internet and digitization. See Gallagher, J. M., Auger, P., and Barnir, A. (2001). Revenue streams and digital content providers: an empirical investigation. *Information & Management*, 38(7), 474.

much access as they can to copyright works.

In the open and freemium music business model, the music content produced and uploaded by other persons or firms other than the owner of the platform on which the music content was uploaded, is used to serve advertisements. Accordingly, the focus here is on the implication of this unique way of exploiting music content from the perspective of copyright law as complemented by competition law.⁵⁶ This clearly excludes the safe harbour regime,⁵⁷ which relies on the activities of platform users as a foundation for establishing the role of the platform firms and, which in certain circumstances exempts or limits the liability of platform firms for the activities of the said users of their platform. The distinction made in this study correlates to the business model concept – a representation of the ways in which firms create and capture value.⁵⁸

Other legal regimes, which this thesis does not explore, are those relating to human rights and privacy issues arising in the context of the open and freemium music business model. Such focus falls outside the scope of this thesis and its discussion may have the effect of making the thesis unwieldy. Due to the impact of digital technology on the way in which copyright works are produced and accessed, there is increased active user interaction with copyright-protected content particularly in terms of user-generated content.⁵⁹ This is also the case in the context of the

⁵⁶ See Rosati, E. (2017). The CJEU Pirate Bay Judgment and its impact on the liability of online platforms. *European Intellectual Property Review*. [Forthcoming] Available at: <https://ssrn.com/abstract=3006591> [Accessed 6 Sep. 2017] (hereafter, Rosati 2017); *Stichting Brein v Ziggo BV and XS4All Internet BV*, C-610/15, EU:C:2017:456 (“The Pirate Bay”, or “Pirate Bay”).

⁵⁷ Lemley, M.A. and Reese, R.A. (2004). Reducing digital copyright infringement without restricting innovation. *Stanford Law Review*, 56(6), 1345 at 1367 (hereafter, Lemley and Reese 2004).

⁵⁸ See Facebook.com. (2017). *Terms of service*. [online] Available at: <https://www.facebook.com/terms.php> [Accessed 12 Nov. 2017].

⁵⁹ See Lee, Y.H. (2015). Copyright and freedom of expression: A literature review. *CREATE Working Paper 2015/04*, p.32-33. Available at:

open and freemium music business model where there are user-uploads and platform firms' use of music content in advertising. These raise issues of the appropriate balance between the right to freedom of expression and copyright protection.⁶⁰ In many cases, there are arguments that users' interaction with copyright-protected works in the business model context requires a shift in the approach to protecting the freedom of expression.⁶¹

In the case of privacy regimes, it is acknowledged that the ability of platform firms to leverage on consumer demand for free music content to deliver targeted ads has raised concerns for consumer privacy due to the amount of information obtained on consumers' preferences. There are calls for privacy-based regulations to address the potential for and the instances of breaches of consumer privacy by firms who use consumers' information to deliver targeted ads.⁶² Again, for similar reasons as the human rights approach, privacy concerns are not further explored in this thesis.

Against this background of the business model context, the open and freemium music business model underscores the need for the application of the copyright law and competition law regulatory regimes. Corollary to the foregoing, while the law does not set out specific or detailed business models for copyright owners or users of copyright products to deploy, copyright law and competition law interface to provide the regulatory frameworks

<https://zenodo.org/record/18132/files/CREATe-Working-Paper-2015-04.pdf>. [Accessed 21 Nov. 2016] (hereafter, Lee 2015).

⁶⁰ For a discussion on the interaction between copyright and freedom of expression, see Lee 2015 *supra*.

⁶¹ See for example, Balkin, J.M., 2004. Digital speech and democratic culture: A theory of freedom of expression for the information society. *NyuL rev.*, 79, p.1.

⁶² For some discussion of privacy issues, see Gal 2015 *supra*. Recently, the activities of Facebook and Cambridge Analytica in using data obtained from consumers' preferences in influencing elections in many countries have engendered massive demands for stricter privacy regimes. See Cadwalladr, C. (2016). Google, democracy and the truth about internet search. *The Guardian*, 4(12), p.2016.

within which business models can be designed and deployed.⁶³ In other words, business models relating to copyright products have legal backing so long as they do not upset the balance of rights sought to be maintained by copyright law and complemented by competition law.

1.4 Music content

There are several sectors in which the general principles of the open and freemium business model have been regularly applied. However, this study does not seek to address all the various aspects of the deployment of the open and freemium business model. Instead, it is limited exclusively to one significant aspect of the open and freemium business model: music content. The reasons for this focus can be explained in both economic and legal terms.

In economic terms, the focus on music content is a response to its significance for the development of national economies around the world. The discourse on the music industry has mostly focused on the music content from developed countries where the major music record companies are domiciled. However, it is to be acknowledged that, in recent times, music content has become a very important asset for economic growth and development. Particularly in Africa, music content and the music industry have contributed significantly to the increase in the GDPs of many African countries.⁶⁴ Also, due to the emergence of Internet and digital technology, music content can be distributed globally at practically zero cost and as such, responds to the needs of developing countries with low income levels.⁶⁵ Accordingly, music content and the music industry have immense potential for the

⁶³ Newman, J. (2013). Copyright freeconomics. *Vand. L. Rev*, 66, 1451 - 1456. (hereafter, Newman 2013).

⁶⁴ Ouma, M., 2004. Copyright and the music industry in Africa. *The Journal of World Intellectual Property*, 7(6), p.920 (hereafter, Ouma 2004).

⁶⁵ See IFPI 2017 *supra* at 33-34.

economic development of all nations, particularly for African nations.⁶⁶

From a legal perspective, music content forms a significant part of a wide range of creative subject-matter protected by copyright law.⁶⁷ However, while there exists similarities between these categories of works, certain specific differences result in different industry calibrations.⁶⁸ Accordingly, the manner in which the open and freemium business model is deployed in the copyright industry depends on the nature of the copyright-protected product.⁶⁹ Even with respect to works protected under the same category, for example, books, journals, software, and the like⁷⁰ protected as literary work,⁷¹ the open and freemium business model is deployed differently, rendering a general analysis of its deployment, untenable. The distribution of music content differs from distribution of other copyright works in several ways.⁷² For instance, unlike software that requires regular updates flowing

⁶⁶ Ibid.

⁶⁷ Since the Berne Convention in 1979, music content has always been part of creative content protected by copyright law. See art 2, Berne Convention for the Protection of Literary and Artistic Works, 1979.

⁶⁸ See Elkin-Koren, N. (2006). Creative Commons: A skeptical view of a worthy pursuit. In: P. B. Hugenholtz & L. Guibault, eds., *The future of the public domain*. Kluwer Law International, p. 18. Available at SSRN: <https://ssrn.com/abstract=885466> [Assessed 19 Nov. 2016] (hereafter, Elkin-Koren 2006).

⁶⁹ The way the open and freemium business model is deployed in the copyright industry depends on the nature of the copyright-protected product. See Russi, G. (2011). Creative Commons, CC-plus and hybrid intermediaries: A stakeholders' perspective. *International Law and Management Review*, Spring, p.170 (hereafter, Russi 2011); Klebanow, A. (2015). Is music the next eBooks-An antitrust analysis of Apple's conduct in the music Industry. *Colum. JL & Arts*, 39, p.128 (hereafter, Klebanow 2015).

⁷⁰ Books are protected as literary works, software as computer programs and artwork as artistic works. See section 51(1) of the Nigerian Copyright Act.

⁷¹ South Africa protects software as computer programs under a specific category. See section 2(1)(i) of the South African Copyright Act.

⁷² See Polverino, F. (2012). Hunting the wild geese: Competition analysis in a world of 'free'. *Concorrenza e Mercato*, p.7-8 (hereafter, Polverino 2012); Klebanow 2015 supra at 154-155; Russi 2011 supra at 128. See also Wang, Y., 2009. *Fair use and file sharing in research and education* (Doctoral dissertation, University of Southampton).

from/connected to the original software, music content does not require such update. Accordingly, open business model used for software distribution in the form of GNU General Public Licence⁷³ that has a “viral”⁷⁴ nature may be an unsuitable form of open business model for music content.⁷⁵

Moreover, while the same medium has been utilized for the dissemination of all categories of copyright works, music content remains of heightened relevancy in the open and freemium business model context. The multiplicity of rights and categories and owners inherent in a single unit of music content⁷⁶ in comparison to other categories of copyright products has combined well with the easy content dissemination and social production enabled by the Internet to turn music content into the one of the most popular products in the open and freemium business model context.⁷⁷

Accordingly, an investigation that treats copyright works generally within an international context will not adequately address the peculiarities of each category of copyright work and

⁷³ The GNU General Public License is a free, copyleft license for software and other kinds of works. See Gnu.org. (2017). *The GNU General Public License v3.0- GNU Project - Free Software Foundation*. [online] Available at: <https://www.gnu.org/licenses/gpl-3.0.en.html> [Accessed 12 Nov. 2017].

⁷⁴ Viral licences require that any derivative work created from the original must be issued under the same open licence. See Erickson, K. and Kretschmer, M. (2014). Research perspectives on the public domain: Digital conference proceedings. In *Research perspectives on the public domain: Digital conference proceedings (February 1, 2014)*. CREATE Working Paper (Vol. 3), at p.27 (hereafter, Erickson and Kretschmer 2014).

⁷⁵ Some Creative Commons Licenses have some “viral” character. For instance, the share-alike licence and the no-derivatives licence can attach to a work and make it difficult for further creativity and/or distribution of future works. See Forsythe, L.M. and Kemp, D.J. (2008). Creative commons: for the common good. *U. La Verne L. Rev.*, 30, p.365. See Erickson and Kretschmer 2014 supra at p. 24.

⁷⁶ See Rae-Hunter 2012 supra at 39-40.

⁷⁷ The Telegraph (2017). Top 10 most watched YouTube video of all time. [online] Available at: <http://www.telegraph.co.uk/technology/0/most-watched-youtube-videos-of-all-time/> [Accessed 12 Nov. 2017].

the uniqueness of practices in each jurisdiction of the world.⁷⁸ For these reasons, this study focuses exclusively on music content to the exclusion of other categories of protected works. However, such focus will not exclude taking account of other categories of copyright-protected subject matter where they appear useful. Such categories may be particularly useful if there are no music content-related cases and if these cases indicate how the issues concerning music content may be addressed in the future.⁷⁹

1.5 Jurisdictional focus

Given that laws are territorial and business models operate within the environment, the application of the regulatory frameworks provided by copyright law as complemented by competition law ought to be undertaken by focusing on specific jurisdictions. A one-size-fit-all approach to such assessment or process would be inappropriate as each jurisdiction's regulatory framework; socio-economic status, developmental goals and business practices have to be taken into account.

Corollary to the foregoing, the analysis in this thesis is also limited in its jurisdictional scope. In this regard, the jurisdictional focus is on South Africa and Nigeria. This choice is based on several compelling factors. Both countries are somewhat large developing countries within the African region. South Africa is a predominant force in the Southern Africa region (specifically Southern African Development Community– SADC) while Nigeria occupies a similar position within the Western Africa and the

⁷⁸ See Rajan, M.T.S. (2010). Creative Commons: America's moral rights. *Fordham Intell. Prop. Media & Ent. LJ*, 21, 905, 931 – 934 (hereafter, Rajan 2010). See also, Dörr, J., Wagner, D. V., Benlian, A., and Hess, T. (2013). Music as a service as an alternative to music piracy? *Business & Information Systems Engineering*, 5(6), 385 (hereafter, Dörr, Wagner, Benlian, and Hess); Rizk, N. (2010). Stories from Egypt's music industry: De facto commons as alternatives to copyright. *Access to Knowledge in Egypt*, p.92 (hereafter, Rizk 2010).

⁷⁹ See section 4.2.1(a), below. For an earlier version of this approach, see D'Agostino, G. (2010). *Copyright, contracts, creators: new media, new rules*. Edward Elgar Publishing.

Economic Organisation of West African States (ECOWAS). There are also similarities in the socio-economic measures within the two countries. High levels of poverty, unemployment and inequalities exist within the two countries. Accordingly, both countries can serve as credible representatives as they present features reflective of most countries within the African continent.

Further, Nigeria's copyright law shares a common heritage with the South African copyright regime. The two copyright law regimes were adapted from the UK's Imperial Copyright Act of 1916. Also, both countries are currently in the process of amending their respective copyright statutes and the proposed amendments have not detracted from the commonality, which the two copyright regimes share.⁸⁰ These similarities may allow for some interesting convergence in the regulatory behaviour of the two countries. Notwithstanding these similarities, there are some material differences between the two countries.

In terms of the economy, the most recent GDP per capita (adjusted for purchasing power parity) ranking by the World Bank, South Africa's GDP of \$12.8 million is quite ahead of Nigeria's GDP of \$5.9 million.⁸¹ In terms of the state of the music market, South Africa's music industry is more developed than its Nigerian counterpart.⁸²

Institutionally, South Africa has a more advanced copyright legislative framework than Nigeria. For instance, while South Africa

⁸⁰ See Draft Copyright Bill 2015 prepared by the Nigerian Copyright Commission. For South Africa, see Copyright Amendment Bill 2017 presented to the National Assembly through the Minister of Trade and Industry. A comparison of the two Bills show that their central objective is to make the law more suited to the digital age.

⁸¹ South Africa's GDP per capita of \$5,273.6 million is quite ahead of Nigeria's GDP of \$2,178 million. See Data.worldbank.org. (2017). *GDP per capita (current US\$)* / *Data*. [online] Available at: https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=ZA&name_desc=false [Accessed 12 Nov. 2017].

⁸² See IFPI 2014 *supra* at 7, 11 and 38.

joined the developed economies in recognising the need to protect internet intermediaries from copyright infringement liability given the nature of their services and the way in which the internet operates, Nigeria is yet to do so.⁸³ In this regard, South Africa's Electronic Communications Transactions Act exempts hosting, caching, linking and conduit intermediaries from copyright infringement liability upon fulfilment of stated conditions.⁸⁴ These differences should reveal some pertinent variation in the regulatory behaviour of the two countries. Also, South Africa has features of both developed and developing economies especially in terms of institutional development as evidenced by its membership of the economic bloc comprising of Brazil, Russia, India, China and South Africa (BRICS) and its accepting developed nation status during negotiations for the World Trade Organisation (WTO) Agreements.⁸⁵ On the other hand, Nigeria has the characteristics of developing and least-developed countries due to the state of its institutions and the income level of its citizens. Least Developed Countries (LDCs) are based on United Nations (UN) classification looking at indexes such as population, markets, institutions, infrastructure, GDP, life expectancy and the like. Generally, markets in LDCs have weaker institutional support in terms of political stability, financial stability, lower levels of protection for property rights.⁸⁶ While Nigeria does not fall under the UN classification of LDCs, it does possess LDCs features such as lack of political and financial stability affecting markets, high population

⁸³ The proposed amendment to the Copyright Act now provides for the safe harbour regime. See Sections 47 - 54 of the Bill.

⁸⁴ In this regard, South Africa's Electronic Communications Transactions Act 2002 exempts hosting, caching, linking and conduit intermediaries from copyright infringement liability upon fulfilment of stated conditions. See Chapter XI, Sections 70-79.

⁸⁵ See Fasan, O. (2007). *Compliance with WTO law in developing countries: A study of South Africa and Nigeria*. (Doctoral Dissertation, London School of Economics and Political Science, United Kingdom).

⁸⁶ See Makino, S., Beamish, P.W. and Zhao, N.B. (2004). The characteristics and performance of Japanese FDI in less developed and developed countries. *Journal of World Business*, 39(4), p.377 at 378.

growth and environmental degradation, amongst other similarities.⁸⁷ This mix of developed, developing and least-developed nation status represents the economic status of the countries within the African continent. Such mix makes it permissible to make some suggestions that may influence the regulatory approach of other African countries.

Also, it is noted that amidst the scholarly and related activities in the context of the open and freemium music business model, one significant lacuna lies in the analysis of the issues from an African context.⁸⁸ It is this lacuna that this thesis also seeks to bridge by assessing the open and freemium music business model from the perspective of these two countries. In doing so, the thesis advocates for a jurisdiction-specific discourse on the regulation of the open and freemium music business model as a one-size-fit-all approach to such process would be inappropriate. Given this jurisdiction-specific focus, the thesis as explained in Chapter three, does not explore possible choice of law and jurisdictional questions that may arise from the transnational nature of majority of copyright owners in both South Africa and Nigeria.⁸⁹ This thesis takes cognisance of the argument against a one-size-fit-all approach to address the gap in previous literature that has largely overlooked the position of the South African and Nigerian regulatory framework on the open and freemium music business model.

Although this thesis focuses on a specific sector in two

⁸⁷ See United Nations Industrial Development Organization (2016). *Industrialization in Africa and Least Developed Countries: Boosting growth, creating jobs, promoting inclusiveness and sustainability*. [online] Vienna: United Nations Industrial Development Organization (UNIDO). Available at: https://www.unido.org/sites/default/files/2016-09/G20_new_UNIDO_report_industrialization_in_Africa_and_LDCs_0.pdf [Accessed 25 Sep. 2017].

⁸⁸ Faturoti's work applies more to the "authorisation regime" that implicates the safe harbour regime. See Faturoti, B. (2017). Re-importing the concept of 'authorisation' of copyright infringement to Nigeria from the UK and Australia. *International Review of Law, Computers & Technology*, 31(1), pp.4-25.

⁸⁹ See section 3.5, below.

comparable jurisdictions, the music content industries in Nigeria and South Africa, it is important, at this point, to consider the possible application of the thesis' main claims to similar investigations in other developing economies in Africa.⁹⁰ The consideration of how copyright law and the complementary competition law framework in Nigeria and South Africa may be applied to regulate the open and freemium music business model is made from the perspective that considers the copyright ecosystem vis-à-vis the regulatory framework, making it possible to put up the arguments as a model for other developing economies in Africa and also add a developing country dimension to future international copyright and competition debate.⁹¹ However, as Chapters four and five of this thesis reveal, the application of the thesis' claims as a developing economy argument is limited by the specific nuances of the respective music content industries and the differences in the legal and socio-economic environment within which such business models are deployed. Nevertheless, it is argued that the need to advance a pro-Africa, developing country perspective to the regulation of the open and freemium music business model may counterbalance such limitations.⁹²

Finally, it is to be noted that whilst this thesis' primary focus

⁹⁰ There is no universal, agreed-upon criterion for what makes an economy developing or developed and which countries fit these two categories, although there are general reference points such as a nation's GDP per capita compared to other nations. Developing economies are economies with an underdeveloped industrial base, and a low Human Development Index (HDI) relative to other economies. See Evenett, S.J. (2015). Competition law and the economic characteristics of developing countries. In: M. Gal, M. Bakhoun, J. Drexler, E. Fox and D. Gerber, ed., *The economic characteristics of developing jurisdictions: Their implications for competition law*, 1st ed. Cheltenham UK: Edward Elgar, pp. 15-6 (hereafter, Evenett 2015); O'Sullivan, A. and Sheffrin, S. (2003). *Economics*. Needham, Pearson Prentice Hall, 471.

⁹¹ While the copyright regulatory framework is country-specific, international copyright treaties such as WIPO Copyright Treaty 1996 and TRIPS Agreement usually constitute a rallying point for local statutes. See Trade Related Aspects of Intellectual Property Agreement (TRIPS) 1869 UNTS 299; 33 ILM 1197 (1994), Correa 2007 *supra* at 2.

⁹² See Drahos, P. and Braithwaite, J. (2002). *Information feudalism*. London: Earthscan.

is Nigeria and South Africa, it also considers the position in the EU, the United Kingdom (UK) and the US, in particular. Both the UK and the US represent one of the leading music markets in the world.⁹³ Moreover, the copyright laws of both Nigeria and South Africa were derived from the UK's Copyright Act and the two jurisdictions share common law jurisdictions. This makes the consideration of the UK approach and the EU approach, given the UK's prior membership of the EU⁹⁴ and its consequent harmonisation of the EU Copyright Directive, particularly persuasive for Nigeria and South Africa.⁹⁵ Such consideration may be particularly useful if there are no music content-related cases in the two jurisdictions and if the UK and EU cases provide an indication on how such issues may be addressed in the two countries.⁹⁶ In terms of competition law, the EU and the US represent the oldest competition law jurisdictions in the world and accordingly, they lead the way in the application of competition law to the analysis of issues related to businesses based on the concept of "free" such as the open and freemium music business model. For the purpose of this thesis, "free" in relation to music content or copyright works is used to identify music content or copyright works provided without charging any price.

⁹³ See generally, British Record Industry. (2011). BPI response to the Digital Copyright Exchange call for evidence, p.8, available at <http://www.ipo.gov.uk/dce-c4e-bpi.pdf> (accessed 10 June 2015); Consumer Focus (2011). *Competition, copyright and collective rights management: A consultation on growth and innovation in the creative and digital technology industries*. Consumer Focus (hereafter, Consumer Focus 2011); IFPI 2017 *supra*.

⁹⁴ Britain voted to leave the EU but the departure process is yet to be concluded.

⁹⁵ The copyright law in both South Africa and Nigeria has its roots in the English copyright legal system. See Ola, K. (2014). Evolution and future trends of copyright in Nigeria. *Journal of Open Access to Law*, 2(1), pp. 7-8 (hereafter, Ola 2014); Schönwetter 2009 *supra* at pp. 11-12.

⁹⁶ See *Adetoun Oladeji Nig Ltd v NB Plc* (2007) 5 NWLR Pt 1027 p 415 at 443-444 paragraphs H-F.

1.6 Research questions

This thesis addresses one key question: How may South Africa and Nigeria apply copyright law and the complementary legal framework of competition law to regulate the open and freemium music business model?

To answer this key question, it is important to address further issues. Firstly, the nature of the relationship between copyright law and competition law must be examined. Secondly, the open and freemium music business model needs to be appropriately described. The notion of open and freemium music business model has been classified in various ways, thus the open and freemium music business model at issue must be distinguished. It is also important to analyse the copyright-based contractual terms (copyright terms) developed by platform firms to explain their use of copyright-protected music content, escape copyright infringement liability and enhance their competitiveness. Moreover, it is important to identify and examine the issue of whether these copyright terms developed in the open and freemium music business model align with the objectives of the copyright law and competition law regulatory framework. Where they are not aligned, there is also the need to suggest viable means of applying the copyright and competition law to regulate the business model. To sum up, the main research question comprises of the following specific questions:

- (a) What are the respective goals of copyright law and competition law? How are these goals related?
- (b) How can the open and freemium music business model be defined and classified? What are the processes and copyright terms within the business model regarding the copyright protection inherent in the music content used?
- (c) Is the open and freemium music business model aligned with the objectives of copyright law and competition law?
- (d) If it is unaligned, how may South Africa and Nigeria apply

copyright and competition law to regulate the business model?

From the foregoing, it is evident that the objective of this thesis is two-pronged. One, the aim is to consider the ways in which the open and freemium music business model may be unaligned with the copyright law system as complemented by competition law. The other objective is to propose how those regulatory frameworks may be applied to regulate the open and freemium music business model. Such objective entails an in-depth understanding and assessment of the ways in which the open and freemium music business model uses and applies copyright-protected music content in the business model context.⁹⁷

1.7 A brief note on motivation for the research

Both Nigeria and South Africa are going through what are arguably the most significant changes ever in their respective copyright regimes presently with South Africa's Copyright Amendment Bill 2017⁹⁸ and Nigeria's Copyright Bill 2015 respectively.⁹⁹ Common to both countries' efforts at shaping a copyright act fit for purpose in a digital environment, is the influence over the past few years of new forms of digital trade in the form of new business models. Open and freemium business models generally have flourished across a

⁹⁷ Solo, A. (2014). The role of copyright in an age of online music distribution. *Media & Arts Law Review*, 19, p.169. Available at: <https://ssrn.com/abstract=2462006> [Accessed 14 Oct. 2016] (hereafter, Solo 2014). Also, see Reed, C. (2013). *Making laws for cyberspace*. 1st ed. Oxford, U.K.: Oxford University Press (hereafter, Reed 2013); Scassa, T. (2013). Acknowledging copyright's illegitimate offspring: user-generated content and Canadian copyright law. *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law*, pp.431-454.

⁹⁸ South Africa commenced with an amendment Bill in 2015 but that bill faced much criticism and was reworked and presented again for comments in March, 2017.

⁹⁹ Both countries invited submissions on the Bills from the public. See Copyright Amendment Bill: Draft 2015 available at <http://www.gov.za/documents/copyright-amendment-bill-comments-invited-27-jul-2015-00000> [accessed 30 August 2015]. Also, Copyright Bill 2015 available at Nigeria <http://reform.copyright.gov.ng/imges/COPYRIGHTBILLCIRCULATIONCOPY02112015.pdf> [Accessed 9 December 2015].

wide spectrum of the digital landscape, in particular as far as music content is concerned – the open and freemium music business model leading the way in this regard. There is little debate as to the enormous impact that technology has had on the trade in music content, driving it from the analogue days of sheet music through to computer files that is prevalent today in the form of downloading, streaming and sharing of such files.¹⁰⁰ Music content has never been as ubiquitous as it is today and as has occurred previously over time, copyright law has had to try and keep up with technological change. This characterizes the effect felt by Nigerian and South African lawmakers as well as the challenges faced by authors, copyright owners and users of music content.

While authors and owners of copyright works should not be denied due recognition and reward and remuneration for their efforts, users should also be entitled to easily access and make certain uses of copyright works. Business models involving the use of copyright-protected works should recognise and embrace these ideals. As argued above, both the business models and the regulatory framework in any economy ought to be sensitive to prevailing socio-economic conditions. The open and freemium music business model has gained popularity as a means of securing wider dissemination of music content and therefore both copyright owners and platform firms ought to be certain as to permissible and impermissible conduct as well as licensable and unlicensed uses.¹⁰¹

Moreover, to further ensure the achievement of the objectives of copyright law, it is important to acknowledge the role that a competition policy approach can play in copyright-related industries. In the case of South Africa and Nigeria, majority of the

¹⁰⁰ See Coetzer 2009 *supra* at pp.14-15.

¹⁰¹ See Quinn, A. (2017). Are online music platforms undermining the principles of copyright law? *Journal of Intellectual Property Law & Practice*, 13(1), pp.49-60.

copyright owners in the music industry such as record companies and music publishers are small businesses/small and medium-sized enterprises (SMEs) referred to as “independents”.¹⁰² SMEs are a special focus group for the application of competition law in many jurisdictions. The recognition of the role of competition law generally and specifically from this perspective in the open and freemium music business context is crucial but appears to be absent from previous research.

1.8 Research method

This study relies entirely on written texts. The key primary sources consulted include national statutes and policies, international treaties and declarations, as well as other official documents. The main secondary sources relied upon include books, journals, newspaper articles, research reports and theses in law, music and business management. No new empirical research was undertaken or relied upon for this study. It is acknowledged that empirical data regarding the nature of the relationship between copyright owners and the platform firms and the actual revenue (if any) received within the open and freemium music business model would most likely have produced some, if not more, pertinent data. However, this method was ruled out because of the confidential nature of the subject matter. It is well known that platform firms and even, most copyright owners are reluctant to provide information regarding their commercial and business transactions.¹⁰³ While this approach may omit some relevant factors regarding the open and freemium music business model, the high level of trust required for other forms of data collection make it the best approach in the circumstances. Therefore, to avoid any ethical impediments and to ensure reliability and validity, the thesis ruled out empirical

¹⁰² See section 3.5, below.

¹⁰³ See Priest, E. (2015). Copyright and free expression in China's film industry. *Fordham Intell. Prop. Media & Ent. LJ*, 26, p.10-11.

research. Instead, the study relies on the information presented or admitted by platform firms in the suits instituted against them in some jurisdictions, particularly at the Court of Justice of the European Union (CJEU) and in the US. The information from these cases and the originating processes filed therein are used in Chapter three of this thesis to describe the processes and copyright terms involved in the open and freemium music business model. It is noted that there have been significant activities by the Copyright Society of Nigeria (COSON) and Musical Copyright Society of Nigeria and the South African Music Rights Organisation (SAMRO) in ensuring mechanical royalty payments from firms deploying a subscription-based business model.¹⁰⁴ However, as Chapter three of this thesis reveals, such activities, while insightful, are outside the scope of this thesis.¹⁰⁵ As explained above, the subscription-based freemium business model, which involves uploads by platform firms themselves, the procurement of licences by the platform firms and the receipt of subscription fees from users, is outside the scope of this thesis.¹⁰⁶

By undertaking the study from a doctrinal perspective, this thesis proposes suitable approaches to applying the regulatory framework. The value of such approach lies in its ability to assess the preparedness of the regulatory framework for the questions that may arise.¹⁰⁷ Further, the analysis from the perspective of copyright law as complemented by competition law

¹⁰⁴ For instance, in 2016, COSON instituted a suit against MTN Nigeria for infringement of copyright by virtue of MTN's use of music content in its subscription-based streaming service without obtaining relevant mechanical licence from COSON. See Suit No. FHC/L/CS/619/2016 COSON v MTN Nigeria. See also, 7 Digital (2015). *7digital announce pan-African licensing agreement through CAPASSO*. [online] Available at: <http://about.7digital.com/news/7digital-announce-pan-african-licensing-agreement-through-capasso> [Accessed 5 Jul. 2017].

¹⁰⁵ See section 3.2.2 and 3.2.3, below.

¹⁰⁶ See section 1.3, above.

¹⁰⁷ See generally, Chynoweth, P. (2008). *Legal research. Advanced Research Methods in the Built Environment*, Wiley-Blackwell, Oxford, pp.28-38.

(“complementarity theory”¹⁰⁸) provides food for thought and raises “theories” of harm and gains which would be available to both policymakers and potential complainants in considering the application of copyright and competition law to the regulation of the open and freemium music business models.¹⁰⁹

Although the thesis considers the application of copyright law and competition law frameworks in South Africa and Nigeria, comparative law is not the goal in this thesis.¹¹⁰ Comparative analysis are usually undertaken to understand foreign law or for the purposes of applying the researcher’s understanding of the differences and similarities and the reason for such.¹¹¹ Neither is the position in this current study. Comparative law studies the relationship between one national legal system and one or more other national systems.¹¹² It is usually applied to scrutinise the nature of such a relationship including the similarities and differences of each legal system, the reasons for the similarities and differences and the degree to which such similarities and differences are significant or insignificant.¹¹³

This study merely conducts an independent examination of the regimes in the two countries as credible representatives of the

¹⁰⁸ See Drexl 2013 supra at 37.

¹⁰⁹ Such analysis takes into account, the economic rationale of copyright – a prerequisite in pursuing overall development goals. Anderson reflects that the application of competition rules on IPRs was a major concern of developing countries during the negotiations leading up to TRIPs. See Anderson, R. (2008). Competition policy and intellectual property in the WTO: More guidance needed?. In: *Research handbook on intellectual property and competition Law*. 1st ed. J. Drexl, Ed. Cheltenham: Edward Elgar, at 457, 459 and 473 (hereafter, Anderson 2008).

¹¹⁰ This is a descriptive comparative law in the sense that any comparison is confined to an analysis of variations between the laws of the two countries. See Gutteridge, H.C. (2015). *Comparative law: an introduction to the comparative method of legal study and research* (Vol. 1). CUP Archive, pp. 7-9.

¹¹¹ Reitz, J. (1998). How to do comparative law. *The American Journal of Comparative Law*, 46(4), 628- 629. (hereafter Reitz 1998).

¹¹² Glendon, M., Carozza, P. (1994). *Comparative legal traditions, texts, materials and cases*. 2nd ed, West, p.6. Also, Reitz 1998 supra at 618 – 619.

¹¹³ Reitz 1998 supra at 621 – 622.

African continent. The aim is to identify the points of friction and concord between the legal framework and the open and freemium music business model and then propose how the legal framework may be applied to provide an appropriate regulatory framework for the business model.

1.9 Research structure

Having appropriately delineated the scope of the research question, how this shall be applied in practice to propose how copyright law and competition law may be used to regulate the open and freemium music business model may now be analysed. This thesis is divided into six chapters.

Chapter two will consider the objectives of copyright law and how they promote competition. By providing for exclusive rights, copyright law encourages firms to compete and strive to get the benefit of those exclusive rights. This is because the exclusive right provides something to sell or license to generate pecuniary benefits. Also, by limiting the scope of the exclusive right, copyright promotes competition by ensuring that the copyright owner does not operate as a monopoly and that he will be “compelled” to disseminate his work. So, on one hand, copyright protects exclusivity and on the other hand, it promotes access and distribution.¹¹⁴ Competition law prohibits both anti-competitive agreements and anti-competitive conduct in any given market, including copyright-related markets. From this perspective, competition law complements copyright law in achieving its (copyright law’s) objectives. Chapter two will examine this “complementarity” in the two fields of law to understand how such may be applied to regulate the use of copyright-protected products in the business model context. In South Africa and Nigeria, the Copyright Act of 1978 and the Copyright Act of 2004 respectively

¹¹⁴ These objectives may sometimes raise conflicts because of the private nature of exclusivity and the public nature of access and dissemination.

are the principal statutes that regulate copyright and the use of copyright-protected products. While South Africa has a Competition Act that provides a general framework to protect competition across a wide range of economic activities, Nigeria does not presently have any statute that deals specifically with competition law issues.¹¹⁵ Nevertheless, the Federal Competition and Consumer Protection Bill 2016 is presently undergoing parliamentary consideration and was recently passed by the Nigerian Senate.¹¹⁶ It is that Bill that will provide the Nigerian competition legal framework to be examined for the present purposes. In the case of South Africa, the thesis will only evaluate the Competition Act and will not consider the recent Competition Amendment Bill proposed in 2017.

Chapter three will explore the concept of the open and freemium music business model and its possible classifications. The approach taken here shall be an expository and descriptive one, relying on information from case law and the literature to describe the current state of the open and freemium music business model.¹¹⁷ The platform firms that deploy that business model operate largely in the advertising sector and they need a large mass of consumers that they can serve advertisements to obtain revenue. To attract the consumers, the platform firm needs content that will attract and sustain consumers' attention – in this case, music content. Accordingly, the platform firm creates and operates a platform that allows the public to upload music content, which anyone can listen to on the platform. To ensure that they

¹¹⁵ This is not for want of trying. Between 2003 and 2007, 3 different Draft Competition Bills were prepared but none has been signed into law till date. See Dimgba 2006 *supra* at 15-9.

¹¹⁶ See Placng.org. (2017). *Federal Competition and Consumer Protection Bill, 2017*. [online] Available at: <http://placng.org/wp/wp-content/uploads/2017/06/Report-on-a-Bill-for-an-Act-to-repeal-the-Consumer-Protection-Act.pdf> [Accessed 13 Nov. 2017].

¹¹⁷ See Burton, D. (2000). Using literature to support research. *Research training for social scientists*, pp.137-152.

operate within the confines of copyright law, the platform firm does not usually upload the music content by itself and in fact, denies responsibility for and knowledge of copyright infringement arising from the users' uploads (in line with the safe harbour regime). It sets out a copyright policy containing provisions regarding the place of copyright in their business model. Three main copyright-based terms can be identified at this level. These are: terms relating to licensing, access and use of the copyright-protected music content. So, on one hand, the business model strives to respect exclusivity and on the other hand, it strives to promote access and distribution. Chapter three also explains the stakes in issue for the market participants (artists and copyright owners, the platform firm, the consumers and the advertising companies) in the open and freemium music business model context in South Africa and Nigeria. The explanation of the stakes from a South African and Nigerian perspective is significant as it explains the local perspective of a business model that operates on a global scale. Chapter three also explains that majority of copyright owners (record companies and music publishers) in these two countries are in fact, small businesses. This position as small businesses casts light on an important issue in competition law discussed in Chapter five: the protection of the economic freedom of small businesses.

The exposition in Chapter three paves the way for the analysis in Chapters four and five. In this regard, the aim is to identify and analyse whether the copyright terms identified in Chapter three are aligned with the objectives of copyright law as complemented by competition law. Indeed, there are concerns regarding "value gap"¹¹⁸ and "scraping"¹¹⁹ said to be perpetuated

¹¹⁸ As explained by the IFPI, "the value gap describes the growing mismatch between the value that user upload services, such as YouTube, extract from music and the revenue returned to the music community – those who are creating and investing in music". See IFPI 2017 supra at 24.

by the copyright terms within this business model.¹²⁰ Generally, both concerns relate to the use of an automated process to efficiently collect and use a significant number copyright-protected content from different copyright owners with little or no payment to them. Also, there are concerns regarding restrictions on copyright user rights inherent in the copyright terms set up by the platform firms to account for their use of copyright-protected content and to “respect” exclusivity.¹²¹ The applicability of the solutions proposed by the literature to address these concerns and regulate the business model will also be discussed in relation to both South Africa and Nigeria. While Chapter four undertakes the analysis in relation to the copyright law frameworks of both South Africa and Nigeria; Chapter five undertakes the exercise in relation to the competition law in South Africa and the competition bill in Nigeria. In both cases, the question relates to the fit between the business model and the objectives of the copyright and competition law regulatory framework. Chapter four will also consider briefly, the recent proposed copyright reform currently going on in the two countries and how the Bills respond to the open and freemium music business context. Chapter five particularly explores the small business status of copyright owners and the protection of the economic freedom of smaller market participants as an objective pursued by competition law. The consideration in these two chapters raises important points about the need for the regulation the business model.

¹¹⁹ Scraping is usually described as an automated process that firms can use to efficiently collect large amounts of targeted data from different websites hosted by another company. See Goldfein, S. and Keyte, J. (2017). Big data, web ‘scraping’ and competition law: The debate continues. *New York Law Journal*, 258(49), p.1 (hereafter, Goldfein and Keyte 2017).

¹²⁰ See section 4.2, below.

¹²¹ The use of the expression, “rights” to describe the range of permissible actions that users of copyright-protected works may validly undertake without the consent of the copyright owner is prevalent in the literature. See Elkin-Koren 2017a supra at 137; Geist, M. ed. (2013). *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law*. University of Ottawa Press. (hereafter, Geist 2013).

Chapter six concludes the thesis with a summative evaluation of the alignment between the open and freemium music business model and the copyright and competition law framework. It also canvasses competition- promoting approaches that may be adopted in the copyright and competition law regulation of the business model.

Chapter Two: Copyright and competition

2.1 Introduction

Competition is a struggle or battle for superiority.¹ As stated in the Draft Competition and Consumer Policy Paper prepared by the Nigerian Government, "...through competition among suppliers, consumers have access to the widest possible range of choice of goods and services at the lowest possible prices and highest possible quality".² Hence, competition between firms may be considered as a necessary instrument for the promotion of efficiency and consumer welfare in the marketplace.

In the context of business models, competition may be seen as a process in which firms strive with other firms through strategies and economic activities aimed at satisfying the needs of customers and capturing value or revenue therefrom.³ In this regard, firms which are efficient and which have a business model with the appropriate value proposition are able to rise above their competitors and dominate the marketplace in satisfying consumer needs. Accordingly, the process of competition can lead to a firm becoming the most preferred by the consumers because of its business model, efficiency, innovative products, quality of its goods and/or lower prices.⁴

To promote and protect competition, the law provides a regulatory framework to ensure that economic activities do not stifle or restrict competition by illegitimate acquisition and/or

¹ Whish, R. and Bailey, D. (2012). *Competition law*. 7th ed. Oxford: Oxford University Press, p.4 (hereafter Whish and Bailey 2012).

² Federal Government of Nigeria (2014). *Draft competition and consumer protection policy*, paragraph 14, p.8. Other governments have expressed similar views. See UK Department of Trade and Industry (2002). White Paper, *Productivity and enterprise: A world class competition regime*, section 1.1.

³ See UK Competition Commission, "Merger references: Competition Commission guidelines" (June 2003, CC 2), section 1.20; Market investigation references: Competition Commission guidelines (June 2003, CC 3), section 1.16, available at www.competition-commission.org.uk.

⁴ Whish and Bailey 2012 *supra* at pp.19 - 21.

exercise of market power. Several legal regimes such as competition law, copyright law, property law, contract law, bankruptcy law amongst others, are considered as one of the regulatory frameworks to promote and/or protect competition between firms and for enhancing efficiency in the marketplace.⁵ However, while competition law provides a general overarching framework to protect competition across a wide range of economic activities, each of the other regulatory frameworks applies to regulate competition in a specific sector or industry. In this regard, copyright law provides a regulatory tool for the protection and promotion of competition in the copyright sector.⁶

Copyright law regulates the exercise of rights of copyright owners and the use of copyright-protected products by users and the general public. Competition law provides a complementary regulatory framework that may be interpreted as serving the interests of copyright law. Accordingly, as a basis for the evaluation of the use of copyright law and the complementary competition law framework to regulate the open and freemium music business model, this chapter examines the nature of the relationship between the two fields of law.

The conclusions of this chapter are particularly relevant, as they will guide the analysis of the functioning of the open and freemium music business model in the subsequent chapters of this thesis. There, the significance of copyright and the promotion of competition and how competition law may be applied to support such goals, will be scrutinised with a focus on the South African and Nigerian open and freemium music business model contexts. In other words, this chapter, by focusing on how copyright law itself

⁵ Maskus and Lahouel 2000 *supra* at 596-600.

⁶ *Ibid.* See also, Stadler, S.K. (2007). Copyright as trade regulation. *University of Pennsylvania Law Review*, pp.899-960 (hereafter, Stadler 2007); Katz, A., (2013). Copyright and competition policy. In: Towse, R. and Handka, C. eds., 2013. *Handbook on the digital creative economy*. Edward Elgar Publishing, pp.209-21 (hereafter, Katz 2013).

contains provisions that aim at protecting competition and how competition law complements the efforts of copyright law, aids the cause of this study which seeks to inter alia explore ways in which the two legal frameworks may regulate the deployment of the open and freemium music business model.

This chapter is divided into 4 parts. Section 2.1 deals with the introduction and section 2.2 identifies the objectives of copyright law by looking at the interface between copyright and income generation, and between copyright's limitations and exceptions and how they help to promote competition in copyright markets. In particular, section 2.2 shows that the exclusive rights granted under copyright law are key resources for the promotion of competition in copyright markets. It focuses on the music industry, drawing links between copyright and income generation. Also, this section evaluates other aspects of copyright law in South Africa and Nigeria that aim to promote competition: it discusses the import of the dichotomy between ideas and expression, the limited term of copyright protection, limitations on copyrightable subject matter, fair dealing and the like. Section 2.3 compares the objectives of copyright law with that of competition law and shows the role that competition law plays in complementing and serving the objectives of copyright law. Section 2.4 concludes the chapter.

2.2 Copyright and the promotion of competition

It has been often held that copyright protection is a tool used to promote competition and the public interest from two distinct but interconnected perspectives. From an *ex ante* point of view, prior to making investments in creative works, copyright law promotes competition and rivalry as firms are incentivized to compete to enjoy the benefits of copyright protection. From an *ex post* perspective, copyright protection comes with constraints and limitations on the exclusive rights of copyright owners to encourage

greater creativity,⁷ access to and dissemination of copyright products.

In recognising the link between copyright law and competition, several aspects of copyright law have been put forward in the literature to explain and conceptualise how copyright law promotes competition principles. Corollary to the foregoing, it becomes necessary to briefly review these approaches that explain the relationship between copyright and competition in the context of South Africa and Nigeria.⁸

One of the central questions relates to the underlying meaning and purpose of copyright protection. The various approaches to copyright protection render the concept capable of being designed and interpreted to address a variety of issues.⁹ In relation to this study, two main justification theories deserve careful attention.¹⁰

The first one, utilitarianism posits that copyright products possess the non-exclusivity and non-excludability nature of public goods.¹¹ In other words, the use of copyright products by one

⁷ See Fishman, J.P. (2014). Creating Around Copyright. *Harv. L. Rev.*, 128, p.1333 (hereafter, Fishman 2014). See also, section 4.2.2, below.

⁸ For a similar exercise in relation to US copyright law, see Cotter, T.F. (2006). The procompetitive interest in intellectual property law. *Wm. & Mary L. Rev.*, 48, p.483 (hereafter, Cotter 2006); Katz 2013 supra; Samuelson, P. (2017). Justifications for copyright limitations & exceptions. In: R. Okediji, ed., *Copyright law in an age of limitations and exceptions*. New York: Cambridge University Press, p.35-7 (hereafter, Samuelson 2017). See also, Katz, A. and Veel, P.E. (2013). Beyond refusal to deal: a cross-Atlantic view of copyright, competition, and innovation policies. *Antitrust Law Journal*, 79(1), pp.141-142 (hereafter, Katz and Veel).

⁹ Giblin, R. and Weatherall, K. (2017). If we redesigned copyright from scratch, what might it look like? In: R. Giblin and K. Weatherall, eds., *What if we could reimagine copyright?* Australia National University Press, p.1.

¹⁰ Other justifications include personality rights theory and “democratic right” theory”, the “cultural argument”, the “freedom of expression argument” and the like. See Schönwetter 2009 supra at p. 30; Fisher, W. (2001). Theories of intellectual property. In Munzer, S.R. ed., 2001. *New essays in the legal and political theory of property*. Cambridge University Press, 168; Zemer, L. (2006). On the value of copyright theory. *IPQ*, 1, p.55.

¹¹ Rizk 2010 supra at p.172.

person does not reduce another person's use (non-exclusivity) nor would it be easy or possible to prevent someone else's use (non-excludability).¹² As a result, it may be difficult, in the absence of regulation, to recoup the investments and cost of producing such public goods. In other words, the utilitarian theory highlights the role of copyright in incentivising copyright owners to invest in the creation of further copyright works.¹³ The rationale in this case is that the exclusive nature of copyright protection enables monetary or economic gains and that in the absence of copyright protection and the resultant economic gains; there would be little or no incentive to create.¹⁴ This would explain the monopolistic nature of copyright.

The second theory usually referred to as the natural rights theory is grounded on the author's natural property rights in his work and his entitlement to reap the reward of his creative labour.¹⁵ From a historical perspective, this view emanates from John Locke's Second Treatise of Government written in 1690.¹⁶ John Locke's argument is that every person is entitled to the natural property rights resulting from their own labour but such rights are

¹² Ibid.

¹³ For a seminal work on the utilitarian theory for copyright, see Landes, W.M. and Posner, R.A. (1989). An economic analysis of copyright law. *The Journal of Legal Studies*, 18(2), pp.325-363.

¹⁴ Cohen, J.E., Loren, L.P., Okediji, R.L. and O'Rourke, M.A. (2015). *Copyright in a global information economy*. Wolters Kluwer Law & Business, p.7; Hugenholtz, P.G.B. (2013). International copyright. *Principles, law, and practice*, 3rd ed. Oxford University Press, p.3; Harms, L.T.C. (2012). *The enforcement of intellectual property rights: a case book*. 3rd ed., World Intellectual Property, p.28 (hereafter, Harms 2012).

¹⁵ See Craig, C.J. (2002). Locke, labour, and limiting the author's right: A warning against a Lockean approach to copyright law. *Queen's Law Journal*. 28(1), pp. 18-20 (hereafter, Craig 2002). Hughes, J. (1988). The philosophy of intellectual property. *Geo. LJ*, 77, 287, p.305; Ginsburg, J. (2017). The role of the author in copyright. In: R. Okediji, ed., *Copyright law in an age of limitations and exceptions*. New York: Cambridge University Press, 60, p.69-70 (hereafter, Ginsburg 2017).

¹⁶ See Schönwetter 2009 supra at p. 32.

limited by the rights of others to the “common stock of property”.¹⁷ In this regard, copyright protection is to be seen as a reward for labour. Natural rights theory differs from the utilitarian theory in that it prioritises the property rights of the author to reap the fruits of their creation¹⁸ and satisfy the innate need to create.¹⁹

Even without deeper reflection, a cursory examination of these theories shows that they are inextricably interwoven, and ultimately explain the import and desirability of copyright for the society. Indeed, it is now well established from a variety of studies that the differences between so-called utilitarian oriented copyright systems and the natural law based jurisdictions have become blurred in the wake of globalization and current international copyright treaties such as the Berne Convention, the 1994 Agreement on the Trade Related Aspects of Intellectual Property (TRIPS Agreement), the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty.²⁰

The preamble to the WCT, which incorporates the elements of the Berne Convention and the TRIPS Agreement, is instructive.

The Contracting Parties...desiring to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible, emphasizing the outstanding significance of copyright protection as an incentive for literary and artistic creation,

[and]

¹⁷ See for example Gordon, W.J. (1993). A property right in self-expression: Equality and individualism in the natural law of intellectual property. *The Yale Law Journal*, 102(7), 1533, 1544-45.

¹⁸ Craig 2002 supra at pp. 20-21.

¹⁹ See Schönwetter 2009 supra at p. 33. Also, Bently, L. and Sherman, B. (2014). *Intellectual property law*. Oxford University Press, USA, pp. 36-8 (hereafter, Bently and Sherman 2014).

²⁰ See Schönwetter 2009 supra at p. 37; Senftleben, M. (2004). *Copyright, limitations, and the three-step test: an analysis of the three-step test in international and EC copyright law* (Vol. 13). Kluwer Law International, 17 (hereafter, Senftleben 2004); Harms 2012 supra at p.19.

...recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention...²¹

This, notwithstanding, various objections have been raised against copyright justifications. One of the foremost criticisms contends that there is no proof that the exclusivity of copyright results in more creativity or incentivises further creation of new products.²² Some argue that other non-exclusionary systems may provide incentives to create and as such, consider the exclusivity of copyright protection as a threat to the public interests and outside the fundamental objectives of copyright.²³ Furthermore, the distribution of copyright works using open business models has been presented as evidence that monetary or economic incentive is not required for the creation or availability of copyright works in the marketplace.²⁴ As an example, they point out the (relative) success of open source software projects such as Linux, the Mozilla internet browser, Google Android and the like in which copyright owners participate in the development and creation of software whilst offering a *gratis* licence of their copyright in the software.²⁵ Another argument put forward against copyright protection is that it inhibits competition and wider distribution of

²¹ Preamble to the WIPO Copyright Treaty, Dec. 20, 1996, WIPO Doc. CRNR/DC/94, available at http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295157.

²² See, for example, Vaver, D. (1994). Some agnostic observations on intellectual property. *Intellectual Property Rights*, (1), pp.240-42; Zimmerman, D.L. (2011). Copyrights as incentives: Did we just imagine that?. *Theoretical Inquiries in Law*, 12(1), pp.38-40 (hereafter, Zimmerman 2011). Also, Bently and Sherman 2014 supra.

²³ Gürel, B. (2009). An external method for establishing the balance in intellectual property rights' scope: Article 102 of the TFEU. *Global Antitrust Review*, 10, p.53..

²⁴ See Creativecommons.org, (2015). *About - Creative Commons*. Available at <http://creativecommons.org/about> accessed 13 May 2015. Also, Rizk 2010 supra at 124-7.

²⁵ See generally, Lessig, L. (2008). *Remix: Making art and commerce thrive in the hybrid economy*. Penguin; Stallman, R. (2002). *Free software, free society: Selected essays of Richard M. Stallman*. Free Software Foundation Inc.; Boldrin, M. and Levine, D. (2002). The case against intellectual property. *American Economic Review*, 92(2), pp.209-212.

copyright products, all of which may not be in the public interest.²⁶

While these criticisms may hold in certain respects, they are not of general application. Copyright protection has clearly been used as a leverage to receive economic rewards even when creation and distribution have taken place outside economic negotiations particularly in the open business model deployed by authors and copyright owners.²⁷ Here, the protected work is given away for free using an express or implied licence, and revenue is derived albeit indirectly from the “enhanced reputation and market share” which the copyright owner enjoys from giving out the work for free.²⁸ Further, copyright protection has a significant impact on the willingness to engage in creative and productive activities for the enjoyment of the public.²⁹ Indeed, as explained in Chapter three of this study, freemium business models have a strong fixation on advertising revenue made possible by the same enhanced reputation and market share.³⁰ As held by the US Federal Circuit Court in *Jacobsen v Katzer*,³¹ the fact that the copyright owner elects to waive some of his rights does not obviate the economic interests in the copyright work.³²

In any event, no copyright theory is without criticisms and differences in theories and national approaches to copyright protection may be more a question of emphasis than outcomes.³³

²⁶ See Davies, G. (2002). *Copyright and the public interest*. Sweet and Maxwell, London, 2nd ed, 250.

²⁷ See Shagall, Y. (2008). *Jacobsen v. Katzer: Federal Circuit affirms economic Interest of open source copyright holder, Slip Opinion*. Jolt.law.harvard.edu. Available at <http://jolt.law.harvard.edu/digest/software/jacobsen-v-katzer> [Accessed 15 June 2015].

²⁸ Ibid.

²⁹ Waelde, C., Kheria, S., Cornwell, J. and Brown, A. (2016). *Contemporary intellectual property: law and policy*. 4th ed. Oxford: Oxford University Press, p.41.

³⁰ Section 3.2.2.

³¹ 2008 U.S. App. LEXIS 17161 (Fed. Cir. 2008).

³² Ibid.

³³ See Goldstein, P. (2001). *International copyright: principles, law, and practice*.

Further, even in jurisdictions that are said to share similar approaches or justification, there are still significant differences between their copyright laws.³⁴ The debate on the justifications for copyright protection inevitably applies to the scope of copyright protection and highlights the need for set boundaries. In this context, there is need to ensure that the protection of the interests of the copyright owner does not adversely affect the public interests.³⁵ On the one hand, there is need to incentivize the author to create and the copyright owner to invest in the production of copyright works by providing effective legal protection. On the other hand, it must be ensured that the public has access to these products. Put differently, it is essential to guarantee that the public is ultimately able to access creative outputs. Where such access does not exist or is unduly constrained, the society would not be able to benefit from the creative nature of copyright works.

To reach a reasonable balance between public and private interests,³⁶ provisions are made for the duration of copyright protection (resulting in the notion of the “public domain”³⁷) and for limitations and exceptions to copyright protection.³⁸ Such provisions are geared towards ensuring that the much-sought balance between the interests of copyright owners and that of users of copyright works can be maintained. This internal mechanism has contributed to defining the boundaries of the scope of copyright and the markets for copyright products.³⁹ However, as

Oxford University Press, USA, p. 10. See also Cornish, J. (1993). Sound recordings and copyright. *International Review of Intellectual Property and Competition Law*, 24, 306 at 307.

³⁴ Schönwetter 2009 supra at p. 30.

³⁵ Cross and Yu 2007 supra at 429.

³⁶ Ibid.

³⁷ Corbett 2011 supra at 528.

³⁸ Cross and Yu 2007 supra at 429. Sections 12, 13 and 14 of South African Copyright Act create certain exceptions to copyright protection including using the work for the purpose of criticism or review.

³⁹ Katz 2013 supra.

this chapter shows, other factors such as the application of competition law, may play a significant role in achieving this objective. Before discussing the role and application of competition law, the next section looks at the copyright law environment.

2.2.1 The relationship between copyright protection and competition

As stated earlier, copyright law is a legal system that protects the creative outputs of authors and copyright owners by granting them exclusive rights to control the use of their creations for a limited time, subject to certain limitations,⁴⁰ exceptions and statutory licensing arrangements allowing use and exploitation without consent.⁴¹ The exclusive rights common to the categories of works protected under copyright law in respect of music content include the right to reproduce the work; perform the work in public; publish the work, make a cinematograph film or a record in respect of the work; distribute the work for commercial purposes and communicate or broadcast the work to the public.⁴²

Copyright law grants copyright owners rights in exclusivity meaning that other persons cannot exercise those rights in relation

⁴⁰ For example, where the work in question fails to meet the requirement of originality, copyright protection may not enure to it. Use of such work would not require licence. See the case of *Moneyweb (Pty) Limited v Media 24 Limited and Another* (31575/2013) [2016] ZAGPJHC 81; [2016] 3 All SA 193 (GJ); 2016 (4) SA 591 (GJ) (5 May 2016) where the court accepted the defendant's argument that four of Media24's articles which were simply rehashes of press releases or transcripts of telephone interviews, did not meet the originality requirement and hence no copyright existed in the said works.

⁴¹ See Second Schedule to the Nigerian Copyright Act. See also sections 12 to 19B of the South African Copyright Act. In each of the afore-mentioned countries, these provisions state that copyright protection does not extend to fair dealing with any protected work. See generally, Wang, J. (2013). *Copyright: rebalancing the public and private interests in the areas of education and research* (Doctoral dissertation, Stellenbosch: Stellenbosch University); Ekpa, F.O., and Kure, B.R. (2014). Fair dealing as an exception to the infringement of copyright: an obstacle to the effective enforcement of copyright claims in Nigeria. *Idah Bar Journal of Contemporary Legal Issues*, (2), pp. 245 – 270 (hereafter, Ekpa and Kure 2015).

⁴² For a full description of each of the exclusive rights available for the mentioned categories of copyright works, see Sections 6, 7 and 8 of the Nigerian Copyright Act; Section 6(1)(a)-(g) South African Copyright Act.

to the copyright work without their permission or licence. In the case of any given music content, any person or entity other than the copyright owner proposing to use the music content in any manner envisaged by the extant copyright laws, would require the permission or the licence of the relevant copyright owner in respect of the literary work, the musical work and the sound recording, to do so.

The exclusive nature of these rights enable income generation by necessitating requests for prior authorisation (license) from the relevant copyright owner from any person wishing to exercise any of the rights. The request for license may result in payment of license fees while failure to obtain a license for uses outside those statutorily permitted, may result in the payment of damages for copyright infringement.⁴³ In other words, these rights are secured through the provisions for appropriate remedies where they are exercised without the license of the copyright owners. Most copyright law cases relate to the application of copyright infringement rules. This is typically due to the fact that copyright infringement rules envisage the possibility of the copyright owner generating revenue from exclusively exercising his rights to reproduce, distribute and/or license its copyrighted works.⁴⁴ These rights together with the possibility of obtaining monetary remedies for their infringement form the basis for the design and deployment of business models in the copyright marketplace.⁴⁵ Even in so-called pure open business models

⁴³ See sections 16 to 18 of the Nigerian Copyright Act; see also, section 24 of the South African Copyright Act, Olubiyi, I.A. (2014). A comparative analysis of copyright enforcement provisions in Nigeria: Maximising the current legal regime. *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 5, p.90 (hereafter, Olubiyi 2014); Angelopoulos, C. (2016). *European intermediary liability in copyright: A tort-based analysis*. Ph.D. Institute for Information Law (IVIIR), p.14 (hereafter, Angelopoulos 2016).

⁴⁴ Olubiyi 2014 supra at 89; Ouma supra at p.921; Ginsburg 2017 supra at 81-82.

⁴⁵ See Coetzer 2009 supra at 41. Also, see Rethink Music, 2015. Fair music: Transparency and payment flows in the music industry. *Berklee Institute of*

where licence to use the protected work is granted for free, the economic rights are activated once the licensee operates outside the terms of licence. Further, at the heart of the copyright infringement suits against platform firms that use copyright-protected content in advertising, is the question of who is entitled to what share of the advertising revenue from using such content.⁴⁶ As such, from the moment the copyright work is created, the author or the right-holder may be perceived as an entrepreneur or firm who has a “product” to sell or license for revenue generation.⁴⁷

The monetization of music content has historically rested on two primary economic rights being 1) the performing right and 2) the reproduction right, with the capacity of having “something to sell or license” or to monetize each of these rights being driven by technology. Prior to any significant technological development, revenue or value could only be generated from the performance of music by assembling people at a specific place and time to listen to the music being performed *at that time*. When the music performance ended, there was no way to monetize or create value from the music thereafter, except to arrange for another music performance. Reproducing music was, prior to the Gutenberg Press in 1454, by copying music on a sheet (“sheet music”) and distributing the sheet music for a fee. This was, of course, a laborious and time-consuming process with relatively low output. With the arrival of the Gutenberg Press, the capacity to reproduce music into copies was greatly enhanced as the ‘reproduced’ sheet music was available and accessible to anyone who could, or

Creative Entrepreneurship. Accessed, 23, p.5. Available at: <https://www.berklee.edu/sites/default/files/Fair%20Music%20-%20Transparency%20and%20Payment%20Flows%20in%20the%20Music%20Industry.pdf> [Accessed 13 Nov. 2017] (hereafter, Rethink Music 2015).

⁴⁶ Ginsburg 2017 *supra* at 81-82.

⁴⁷ *Ibid*.

wished to learn, a musical instrument, at a time of their choosing and with the sheet music at hand, the music could be performed.⁴⁸

With more technological advancements, the reproduction right migrated from generating revenue through sheet music to generating revenue through piano rolls, acetates and then vinyl and then on to tapes to cassettes⁴⁹ to CDs and now to digital files and streaming. These mediums represented the means of exploiting the reproduction right to generate revenue. Similarly, technological advancements ensured that revenue could be generated from performing rights without the requirement of assembling the audience in one place and at a specific time. Instead, revenue was generated from the performing right through the public performance, the broadcast, the transmission through diffusion services and the communication to the public⁵⁰ of the music content. In this regard and leveraging on the statutory provision that reproduction of any copyright work can be “in any manner or form”,⁵¹ digitisation and technology have necessitated the expansion of the exercise of the reproduction right to include performance⁵² of the reproduced work through “broadcast” rights,

⁴⁸ See Coetzer 2009 supra at 14-19; Towse, R. (2013). The economic effects of digitization on the administration of musical copyrights. *Review of economic research on copyright issues*, 10(2), pp.55-67; Towse, R. (2016). Copyright and music publishing in the UK. In *The Artful Economist* (pp. 133-151). Springer International Publishing (hereafter, Towse 2016a).

⁴⁹ The piano roll, acetates, vinyl and cassettes were the old ways of listening to recorded music. The piano roll, for instance, is a music storage medium used to operate a player piano, piano player or reproducing piano. See Barnet, R.D. and Burriss, L.L. (2001). *Controversies of the music industry*. Greenwood Publishing Group.

⁵⁰ See section 9(e) of the South African Copyright Act. This right is not applicable in Nigeria presently. It is however provided for in the current Copyright Amendment Bill 2015.

⁵¹ See Sections 6(d), 8(1)(c) and 9(c) of the South African Copyright Act.

⁵² See the following provisions of the South African Copyright Act: Sections 6(d), 8(1)(c) and 9(c) for broadcast rights; Sections 6(e), 7(d) and 8(1)(d) for the transmission through a diffusion service rights; Section 9(e) for the communication to the public rights. Apart from the right of communication to the public, corresponding provisions in the Nigerian Copyright Act may be found in Sections 6, 7 and 9.

“transmission through a diffusion service” rights and “communication to the public” rights and have also evolved to include the “publishing rights and “adaptation” rights.⁵³ Accordingly, apart from public performance in a live format, the reproduction right became the most recognised value metric or revenue generator for the recorded music copyright sector because it involved the many ways in which music content may be perceived.

From a copyright law perspective, the revenue received from sale of music CDs and DVDs, licences for the streaming of music, digital downloads and the like is said to be directly attributable to the exercise and enforcement of the statutorily protected reproduction rights and rights ancillary thereto.⁵⁴ Accordingly, copyright law requires the authorization of the person or entity who owns the reproduction right in the music content before the right may be exercised or exploited in any manner.⁵⁵ The exploitation by the copyright owner or the implied or express authorisation of the exploitation of the reproduction right and/or other ancillary right is reflected in the business model.⁵⁶ However, the law does not set out the specifics or details of business models

⁵³ “Publishing”, in the context of music content involves the acquisition of musical compositions from composers and songwriters, the subsequent transformation of the musical composition from manuscript to performance, recording and subsequent uses. See Towse, R. (2017). Economics of music publishing: copyright and the market. *Journal of Cultural Economics* 41(4), pp.404-5 (hereafter, Towse 2017).

⁵⁴ Kretschmer, M. (2005). Artists’ earnings and copyright: A review of British and German music industry data in the context of digital technologies. *First Monday*, 10(1). See also Future of Music Coalition (FMC) Report on music industry revenue streams. FMC refers to this income stream as “songwriter and composer revenue”. Money.futureofmusic.org. (2017). *Artist revenue streams*. [online] Available at: <http://money.futureofmusic.org/wordpress/wp-content/uploads/2012/01/revenue-streams-handoutlist.pdf> [Accessed 17 Nov. 2017].

⁵⁵ As earlier stated, the exception to this rule may be “fair dealing” under Nigerian and South African copyright regimes, with the music content. Licensing obligations may not exist when the music content is either in the public domain or not eligible for copyright due to subsistence challenges or for private enjoyment or use of a small portion of the work. Also see, section 2.2.2, below.

⁵⁶ See Towse 2016a supra at p.135.

for the use and exploitation of copyright products. Rather, copyright law provides the regulatory framework within which business models consisting of the exercise of and control of the exclusive rights can be designed and deployed.⁵⁷

Therefore, copyright is to be understood as one of the essential institutional mechanisms, which has helped facilitate the creation and dissemination of cultural and creative works through business models, by providing a framework to manage the need for the public to have access to copyright-protected products.⁵⁸ As such, it is much more than a mechanism for protecting the revenue or royalties derived from an intellectual resource; it is part of the institutional framework that helps define a marketable product as well as reliable income flows (through royalties and related income).⁵⁹

In a related manner, copyright law, by necessitating the prior license of the copyright owner before exercising any of the exclusive bundle of rights, protects the right holder from others taking over and reaping the rewards from his or her intellectual efforts, that is, from free riding on these efforts through the copying of another's expression (imitation). By prohibiting the use of copyright works without the permission of the copyright owner, copyright law "excludes competition by imitation" and "forces the investors in creative production to rely on their own creativity, or the creativity of people they employ, to come up with different products that may please consumers".⁶⁰ Therefore, the exclusivity

⁵⁷ See Stadler 2007 supra at p.910; Newman 2013 supra at 1451 – 1456.

⁵⁸ See Drexl 2013 supra at pp. 5-6.

⁵⁹ Andersen, B., Kozul-Wright, Z. and Kozul-Wright, R. (2000). *Copyrights, Competition and Development* (No. 145). UNCTAD Discussion Paper (hereafter, Andersen and others 2000).

⁶⁰ See Drexl 2013 supra at p. 39. See the case of *Mandla-Matla Publishing (Pty) Ltd v Independent Newspapers (Pty) Ltd*, (48/CR/Jun04) [2006] ZACT 84 (6 November 2006), para. 54 (hereafter, Mandla-Matla Publishing). See also Fishman 2014; Burk, D.L. (2014). *The Creating around Paradox: Responding to*

of copyright is to be interpreted as encouraging competition by substitution in the long-term benefit of the consumers.⁶¹

Due to the exclusive nature of the rights conferred by copyright law, the copyright owner may now possess “something to sell or license” to generate revenue.⁶² In this regard, copyright owners design and deploy business models based on these exclusive rights.⁶³ Therefore, copyright law is said to encourage firms to compete in the kind of works they create so as to enjoy copyright protection. Furthermore, inasmuch as copyright protection and exploitation is expected to yield sales and/or licensing revenue, the provision of remedies for the unlicensed exercise or exploitation of those exclusive rights promotes competition and enables firms obtain and retain competitive advantage.

Accordingly, by creating rights that may help to guarantee returns on creative investments, copyright law encourages competition amongst potential authors to create new works.⁶⁴ Indeed, the promotion of competition through the grant of exclusive rights is so sacrosanct that courts are quite reluctant in interfering with that right even under the guise of competition law. In this regard, the application of competition law to the exercise of this right is said to be *prima facie* prohibited and may only be

Joseph P. Fishman, *Creating around Copyright*, 128 Harv. L. Rev. 1333 (2015). *Harv. L. Rev. F.*, 128, p.118.

⁶¹ See US Department of Justice and US Federal Trade Commission, (2017). *Antitrust Guidelines for the licensing of intellectual property*. para. 1.0. Available at <https://www.justice.gov/atr/IPguidelines/download> [Accessed 20 May 2017] [Henceforth, “US Antitrust Guidelines 2017”].

⁶² See Kretschmer 2010 *supra* at 144. Also see Corbett 2011 *supra* at 433, referring to copyright as “a commodity”; Andersen and others 2000 *supra* at 6, 23.

⁶³ Towse 2016a *supra* at 135-8; Rajan 2010 *supra* at pp.931-2; Drexl 2013 *supra* at 5.

⁶⁴ See Van Aswegen, P.F. (2003). Right to exclude others from using claimed intellectual property: A perspective from competition law, *The Stellenbosch L. Rev.*, 14, pp.125-6 (hereafter, Van Aswegen 2003).

undertaken “in exceptional circumstances”.⁶⁵

2.2.2 Beyond exclusive rights: the promotion of competition

Apart from the role of exclusive copyright protection in promoting competition in copyright markets, copyright law contains other provisions and adopts other doctrines to encourage competition in the copyright market. These provisions aim at providing a balance between the exclusive rights and control of copyright owners, and the rights of access by copyright users. Further, such provisions may also constitute the basis for designing and deploying business models that aid increased access to copyright products as exemplified in the case of Google Books (developed on the basis of the US fair use exception).⁶⁶

Corollary to the foregoing, the succeeding paragraphs of this sub-section examines the provision for a limited term of copyright protection resulting in the notion of “public domain”⁶⁷, the fair dealing provision, and other provisions for limitations and exceptions to copyright protection,⁶⁸ the originality requirement, and the idea-expression dichotomy.⁶⁹ While copyright owners may exercise their exclusive rights to encourage competition by substitution, copyright users can also rely on these provisions or “internal safeguards”⁷⁰ to compete by creating copyright-protected products which may act as substitutes for other protected products. Such internal safeguards may also prevent copyright owners from restricting the public from finding satisfactory market substitutes. Each of these elements is briefly explained below.

⁶⁵ See Drexl 2013 supra at 36. Also, Van Aswegen 2003 supra at 125-6.

⁶⁶ See Stadler 2007 supra at 903; *Authors Guild v. Google, Inc.*, No. 13-4829 (2d Cir. 2015).

⁶⁷ Corbett 2011 supra at 528.

⁶⁸ Cross and Yu 2007 supra, note 26 at 429. Sections 12, 13 and 14 of South African Copyright Act.

⁶⁹ See Cross and Yu 2007 supra at 429. Also, Katz 2013 supra at 212.

⁷⁰ Cross and Yu 2007 supra at 429.

Limitations regarding the subject matter of protection

Copyright protects only original expressions and does not protect ideas, procedures and the like. According to the TRIPs Agreement to which both South Africa and Nigeria are signatories to, “copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such”.⁷¹ Even when copyright subsists in a work, copyright applies only to copying the expression or substantial part thereof, but it is not an infringement to copy any facts contained therein or any idea, process, system, and so on that the work describes.⁷² As a result, copyright protection is designed in such manner as to not prevent others from selling competing substitutes,⁷³ which may include those based on ideas or information copied from the first.

Indeed, by removing facts and ideas from the exclusive preserve of copyright protection, copyright law applies to ensure that any person or firm may freely apply such facts and ideas to several other uses.⁷⁴ By implication, the copyright owner may still exercise his exclusive rights but such would not be at the detriment of other competitive uses of the ideas or facts underlying the product protected by copyright.⁷⁵ The author’s work competes with other works in the market for the underlying idea. The focus in this case is not on the specific work itself, rather it is for the original expression in each work.⁷⁶

On a related matter, copyright law requires that for a work to be eligible for copyright under the Copyright Act, sufficient effort

⁷¹ Article 9(2) TRIPs Agreement.

⁷² Indeed, the fact that the making of a work involved some form of copyright infringement would not alone constitute grounds for ineligibility. See section 1(4) of the Nigerian Copyright Act. See also, Ola 2014 *supra* at p. 12.

⁷³ Breyer, S. (1970). The uneasy case for copyright: A study of copyright in books, photocopies, and computer programs. *Harvard Law Review*, pp.281-351.

⁷⁴ Katz 2013 *supra* at 213.

⁷⁵ *Ibid.*

⁷⁶ Cross and Yu 2007 *supra* at 433. See also Cotter 2006 *supra*.

must have been expended on the work to give it an original character and it must have been fixed in a definite medium directly perceivable or perceivable with the aid of any device or machine.⁷⁷ In essence, the originality requirement demands that the work is an independent creation of the creator and that some exertion is expected from the author. In South Africa a work is considered original if, in addition to independent creation, “sufficient skill and effort” have been expended in creating it.⁷⁸ The originality requirement is interpreted in substantially the same way in Nigeria.⁷⁹

By protecting only original expressions, copyright protection will by implication, be unavailable to works that do not measure up to such standards. Copyright owners may therefore be incentivised to create quality, original works to be sure to enjoy the benefit of copyright protection. Users are, by extension, able to have access to quality copyright products.

Limited term of protection

Copyright protection does not exist in perpetuity. Rather, the protection lasts for a stated period. In the case of Nigeria, the term of copyright protection in a musical work is life of the author plus 70 years.⁸⁰ Upon the expiration of the term of protection, the protected work is said to enter the public domain.⁸¹ A work created in 1900 whose author died in 1930, will enter the public domain in 2000. Once a given work enters the public domain, there is no risk of

⁷⁷ See section 1(2)(a) and (b) of the Nigerian Copyright Act. Also, see the South African case of *Waylite Diary CC v First National Bank Ltd* 1995 (1) SA 645.

⁷⁸ See Harms 2012 supra at 201-9. Also, *Juta & Company*. Dean, O.H. (2006). Handbook of South African copyright law, loose-leaf updates. *Juta, Cape Town*, 1-15 - 1-17.

⁷⁹ Nwogu, M.I.O. (2015). Copyright Law and the menace of piracy in Nigeria. *JL Pol'y & Globalization*, 34, pp.114-5.

⁸⁰ See Section 2(2) and the First Schedule to the Nigerian Copyright Act. The duration of protection in the case of South Africa is 50 years. See section 3(2) of the South African Copyright Act.

⁸¹ Corbett 2011 supra at 518.

infringement and no need for permission or licence to use the work. As a result, the public domain generates further creativity and wider dissemination of copyright works to the public as consumers can freely enjoy public domain works and (other) authors can build upon such works to create new works.⁸²

The limited term of copyright serves to increase the chances that the work in the public domain will generate more competitive pricing for similar works that still enjoy copyright protection.⁸³ Limited term also serves to reduce the cost of future works that seeks to build on existing works.⁸⁴ Likewise, to successfully compete with works and attract higher prices, new works have to offer something better, or at least different, than the said works.⁸⁵ It must be noted that the benefits of a limited term of protection may have been substantially whittled down by the length of the term of protection. The initial 14 years term provided for in the Statute of Anne has now given way to protection for the life of the author plus 70 years.⁸⁶ As Katz rightly notes: "...the public benefit arising from current copyright terms that can easily exceed a century is highly doubtful".⁸⁷

⁸² Erickson and Kretschmer 2014 *supra* at 6. Deazley, R (2006). *Rethinking copyright: history, theory, language*. Cheltenham, UK: Edward Elgar Publishing, 118. Also, Greenleaf, G. and Bond, C. (2013). Public rights in copyright: What makes Up Australia's public domain? *Australian Intellectual Property Journal*, 23, 132.

⁸³ Katz 2013 *supra* at 211-2.

⁸⁴ Erickson, K., Heald, P., Homberg, F., Kretschmer, M. and Mendis, D. (2015). Copyright and the Value of the Public Domain. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/561543/Copyright-and-the-public-domain.pdf [accessed 11 Nov 2016]

⁸⁵ Katz, A. (2009). Substitution and Schumpeterian effects over the life cycle of copyrighted works. *Jurimetrics*, pp.113-153. See also, Elkin-Koren, N. (2005). What contracts cannot do: The limits of private ordering in facilitating a creative commons. *Fordham L. Rev.*, 74, pp.376-377.

⁸⁶ For a discussion on the expansion of copyright protection and the history of open licensing, see Frosio, G (2014). *Open access publishing: A literature review*. 1st ed. Centre for Copyright and New Business Models in the Creative Economy (CREATE), 1.

⁸⁷ Katz 2013 *supra* at 212.

Fair dealing

Another internal safeguard within the copyright law system for the protection of competition is the exception regarding fair dealing in both South Africa and Nigeria. Fair dealing extends the rights of users by allowing them to use substantial parts or the whole of a copyright-protected work without incurring liability for copyright infringement liability. In South Africa, the fair dealing exceptions in the Copyright Act apply to literary (which includes dramatic) and musical works, artistic works, cinematographic films, sound recordings, broadcasts, programme-carrying signals, published editions and computer programs.⁸⁸ The fair dealing provisions in the current Act permits dealing with the work for research and private study, personal or private use, criticism and review, and reporting current events. The Act does not define the notion of fairness and as such the court has a wider discretion to consider everything relevant to the copyright owner's rights and the public interest, in the specific context of the facts of each case, before reaching a decision as to whether an infringement occurred.

The Nigerian situation is quite similar to the scenario in South Africa. The Nigerian fair dealing exception like its South African counterpart permits research and private study, personal or private use.⁸⁹ The second schedule to the Nigerian Copyright Act deals generally with exceptions to copyright infringement, particularly, paragraph (a) provides for fair dealing as follows:

The doing of any of the acts mentioned in the said section 6 by way of fair dealing for purposes of research, private use, criticism or review or the reporting of current events, subject to the condition that, if the use is public, it shall be accompanied by an acknowledgement of the title of the work and its authorship except where the work is incidentally included in a broadcast.

⁸⁸ For the full bouquet of the fair dealing exception, see sections 12 to 19B of the South African Copyright Act.

⁸⁹ Ekpa and Kure 2015 *supra* at pp. 247– 250.

Similar to South Africa, there is no clear definition of what the concept of fairness means in relation to the term “fair dealing” under the Nigerian Copyright Act. Again, for the meaning and criteria to be applied in determining fairness in dealing with a given work falls within the discretion of the courts. However, courts may look at whether an objective viewer would consider that, the person is genuinely using the material for one of the purposes set out in the Act; and their use of it is fair in that context.⁹⁰ Factors that may be considered in working out whether a use is “fair” include whether the person using the material is doing so for commercial purposes, and whether the copyright owner is financially prejudiced because of the use. The mere fact that the person using the material is not making a profit does not make it fair.

Typically, the fair use model applicable in the US, Israel and the Philippines is widely considered as more expansive and flexible because of its open-ended nature, while the fair dealing model is considered narrow because of its closed, specific nature. However, it is beyond the scope of this study to examine the advantages and/or disadvantages of the approach to the definition of the fair dealing exception. For the purposes of this chapter, it is only pertinent to note that because of the fair dealing exception, copyright-protected works are used as a basis for further creativity, which will in turn compete with the first protected work in the copyright marketplace.⁹¹

Based on the discussion of these two significant ways in which copyright law protects competition (that is, exclusivity and limitations), the utilitarian theory as justification for copyright protection may be understood. The next section now looks at the role of competition law in copyright policy.

⁹⁰ Ibid at p. 258.

⁹¹ See Asien, J.O. (2012). *Nigerian copyright: law & practice*. Books and Gavel Ltd, Abuja, 2nd ed., 250. See also, Katz 2013 supra at 214-5 analysing the US copyright doctrine of “fair use”, which shares some similarities with the fair dealing exception.

2.3 The role of competition law

As already stated, competition law provides a general regulatory framework to ensure the promotion and protection of competition in the marketplace. Competition law prohibits concerted conduct in terms of agreements that have the effect of substantially preventing, or lessening, competition in a market (“restrictive agreements”). It also prohibits unilateral conduct by firms in dominant market position where such unilateral conduct affects competition in the market place. In these circumstances, competition law may act as a complementary framework to guarantee that copyright owners are able to get the expected returns for investments made in creativity. Competition law may also complement copyright law by ensuring that neither concerted nor unilateral conduct restricts the wider distribution of copyright-protected products. In achieving this purpose, competition law is applied to the creation of a fair and competitive market for creative works.⁹²

Restrictive agreements may be between firms in either a horizontal relationship or a vertical relationship. Specifically prohibited restrictive agreements include formation of price cartels - agreements in which firms (including copyright owners) use copyright for sharing markets or in entering into market-foreclosure agreements; exclusivity agreements regarding the distribution of works, resale-price maintenance, and the like. Sections 4 and 5 of the Competition Act in the case of South Africa and s 60 of the Competition and Consumer Protection Bill in the case of Nigeria cover such prohibited restrictive agreements. Where copyright owners or copyright users enter into agreement or contractual arrangements that have the effect of restricting competition by

⁹² Consumer Focus 2011 supra at p.2; Cross and Yu 2007 supra at 429 and 434. It must be noted that competition law serves other purposes which may not be apposite to the discourse in this thesis. One example is the regulation of mergers.

foreclosing the distribution of copyright products, such may be addressed by the relevant competition statute. Such application of competition law complements the goal of copyright law in ensuring wider distribution of copyright-protected products.

Competition law may also apply to unilateral conduct by firms (whether copyright owners, copyright users, distributors), which enjoy a dominant position in the market for distribution of creative works, to prohibit them from abusing their dominant market positions to the detriment of the market.⁹³ In the case of conduct by the relevant copyright owner, competition law may apply to restrict the exercise of copyright protection.⁹⁴ Indeed, the so-called interface between copyright and competition law has been the attempts to apply competition law to address what is perceived as the undue exercise of copyright or other intellectual property rights. The exclusive nature of the copyright owner's rights is interpreted as conferring the copyright owner with market power in the competition law sense.

Specifically, based on the right to exclusivity conferred on the copyright owner under the Copyright Act, such copyright owner may, where he has the requisite dominant position, contravene s 8 of the South African Competition Act that deals with the "abuse of a dominant position". Section 8 provides that:

It is prohibited for a dominant firm to:

- (a) charge an excessive price to the detriment of consumers;
- (b) refuse to give a competitor access to an essential facility when it is economically feasible to do so;
- (c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive, gain; or
- (d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive, gains which outweigh the anti-competitive effect of its act:
 - (i) requiring or inducing a supplier or customer to not deal with a competitor;

⁹³ See Section 8(a) and (b) of the South African Competition Act.

⁹⁴ See Drexl 2013 supra at p. 40.

- (ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;
- (iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;
- (iv) selling goods or services below their marginal or average variable cost; or
- (v) buying-up a scarce supply of intermediate goods or resources required by a competitor.

Any such conduct will constitute a contravention of the Competition Act. Similarly, other firms outside the copyright owner may be subject of competition law enforcement under this provision, in the interest of the distribution of copyright products. However, as earlier stated, the copyright owner or some other relevant firm may be able to escape the brunt of this section if he/she/it qualifies for an exemption in terms of s 10(4) of the Act.⁹⁵

In Nigeria, there is no provision for a specific list of conduct prohibited as abuse of dominance. However, a copyright owner who “enjoys a position of economic strength enabling it to prevent effective competition being maintained on the relevant market and having the power to behave to an appreciable extent independently of its competitors, customers and ultimately of the consumers” will be considered to have abused its dominant position⁹⁶ and may be liable to comply with the directives of the Competition and Consumer Protection Commission⁹⁷ and/or “a fine of not less than ten per cent of its turnover in the preceding business year or such higher percentage as the court may determine under the circumstances of the particular case”.⁹⁸ This is also the case where the activities of such copyright owner “have the effect of unreasonably lessening competition in a market; and impeding the

⁹⁵ See Section 1.2, above.

⁹⁶ Section 71(2) of the Competition and Consumer Protection Bill 2016 (henceforth, Nigerian Competition Bill).

⁹⁷ Such directive may include a “cease-and-desist” order. See Section 74(1) of the Nigerian Competition Bill.

⁹⁸ See Section 74(3).

transfer or dissemination of technology”.⁹⁹

In this regard, the abuse sought to be addressed is that implemented by the copyright owner who may be allegedly acting outside the scope of the copyright protection.¹⁰⁰ There is much emphasis placed on the unilateral conduct of the copyright owner in what would be the exercise of its exclusive rights as copyright owner. Harrison explains this in the context of online music:¹⁰¹

...Licensing practices seem to fall into three ranges. In the first range, the copyright holder uses its power simply to preclude free riding. Efforts of this sort find a safe haven within copyright laws. At the next level, the effort is to expand the effect of exclusivity beyond that granted by copyright but not to the point of having an impact on an economically significant market. Finally, the use of the exclusivity may have a sufficient impact on an economically significant market to raise an antitrust issue.

However, as stated above, such application and indeed, other external doctrines are largely applied when copyright protection is regarded as a monopoly right, which may be abused to the detriment of competition. In such instances, competition law may be applied to restrict the exercise of copyright and direct the issuance of a compulsory licence in the interest of competition.

In *Magill*,¹⁰² the European Commission’s decision, which was upheld by the Court of First Instance and Court of Justice, required the broadcasters for television programme listings to grant a license to third parties willing to publish a comprehensive weekly guide. The courts found that the firms under investigation enjoyed

⁹⁹ Section 73(4)(a) and (b) of the Nigerian Competition Bill.

¹⁰⁰ For instance, the copyright misuse doctrine in the US is invoked when a defendant in an infringement suit argues that the copyright owner’s action is tantamount to an attempt to extend protection beyond the scope of copyright law. See the case of *Lasercomb Am. Inc. v Reynolds*, 911 F.2d 970 (4th Cir. 1990); Harrison, J.L. (2002). Online music: antitrust and copyright perspectives. *Antitrust Bull.*, 47, pp. 483–4 (hereafter, Harrison 2002).

¹⁰¹ Harrison 2002 *supra* at 486.

¹⁰² Joined Cases C 241-242/91 P, *Radio Telefis Eireann & Independent Television Publications v European Commission* [1995] 4 C.M.L.R. 718 (*Magill*).

a de facto monopoly over the information used to compile listings. It was also found that their refusal to license was an abuse of their dominant position, as the refusal prevented the appearance of a new product for which there was a potential consumer demand (“new product test”). The “new product test” primarily focuses on the development of new products for consumers in the downstream market.¹⁰³ This interpretation was also supported by the fact that there was no actual or potential substitute to the product, and that there was no objective justification for a refusal. Rather, the IPRs owners were reserving for themselves the secondary market of weekly guides by refusing to license IPRs that were indispensable for operating in the secondary market. All these factors represented “exceptional circumstances”, which ultimately led the Commission to apply competition law and impose a compulsory license.

While *Magill* was unclear as to whether the “exceptional circumstances test” was cumulative or separate,¹⁰⁴ the test itself strongly influenced further decisions of the EU courts especially in the cases of *IMS Health*¹⁰⁵ and *Microsoft*¹⁰⁶. These later cases contributed to expand the scope of *Magill*.

In *IMS Health*, the CJEU substantially followed *Magill* and also stated that the tests proposed in the *Magill* case was to be applied cumulatively and that both tests must be satisfied for the

¹⁰³ Colston, C. and Galloway, J. (2010). *Modern Intellectual Property Law*. Taylor & Francis, p.432.

¹⁰⁴ Other criticisms of the decision related to the absence of guidance on the defences IPRs holders may oppose, in terms for instance of objective justifications and the potential negative effects of the decision on innovators’ incentives to invest time and money on research. See Aitman, D. and Jones, A., 2004. Competition Law and Copyright: Has the copyright owner lost the ability to control his copyright?. *European Intellectual Property Review*, 26(3), pp.137-147.

¹⁰⁵ Case C-481/01 *IMS Health GmbH v NDC Health GmbH* [2004] 4 C.M.L.R. 28 (*IMS Health*).

¹⁰⁶ Case C-3/37.792 *Microsoft* [2007] O.J. L32; and Case T-201/04 *Microsoft v European Commission* [2007] E.C.R. II-03601 (*Microsoft*).

finding of a competition violation. Specifically, the court took the view that a compulsory license should not be issued where the competitors only propose “clones” of the main product. Only the advancement of innovative processes, through development of new products, may justify a limitation of IPRs through the grant of a compulsory license (“innovation balance test”).¹⁰⁷

In *Microsoft*, the court further expanded on the tests proposed in the *Magill* and *IMS Health* cases. The court broadened the “new product test” by interpreting it as a “limitation to technical development to the prejudice of consumers under Article 102(b)”.¹⁰⁸ In the court’s view, a compulsory license was justified where the complainant has shown that the refusal to license is likely to harm consumers.¹⁰⁹ Here, consumer harm for this purpose is primarily interpreted in terms of consumer choice, or lack of it.¹¹⁰ This interpretation has been criticised as capable of discouraging investments into innovative but costly research.¹¹¹

In all, these EU cases show the role of competition law in the exercise of copyright. The application of competition law to restrict the exercise of IPRs can only be made in “exceptional circumstances” and mere existence of IPR will not confer

¹⁰⁷ See Anderman, S. (2004). Does the Microsoft Case offer a New Paradigm for the ‘Exceptional Circumstances’ Test and Compulsory Copyright Licenses under EC Competition Law. *The Competition Law Review*, 1(2), p.13. Also, Park 2010 supra at p.72; McMahon, K., 2007. Interoperability: Indispensability and “Special Responsibility” in High Technology Markets. *Tul. J. Tech. & Intell. Prop.*, 9, p.123.

¹⁰⁸ *Microsoft* supra at para. 647.

¹⁰⁹ *Microsoft* supra at para. 650. See Anderman, S. (2008). Microsoft v Commission and the Interoperability Issue, *European Intellectual Property Review*, 30(10), p.399.

¹¹⁰ Colston, C. and Galloway, J. (2010). *Modern Intellectual Property Law*. Taylor & Francis, p.432.

¹¹¹ See Gürel, B., 2009. An External Method for Establishing the Balance in Intellectual Property Rights’ Scope: Article 102 of the TFEU. *Global Antitrust Review*, 10, p.66; Park, J.H. (2010). *Patents and industry standards*. Edward Elgar Publishing, p.75. Other criticisms related to the objective justification, which the rights-holder may put forward to defend a competition law infringement.

dominance. The decision in these cases especially as to the test to be applied in determining what would constitute “exceptional circumstances” in which a competition authority would interfere with the exercise of copyright and issue a compulsory licence; is noteworthy for the direction it provides on the relationship between IP generally and competition law.¹¹² It is also significant for the direction it offers on when competition law will impose compulsory licence. That said, it is important to note that this thesis is based on a different perspective: its focus is on the conduct of the platform firm rather than the conduct of the copyright owners as explored in those cases and in the South African cases discussed, below. The competition law approach to compulsory licences may however, influence policy considerations that may lead to statutory compulsory licences under copyright law as argued in Chapter six, below.¹¹³

Notably, the application of competition law to restrict the exercise of copyright per se has rarely yielded the expected result of interfering with copyright protection.¹¹⁴ Two South African, two cases are instructive.¹¹⁵

In *DW Integrators CC and SAS Institute (Pty) Ltd*¹¹⁶ decided by the South African Competition Tribunal, the defendant, a large software firm, which holds IPRs on software program was alleged to have abused its dominant position. SAS had an arrangement with DWI and had licensed DWI to use the IPRs in its business of supporting other firms using the SAS software programs. SAS,

¹¹² For more discussion on this relationship, see Drexl, J. ed. (2010). *Research handbook on Intellectual property and Competition law*. Edward Elgar Publishing.

¹¹³ See section 6.3.1(i) and (ii), below.

¹¹⁴ See Drexl 2013 supra at p. 42.

¹¹⁵ As earlier stated, Nigeria is yet to have a proper competition statute.

¹¹⁶ 14/IR/Nov99) [2000] ZACT 16 (1 May 2000) (hereafter, *DW Integrators*). See also Brand, J. (2005). Intellectual property and the abuse of dominant position in South African competition law. *S. African LJ*, 122, p.907; Drexl 2013 supra; van Aswegen 2003 supra at 118-19.

however, refused to continue this agreement and DWI sought an “interim relief”¹¹⁷ on the grounds that the refusal of SAS was anti-competitive. DWI argued that inter alia that SAS’s software constituted an essential facility and, therefore, SAS was under a duty to license to DWI. While the Tribunal did not consider whether the software indeed constituted an essential facility since DWI had failed to establish the relevant market,¹¹⁸ the Tribunal suggested that there were other suppliers of similar software.¹¹⁹ Furthermore, the Tribunal refused to accept the market definition proposed by DWI because DWI had narrowly defined the market to make SAS a dominant market operator. Specifically, the Tribunal did not accept DWI’s argument that SAS’s IPRs constituted a proper market and that SAS’s refusal to license was an attempt to leverage market dominance to the service market.¹²⁰ Rather, the Competition Tribunal advised that, “caution is particularly well - advised when dealing with the interface between anti - trust and intellectual property”.¹²¹ In this regard, the Tribunal relied on the decision of the US Federal Circuit court in the case of *Atari Games Corp. v. Nintendo of America, Inc.*,¹²² where the court warned that:

...the danger of disturbing the complementary balance struck by Congress is great when a court is asked to preliminarily enjoin conduct affecting patent and antitrust rights. A preliminary injunction entered into without a sufficient factual basis and findings, though intended to maintain the status quo, can offend the public policies embodied in both the patent and the anti - trust laws.

In *Mandla - Matla Publishing (Pty) Ltd v Independent Newspapers*

¹¹⁷ See section 59 of the South African Competition Act.

¹¹⁸ *DW Integrators*, paras 23 and 31.

¹¹⁹ *Ibid* at para. 25.

¹²⁰ *Ibid* at para. 24.

¹²¹ *Ibid* at para. 18.

¹²² 897 F.2d 1572, 1577(Fed. Cir. 1990).

(Pty) Ltd,¹²³ the complainant argued that the respondent's action in holding back information on the distribution of the IsiZulu newspaper and in insisting on providing the information only if the complainant and its business partner entered into distribution agreements for certain districts, was anti-competitive.

The Tribunal affirmed the decision of the Competition Commission against the complainant. The Tribunal found that instead of restricting distribution, the respondent's conduct actually resulted in broader circulation and more sales. Accordingly, the Tribunal held that such situation was pro-competitive as the complainant was compelled to build up its own distribution network in response to the respondent's competitive advantage. The Tribunal took the view that the claim could only be justified under essential - facilities doctrine.¹²⁴ Therefore, the Tribunal considered the claim to grant access to respondent's distribution system as "anti - competitive" as the refusal had even promoted competition.¹²⁵ Further, although the Tribunal found that the respondent had exercised market dominance in convincing distributors not to sell the complainant's newspaper,¹²⁶ such conduct had no anti - competitive effect as required for a competition law infraction.¹²⁷ For this reason, the complaint was dismissed.¹²⁸

In summary, the application of competition law in cases outside the "internal safeguards" has traditionally been undertaken to curtail the copyright owner's undue exercise of his exclusive rights. The possible anti-competitive effects of conduct relating to

¹²³ *Mandla-Matla Publishing supra*.

¹²⁴ *Mandla-Matla Publishing supra* at para. 53.

¹²⁵ *Ibid* at para. 54.

¹²⁶ *Ibid* at para. 63.

¹²⁷ Given that respondent's conduct had indeed enhanced competition. *Ibid* at para. 99.

¹²⁸ *Ibid* at para. 100.

the exercise of copyright may result in the application of competition law to restrict the exercise of the exclusive rights. With its rules on monopoly and abuse of market dominance, competition law can be applied to cases where a copyright owner refuses to issue a licence and may be applied to restrict the exclusivity of rights where the exercise of such right appears excessive and detrimental to consumer welfare.¹²⁹ However, such restrictive application of competition law to the exercise of copyright by the copyright owner is typically unsuccessful due to the availability of substitutable copyright products that whittle down the required market power of the copyright owner. Moreover, as Chapter five will argue, such approach constitutes an incomplete consideration of the role of competition law in copyright and copyright-related industries. The prohibitions stipulated within competition law may apply to the conduct of any firm so long as such conduct restricts competition and/or the relevant firm is in a market dominant position in terms of the competition statute. This argument may be particularly apposite for the open and freemium music business model where the focus is on the import of the actions and activities of the platform firms as distributors and users of copyright-protected music content.¹³⁰ Its point of divergence from the traditional copyright and competition law interface relates to its application to the conduct of other persons or firms (outside the copyright owner exercising its exclusive rights), which deal with content or product protected by copyright law. Here, competition law applies as a distinct body of law and there is no conflict in the traditional sense between the two fields of law.¹³¹ Section 2.3.1 below, highlights another perspective to the application of

¹²⁹ Consumer Focus 2011 *supra* at 6-8. See also, Drexl 2013 *supra* at 40- 41.

¹³⁰ See Chapter 3, particularly sections 3.2 and 3.4.

¹³¹ See for instance, Drexl's work, which goes beyond the copyright and competition interface (that is, where the exercise of copyright produces anticompetitive effects, inviting the application of competition law) to deal with the complementary role of competition law in relation to the objectives of copyright law. Drexl 2013 *supra* at p. 16.

competition law to the exercise of copyright as well as another significant role which competition law may play in the achievement of the goals of copyright law.

2.3.1 The complementarity theory

The acknowledgement that competition law can complement the role of copyright law in incentivising creativity and encouraging the wider dissemination of copyright works is encapsulated in the theory of complementarity.¹³² In this regard, competition law is not applied to restrict the exercise of copyright but rather, competition law uses its legal tools in a complementary manner to serve the same goals of incentivising creativity and enhancing consumer welfare.¹³³ Nevertheless, the existence of other complementary paradigms for incentivising creativity does not mean that copyright should be jettisoned. Rather, copyright is complemented with these regimes so that they can co-exist.¹³⁴ As Drexl explains,¹³⁵ the theory of complementarity was first recognised in 1995 in the US IP Licensing Guidelines and reiterated in the EU Technology Transfer Guidelines of 2004.¹³⁶ Notably, the recent US IP Licensing Guidelines issued in 2017 reiterates similar provisions as the 1995

¹³² See Santos, A. (2013). Nurturing creative industries in the developing world: The case of alternative systems of music production and distribution. *Mich. St. U. Coll. L. Int'l L. Rev.*, 21, p.623 (hereafter, Santos 2013).

¹³³ Consumer Focus 2011 supra at 2, 18. Also, Russi 2011 supra at 170; Polverino 2012 supra at p.1, Newman 2013 supra at 1443; Santos 2013 supra at 624; Gal, M. and Rubinfeld, D. (2015). The hidden costs of free goods: Implications for antitrust enforcement. *UC Berkeley Public Law Research Paper No. 2529425.*, p.40. Available at SSRN: <http://ssrn.com/abstract=2529425>. (hereafter, Gal and Rubinfeld 2015).

¹³⁴ See Santos 2013 supra at 624, 628.

¹³⁵ See Drexl 2013 supra at p. 38.

¹³⁶ Commission Notice - Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements OJ No. 2004/C 101/02, paragraph 7. [Henceforth, "EC Technology Transfer Guidelines"]; US Department of Justice and US Federal Trade Commission, (1995). *Antitrust Guidelines for the licensing of intellectual property.* p.2. Available at <https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/0558.pdf> [Accessed 20 Jan. 2016] [Henceforth, "US Antitrust Guidelines 1995."]. See also, Anderson 2008 supra at p.451.

version in recognising the theory of complementarity.¹³⁷ Likewise, similar provisions are made in the revised EU Technology Transfer Guidelines of 2014.¹³⁸

Copyright law encourages creativity by granting the copyright owner an exclusive bundle of rights for a limited period.¹³⁹ Exclusive rights safeguard the creative efforts and the investments of the copyright owner by restricting imitation (copying), which may reduce the commercial value of the copyright work. In a case where the commercial value of a copyright work is reduced by copying, the copyright owner is unable to recoup his investments and may be discouraged from further creativity – ultimately affecting the consumers. Consumer welfare or public interest is further enhanced by provisions that permit limited and specific uses of a copyright work during its term of protection without the consent of the copyright owner, provision of a limited term of protection during which the exclusive rights of the owner may be exercised and the use of copyright-inspired tools such as collecting societies and blanket licensing¹⁴⁰ to ensure wider opportunities for the availability and dissemination of copyright works. In the same vein, competition law promotes creativity and enhances consumer welfare by prohibiting concerted and/or unilateral conduct where it may distort or harm competition in the

¹³⁷ US Antitrust Guidelines 2017 supra at p.2.

¹³⁸ Commission Notice - Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements OJ No. 2014/C 89/03), paragraph 7. [Henceforth, “EC Technology Transfer Guidelines 2014”].

¹³⁹ See US Antitrust Guidelines 2017 supra at p.2..

¹⁴⁰ Blanket licensing provides licensees with a licence and a flat-fee is charged for a variety of approved uses of a music catalogue rather than billing for each music based on specific uses. See Towse, R. (2012). Economics of Copyright Collecting Societies and Digital Rights: Is there a case for a Centralised Digital Copyright Exchange?. *Review of Economic Research on Copyright Issues*, 9(2), 16 (hereafter, Towse 2012). Also, Bourreau 2008 supra at 4.

(copyright) marketplace.¹⁴¹

Based on this theory of complementarity, the competition law assessment of the conduct of the copyright owner in the copyright marketplace may involve checking whether such conduct accomplishes or prevents the achievement of the objectives of incentivising creativity and enhancing consumer welfare.¹⁴² Usually, such checks do not apply the same parameters as copyright law.¹⁴³ Indeed, the conduct of the copyright owner in exercising exclusive rights may ordinarily appear restrictive of competition, but is encouraged on the grounds that the pro-competitive effects of such conduct outweighs the anti-competitive effects.¹⁴⁴ For example, the exercise of copyright may be anti-competitive in that it restricts competition by preventing competitors from competing with the copyright owner in respect of his rights. The same exercise of copyright can be pro-competitive in the sense that it forces competitors to create their own works and compete on the basis of their works rather than compete by imitating or copying another's creative efforts.¹⁴⁵ Kolstad explains this in economic terms:

But the key issue is not to maximise static and dynamic efficiency, respectively, but to maximise the sum of both static and dynamic efficiency. If the overriding goal is an efficient use of society's scarce resources, the task is to find the interpretation of Articles 81 and 82¹⁴⁶

¹⁴¹ US Antitrust Guidelines 1995 *supra* at 2; van Aswegen 2003 *supra* at 118-119.

¹⁴² Anderson (2008) *supra* at 457; Solo 2014 *supra* at p.183.

¹⁴³ See Drexl 2013 *supra* at p.39-44; Katz 2013 *supra* at pp.217-21.

¹⁴⁴ Consumer Focus 2011 *supra* at 5-8. Also, Polverino 2012 *supra* at pp.19- 20; Haunss, S. (2013). The changing role of collecting societies in the internet. *Internet Policy Review*. 1 [online] Available at: <http://ssrn.com/abstract=2339950> [Accessed 4 Nov. 2015] (hereafter, Haunss 2013); Klebanow and Wu 2015 *supra* at 34-5.

¹⁴⁵ See Consumer Focus 2011 *supra* at 6, 9 and 18. Also, Russi 2011 *supra* at 146-147; Haunss 2013 *supra* at 4.

¹⁴⁶ Articles 81 and 82 (now Articles 101 and 102) of the Treaty on the Functioning of the European Union (TFEU) are the two fundamental provisions on European competition law.

that gives the best overall result...The challenge is to develop an analytical framework that includes the effects on dynamic competition and dynamic efficiency in the analysis of conduct alleged to be contrary to articles 81 and 82. This is especially important for the analysis of conduct based on IPRs. IPRs promote innovations and technological progress, and if this is not recognised in competition analysis one risks prohibiting conduct that may have a positive effect on dynamic efficiency. When assessing whether conduct based on IPRs is contrary to Articles 81 and 82, the effects of the conduct on both static and dynamic efficiency must be taken into account. Only if the sum is negative is the conduct contrary to the efficiency goal of Articles 81 and 82.¹⁴⁷

This application of competition law extends to conduct by persons or entities other than the copyright owner. In the case of provision of music content “free-of-charge” to the consumers, there may be real benefits to consumers and as such may be considered pro-competitive.¹⁴⁸ However, this is not always so. Depending on the modalities of providing the music content free-of-charge, there may be significant anti-competitive effects.¹⁴⁹ Indeed, despite the fact that the consumer does not pay a direct price for free music content, there are indirect “prices” (such as the free music content reducing the ability of at least some firms to provide competing works) that reflect the opportunity cost associated with the consumption of free music content. Despite this opportunity cost, the provision of free music content can improve consumer welfare. In relation to the deployment of the open and freemium music business model and indeed conduct in the copyright marketplace, the theory of complementarity, therefore, advocates the consideration of both the pro- and anti-competitive effects of such business models.

¹⁴⁷ Kolstad, O. (2008). Competition law and intellectual property rights - Outline of an economics-based approach. In: J. Drexler, ed., *Research Handbook on Intellectual Property and Competition Law*, 1st ed. Cheltenham UK: Edward Elgar Publishing, p.5.

¹⁴⁸ Gal and Rubinfeld 2015 supra at 3 and 13.

¹⁴⁹ Ibid at 3, 14 and 15.

The open and freemium music business model is an increasingly popular business model applied in the distribution of music content in Nigeria and South Africa. This thesis weighs both the pro and anti-competitive effects of conduct involved in the open and freemium music business model as represented by the copyright terms. By doing so, this thesis deploys the complementarity framework to the consideration of how the business model may be regulated by copyright law as complemented by competition law.¹⁵⁰

Accordingly, given the importance of copyright protection for the larger copyright market and the way in which competition law prohibits both anti-competitive concerted and unilateral conduct, it becomes clear that competition law may play a significant role in relation to the use of copyright-protected content in the course of economic activities. Where the conduct of any person or entity involved in the deployment of copyright-based business models (including the open and freemium music business model) harms or distorts the functioning of copyright markets, such conduct is opposed to the very objectives of copyright law. In such case, competition law may also be applied to maintain the proper functioning of such copyright market.¹⁵¹ Competition law will apply to treat any conduct that harms the functioning of copyright markets, regardless of whether such conduct is initiated by copyright owners, and/or distributors of copyright products. Especially when initiated by distributors, the harm to competition is highlighted by the fact that such conduct may encourage or increase the chances of piracy and/or copyright infringement.¹⁵² Further, piracy and copyright infringement may dislodge copyright owners who are small businesses from participating in the market

¹⁵⁰ Anderson 2008 *supra* at 451. See also, Santos 2013 *supra* at 602 and 610; Consumer Focus (2011) *supra* at 2.

¹⁵¹ See Drexel 2013 *supra* at 40-1.

¹⁵² Drexel 2013 *supra* at 44.

for the production and distribution of copyright products. A lack of authors, entrepreneurs, and SMEs who churn out creative products will be to the detriment of consumers, as there is reduced availability of creative products. Competition law can protect the economic freedom of market participants in the interest of the competitive process.

In the above regard, it is evident that the theory of complementarity aligns with the incentive theory of copyright law. Both approaches assert that the economic incentives offered by the exclusion of third parties from dealing with the copyright work, are required to incentivise creativity and encourage recoupment of cost of creativity.¹⁵³ However, protected works may sometimes be produced for reasons other than financial or economic gains and there seems to be no compelling evidence that copyright protection is the reason for creativity. These, regardless, the complementary role of competition law is about weighing both the pro-competitive and anti-competitive effects of conduct that involve the use of copyright-protected content. Such consideration ensures that the application of the prohibition against anti-competitive concerted and/or unilateral conduct works in favour of the goals of copyright law.

Given a choice between the application of copyright law and competition law to conduct involving the use of copyright-protected content as applicable in the open and freemium music business model, there may be some preference for one or the other. Indeed, there is some debate among scholars and governmental bodies as to the appropriate manner in which such question is to be resolved and how copyright and competition law and policies should interact.¹⁵⁴ Although it seems clear that greater weight is now given to complementary rather than conflicting application, there is no

¹⁵³ Corbett 2011 *supra* at 510.

¹⁵⁴ Drexel 2013 *supra* at 39-40; Katz 2013 *supra* at 217-8.

definitive answer or consensus on the matter. However, by taking both incentive and complementarity theory into the consideration of how to apply copyright law and competition law in the open and freemium music business context, this thesis smoothens the areas of divergence.

2.4 Conclusion

This chapter discussed the relationship between copyright law and competition and some of the ways through which copyright law itself works to advance competition policy goals. It showed that the grant of exclusive rights promotes competition, as firms are incentivised to compete by substitution rather than by imitation or copying. It also showed how the exclusive rights provide a framework, consisting of revenue generation as a product of the response to the access and consumption needs of users and consumers, can explain some key elements of the law, and provide guidance in its further development. The chapter also demonstrated how the limited term of copyright, limitations on subject matter, fair dealing and other limitations and exceptions to copyright protection apply to ensure that the copyright protection may not unduly constrict the interests of copyright users in accessing and enjoying copyright products.

The principle under which copyright protection generates competition as firms strive to create more to obtain the benefit of copyright protection may theoretically find application also in the context of the open and freemium music business model. Beyond creating value, the business model is meant to capture value through revenue generation from business activities and processes. Revenue generation furnish the main incentive for rights-holders to distribute and/or control the dissemination of their music products. Here, indeed, the use of the copyright-protected music content generates revenue for platform firms exclusively despite their taking advantage of the copyright-protected music content in deploying their open and freemium music platform. This

raises the question of how this conduct may be assessed. In this regard, questions arise regarding whether such conduct should form the basis of a claim in competition within the copyright system or whether it should be seen as the legitimate exercise of the platform owner's control over its platform.

Extending the analysis to competition law, the chapter showed that the application of competition rules prohibiting anti-competitive; conduct which derail the functioning of copyright markets can complement the "efforts" of copyright law. The chapter further highlights an attractive feature of using competition law to complement the achievement of the goals of copyright law particularly in relation to the distribution of copyright products. The value of this approach lies principally in its ability to reframe the demands for financial incentives as a reality rather than an ideal for copyright owners. Further, it reframes public demands for access to copyright products as valid statutorily recognised entitlements similar to those accorded to copyright owners. Such language shift can help to restructure legal norms and negotiating strategies. Indeed, such a reframing encourages copyright reform advocates to engage with international competition law forums to clarify ambiguous treaty texts and evaluate copyright laws and policies from a competition-based perspective.

As it will be better explained in the next chapters, the deployment of copyright to gain competitive advantage is central to the functioning of open and freemium music platforms, whose main aim is to generate revenue from advertising fuelled by unique uses of copyrights. The provision of an avenue for legitimate access to music content is central in the deployment of the open and freemium music business model, given that it deals with products protected by copyright law.¹⁵⁵ Consent of and remuneration for the

¹⁵⁵ See Joshi, D. (2017). *You Wouldn't Stream a Car – What Netflix's Refusal to Bow to Pirates Means for Digital Piracy*. [online] SpicyIP. Available at:

copyright owner constitute a significant basis of the legitimacy of the access provided by the open and freemium music business model. Accordingly, the complementarity approach presents a veritable, apposite approach with which to consider and the interests of all relevant stakeholders in the model. The premise here is that there needs to be, and there is, a possibility of safeguarding the interests of all stakeholders for the proper functioning of the open and freemium music business model as a market for copyright goods. Lessons learnt from such approach will inform the suggestion in the thesis regarding how to address the challenges brought about by the open and freemium music business model and indeed, other internet-based business models dealing with copyright-protected products.

The open and freemium music business model alters the ways in which music content is created, disseminated, and controlled, and like the print revolution of the Gutenberg era, may bring about significant economic, social, and political changes. In this regard, the instinctive reaction may be to further strengthen the rights of authors and copyright owners. But such reaction would be ineffective if there is insufficient attention to what the actual realities of the business model indicate for owners' interests and also, how users' interests might be equally essential for achieving copyright law's ultimate purposes. To regulate the deployment of the open and freemium music business model, it is suggested that copyright law complemented by competition law may offer useful tools. To apply this regulatory framework, it is pertinent to understand the business model itself and how it addresses the interests and position of the copyright owners and the copyright users. As stated in Chapter one, above, this understanding is provided in the next chapter. This relates to the thesis' primary question of how the copyright and competition law framework may be used to regulate

the open and freemium music business model in South Africa and Nigeria.

Chapter Three: Copyright terms in the open and freemium music business model

3.1 Introduction

The advent of today's knowledge-based economy has increased the importance of copyright and made it more significant in the strategies and processes of many firms. Several firms have started to design and deploy new uses and new approaches to the use of copyright and have begun to market same, exclusively focusing on such new uses to fuel their core business.¹ Platform firms – companies that are primarily involved in other ventures but rely on music content and other copyright products to offer their services – are increasingly interested in generating profits from new, innovative ways of using music content rather than from traditional ways of selling or licensing music content.² In a context of increasing attention towards new ways of using and assessing copyright-protected content, the open and freemium music business model, its processes and copyright terms are of strategic importance.³ Digital platforms represent the most common vehicle for new uses and new ways of accessing music content in the open and freemium music business model. Seen in that light, platform firms may be considered as key partners to copyright owners as they have the capability to provide a means for artists, music publishers and record companies to connect more with fans and customers.⁴ Through their digital platforms, platform firms also enable social interaction amongst other copyright users and also

¹ See Towse 2017 *supra* at p.415-6.

² *Ibid.* See also, Dörr, Wagner, Benlian, and Hess *supra* at, pp.383-396.

³ See Solo 2014 *supra* at p.183.

⁴ See Rajan 2010 *supra* at 929. See also, Rethink Music 2015 *supra* at 4; Prsformusic.com. (2015). *PRS for Music and SoundCloud reach licensing agreement*. [online] Available at: <https://www.prsformusic.com/press/2015/prs-for-music-and-soundcloud-reach-a-multi-territory-licensing-agreement-ending-legal-proceedings> [Accessed 19 Mar. 2017].

provide a means for “social production”.⁵ The crucial function of platforms and platform firms in this context has also been recognised in many countries including South Africa and Nigeria where the umbrella body for the recorded music industry, the International Federation of the Phonographic Industry (IFPI) noted the steady rise in the number of such platforms in the two countries.⁶ Indeed, everyone nowadays seems to be familiar with these digital platforms, from the most basic to the most sophisticated of them. These digital platforms include YouTube.com, SoundCloud.com, Notjustok.com and Facebook.com, which are digital platforms that have become increasingly popular for being used inter alia, in the sharing and creation of music content and other copyright-protected products.⁷ Majority of these digital platforms are multinational internet companies with footprints across many jurisdictions in the light of the global reach of the internet.⁸

The popularity and utility of the platform firms also contribute to their significance to both copyright owners and users of copyright-protected music content. Accordingly, their business model as it relates to the use of copyright-protected content provides an interesting case study for exploring the promotion of

⁵ Social production is a major type of content production facilitated by social media platforms, both commercial and nonprofit, where individuals are playing a more significant role in the production of content outside the usual organizational structure of the content industry. See Elkin-Koren, N. (2011). Tailoring copyright to social production. *Theoretical Inquiries in Law*, 12(1), pp.311-313 (hereafter, Elkin-Koren 2011).

⁶ See International Federation of the Phonographic Industry (IFPI), (2014). *Digital Music Report: Lighting up new markets*. London: International Federation of the Phonographic Industry (IFPI), p.42. See also, Heald, P.J. (2014). How notice-and-takedown regimes create markets for music on YouTube: An empirical study. *UMKC L. Rev.*, 83, p.313 (hereafter, Heald 2014).

⁷ YouTube.com and Facebook.com ranks as the second and third top sites globally. In Nigeria, the two platforms rank fourth and fifth top sites while in South Africa, they rank as third and fourth respectively. See Alexa.com. (2017). *Top sites in South Africa - Alexa*. [online] Available at: <https://www.alexa.com/topsites/countries/ZA> [Accessed 19 Nov. 2017].

⁸ For example, YouTube is headquartered in the US with offices in the UK, Nigeria and many other jurisdictions.

competition through the copyright law framework as complemented by competition law. In view of the objective of this study in identifying and exploring possible avenues to apply copyright and competition law for the purpose of regulating the open and freemium music business model, there is need to understand the business model itself and the activities undertaken as part of deploying the business model.⁹

Section 3.2 provides a definition and description of the open and freemium music business model. A concise definition has been provided in Chapter one, above.¹⁰ However, a fuller definition is provided in this chapter to aid better understanding of the contours of the business model as explored in this thesis. In this regard, rather than attempting to cover all aspects of the business model, the focus of this chapter is limited to the way music content is used and applied by the platform firms themselves and the import of such application on copyright owners and users. Sections 3.3 and 3.4 respectively examine the processes and copyright terms implemented in the open and freemium music business model. In this regard, given that copyright law protects music content, there is much focus on the various uses applied to the music content from a copyright law perspective. Section 3.5 briefly reviews the nature of the relationships and interests of the various stakeholders in the context of the open and freemium music business model. The deployment of the open and freemium music business model implies the convergence of music content owned and accessed by different parties. Such relationships are not easy to manage and there are different stakes in issue. Given the fact that the business model operates on the Internet, the processes and policies apply globally across each jurisdiction. However, their acceptance or rejection depends on the nuances of the music industry in each

⁹ See Solo 2014 *supra* at p.183. Newman 2013 *supra* at p.1407.

¹⁰ See sections 1.1 and 1.3, above.

jurisdiction. Accordingly, section 3.5 provides a brief overview of the stakeholders in the South African and Nigerian music industry as a way of placing the process and policies in better perspective.

In concluding the chapter, section 3.6 provides the foundation for the identification and analysis of the regulatory terrain to be discussed in the subsequent chapters.

3.2 Characterising the open and freemium music business model

Usually, business models are better explained from the context of a specific firm or enterprise operating in a stated industry. In other words, as conceptual blueprints, business models identify the customers and value propositions¹¹ of a particular firm and are tools for a firm to convert plans and strategies into operations.¹² However, the notions of “open and freemium” business models are not identified in the business model literature as pertaining to any specific industry or sector. Instead, within the business model literature, open and freemium business models are prototypes of a category of activities that may be undertaken by any organisation in the creation and delivery of value.¹³ These prototypes are distinct from the product, organisation, industry, sector or network. As prototypes, the description of the open and freemium business models may not be centred on a focal organisation but their boundaries are determined by those of the firm deploying the business model as well as the economic activities within the industry or sector in which they are deployed.¹⁴ The “open

¹¹ Magretta, J. (2002). Why business models matter. *Harvard business review*, 80(5), p.87.

¹² Pateli, A. and Giaglis, G.M. (2003). A framework for understanding and analysing ebusiness models. *Bled 2003 Proceedings*. Available at: [https://domino.fov.uni-mb.si/proceedings.nsf/Proceedings/4C84233423603AD0C1256EA1002D1A29/\\$File/25Pateli.pdf](https://domino.fov.uni-mb.si/proceedings.nsf/Proceedings/4C84233423603AD0C1256EA1002D1A29/$File/25Pateli.pdf), 337 [accessed 19 Nov. 2017].

¹³ See Zott, Amit, and Massa 2011 supra at 1025.

¹⁴ See Preston, M. and Zurer, R. (2003). Open content and the search for a better intellectual property model: Lessons from open source. available at:

business model” and the “freemium business model” are expressions used in the adjectival sense to explain how organisations create and deliver their value proposition as well as how they generate revenue.¹⁵

3.2.1 Open vs. Proprietary

The business model literature distinguishes between proprietary and non-proprietary business models, and between open and closed business models. These classifications have been subject of debate, in particular, regarding the meaning of “open” in relation to the business model. Some scholars construe the notions of proprietary and openness as being not necessarily incongruous. Hence, it is possible to have both a proprietary and open business model, depending on the definitions adopted.¹⁶ Other scholars posit that proprietary business models are usually closed, as they require access to the copyright owner or firm’s intellectual property rights (for example, copyright), and link the notion of openness only to business models that do not restrict access to such intellectual property rights.¹⁷

https://www.cs.duke.edu/courses/cps182s/compsci342s/cps182s/spring05/assignment/project/fall03/raz3_1/opencontent.pdf (accessed 13 June 2015) (hereafter, Preston and Zurer 2003).

¹⁵ Several authors aptly demonstrate this. For instance, Chesbrough in his book “Open Business Models: How to thrive in the new innovation landscape”, explains how organisations can adopt and maintain an “open” or “more open” business model. Chesbrough, H. (2006). *Open Business Models: How to Thrive in the New Innovation Landscape*. Boston, Mass.: Harvard Business School Press. Also, Osterwalder and Pigneur explain “open” and “freemium” as each having “specific patterns”, “similar characteristics, similar arrangements of business model Building Blocks, or similar behaviors”. These patterns form the basis of such business models. See Osterwalder and Pigneur *supra* at p.49. See also, Chesbrough, H.W., 2006. The era of open innovation. *Managing innovation and change*, 127(3), pp.34-41.

¹⁶ Müller, R.M., Kijl, B. and Martens, J.K. (2011). A comparison of inter-organizational business models of mobile app stores: There is more than open vs. closed. *Journal of theoretical and applied electronic commerce research*, 6(2), pp.63-76; Trott, P. and Hartmann, D.A.P. (2009). Why 'open innovation' is old wine in new bottles. *International Journal of Innovation Management*, 13(04), pp.715-736.

¹⁷ Chesbrough, H. (2003). The logic of open innovation: managing intellectual property. *California Management Review*, 45(3), pp.33-58.

In relation to music business models, the notion of “open” may be defined in the context of whether the proprietary rights in copyright are retained or waived. In such instance, music business models would be described as proprietary when the use of the music content requires access to and the right to use or exercise the exclusive bundle of rights provided by copyright law.¹⁸ Accordingly, a firm or copyright owner who reserves and exercises the entire exclusive rights provided by copyright law and requires a (paid) license or exclusive assignment before legitimate use can be made, may be said to be deploying a proprietary business model.¹⁹ On the other hand, when the music business model is open or non-proprietary, it would not be necessary to negotiate a licensing agreement, or pay for the purchase of music content or request permission to use or modify the music content. The relevant copyright owner would have obliterated this need by providing a licence and indicating terms which permit many uses of the music content. For instance, a copyright owner may provide a Creative Commons²⁰ license such as the “Attribution²¹” and “Attribution-Share Alike²²” licenses with respect to the use of his copyright-protected music content. The Attribution license permits other persons to distribute, remix, tweak, and build upon existing work,

¹⁸ Ibid. See also Osterwalder and Pigneur 2010 *supra* at 49.

¹⁹ Ibid. See also Chesbrough 2003 *supra* at 35.

²⁰ Creative Commons is an organization established for the purpose of increasing the availability of creative works which the public may legally access and build upon. Towards this commitment, the Creative Commons has designed a range of licences available to the public free-of-charge and which may be used to permit different level of access for users of creative works. See Creative Commons. (2017). *What we do - Creative Commons*. [online] Available at: <https://creativecommons.org/about/> [Accessed 20 Nov. 2017]. See also, Dusollier, S. (2006). The master's tools v. the master's house: Creative commons v. copyright. *Columbia Journal of Law & Arts*, 29, p.274 (hereafter, Dusollier 2006); Elkin-Koren, N. (2005). What contracts cannot do: The limits of private ordering in facilitating a creative commons. *Fordham L. Rev.*, 74, p.383.

²¹ See Corbett 2011 *supra* at 512; Dusollier 2006 *supra* at p.275.

²² This license permits others to remix, tweak, and build upon existing work even for commercial purposes, as long as they credit the copyright owner and also license their new creations under the identical terms. See Corbett 2011 *supra* at 512; Dusollier 2006 *supra* at p.275.

even commercially, provided that such person credits the copyright owner for the original creation.²³ Music content may also be distributed under the “open music archive” system, which permits the use of music held in common by a group as a whole.²⁴

Further, the notion of open and freemium music business models may be considered from some other perspectives: access to the creative process and access to the music content once created or produced.²⁵

First, the creative process refers to the development and approval of the music content by the relevant copyright owner.²⁶ Access to the creative process may then be interpreted as being open when: (a) interested persons or firms are not restricted from using the music content and the rights inherent in them, to create new (copyright-protected) products;²⁷ and/or (b) there is collaboration (inviting external persons or firms or using their protected subject-matter) in the creation of a firm’s music content.²⁸ Many authors and business scholars have confirmed the

²³ *ibid.*

²⁴ According to the open music archive website, “[T]he Open Music Archive concerns itself with the public domain and creative works which are not owned by any one individual and are held in common by society as a whole”. See Openmusicarchive.org. (2017). *Open Music Archive - About*. [online] Available at: <http://www.openmusicarchive.org/about.php> [Accessed 20 Nov. 2017].

²⁵ Okoli and Carillo 2013 *supra* at pp. 2-3. See also Domb Krauskopf, A.E. (2009). *Fire, lights, everything!": Exploring symbolic capital in the Tecnobrega dance scene*. Master of Science in Comparative Media Studies. Massachusetts Institute of Technology.; Russi, 2011 *supra* at 109 - 110. See also, Jarvenpaa, S. and Lang, K. (2011). Boundary management in online communities: Case studies of the Nine Inch Nails and ccMixter music remix sites. *Long Range Planning*, 44, pp.440 - 457.

²⁶ *Ibid.*

²⁷ This may involve express or tacit permission of cover versions or mash-ups of music content. See Rimmer, M. (2005). The grey album: copyright law and digital sampling. *Media International Australia Incorporating Culture and Policy*, 114(1), pp.40-53 (hereafter, Rimmer 2005). Elkin-Koren 2017a *supra* at pp.142-143.

²⁸ Rimmer 2005 *supra*.

importance of these elements.²⁹ For instance, Osterwalder and Pigneur describe open business models as business models that:

“...can be used by companies to create and capture value by systematically collaborating with outside partners. This may happen from the “outside-in” by exploiting external ideas within the firm, or from the “inside-out” by providing external parties with ideas or assets lying idle within the firm”³⁰.

From the foregoing, it can be seen that the underlying principle of “openness” may be expressed through external collaborations and through explicit or implicit licences.³¹ The copyright owner as an entity may collaborate with persons outside the firm in carrying out its key activities³² especially in the creation or development of the music content. Within such open music business model, the exclusive rights belonging to the copyright owner (“internal properties”) and/or the exclusive rights belonging to another copyright owner who has waived all or some of the rights (“external properties”) are utilised in creating the music content that is distributed to users and consumers. Likewise, the copyright owner may also grant an explicit licence or permission to the public in respect of its copyright in a given music content. Such licences specify the uses to which the copyright may be put and is meant for users who need access to the music content to create new music content. The creative process of the music content and the resultant product are expected to be strengthened or unaffected by the uses to which the copyright may be put. In other words, the author may create a better-received or new product based on ideas

²⁹ Okoli and Carillo 2013 supra at 5; Preston and Zurer 2003 supra; Elkin-Koren, N. (2016). The new frontiers of user rights. *Am. U. Int'l L. Rev.*, 32, p.1 (hereafter, Elkin-Koren user rights); Santos 2013 supra at p.601.

³⁰ Osterwalder and Pigneur 2010 supra at 80.

³¹ See Okoli and Carillo 2013 supra at 5.

³² Key activities include creation/production of key resources, establishing and maintaining channels of distribution and customer relationships, delivering the value proposition and solving customer problems. The specific key activities will differ with each business model, each industry and each organisation. See Osterwalder and Pigneur 2010 supra at 39.

resulting from “inviting” others to participate in the use of its copyright. The copyright owner and any external key partner, which the copyright owner may use or rely upon, usually set the “some rights reserved” license and the implementation of collaborative creative process.

Secondly, the concept of openness may be appraised based on the access to the music content once created or produced. In this context, the copyright owner retains the entire exclusive rights granted by copyright law but refrains from or waives the right to exploit or monetise those rights. Instead, the copyright owner explores alternative means of revenue generation, which may be attributable to the waiver of the rights in the first place. In this context, further differentiation may be made. It is possible to distinguish between access for use of the music content in some other creative endeavour or for distribution and access for consumption of the music content. While access for use refers to the ability of distributors, digital platforms and firms to use the music content in the operation of their distribution, music subscription or other services, access for consumption involves persons who require the music content for their listening and personal enjoyment only.³³ Because copyright law demands that access for the purposes of using the music content requires the licence of the relevant copyright owner³⁴ and also, access for consumption purposes demands a sale and purchase

³³ Stazi, A. (2012). Digital copyright and consumer/user protection: moving toward a new framework?. *Queen Mary Journal of Intellectual Property*, (2), pp.158-174; Ritala, S. (2013). Pandora & Spotify: Legal issues and licensing requirements for interactive and non-interactive Internet Radio Broadcasters. *Idea*, 54, 23. (hereafter, Ritala 2013); Teague, J. (2012). Saving the Spotify revolution: Recalibrating the power imbalance in digital copyright. *ExpressO*, [online] pp.27 to 28. Available at: http://works.bepress.com/jordan_teague/1/ [Accessed 4 Feb. 2016]. (hereafter Teague 2012); Richardson, J. (2014). The Spotify paradox: How the creation of a compulsory license scheme for streaming on-demand music services can save the music industry. *UCLA Ent. L. Rev.*, (22), p.45. (hereafter, Richardson 2014).

³⁴ See Heald 2014 *supra* at 313; Perel, M. and Elkin-Koren, N. (2016). Accountability in algorithmic copyright enforcement. *Stan. Tech. L. Rev.*, 19, p.473 (hereafter, Perel and Elkin-Koren 2016).

arrangement,³⁵ access for use without paid license and access for consumption free-of-charge may still be considered as deploying the open business model.

3.2.2 Freemium

Apart from business model patterns described as “open”, the business model literature also describes some business models as based on the concept of “free”.³⁶ Here, the relevant firm creates and captures value by offering a product free-of-charge and generating revenue through other means or products. In this regard, the concept of “free” may translate into an advertisement-based free offer; a subscription-based free offer; and/or a free offer based on a “bait and hook” pattern where the free offer is used to attract customers to a paid offer.³⁷ “Freemium” provides a veritable example of business models based on the notion of “free” or “zero price”.

To be able to offer the music content free-of-charge to the consumers, a firm may provide “freemium” services to consumers - either offer subscription services to a category of consumers (“subscription-based freemium”) and/or offer advertising services to firms that may wish to advertise their products to the consumers on the platform (“ad-based freemium”).³⁸ Subscription-based freemium enables users of the platform to access certain music consumption features free-of-charge and requires users to pay a subscription fee or some similar fee (usually referred to as a

³⁵ See Derclaye, E. and Favale, M. (2010). Copyright and contract Law: regulating User contracts: The state of the art and a research agenda. *J. Intell. Prop. L.*, 18, pp.92-5 (hereafter, Derclaye and Favale 2010).

³⁶ Osterwalder and Pigneur 2010 supra at 67.

³⁷ Ibid.

³⁸ Mounier, P. (2011). Freemium as a sustainable economic model for open access electronic publishing in humanities and social sciences. *Information Services & Use*, 31(3-4), p.230; Halmenschlager, C. and Waelbroeck, P. (2014). Fighting Free with Free: Freemium vs. Piracy. *SSRN Electronic Journal*. [online] Available at: <https://ssrn.com/abstract=2475641>, pp. 2-3 [Accessed 7 Aug. 2016].

“premium”) to enjoy specialised functions and services such as an unlimited music catalogue, ad-free listening, off-line access and extended search features.³⁹ The process here involves the platform firms themselves uploading the music content onto their platforms. As a result, there is the requirement to obtain the license of the relevant copyright owner of the music content, which may be an individual, a record company, a Collective Management Organisation (CMO) and/or a music publisher.⁴⁰ Such “licensing” terms are usually set by agreement between the platform firm and the copyright owner and would represent terms of access to the music content.⁴¹ The agreement would also stipulate how the subscription fees received from subscribers may be shared and also, stipulate whether the music content is to be available to the free or non-subscribing customers.⁴² In many cases, most platform firms that deploy a subscription-based freemium business model combine such with ad-based freemium. In such instance, the agreement usually addresses the issue of whether and how to share the subscription fees and/or the advertisement fees received

³⁹ Bekkelund, K.J. (2011). Succeeding with freemium: Exploring why companies have succeeded and failed with freemium. *Innovation and Entrepreneurship, Specialization Project*, 4350, pp. 6-7 (hereafter, Bekkelund 2011). Examples in the music industry include Spotify, Deezer as well as Spinlet. See generally, Spotify, (2015). *Music for everyone*. Available at: <https://www.spotify.com/us/about-us/contact/> [Accessed 9 Jun. 2015]; Spinlet.com, (2015). *Spinlet*. [online] Available at: <https://spinlet.com/faq/> [Accessed 10 Jul. 2015]; Pujol, N. (2010). Freemium: attributes of an emerging business model. Available at SSRN: <https://ssrn.com/abstract=1718663> or <http://dx.doi.org/10.2139/ssrn.1718663> (accessed 19 Jul. 2016) (hereafter, Pujol 2010)

⁴⁰ Ritala 2013 supra at 42-3.

⁴¹ Ibid. See also Solo 2014 supra at pp. 184–187; Teague 2012 supra at 27 - 28.

⁴² For example, popular US artist, Taylor Swift had at some point withdrawn her music content from the Spotify platform because she did not want her music offered for free. See Dredge, S. (2015). *Taylor Swift still has bad blood with Spotify over streaming music dispute*. [online] the Guardian. Available at: <http://www.theguardian.com/technology/2015/aug/04/taylor-swift-bad-blood-spotify-streaming-music> [Accessed 5 Aug. 2015]. See also Sawyer, P. (2015). *Spotify must change its free music service, says Universal records*. [online] Telegraph.co.uk. Available at: <http://www.telegraph.co.uk/culture/music/music-news/11487187/Spotify-must-change-its-free-music-service-says-Universal-records.html> [Accessed 5 Aug. 2015].

from subscribers and advertisers, respectively.⁴³ In this regard, the terms of the agreement are expressly stated in line with the copyright law regulatory framework.⁴⁴

On the other side of the spectrum are platform firms, which deploy an ad-based freemium service where rather than the platform firm, it is the users of the platform that upload the music content onto the platform. Any member of the public may then access the music content free-of-charge. As a result of this, a lot of users are attracted to the platform both for the purpose of consuming the music content and for the purpose of uploading music content onto the platform. Advertisers, in turn, pay an advertising fee to the platform firms to use the platform to advertise their product and services to the teeming users of the platform.⁴⁵ The challenge in terms of the copyright law lies in ad-based freemium where there may be no explicit licensing agreement between the copyright owner and the platform firm or, where the platform firm is able to “force” the issuance of a *gratis* license.⁴⁶

More importantly, for the purposes of this study, it is worth noting that the various theories and interpretations developed are evidence of a lack of uniform terminology. Accordingly, the discussion in this section has been devoted to the analysis of the main classifications, in the attempt to shed some light on the issue and avoid possible misconstructions.

3.2.3 Concluding remarks on open and freemium music business models classification

From the foregoing, it is evident that there is no straightforward answer in defining an open music business model. On the one

⁴³ See Ginsburg 2017 *supra* at p.74.

⁴⁴ See Derclaye and Favale 2010 *supra* at 110.

⁴⁵ See [prezi.com](https://prezi.com/puvz26rl2cbg/youtube-business-model/). (2015). *YouTube business model*. [online] Available at: <https://prezi.com/puvz26rl2cbg/youtube-business-model/> [Accessed 20 Nov. 2017].

⁴⁶ See sections 3.4.1 and 4.2, below.

hand, the notion of open access to the creative process does not seem to raise many questions in terms of acceptance as an “open” business model. On the other hand, the issue regarding open access to the use and consumption of the music content has been at the core of some serious debate. While some platform firms collaborate with copyright owners to provide open access to the consumption of music content without any discussion as to revenue or revenue share,⁴⁷ other platform firms enter into terms with the copyright owner to receive and share the subscription fees and/or the advertisement fees received from subscribers and advertisers, respectively.⁴⁸ The major reservation, therefore, is whether music business models can be interpreted as open even when they are based on the use of copyright-protected works, which are not licensed for free, but under terms that only provide free access for music consumption. The answer may be relevant for copyright owners who have a policy interest in deploying proprietary music business models (hence, covered by exploitable copyright-protected works) while maintaining some form of openness. However, the significance of the debate is not only connected to the import of openness as such. Rather, the different arguments made by the literature focus on a much more relevant issue, which calls into question the relationship between the platform firm’s interests and the copyright terms applicable to the open and freemium music business model. The issue pertains to the need to, in the context of the open and freemium music business model, align the public interests in the use of the copyright products with the private interests of the copyright owners in being rewarded for their creative efforts.

In the circumstances, this study’s focus on the open and freemium music business model is based on a combination of

⁴⁷ For instance, NotJustok.com. See section 3.4.4 below.

⁴⁸ See Ginsburg 2017 *supra* at 74. See Heald 2015 *supra* at 318. See also, YouTube’s Content ID discussed in section 3.4.4 below.

selected features of the prototypes as described above. Here, the ability to upload and access the music content free-of-charge falls within the “open” description while ability to collect advertising payments from some other customer segment, falls within the “freemium” description. It is in this context, which accords with the business environment, that the term “open and freemium music business model” is used in this thesis. Here, the business model is “open” in the sense of being free-of-charge to the consumer and “freemium” in the sense of receiving a premium in terms of an advertising fee. Typical examples in Nigeria and South Africa include multinational internet companies such as YouTube, SoundCloud, and Facebook and local companies such as NotJustok.com.⁴⁹

3.3 The open and freemium music business model processes

Before proceeding to examine the terms regarding the use of copyright-protected music content as they currently exist within the open and freemium music business model, it is important to first consider the processes that are put in place to deploy the business model. This is the case for two main reasons: for one thing, the processes provide the parameters within which the terms are set. There is therefore no meaningful application of the copyright terms without the processes surrounding their formulation and application. For another, before examining the contractual terms that apply within a given business model, it is important to understand the parameters of the business model itself. This will be so regardless of whether or not the business model is open and/or freemium: the crucial feature of all business models is their activity-based nature, which is revealed in the business processes. As noted in section 3.2, the open and freemium music business model does not exist in vacuum, but is explained within the context

⁴⁹ These platforms are also referred to as “user-upload” platforms. See IFPI 2017 *supra* at 33-34

of the processes/activities of a specific firm and/or the sector within which such firm operates.⁵⁰ This dependence on processes is particularly relevant in the context of this thesis, as it also has implications for suggested solutions: without an understanding of the processes, any solution proposed to regulate the open and freemium music business model will inevitably prove ineffective.

The deployment of the open and freemium music business model varies across firms. However, the following activities are characteristic of the open and freemium music business model:⁵¹

- (i) The design of a user-friendly digital platform that can store and/or host a large catalogue of music content as well as other copyrighted and non-copyrighted content; The digital platform is owned and operated by a firm to offer various products and services⁵² pertaining to copyright for profit.⁵³
- (ii) Creation and operation of registration or some entry requirement that keeps an index of users (“views” or “download” counts) which helps advertisers appreciate the number of consumers (“eyeballs”) that may potentially view their product advertisements; and also,
- (iii) The creation and operation of an interface that can serve

⁵⁰ See section 1.4.1. See also Searle, N. (2011). Changing business models in the creative industries: The cases of television, computer games and music. *Intellectual Property Office*, pp.8-10.

⁵¹ These activities are gleaned from a variety of studies regarding the open and freemium music business model. See Bekkelund 2011 *supra* at pp. 6-7. Pujol 2010 *supra* at 1; Ritala 2013 *supra* at 42-3; Solo 2014 *supra* at pp. 184–187; Teague 2012 *supra* at 27 - 28.

⁵² The products offered in this regard is a range of technical facilities including search facilities, listening service etc. For similar arguments in relation to algorithmic copyright enforcement, see Perel and Elkin-Koren 2016 *supra* at 485. See also, paragraph 70 of the Statement of Defence filed in the suit between the *Performing Rights Society v Soundcloud*, Claim number 2015-903033, before the High Court of Justice, Chancery Division, Intellectual property (henceforth, PRS v Soundcloud).

⁵³ See for example, paragraph 90.2 of the Statement of Defence in *PRS v SoundCloud*. See also, *Viacom International, Inc. v. Youtube, Inc.* 676 F.3d 19, United States Court of Appeals, Second Circuit, decision of 5 Apr. 2012, paragraph 22..

advertisements or commercials to users and other platform visitors in such manner as not to detract from the user-friendly experience.

- (iv) The availability of a “unilateral” contract in the form of “Terms of use and Privacy Policy” set by the relevant platform firm to address copyright use and privacy concerns.⁵⁴

The deployment of the open and freemium music business model usually begins with the platform firm providing a platform that is capable of hosting or storing music content, which users of the platform may upload thereon.⁵⁵ Members of the public may access the uploaded music content free-of-charge and in such cases, may either download or stream music content, depending on the specific platform firm.⁵⁶ The platform firm optimises the consumer-experience through tags, search features, automatic playlists based on the direction of the consumer and the like.⁵⁷ Given the *gratis* nature of the uploaded music content and the popularity of music content generally,⁵⁸ the platform is able to aggregate a large mass of consumers. This in turn attracts other firms to advertise

⁵⁴ Unilateral contracts lack mutuality given that the offeree or promisee is not bound to perform the requested act or forbearance. Examples include click-wrap contracts, browse-wrap contracts. See Clark, D. (2000). Revocation and the unilateral contract: A reappraisal. *NZL Rev.*, p.17 at 35. By continuing to use the platform, the user is deemed to accept the terms stipulated by the platform firm. See Derclaye and Favale 2010 *supra* at 100.

⁵⁵ See paragraph 6.1 of the Particulars of Claim in *PRS v Soundcloud* which Soundcloud admitted in paragraphs 10, 17, 19, 20 of its Statement of Defence.

⁵⁶ See paragraphs 4, 5 and 6.4 of the Particulars of Claim in *PRS v Soundcloud*. See also, Schultz, A. (2016). *IP and African Music Industries: An Interview with Phil Chard - part 4*. [online] Afro-IP. Available at: http://afro-ip.blogspot.com.ng/2016/09/ip-and-african-music-industries_2.html [Accessed 20 Jan. 2017] (“Schultz 2016”); Notjustok. (2017). *About Us - Notjustok*. [online] Available at: <http://notjustok.com/about/> [Accessed 20 Nov. 2017].

⁵⁷ See Perel and Elkin-Koren 2016 *supra* at 485. Also, see paragraph 8 of the Particulars of Claim and paragraph 37 and 70 of the Statement of Defence in *PRS v Soundcloud*.

⁵⁸ See The Telegraph (2017). Top 10 most watched YouTube video of all time. [online] Available at: <http://www.telegraph.co.uk/technology/0/most-watched-youtube-videos-of-all-time/> [Accessed 12 Nov. 2017].

their own products in the hope that the large mass of platform users will give attention to such advertisements. Of course, such firms can only serve their advertisements upon payment of agreed fees to the platform firms. Whether or not the platform firm will share the advertising fees with the relevant copyright owner, depends on the platform firm itself.⁵⁹ Terms of use and Privacy Policy are documents to which registered users assent to or are presumed to have assented to upon using the platform or uploading content thereon.⁶⁰ These documents particularly stipulate the nature of the platform firm's service and the representations and warranties obtained from the registered users.⁶¹ In most cases, the Terms of use requests for and relies on representations and warranties of the registered user regarding copyright ownership.

The Terms of use are set unilaterally by the relevant platform firm and indicates a copyright policy, which governs the deployment of open and freemium music business model in terms of supply of the music content, revenue generation as well as access to the music content. Accordingly, the Terms of use function as a way to recognise the private interests of the copyright owner in revenue generation and the public interests of users and consumers in accessing the music content.

Corollary to the foregoing, it can be said that the process of deploying the open and freemium music business model is largely unilateral and mostly directed by the platform firms. For one, the uploading of the music content presumes that the uploader owns or has acquired copyright in the music content uploaded.⁶² The

⁵⁹ See section 3.4, below. See also IFPI 2017 *supra* at 24.

⁶⁰ See paragraphs 19, 20 and 73 of the Statement of Defence in *PRS v Soundcloud*.

⁶¹ See Elkin-Koren 2011 *supra* at 329; paragraph 88.2 of the Statement of defence in *PRS v Soundcloud*.

⁶² See paragraphs 3, 4, 26, 27, 52, 54 and 73.2 of the Statement of defence in *PRS v Soundcloud*.

consent or licence of the copyright owner is therefore implied in the case where it is not the uploader. Indeed, the copyright owner is directed to request a takedown of such music content where it is not the uploader and it objects to the provision of the music content.

Furthermore, many users (including copyright owners) are also attracted by the availability of the platform free-of-charge to store and help distribute their music content. From this perspective, some copyright owners elect to accept the Terms of use and consider the platforms to be a popular way of showcasing and promoting their music content. Whatever be the case, the Terms of use are set unilaterally by the platform firms in most cases.

The deployment of the open and freemium music model through unilateral processes has grown rapidly and consistently, as a mechanism for distributing music content in South Africa and Nigeria. This process represents the most common approach to deploying the open and freemium music business model globally on the Internet. In the context of copyright law, unilateral processes are faster and less formal than bilateral processes. This is because unilateral processes do not require prior agreement of the copyright owner, and therefore, there may be no lengthy negotiation process.⁶³

These characteristics of unilateral processes, at the same time, may be contrary to the policy approach of copyright law. There may be concerns for compliance with copyright law where platform firms, which obtain revenue based on the use of the music content, control and direct the deployment of the open and freemium music business model, without the prior involvement of

⁶³ See Ginsburg 2017 *supra* at 74; Heald 2015 *supra* at 318; Elkin-Koren 2017a *supra*.

the copyright owner.⁶⁴ The Content ID tool by YouTube discussed in section 3.4.4 below, provides a good example.

3.4 Copyright terms

Firms that deploy the open and freemium music business model have developed – sometimes in different ways – copyright terms indicating the various ways in which the copyright-protected music content may be used and accessed. These copyright terms also function as a framework to legitimise the platform firm’s use of the music content, as they need to be able to show compliance with extant copyright laws. Also, the copyright terms serve as a tool for the platform firms to enhance their competitiveness given that the terms explain the ways in which the music content is used. Further, users of the platform are guided by these copyright terms to also enable compliance with copyright laws. Without these terms as a guide, platform firms run the (greater) risk of copyright infringement liability and such outcome may be anticompetitive in the context of copyright law.⁶⁵

The above-mentioned copyright terms are of three main types: licensing terms and; access and usage terms.⁶⁶ The specific content of these typical copyright terms may vary from one platform firm to the other, making it difficult to describe them with exactitude. Indeed, users of the platform may sometimes find it difficult to clearly identify which of the copyright terms apply to their actions.⁶⁷ For instance, the Creative Commons licences as a platform for the deployment of the open music business model have been criticised on the grounds that it misunderstands some key aspects of copyright law.

⁶⁴ See Ginsburg 2017 *supra* at 74.

⁶⁵ See Andersen and others 2000 *supra*.

⁶⁶ See for example, paragraph 5 of YouTube’s terms of service. See also, Perel and Elkin-Koren 2016 *supra* at 473; Elkin-Koren user-rights *supra* at 3-7.

⁶⁷ See Corbett 2011 *supra* at 518-522.

This notwithstanding, these copyright terms are particularly important as they aim at neutralising any potential risk of abusive or anticompetitive conduct, consisting for instance, in scraping or in a value gap. Such conduct may be anticompetitive in the copyright law sense. As will be better explained in Chapters four and five, scraping occurs when a platform firm “scrapes” or applies copyright owner’s music content in the business model context without any payment to or licence from the copyright owner.⁶⁸ Consequently, the platform firm may be competitive in its own sphere at the expense of the copyright owner.

Furthermore, licensing, access and usage terms play a significant role as they function as constraints on the relevant stakeholders. From a policy perspective, they are important as the choice of relevant terms and their implementation by any stakeholder directly reflect the standards of competition within the copyright law framework.⁶⁹

3.4.1 Licensing terms

As noted in the preceding chapter, a license is required where any person other than the relevant copyright owner, wishes to exercise or exploit any of the exclusive rights granted under copyright law. By extension, licensing arrangements determine the money flow to the copyright owner as well as the extent of use of the copyrighted material by the licensee.

In the open and freemium music business model, licensing terms require registered users of the digital platform who upload music content thereon to grant a non-exclusive, worldwide, royalty-free licence to the platform firm with respect to the uploaded music content.⁷⁰ Uploaders may be able to, in the case of certain

⁶⁸ See Goldfein and Keyte 2017 *supra* at 1-2.

⁶⁹ See sections 2.2 and 2.3, above. See also, Drexl *supra* at p.44.

⁷⁰ See paragraph 6.2 of the Particulars of Claim and paragraphs 28–31 of the Statement of defence in *PRS v Soundcloud*. See also, paragraph 6(c) of

platforms specify whether the music content is to be private or publicly available and whether download should be enabled. Furthermore, to address cases where the royalty-free licence was invalidly given (that is, in cases where the “uploader-licensor” is not the actual copyright owner), the licensing terms further provide for the actual copyright owner to notify the platform firm to takedown infringing music content.⁷¹ Such notification may be made using designated forms provided by the platform firm for that purpose, by email or by post. This is the case, for instance with platforms such as YouTube.com, SoundCloud.com, NotJustOk.com and TooXclusive.com. The platform firm may then face copyright infringement liability where it does not takedown or disable access to the content upon receipt of the takedown notice or where its Terms of use and actual use are not such as may be undertaken without the prior, active approval of the copyright owner.⁷² The applicable scenario may depend on the copyright or related law applicable to the music content especially where the copyright owner is not the uploader. For instance, even s75 of the Electronic Communications and Transactions Act 2002 (South Africa) that offers protection to platform firms from copyright infringement liability when they act expeditiously to remove infringing content upon notification, differs slightly from other regimes. Here, platform firms may be protected only where they are members of an organisation approved by the Minister of Communication.⁷³ Such copyright owner may rightfully decline to use the notification avenues provided by the platform firm and may instead, sue the

Youtube's Terms of service. Youtube.com. (2016). *Terms of Service - YouTube*. [online] Available at: <https://www.youtube.com/t/terms> [Accessed 14 Mar. 2016].

⁷¹ See Heald 2014 *supra* at 313.

⁷² See Comninos, A., 2012. Intermediary Liability in South Africa. *Association for Progressive Communications, Intermediary Liability in Africa Research Papers*, 3, pp.6-7, 12 (hereafter, Comninos 2012).

⁷³ Comninos 2012 *supra* at 12.

platform firm for copyright infringement as occurred in the *PRS v Soundcloud*⁷⁴ case.

Notice and takedown procedures are usually prevalent in unilateral processes (in that the prior approval of the copyright owner is not obtained) and have been a popular feature of platform firms that deploy the open and freemium music business model.⁷⁵ Under such procedure, platform firms undertake to act expeditiously to remove or disable access to infringing music content to be exempted from copyright infringement liability.⁷⁶ Notice and takedown procedures may be implemented in two different ways. First, the platform firm may make the music content available on its platform by itself. In this regard, the platform firm may procure the music content from different sources and then directly upload the music content to the platform. The platform firm further indicates its willingness to respond promptly to any request from the copyright owner to takedown such content. Such platform firms understand that copyright likely subsists in the products, which it makes available on its platform.⁷⁷ However, they operate on the presumption that silence on the part of the relevant copyright owner is tantamount to consent.⁷⁸ This presumption may be risky as the act of uploading music content without the consent of the relevant copyright owners may expose the platform firms to

⁷⁴ See paragraph 111 of the Statement of defence in *PRS v Soundcloud*.

⁷⁵ See Perel and Elkin-Koren 2016 supra at 477.

⁷⁶ Ibid. See also Lee, Y.H. (2015). Copyright and freedom of expression: A literature review. *CREATE Working Paper 2015/04*, pp.155-156. Available at: <https://zenodo.org/record/18132/files/CREATE-Working-Paper-2015-04.pdf>. [Accessed on 21 Nov. 2016].

⁷⁷According to tooXclusive, "If you want to make a complaint about any of our online services or if you think your or someone else's intellectual property or other rights have been infringed by our online services you can do so by submitting full details by sending your email to dcma@tooxclusive.com". See tooXclusive. (2017). *Contact Us* « *tooXclusive*. [online] Available at: <http://tooxclusive.com/contact-us/> [Accessed 21 Nov. 2017].

⁷⁸ See Schultz 2016 supra; Notjustok. (2017). *About Us - Notjustok*. [online] Available at: <http://notjustok.com/about/> [Accessed 20 Nov. 2017].

liability for copyright infringement.⁷⁹ Such platform firms are prevalent in Nigeria. In this regard, Notjustok.com⁸⁰; tooXclusive.com⁸¹; 360nobs.com⁸² are typical examples.

A second approach to implementing notice and takedown procedures involves the platform firm creating an enabling environment for copyright owners, users and consumers to make the music content available on that platform.⁸³ Similar to the first approach, there is recognition that copyright may subsist in music content available on its platform. In this context however, the platform firm does not upload the music content on the platform and is not directly responsible in the event that the uploaded content is found to be infringing. Such licensing term falls under the statutory regime commonly referred to as the “safe harbour” regime – where platform firms are exempt from liability for copyright infringement resulting from the actions of their users in uploading and streaming the music content.⁸⁴ Such exemption applies in specified instances and in most cases the exemptions apply insofar as the platform firms act expeditiously to remove or disable access to infringing content upon notification. However, the issue of recourse for copyright owners whose content are found on platforms without their consent remains.⁸⁵ Usually, because most platform firms are established in Europe or in the US, the platform firms adopt the safe harbour regime applicable in either regime, as

⁷⁹ As the relevant copyright statutes provide, copyright is infringed when there is a reproduction of the work without the authorization of the relevant rights-holder. See for example, Section 15(1)(a) of the Nigerian Copyright Act.

⁸⁰ See notjustOk. (2016). *About Us –notjustOk*. [online] Available at: <http://notjustok.com/about/> [Accessed 14 Mar. 2016]

⁸¹ See tooXclusive. (2017). *Contact Us « tooXclusive*. [online] Available at: <http://tooxclusive.com/contact-us/> [Accessed 21 Nov. 2017]

⁸² 360Nobs.com. (2017). *About 360NoBS.com | 360Nobs.com*. [online] Available at: <https://www.360nobs.com/about/> [Accessed 21 Nov. 2017].

⁸³ See Heald 2014 supra at 313.

⁸⁴ See Lemley and Reese 2004 supra at 1367-1368.

⁸⁵ For a fuller discussion, see section 4.2.1, below.

part of their licensing terms.⁸⁶ Accordingly, the safe harbour regime statutorily provided for under s 512(c) of the US Digital Millennium Copyright Act, 1998 (DMCA) and Arts 12 to 14 of the EU E-Commerce Directive provides one of the pillars of the copyright terms of the open and freemium music business model.⁸⁷

Under s512(c) of the DMCA, anyone who stored music content “at the direction of a user” on a “system or network controlled by or operated by the service provider” would ordinarily incur copyright infringement liability unless such person or entity falls within any of the criteria (safe harbour) provided under the statute. These criteria includes that such person or entity:

- (A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
- (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
- (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
- (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
- (C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

While the EU E-Commerce Directive is different in that it provides for all forms of online content including copyright-protected content, it makes quite similar safe harbour provisions.⁸⁸ For instance, art 14 provides that:

Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

- (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the activity or information is

⁸⁶ Examples include YouTube, Soundcloud, Facebook.

⁸⁷ See Perel and Elkin-Koren 2016 supra at 477.

⁸⁸ Leonard, P. (2010). Safe harbors in choppy waters - Building a sensible approach to liability of internet intermediaries in Australia. *J. Int'l Media & Ent. L.*, 3, p.247.

apparent; or

- (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.⁸⁹

Efficient takedown procedures enable the platform firms to meet the requirements for safe harbour protection and avoid liability for “authorising”, “enabling” or “directing” the infringement of their registered users. Indeed, the efficacy or validity of the takedown procedures to exempt the platform firms from liability for the infringement of their users has been challenged without much success in several suits in the US and within the EU.

In *Viacom v Youtube*,⁹⁰ Viacom argued inter alia that YouTube was generally aware that the reproduction of music content on its platform was infringing and, for that reason, the safe harbour protection should not avail YouTube. Damages sought were to address the reproduction of copyright-protected content owned by Viacom. The Court rejected this argument holding that the fact that the language of the statute required expeditious removal of infringing material, it meant that the Internet Service Provider (in this case YouTube) would require prior knowledge of the specific infringing material.⁹¹ The applicable test was, therefore, one of distinction between subjective and objective standard. To have actual knowledge of infringement under the DMCA, an Internet Service Provider (ISP) must subjectively know of specific instances of infringement. To have the requisite offending knowledge of infringement, the ISP must be aware of facts that would have made the existence of specific acts of infringement objectively obvious to a reasonable person.⁹² According to the

⁸⁹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').

⁹⁰ *Viacom International, Inc. v. Youtube, Inc.* 676 F.3d 19, United States Court of Appeals, Second Circuit, decision of 5 Apr. 2012, paragraph 22.

⁹¹ *ibid* at paragraph 89.

⁹² Notwithstanding this decision, the Court was persuaded by Viacom's argument that “item specific” knowledge was required to prove that YouTube's financial benefit from the infringement. See paragraph 89(4) of the Judgment.

Judge Stanton of the US District Court for the Southern District of New York in his summary judgment:

The tenor of the [DMCA] provisions is that the phrases "actual knowledge that the material or an activity" is infringing, and "facts or circumstances" indicating infringing activity, describe knowledge of specific and identifiable infringements of particular individual items. Mere knowledge of prevalence of such activity in general is not enough. That is consistent with an area of the law devoted to protection of distinctive individual works, not of libraries. To let knowledge of a generalized practice of infringement in the industry, or of a proclivity of users to post infringing materials, impose responsibility on service providers to discover which of their users' postings infringe a copyright would contravene the structure and operation of the DMCA. As stated in *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, (9th Cir. 2007): The DMCA notification procedures place the burden of policing copyright infringement-identifying the potentially infringing material and adequately documenting infringement-squarely on the owners of the copyright. We decline to shift a substantial burden from the copyright owner to the provider.⁹³

Notwithstanding this decision, the Court was persuaded by some of the arguments made by Viacom particularly the argument that specific knowledge of infringement was not required to show the existence of right and ability to control on the part of YouTube. For this reason, the Court remanded this issue to the district court for further proceedings.⁹⁴ In April 2013, the district court again ruled in favour of YouTube, and Viacom once again appealed. However, the parties concluded an out-of-court settlement in March 2014, shortly before the time scheduled for oral arguments on the second appeal.⁹⁵

In the case of *PRS v SoundCloud* instituted in the UK, whether or not the E-Commerce Directive's safe harbour provisions would interpret SoundCloud's business model as making it "aware of specific facts that would make specific acts of infringement obvious", was not tested after all due to the settlement reached

⁹³ 718 F. Supp. 2d at 523.

⁹⁴ See paragraph 89(4) of the Judgment.

⁹⁵ For a record of court filings in this case, see Justia Dockets & Filings. (2015). *Viacom International, Inc. et al v. Youtube, Inc. et al.* [online] Available at: <https://dockets.justia.com/docket/new-york/nysdce/1:2007cv02103/302164> [Accessed 29 Jan. 2017].

between the PRS and SoundCloud.⁹⁶ In the originating processes, PRS had claimed that SoundCloud required its license for streaming of music content owned by PRS members. PRS expressed the view that SoundCloud had a duty to procure PRS license and can only escape liability for its services' copyright infringement if it procures the said license.⁹⁷

However, while the notice and takedown procedures are addressed within the safe harbour regime, that regime does not address the platform firm's use of the uploaded music content once it is placed on the platform. Such situation, which is the focus of this study, is a product of the copyright regime and the appropriate question would be whether such use falls or should fall within the scope of the exclusive rights available to the copyright owner under copyright law.⁹⁸ This is especially so when the platform firms not only profit from the availability of music content on their platforms but also, provide other mechanisms for selected copyright owners to generate revenue from what may constitute users' infringing acts and from the platform firm's actions.⁹⁹ Such conduct has become the subject of much scholarly attention and significant legislative activities particularly within the EU in the context of the interaction between the E-Commerce Directive and the proposed directive on copyright in the digital single market and the value gap proposal.¹⁰⁰ This is more fully discussed in Chapter four, below.¹⁰¹

⁹⁶ See Prsformusic.com. (2015). *PRS for Music and SoundCloud reach licensing agreement*. [online] Available at: <https://www.prsformusic.com/press/2015/prs-for-music-and-soundcloud-reach-a-multi-territory-licensing-agreement-ending-legal-proceedings> [Accessed 19 Mar. 2017].

⁹⁷ See Greenstein, N. (2016). Striking the Right Chord: A Theoretical Approach to Balancing Artists' Intellectual Property Rights on Remix Audio-Sharing Platforms. *Cornell L. Rev.*, 102, pp.212-3 (hereafter, Greenstein 2016).

⁹⁸ See Rosati 2017 *supra* at 15-6.

⁹⁹ For example, see Heald 2014 *supra* at 313.

¹⁰⁰ See Directive of the European Parliament and of the Council on copyright in the Digital Single Market - COM(2016)593. See also, Rosati 2017 *supra*.

¹⁰¹ See section 4.2.1(a), below.

Indeed, apart from the *gratis* license issued by uploaders to the platform firms in respect of the music content uploaded to the platform, the platform firms also set licensing terms that could result in payments to copyright owners.¹⁰² These payments may be received directly from the platform firms or from aggregators selected by copyright owners due to the aggregator's relationship with the platform firm.¹⁰³ Such payments are based on advertising revenue arising in connection with the use of the music content on the platform. This revenue-based approach is evident with YouTube, Soundcloud and Notjustok.com.¹⁰⁴ However, Notjustok.com does not share its advertising revenue with copyright owners.¹⁰⁵

3.4.2 Terms relating to access (“access terms”)

Access terms in the open and freemium music business model impose obligations on the consumers, the users, the platform firms and the copyright owners. First, access terms impose on the consumers to use the music content in accordance with the dictates of the platform firms and in respect (for) of copyrights inherent in the music content. These terms are established by platform firms with the intention to limit copyright infringement and, generally to protect the respective economic interests of the copyright owners and enhance the competitiveness of the platform firms.

Typically, the access terms concern the use of technological protection measures with respect to the music content. Music content can be accessed for free but beyond that, nothing much may be done with the music content. To access the music content, the terms and conditions for such access are stated on the

¹⁰² Ibid.

¹⁰³ See section 3.4.4, below.

¹⁰⁴ See Perel and Elkin-Koren 2016 *supra* at 510-512.

¹⁰⁵ See notjustOk. (2016). *About Us –notjustOk*. [online] Available at: <http://notjustok.com/about/> [Accessed 14 Mar. 2016]

platform's Terms of use and privacy policy.¹⁰⁶ Again, the Content ID system in the case of YouTube (the CIS system for SoundCloud and Rights Manager for Facebook) is relevant here for the purpose of explaining the operation of the access and usage rules.¹⁰⁷ Once a given music content is uploaded to the reference file by a copyright owner, others may be precluded from uploading or making available any music content found by the system to be a match with the uploaded music content.¹⁰⁸ In taking down or refusing access of music content to the platform, the platform firm is able to influence the decision of consumers regarding each specific music content as well as whether the relevant copyright owner may receive a share of the advertising revenue. As Perel and Elkin-Koren noted, "from an economic perspective, control over what information becomes available may shape the preferences of consumers, creating demand for particular content, while diminishing demand for other types of content."¹⁰⁹

A further relevant issue, then, concerns access terms that are focused on attempts by platform firms to limit or increase its interaction with consumers of music content to avoid the risk of copyright infringement. Elkin-Koren, in particular, has noted that most platform's Terms of use and related documents are crafted to please powerful corporate copyright owners and may ordinarily be unconscionable.¹¹⁰ Where the platform firm is actively involved with the consumer's activities in respect of the platform, such may affect its ability to successfully rely on the safe harbour regime to escape

¹⁰⁶ See Derclaye and Favale 2010 *supra* at 110-112. See also, Elkin-Koren 2011 *supra* at 329.

¹⁰⁷ See section 3.4.4 below. See Perel and Elkin-Koren 2016 *supra* at 483.

¹⁰⁸ See Perel and Elkin-Koren 2016 *supra* at 510. See also, Elkin-Koren 2017a *supra* at pp.132, 138.

¹⁰⁹ Perel and Elkin-Koren 2016 *supra* at 491-492.

¹¹⁰ See Elkin-Koren, N. (2010). User-Generated platforms. In: R.C. Dreyfuss, D.L. Zimmerman & Harry First, eds., *Working within the boundaries of intellectual property*. Oxford University Press, pp. 111-136. Available at SSRN: <https://ssrn.com/abstract=1648465>, p.33 (hereafter, Elkin-Koren 2010).

copyright infringement liability¹¹¹ (so-called safe harbour protection).

According to the above, consumers and platform users accept that their use and access to the music content can be removed or restricted if the platform firm so decides or where the alleged copyright owner requests such restriction.¹¹² In these circumstances, as more fully discussed in Chapter four of this thesis, access terms that restrict such uses may conflict with statutory limitations and exceptions to copyright¹¹³ as well as the statutory scope of copyright protection¹¹⁴. At the same time, too “minor” restrictions may also be considered problematic for platform firms, as they risk copyright infringement liability.¹¹⁵

Furthermore, access terms may impose on copyright owners that the music content and by extension, their access to revenue generation may be removed or suspended, where the relevant platform firm so decides.¹¹⁶ The timing of such removal or suspension may affect revenue generation. There are both practical and policy reasons why this may be so. For one, the

¹¹¹ See Rosati, E. (2016). Why a reform of hosting providers' safe harbour is unnecessary under EU copyright law. *CREATe Working Paper 2016/11 (August 2016)*. Available at SSRN: <https://ssrn.com/abstract=2830440> or <http://dx.doi.org/10.2139/ssrn.2830440> [Accessed 6 Sep. 2017] (hereafter, Rosati 2016).

¹¹² See Perel and Elkin-Koren 2016 supra at 478.

¹¹³ Grondal, L. (2006). DRM and contract terms. *Indicare*, 2, p.3; Bechtold, S. (2004). Digital rights management in the United States and Europe. *The American Journal of Comparative Law*, 52(2), pp.323-382.

¹¹⁴ See Elkin-Koren, N. (1997). Copyright policy and the limits of freedom of contract. *Berkeley Technology Law Journal*, 12(1), pp.106-113; Dreier, T. (2005). Contracting out of copyright in the information society: The impact on freedom of expression. *Copyright and Free Speech: Comparative and International Analyses*, 390-391.; Noguchi, Y. (2006). Freedom override by Digital Rights Management technologies: Causes in market mechanisms and possible legal options to keep a better balance. *Intell. Prop. L. Bull.*, 11, pp.7-8. Moffat, V.R. (2007). Super-Copyright: Contracts, preemption, and the structure of copyright policymaking. *UC Davis L. Rev.*, 41, pp.55-59. Akester, P. (2010). The new challenges of striking the right balance between copyright protection and access to knowledge, information and culture. *EIPR*, 32(8), pp.375-376.

¹¹⁵ Rosati 2016 supra at 13-14.

¹¹⁶ See Perel and Elkin-Koren 2016 supra at 512-513.

“number of views or streams” of the music content may serve as an index of the copyright owner’s reputation and popularity.¹¹⁷ Such popularity is the basis upon which advertisement fees are generated and shared. It may also provide or attract revenue from alternative sources such as invitations for concert performance,¹¹⁸ brand endorsements and the like.¹¹⁹ Accordingly, removal of the music content after such index has been amassed, may affect the effectiveness of the alternative income streams.¹²⁰ Second, the effective enforcement of the copyright owners’ rights to revenue lies largely in the hands of the platform firms because the platform firm regulates access to the music content and access of the music content itself to the platform.¹²¹

Corollary to the foregoing, it may be problematic where the platform firm acts arbitrarily in denying or refusing access to the platform in the context of open and freemium music business model. This observation leads to the conclusion that access terms should explain procedures for denial/refusal of access to platforms. Such explanation, as further explained in chapter six, will enable the copyright owners continue to “trade” on their publicity through view count and ensuing social media and brand ambassador relationship.¹²²

¹¹⁷ See Elkin Koren 2011 supra at 323-324.

¹¹⁸ Rizk 2010 supra at 114-7.

¹¹⁹ See Hu, C. (2017). *Understanding a data-driven music industry culture - Lessons from fast forward* [Cherie Hu]. [online] hypebot. Available at: <http://www.hypebot.com/hypebot/2017/03/fastforward-understanding-a-data-driven-music-industry-culture.html> [Accessed 23 Nov. 2017] (hereafter, Hu 2017); Booth, N. and Matic, J.A. (2011). Mapping and leveraging influencers in social media to shape corporate brand perceptions. *Corporate Communications: An International Journal*, 16(3), pp.184-191 (hereafter, Booth and Matic 2011)

¹²⁰ Perel and Elkin-Koren 2016 supra at 483. See for example, the case of Attrakt against Google where Google’s arbitrary termination of contract and withdrawal/denial of access annihilated the business of Attrakt. *Attrakt S.R.L. v Google Ireland Ltd*, General Case List no. 86198/2013. Available on: <https://www.attrakt.com> (hereafter, *Attrakt v Google*)

¹²¹ See Perel and Elkin-Koren 2016 supra at 479-480.

¹²² See section 6.3, below.

Finally, access to the web platform and the available music content is free-of-charge. In the case of the former, this may be of immense benefit to copyright owners as the popularity of the platform provides authors (or artists) with considerable exposure that may be ordinarily out of its reach. In this regard, artists and copyright owners get to promote and create awareness to their music content. These have the potential to provide free promotion to uploaded content. Such benefit is crucial in the context of “plugging”.

Within the music industry, “plugging” has been a significant part of the business model and a key mechanism for promoting new music content. According to Towse, plugging could be an “expensive affair” with copyright owners spending thousands of pounds to promote new music content in seaside resorts and on the radio.¹²³ In the above context, the opportunities presented by the access rules are significant. At no cost to the copyright owner, its music content can be presented and promoted to the millions of platform users and advertisers. As a practical example, *NotJustOk.com*, available in South Africa and Nigeria has come to represent a powerful tool for plugging of new music content. In this regard, the platform provides the much-needed traction that copyright owners seek with open and freemium music business models and overcomes the constraints of geographical location (limited reach) and the inconvenience of online infringement.

Access rules embody the openness that responds to the universal access objective of copyright law. They can offer copyright owners (performers and artists, particularly) the popularity and promotion that brings them more live performance opportunities, more brand sponsorships and more personality right licensing opportunities. Due to the fact that consumers are able to access the platform free-of-charge, the copyright owner enjoys

¹²³ Towse 2017 supra at 415.

instant access to millions of consumers to whom it may communicate and advertise its music content.¹²⁴ However, there is the question of whether such exposure constitutes adequate consideration for the music content provided through a *gratis* license.¹²⁵

3.4.3 Terms relating to usage of the music content (“usage terms”)

Usage terms are closely connected to the terms regarding access. In this regard, usage terms determine what users of the platform and members of the public may do in relation to the music content. Members of the public may “like” and repost available music content. “Like”, “share”, “repost” are some of the buttons available on digital platforms. Users of these platforms may click any such button to express their feelings regarding the relevant content on the platform. As Robbins argues, clicking “like” or “share” may be construed as speech.¹²⁶ They may also share the music content on other platforms using the facilities provided by the platform firms. The use of the music content by members of the public is mostly experiential and collaborative.¹²⁷ Such collaboration may be at several levels depending on the extent of the commitment required of participants. In this regard, the users of the platform may be restricted only to consumption or may be permitted to use the

¹²⁴ See Schultz 2016.

¹²⁵ See Rajan 2010 *supra* at 929. See also, Rosch, J. (2013). *Concurring and dissenting statement of Commissioner J. Thomas Rosch regarding Google's search practices - In the matter of Google Inc.*. 111-0163. [online] pp.1-3. Available at: https://www.ftc.gov/sites/default/files/documents/public_statements/concurring-and-dissenting-statement-commissioner-j.thomas-rosch-regarding-googles-search-practices/130103googlesearchstmt.pdf [Accessed 22 Nov. 2017]; Lamadrid, A. (2013). *More on Google: is scraping anticompetitive?*. [online] Available at: <http://More on Google: is scraping anticompetitive?> [Accessed 22 Nov. 2017].

¹²⁶ See Robbins, I.P. (2014). What is the meaning of like: The First Amendment implications of social media expression. *Fed. Cts. L. Rev.*, 7, p.123 at 140-142.

¹²⁷ See for example, paragraphs 6.7 and 8 of the Statement of Claim and paragraph 46 of the Statement of Defence in *PRS v Soundcloud*. See also, Elkin-Koren 2011 *supra* at 312; Elkin-Koren 2010 *supra* at 8-9, 17-18.

music content in other creative endeavours.¹²⁸ The design of the platform often determines the nature of the collaboration and the nature of the relationships among users.¹²⁹

Platform firms utilise the tags¹³⁰ and title provided by the uploaders to offer search facilities and recommendations¹³¹ related to the music content to users.¹³² User preferences in terms of music content are used to rank popular music content such that users can identify and view popular music content.¹³³ More generally, the music content is used to provide a webcast for users of the web platform. In this regard, the platform firm automatically selects continuous, successive music content for the user's listening pleasure once the user has selected specific music content.¹³⁴ The music content is also used to provide a popularity index that enables uploaders to gauge public engagement with its uploaded music content.¹³⁵ Specific music content may be selected and promoted to registered users through various means such as on the platform, via email and also, on social media platforms.¹³⁶ In some cases, platform firms also publicise and promote the

¹²⁸ See Elkin-Koren 2011 *supra* at pp. 327 – 328.

¹²⁹ *Ibid* at pp.328-329.

¹³⁰ A tag is a “word, phrase, or name used to identify digital content such as blog and social media posts as belonging to a particular category or concerning a particular person or topic”. See Tag. (2017). In: *Oxford Dictionaries*. [online] Oxford University Press. Available at: <https://en.oxforddictionaries.com/definition/tag> [Accessed 22 Nov. 2017].

¹³¹ Paragraph 6.10 – 6.13 of the Particulars of Claim and paragraph 47 Statement of Defence in *PRS v Soundcloud*.

¹³² See Elkin-Koren 2010 *supra* at 8-9, 17-18. See also paragraphs 6.1,6.5 of the Particulars of Claim in *PRS v Soundcloud*.

¹³³ *Ibid*. For the description of the various features offered by the platform firm, see paragraphs 40 – 41 of the Statement of Defence in *PRS v Soundcloud*. Paragraph 41 specifically links the search facility to Google search engine.

¹³⁴ See generally, Heald, P.J. (2014). How copyright keeps works disappeared. *Journal of Empirical Legal Studies*, 11(4), pp.829-866 (Heald 2014b). See also, paragraph 48 of the Statement of Defence in *PRS v Soundcloud*.

¹³⁵ See Rajan 2010 *supra* at 929. See also Elkin-Koren 2011 *supra* at 332; paragraphs 49 – 50 of the Statement of Defence in *PRS v Soundcloud*.

¹³⁶ *Ibid*. See also, paragraph 52 of the Statement of Defence in *PRS v Soundcloud*.

availability of and available music content on its platform thereby encouraging more user engagement with the platform and its services.¹³⁷

The pertinent question arising in this context relates to the interface between the nature of the usage rules and the scope of the rights, which is available to copyright owners in respect of the music content. This is a significant issue when it is considered that the boundaries of the exclusive rights determine the scope of the “rights” available to the copyright users.¹³⁸

3.4.4 Practical implementation of the copyright-based terms

Having identified the copyright-based terms applicable to the open and freemium music business model, the next paragraphs provide a brief overview of the practical implementation of these rules. Examples include YouTube’s Content ID system, Facebook’s Rights Manager, Notjustok.com’s advertising and the like.

The Content ID for the copyright community developed by YouTube operates very much like both a payment system and a decision-making system regarding the copyright-protected music content. As a payment system, it operates between the copyright owner and YouTube, to signal whether revenue is to be expected in relation to specific music content through YouTube’s AdSense program.¹³⁹ In this context, the copyright owner from YouTube’s perspective may be the actual copyright owner or an aggregator having the authority of a multiplicity of actual copyright owners to

¹³⁷ For instance, see NotJustok.com; tooXclusive. (2017). *Contact Us « tooXclusive*. [online] Available at: <http://tooxclusive.com/contact-us/> [Accessed 21 Nov. 2017]. See also, Soundcloud’s admission in paragraphs 51 – 52, 54 of its Statement of Defence in *PRS v Soundcloud*.

¹³⁸ See Greenleaf, G. and Bond, C. (2013). Public rights in copyright: What makes up Australia’s public domain? *Australian Intellectual Property Journal*, 23, 157-159; Geist 2013 supra.

¹³⁹ See Perel and Elkin-Koren 2016 supra at 513-514.

deal with YouTube on their behalf.¹⁴⁰ As a decision-making system, Content ID offers a mechanism for automatic detection of uploaded music content that was put up without the consent and/or authorisation of the copyright owner.¹⁴¹ The system creates an ID File for music content, and stores it in a database. This reference content comes mostly from several pre-selected partners: an arrangement that naturally leaves some blind spots when it comes to independent musicians and other rights holders.¹⁴² The Content ID system is only available to copyright owners who meet specific criteria specified by Google.¹⁴³ One of such criteria is that a Content ID applicant must have exclusive rights to a fairly large music catalogue sought to be uploaded.

When another platform user uploads music content (in the form of a video), it is checked against the database, and the Content ID system flags the video as a copyright violation if such content matches music content previously uploaded by a Content ID partner/copyright owner.¹⁴⁴ When this occurs, the copyright owner has the choice of muting the audio of a video file, blocking the video to make it unavailable, permitting continued reproduction while monitoring the viewing statistics of the video, or adding advertisements to the video.¹⁴⁵ Unless the copyright owner accepts the displaying of advertisements alongside its music content, using the Content ID system, no revenue can accrue to such copyright owner.

¹⁴⁰ See Support.google.com. (2016). *Multi-Channel Network (MCN) overview for YouTube Creators - YouTube Help*. [online] Available at: <https://support.google.com/youtube/answer/2737059?hl=en> [Accessed 29 Jan. 2018].

¹⁴¹ See Heald 2014 supra at 313; Official Google Blog. (2007). *Latest content ID tool for YouTube*. [online] Available at: <https://googleblog.blogspot.co.za/2007/10/latest-content-id-tool-for-youtube.html> [Accessed 21 Nov. 2017].

¹⁴² See Perel and Elkin-Koren 2016 supra at 513-514.

¹⁴³ Ibid.

¹⁴⁴ See Perel and Elkin-Koren 2016 supra at 477-479.

¹⁴⁵ Ibid at 504-507, 515. See also Heald 2014 supra at 313.

To be able to receive the revenue accruing from his decision to include advertisements alongside his music content on YouTube, the copyright owner is required to operate a “Google AdSense” account.¹⁴⁶ The Google AdSense account may only be established and operated based on an AdSense Agreement – a standard contract drafted by Google.¹⁴⁷ Under the AdSense arrangement, if Google were to serve advertisements alongside or simultaneously with the music content, the payment made to Google by the company whose advertisement is served would be split between the copyright owner and Google. Advertising fees becomes the revenue stream – it serves, implicitly as the new value metric available to the copyright owner in an environment where exploitation of reproduction rights previously held sway. In this context, the copyright work may be reproduced and distributed repeatedly without a single payment made to the copyright owner. Payment is only made to the copyright owner when the consumer takes interest in the advertisement running on the copyright work and if the copyright owner is part of the AdSense program. So, for example, music content uploaded by an AdSense partner may show advertisement of a new baby monitor before, during and/or at the end of communicating the music content to the consumer. But the revenue paid to the copyright owner would only accrue because the advertisement of the baby monitor was served to the consumer. This would be the case because the consumer indicated that his attention was first drawn to the music content – even if he ends up seeing the music content *and* the baby monitor advertisement. Access to the consumer is procured through his interest in the copyright-protected music content. Accordingly, the AdSense account and the AdSense relationship enable payment of revenue for the application of advertisement on the music content.

¹⁴⁶ See for example, the case of *Attrakt v Google* supra where Google’s arbitrary termination of contract and withdrawal/denial of access annihilated the business of Attrakt.

¹⁴⁷ *ibid.*

Without Content ID, a copyright owner would be ratcheting up streams with no revenue to show for it. Indeed, Content ID accounts for over a third of the monetized views on YouTube.¹⁴⁸

NotJustOk.com embodies this philosophy of generating revenue from advertising enabled by the availability of music content.¹⁴⁹ Its approach provides a platform for copyright owners to, openly and freely share their music with fans and interested parties. The Terms of use direct artists to share their music with friends, fans and followers. Its stated philosophy is unpretentious:¹⁵⁰

NotJustOk.com offers a platform where Nigerian Music lovers around the world can access, listen, stream and give their opinions on Nigerian music content anywhere and anytime. Our music content is accessible at any time to our audience in all time zones. Furthermore, artists find our platform a useful source of direct feedback from their fans and a way to gain insight into what their fans respond to.¹⁵¹

As a firm, the operators of NotJustOk.com attracts a lot of advertising revenue due to its popularity as the go-to place for free music content in Nigeria. In fact, NotJustOk.com recognizes the shift to access to the customer and the customer's data as the new value metric. It recognizes that by being the most-visited music platform, revenue does not come from reproduction but from its amassing of millions of "page views". This acquisition of page views – the foundation of its existence – is neither focused on the copyright owner nor on the reproduction of its work. Rather, its objective is to attract the customer's "eye" – the only thing that an advertising company will pay for.¹⁵² It is akin to the purpose of advertising in communicating a firm's message to the public in a

¹⁴⁸ See Perel and Elkin-Koren 2016 supra at 477-479.

¹⁴⁹ Similar systems are in place as evident from Facebook, tooXclusive.com and Soundcloud.

¹⁵⁰ See Schultz 2016 supra.

¹⁵¹ <http://notjustok.com/about/>

¹⁵² Zeff, R.L. and Aronson, B. (1999). *Advertising on the Internet*. John Wiley & Sons, Inc.

medium/form where such message is most likely to be received.¹⁵³ However, there is no provision for NotJustOk.com to share such advertising revenue with the copyright owner.

Beyond providing a system that has the potential to generate some advertising revenue for the copyright owner, the Content ID and AdSense systems and other similar systems such as Facebook's "Rights Manager" also serve to provide a mechanism for platform firms to determine the level of access, which the platform users may enjoy with respect to the music content.¹⁵⁴ In this regard, the platform firm may restrict or prevent the upload of music content based on prior arrangement with "participating right-holders". Such music content may be blocked, removed or deleted. This is achieved through the operation of an automated surveillance system that permits some (but not each) copyright owner to upload their music content in a reference file and specify what action may be taken when a non-participating uploader attempts to upload music content matching the former music content.¹⁵⁵

3.5 The stakes at issue in the music copyright industry

One of the key policy questions is whether compelling platform firms to obtain a paid licence for the music content in the open and freemium music business model may benefit the music copyright industry and the users and final consumers of music content. As some authors have rightly noted, a truly copyright-free music content may not always be as open to competition as music content with reasonable payment structures.¹⁵⁶ According to Perel

¹⁵³ *ibid.*

¹⁵⁴ Perel and Elkin-Koren 2016 *supra* at 476-477.

¹⁵⁵ *Ibid* at 478. See Paragraph 6.19, 7 of the *PRS v Soundcloud* Particulars of Claim. See [Rightsmanager.fb.com](https://rightsmanager.fb.com). (2017). *Copyright Management | Facebook*. [online] Available at: <https://rightsmanager.fb.com> [Accessed 23 Nov. 2017]; Elkin-Koren 2017a *supra*.

¹⁵⁶ Ginsburg 2017 *supra* at 69-70, 75-76; Rajan 2010 *supra* at 935-936.

and Elkin-Koren, algorithmic copyright enforcement may save licensing costs and grant a measure of access to copyright products, but they also regulate what users can do with the music content. In this regard, algorithms can lead to another user's inability to upload a particular music content file.¹⁵⁷ Another question relates to the issue of whether the restrictions imposed on platform users and those obligatory for platform firms to put up are permissible within the scope of rights available to the copyright owner. In this regard, it is important to recognise the relationships and interests between the market players in the open and freemium music business context.¹⁵⁸

On the one side, there are the authors and owners of copyrights in the music content which are strategic for the implementation of the open and freemium music business model in terms of advertising and, which can include individual artists, composers and companies predominantly involved in music recording, production, publishing and distribution. Three major record companies dominate the global music industry. These are Sony Music Entertainment, Universal Music Group and Warner Music Group. These record companies are large-sized conglomerates with branches in many countries. They also have a significant music distribution network with a large artist roster housing some of the world's biggest music artists. These companies control many smaller record labels and may exercise oligopolistic powers, which may influence prices of music content and thus directly affect the position of competitors.¹⁵⁹ Every other record company outside these three global majors are usually

¹⁵⁷ See Perel and Elkin-Koren 2016 *supra* at 477-478. A slightly different position has been adopted by Zimmerman, who has argued that money or revenue does not provide incentives for further creativity. See Zimmerman 2011 *supra* at 38-40.

¹⁵⁸ See Elkin-Koren 2011 *supra* at 311.

¹⁵⁹ See Garcia, K.A., 2014. Penalty default licenses: A case for uncertainty. *NYUL Rev.*, 89, p.1117.

referred to as “independent” record labels. In South Africa, Universal Music Group and Sony Music Entertainment also operate as the major record labels, while Warner Music Group is represented by Gallo Records.¹⁶⁰ In the case of Nigeria, these three major record labels are not active as the major record labels. While Sony Music Entertainment began operations in Nigeria in 2016,¹⁶¹ Universal Music Group only commenced operations in Nigeria in 2017.¹⁶² Warner Music Group is yet to establish operations in Nigeria. The situation is the same on the publishing side. It is noted that there may be choice of law and jurisdictional questions given the transnational dimensions of these companies in South Africa and Nigeria.¹⁶³ However, the focus of this thesis is on the regulation of the open and freemium music business model at the national (Nigerian and South African) level, given that Nigerian and South African copyright laws dictate copyright in the music content as discussed in this thesis. Therefore, questions of choice of law and jurisdiction are not explored in this thesis.

In essence, independent record labels and music publishers populate the music industry in South Africa and Nigeria. As copyright owners, these independents qualify as SMEs due to their small size and small market share.¹⁶⁴ As SMEs, these copyright owners do not have the resources and market power of the major record companies or any large-sized firm. Accordingly, they need

¹⁶⁰ See Matzukis, N. (2013). *South African music law, contracts and business*. 3rd ed. Auckland Park: Academy of Sound Engineering; Fouché 2015 supra at pp. 34-8.

¹⁶¹ allAfrica.com. (2016). *Nigeria: Sony Music Entertainment opens office in Nigeria*. [online] Available at: <http://allafrica.com/stories/201602250349.html> [Accessed 29 Jan. 2018].

¹⁶² Aroture, B. (2017). *Copyright Society of Nigeria welcomes Universal Music Group to Nigeria | Nigerian Law Intellectual Property Watch Inc.* [online] Nigerian Law Intellectual Property Watch Inc. Available at: <https://nlipw.com/copyright-society-nigeria-welcomes-universal-music-group-nigeria/> [Accessed 30 Jan. 2018].

¹⁶³ See van Eechoud, M.M., 2003. *Choice of law in copyright and related rights: alternatives to the lex protectionis* (Vol. 12). Kluwer Law International.

¹⁶⁴ Abor and Quartey 2010 supra at 219.

consistent growth in terms of revenue to lower the risk of financial failure and market exit.¹⁶⁵ The aim pursued by this group is to maximize the revenue originating from licensing their music copyright out, with the purpose either to reinvest or simply to make profits out of their assets.¹⁶⁶ Indeed as argued below,¹⁶⁷ the greater the revenue, the better their chances of staying in the market. This correlates with their status as small business.¹⁶⁸

On the other hand, there are those players who (may) need a licence to use the music content protected by copyright, to legally implement their communication of the music content in the course of advertising. The aim pursued by this second group of firms is to either obtain a *gratis* licence or to pay the lowest possible amount as royalties and to obtain fair licensing terms. This is expected to enable them enhance their competitiveness and recoup their investments in designing the platform and its features. These market players do not wish to be compelled to undertake onerous filtering and monitoring measures to check copyright infringement. Finally, also a third category of market player operates within the open and freemium music business model context, namely the creative users who may apply the music content to producing new creative outputs.

As shifts in business models occur in the wake of digitization and information technologies, the copyright owner, like every business entity, relies more and more on virtual or digital platforms to distribute the copyright products and generate revenue therefrom. Put differently, copyright owners usually rely on the assistance of digital platforms and firms who operate such

¹⁶⁵ Okpara, J.O. (2011). Factors constraining the growth and survival of SMEs in Nigeria: Implications for poverty alleviation. *Management Research Review*, 34(2), pp.156-171.

¹⁶⁶ See Elkin-Koren 2017 *supra* at 135-137.

¹⁶⁷ See Sections 5.3 and 6.3, below.

¹⁶⁸ See Coetzer 2009 *supra* at 41; Rethink Music 2015 *supra* at p.5.

platforms to realise the economic interests from exploiting their exclusive rights through business models. If platform firms were to exclude paid licensing from the open and freemium music business model, there may be fewer firms investing in the creative outputs in copyright markets. It should be recalled that copyright owners are usually incentivised in investing resources in creativity if they get rewarded for their economic efforts. Rewards may consist either in the payment of royalties or in sharing of revenue realized from business activities ancillary to the dissemination of music content.¹⁶⁹ Copyright owners thus have the need to be able to exert control over their creative outputs¹⁷⁰ and to be able to reduce the cost of licensing and monitoring use of their creative outputs.¹⁷¹ Exclusion of paid licensing from the open and freemium music business model may therefore result in less creativity and less competition within the music copyright industry.¹⁷² In other words, the immediate consequence could be a reduced number of professional creative outputs.¹⁷³ The ultimate effect could be detrimental to competition as well as the welfare of consumers, and may impact negatively on their consumption levels. A slightly different position has been adopted by Elkin-Koren, who has argued that the music content is experiential and demand is dependent on individual perception.¹⁷⁴ Nevertheless, there is significant consensus in the literature that copyright is considered a tool for revenue generation and whether it is directly (as in the case

¹⁶⁹ See Carroll, M.W. (2007). Creative commons as conversational copyright. *Public Policy Research Paper*, (2007-8), p.530 (hereafter, Carroll 2007); Dusollier 2006 supra at 281, 288; Kim, M. (2007). The Creative Commons and copyright protection in the digital era: uses of Creative Commons licenses. *Journal of Computer-Mediated Communication*, 13(1), pp.187-209.

¹⁷⁰ Dusollier 2006 supra at 280.

¹⁷¹ Perel and Elkin-Koren 2016 supra at 477.

¹⁷² See section 2.2.1, above.

¹⁷³ Ibid. Note that the impact of this may not be as strong as it may be in the context of books and scholarly articles, a distinction recognised by Ginsburg. See Ginsburg 2017 supra at 69.

¹⁷⁴ Elkin-Koren 2011 supra at pp.312, 326.

of assignment or licensing) or indirectly applied (as in the case of brand sponsorships and licensing of personality rights), the expectation of revenue persists.¹⁷⁵ Indeed, even in the case of the Creative Commons and other open business model, actions for copyright infringement results in damages once the work is used outside the dictates of the licence.¹⁷⁶ Further, as Elkin-Koren points out, even though user-generated content is not produced for profit, it is increasingly shaped by market forces and can be distributed in a commercial setting and may, in fact, generate revenues.¹⁷⁷ The platform firms offer several economic incentives – monetising activities through advertisements, charging subscription fees, using free distribution to market artists by cashing in on the online reputation. Platform firms generate revenue from social motivation and sometimes share advertising revenue with copyright owners who may also be platform users.¹⁷⁸

On the other side of the spectrum, it is to be noted that platform firms as a category of copyright users, invest considerably in creating and operating platforms.¹⁷⁹ These platforms play a central role in the deployment of open and freemium music business models. They facilitate trade and increase economic efficiency by making it easier for copyright owners to interact with their customers and people who value their music content and creative outputs.¹⁸⁰ For example, a person who loves Flavour’s “*Nwa Baby*” can listen to the song on YouTube or on NotJustOk.com at no charge. In turn, Flavour or the copyright owner can see on YouTube the number of views to gauge

¹⁷⁵ Booth and Matic 2011 *supra*.

¹⁷⁶ *Jacobsen v. Katzer supra*.

¹⁷⁷ See Elkin-Koren 2010 *supra* at pp. 22 – 23.

¹⁷⁸ See Elkin-Koren 2011 *supra* at pp. 323 – 324.

¹⁷⁹ Perel and Elkin-Koren 2016 *supra* at 518-520.

¹⁸⁰ See Evans 2016 *supra* at 6. See also, Kosciak, M. and Savelka, J. (2013). Dangers of over-enthusiasm in licensing under Creative Commons. *Masaryk UJL & Tech.*, 7, p.218; Elkin-Koren 2011 *supra* 5 at 343, 345; Perel and Elkin-Koren 2016 *supra* at 485.

consumer reaction to the song. Especially in low-income economies like Nigeria and South Africa, platforms and platform firms can help achieve wider revenue-based distribution and allow copyright owners to concentrate on creating better music content.¹⁸¹

However, platform firms need a large music catalogue that will attract both platform users and advertisers to their platform. As stated in the Particulars of Claim filed in the suit between PRS and Soundcloud in the UK, such user-friendly service centred around availability of music content may include: provision of categorised and easily searchable music content¹⁸²; making recommendations to users based on their indicated preferences, pushing and promoting particular music content to users, providing facilities for users to follow, like and share particular music content.¹⁸³ Platform firms therefore incur costs of maintenance and updates, online marketing, managing the online community, protection against potential legal liability and they need ways to recoup these costs. They therefore adopt different business models (such as advertising) to recoup costs.¹⁸⁴ Its services are provided with a view to generating revenue therefrom.¹⁸⁵ Hence, by coordinating technology and by enabling the growth of music distribution, platform firms stand in a crucial position in relation to balancing the so-called private-public interest inherent in copyright law.¹⁸⁶

Given that the revenue flow is from advertising services, the availability of music (and other popular) content is crucial to the

¹⁸¹ See Rethink Music 2015 *supra* at 5.

¹⁸² Example, paragraph 40 – 41 of the Defence filed in *PRS v Soundcloud*.

¹⁸³ See paragraph 8 of the Particulars of Claim and paragraph 70 of the Defence filed in *PRS v Soundcloud*.

¹⁸⁴ See Elkin-Koren 2010 *supra* at 11.

¹⁸⁵ See paragraph 52 of the Defence filed in *PRS v Soundcloud*; Elkin-Koren 2010 *supra* at pp. 8 –10.

¹⁸⁶ Elkin-Koren 2011 *supra* at 319, Elkin-Koren 2017a *supra* at 133-135. Russi 2011 *supra* at 109-110.

platform firm's success. In each case, the relevant platform firm aggregates a large music catalogue thereby increasing the likelihood that music consumers will be attracted to the site and companies seeking to advertise their products would pay a fee to access the advertising audience. In the circumstances, there is the question whether platform firms should be compelled to share advertisement revenue with copyright owners bearing in mind that the availability of the platform can create revenue streams from brand sponsorships and live performances for copyright owners.¹⁸⁷ Platform firms generally pursue the aim of working outside the exclusive rights framework to obviate any need for licensing obligations.

For creative users, there is some room within copyright limitations and exceptions and subject matter restrictions that should enable them make certain creative uses of music content.¹⁸⁸ Users of music content in the digital environment generally are looking for: unrestricted access for transformative use; interaction; absence of contractual and technical restrictions as well as absence of constraints that may prevent them from engaging with the music content, transforming and remixing it.¹⁸⁹ Accordingly, certain restrictions in their access to the music content and the platform itself may frustrate the aim of this category of users in investing in further creative efforts. Such will be to the detriment of the copyright market.

Beyond users who propose to apply the copyright-protected music content to further creative activities, there are consumers

¹⁸⁷ See Evans 2016 *supra* at 7; Heald 2014 *supra* at 318; Coetzer 2009 *supra* at 66-72.

¹⁸⁸ See Carroll 2007 *supra* at pp.448-9. See also, Dusollier 2006 *supra* at pp.285-6; Elkin Koren user rights *supra* at pp. 4, 12-14, 19-20.

¹⁸⁹ See Elkin Koren user rights *supra* at pp. 4, 12-14, 19-20. Users producing User-Generated Content (UGC) are looking for attribution, online reputation, autonomy that can restrict unacceptable commercialisation, autonomy over use of purchases.

who need to be able to access the music content for the purposes of consumption and consequent interaction with the copyright owner.¹⁹⁰ For this category, it is important to them that their quest to enjoy the music content does not engender copyright infringement liability for them.¹⁹¹

Therefore, while economic and social benefits stimulated by the open and freemium music business model are widely recognised by scholars and regulatory institutions, it is also true that the market players in that context present diverse interests, which are crucial to the promotion of competition in the music copyright industry.

3.6 Conclusion

Copyright protection and the open and freemium music business model play a significant role in today's information-based economy. Copyright represents a relevant incentive for firms to create more and to enhance dynamic efficiency. The music content produced by copyright owners may then be subject to the open and freemium music business model processes; and the open and freemium music business model, it is well-known, may contribute significantly to economic growth. The copyright terms facilitate access to music content and have the potential to help in revenue generation for copyright owners. Both copyright and the open and freemium music business model, therefore, aim at enhancing societal welfare, which is crucial in competition policy's goals.

Besides the importance and meaning of the open and freemium business model, the chapter has shed light also on the different processes that may lead to its deployment. Further, relevant questions have been identified, particularly the question of rewarding copyright owners and addressing users' needs in the

¹⁹⁰ See Dusollier 2006 *supra* at 290; See Elkin Koren user rights *supra* at pp. 16-18.

¹⁹¹ *Ibid.*

context of the open and freemium music business model. As argued above, rewarding copyright owners' investments in creativity may consequentially provide benefits for both consumers and competition, to the benefit of the welfare of the society as a whole. Equally important was the analysis of the most common copyright terms. The nature of the copyright term implemented may discourage or incentivise the participation of copyright owners and users to the open and freemium music business model. For instance, terms relating to licensing pose many questions on the subject of revenue and the issue of platform firms' obligations regarding paid licensing and potential liability for copyright infringement. Similarly, access and usage terms may determine the level of access to the music content, which platform users may enjoy.

As some authors have noted, providing music content to consumers at zero price, whilst laudable, may still exceed the boundaries of the copyright law regulatory framework and its objectives. If the platform firms and the copyright owners agree to provide zero-price access to consumers, the terms of such agreement may restrict what consumers and users may do with the music content beyond consumption (i.e. listening) and may also adversely affect the economic interests of the copyright owners.

Further, such terms may play a role in the determination of whether the platform firm may incur liability for copyright infringement. This may be the case where the copyright owner is presumed to have consented to the placing of the music content on the platform when no request is made to takedown the music content. The terms may also determine copyright infringement liability where the platform firm is presumed to have knowledge of the infringing nature of any use of the music content on such platform.

The terms of inclusion or exclusion of the copyright owners from revenue share may lead to greater profit for platform firms as

distributors to the detriment of the economic interests of the copyright owners.

The above analysis reveals that the deployment of the open and freemium music business model is a veritable example of innovation. As such, the business model may boost competition and add to a firm's competitive advantage by ensuring that copyright-protected music content is used to set a firm ahead of its competitors in various markets. However, there is need to account for the copyright protection inherent in the music content utilised in the open and freemium music business model. Accordingly, the open and freemium music business model may also raise concerns under both South African and Nigerian copyright laws. This is because, as argued in this chapter, the open and freemium music business model represents a context where decisions are made and processes implemented and policies applied that affect both income generation for copyright owners and access for copyright users.

All these conclusions will be thoroughly justified in the next chapters, which will shed further light on the need for the regulation of the open and freemium music business model and will better explain the opportunities and challenges emanating from these terms.

Chapter Four: Copyright consequences in the deployment of the open and freemium music business model

4.1 Introduction

The preceding chapter examined the processes and copyright terms regarding the music content used in the context of the open and freemium music business model. That chapter showed how copyright law influenced the establishment and implementation of the terms that determine the conduct of platform firms, copyright owners and users of the platform in relation to the music content.

Corollary to the foregoing, this chapter is aimed at highlighting the need for the regulation of the open and freemium music business model. To this end, the chapter seeks to identify and analyse whether the copyright terms identified in Chapter three are aligned with the objectives of the copyright law framework. Accordingly, after an in-depth examination of the copyright terms from the perspective of the copyright regulatory framework, this chapter proceeds to examine the regulatory terrain for the business model in South Africa and Nigeria. From the perspective of copyright law, the open and freemium music business model may be aligned with the copyright system where copyright owners are incentivised and rewarded for their creative efforts and investments. This is also the case whenever copyright users are able to enjoy both creative and consumptive access to the music content. By providing for revenue for copyright owners and by ensuring access to users, the open and freemium music business model may serve the objectives of copyright law. However, the establishment and implementation of the copyright terms involved in the open and freemium music business model has created concerns for the incentives expected by the copyright owners both in terms of licensing revenue and in terms of the potential for success in obtaining

damages for infringement. Some of these concerns relate to the concepts of “value gap” and “scraping” said to be perpetuated by the copyright terms within this business model. There are also concerns regarding the ability of users of copyright works to lawfully access and use the music content in every manner outside the protected uses guaranteed by the copyright framework. While copyright users expect to use the music content for a wide variety of purposes given the limitations and exceptions to copyright, the copyright terms reveal some restrictions on those expectations.

Section 4.2 analyses the relevant exclusive rights granted under copyright law vis-à-vis the copyright terms (licensing terms, access and usage terms) as well as the relevant limitations and exceptions to copyright protection in relation to the copyright terms.¹ The “template” provided by the international copyright treaties for these exclusive rights and the limitations and exceptions thereto is used as a benchmark to analyse the copyright terms. Before focusing exclusively on the regulatory experiences, as they currently exist in South Africa and/or Nigeria, it is important to first consider the various international copyright instruments that address the exercise of copyright. The reason for this is not far-fetched. National regulation of copyright has largely taken its cue from existing international instruments and in particular the Berne Convention, the TRIPs Agreement and the WCT. Despite the similarities that may arise from using the same legislative “template”,² the ratification approach specific to each jurisdiction as well as the promise of an eventual regulatory cumulative body of interpretative material as constructed by

¹ As already stated, the establishment and implementation of the copyright terms stem from the platform firm’s interpretation of the copyright law system. See Section 3.4, above.

² See Hugenholtz, P.B., van Eechoud, M., Gompel, S.V. and Helberger, N. (2012). *The Recasting of Copyright & Related Rights for the Knowledge Economy*. Vancouver, 31 (hereafter, Hugenholtz and others 2012).

the courts are factors that result in national differences.³ Consequently, the analysis here shall begin with a brief description of any guidance that can be gleaned from this international “template”, before moving on to the consideration of the South African and Nigerian respective regulatory experiences. Sections 4.3 and 4.4 examine the copyright terms in the light of the regulatory framework provided by copyright law in South Africa and Nigeria, respectively. In doing so, the common position applicable to both South Africa and Nigeria will be pointed out while differences will be highlighted. In this regard, it is important to note that due to the influence of international treaties on domestic copyright laws, differences may not be so acute. Further, the two sections consider briefly, the recent proposed copyright reform currently going on in the two countries and how the Bills respond to the open and freemium music business context. Section 4.5 concludes.

4.2 The copyright terms and the international copyright framework

As stated in Chapter three, above, the copyright terms implemented in the open and freemium music business model relate to the issue of use and exploitation of copyright in the music content. In the case of the licensing terms, such relate particularly to the issue of revenue accruable to the copyright owner in respect of the music content.⁴ Access terms relate *inter alia* to free access to the platform that copyright owners have as uploaders to upload their music content. In the case of usage terms, copyright owners as platform users would be unable to use the platform in the event of a match between their

³ Depreeuw, S. (2014). *The variable scope of the exclusive economic rights in copyright*, Wolters Kluwer, 487; Reid, L., 1972. The judge as law maker. *J. Soc’y Pub. Tchrs. L. ns*, 12, p.22.

⁴ See Section 3.4.1, above.

uploads and the music content contained in a previously-generated reference file. Further, the platform firm will deny the music content itself access to the platform again on the grounds that such content matches previously-uploaded content.⁵ Specifically, usage terms deal with the scope of permissible uses that the platform firm may make of the music content without the shadow of copyright infringement liability.⁶

Corollary to the foregoing, a crucial part of the analysis of the copyright terms implemented in the open and freemium music business model hinges on their relationship to the scope of the exclusive rights framework and the limitations and exceptions to those rights. As the licensing terms involve *gratis* licenses as well as revenue-based licenses,⁷ the question of their alignment with the copyright law framework must be answered from the perspective of the relationship between the revenue streams and the exclusive rights available within the copyright framework. In particular, it may be argued that despite the use of their copyright-protected music content, the licensing terms are not aligned with the incentive basis for copyright protection. In the case of usage terms and access terms, these not only raise the question of the scope of the exclusive rights; they also raise questions regarding the scope of limitations and exception to copyright protection.

In providing a platform for the hosting and storage of music content alongside a notice and takedown system, the platform firms are able to procure a *gratis* licence from the uploader. Bearing in mind that on one hand, a wide range of music content attracts consumers and on the other hand, the consumers are much sought-after by

⁵ Sections 3.4.2 and 3.4.4, above.

⁶ See Section 3.4.3, above.

⁷ See Sections 3.4.1 and 3.4.4, above.

advertisers, the significance of the *gratis* licence is heightened. In these circumstances, the *gratis* licence provides the platform firms with the freedom to apply the available music content towards attracting and retaining the attention of members of the public and in rendering their advertising services. For example, in the case of *Viacom v YouTube*, it was alleged that at its inception, YouTube encouraged massive uploads to gain user traction.⁸ Such user traction in turn attracts advertising revenue as third party firms pay the platform firms to have their products and services showcased to the members of the public who visit the platforms. With respect to the revenue-based licence, copyright owners operating within the licensing terms of the open and freemium music business model enjoy the opportunity to generate revenue by not requesting the platform firm to remove or disable access to its music content and instead, monetizing the access to such music content through advertisements.

In these circumstances, advertising creates the nexus between the source of revenue and the music content. To obtain and retain the attention of the users of the platform, the platform firms would index, categorise and tag the music content, optimising access and interaction with it.⁹ Accordingly, in considering the relationship between the copyright terms and the copyright framework, the pertinent question relates to whether these activities of the platform firm itself are within or outside the scope of the exclusive economic rights available to the copyright owners under the copyright framework. In this regard, the most relevant rights for copyright owners in the online context in which the open and freemium music business model operates, would be the right of reproduction and the

⁸ No. 07 Civ. 2103, 2010 WL 2532404. See paragraphs 3 to 6 and 31 particularly of the Complaint for declaratory and injunctive relief and damages.

⁹ See section 3.4.3, above.

right of communication to the public.¹⁰ The other economic rights recognised by the Copyright Act in the case of Nigeria and South Africa, are either generally understood to be limited to tangible copies or more relevant in the physical space and are accordingly not relevant to the internet context of the open and freemium music business model.

Further, it is to be noted that the boundaries of the exclusive rights determine the scope of the permissible uses that may be available to the copyright users. These permissible uses fall within the purview of limitations and exceptions to copyright protection. Accordingly, in considering the relationship between the copyright terms and the copyright framework, the other pertinent question relates to whether the implementation of the copyright terms are cognisant of the limitations and exceptions to copyright protection. The most relevant limitation and exception to copyright protection in the open and freemium music business model context, would be the fair dealing exception¹¹ and the limitation to copyright protection imposed by statutory and/or compulsory licenses.¹² The other limitations and exceptions such as limits on copyright subject matter, originality and fixation requirements, the exclusion of ideas, and the duration of rights, recognised by the copyright system, are of more general application and are accordingly not specifically relevant to the internet context of the open and freemium music business model.¹³

¹⁰ See Angelopoulos 2016 supra at p.13; Harms 2012 supra at 217.

¹¹ See Samuelson 2017 supra at 36-42.

¹² Ibid at p.13.

¹³ See Challis, B. (2015). *The 1709 Blog: What's Wrong With the 'Blurred Lines' Copyright Ruling?*. [online] The1709blog.blogspot.com. Available at: <http://the1709blog.blogspot.com/2015/03/whats-wrong-with-blurred-lines.html> [Accessed 7 Apr. 2015]; Corbett 2011 supra at 515; Heald 2014b supra; Elkin Koren user rights supra at pp. 4, 12-14.

The next paragraphs examine the copyright terms with reference to the right of reproduction and the right of communication to the public and identifies whether there is a fit between each right and the copyright terms. Subsection 4.2.2 undertakes a similar exercise with reference to the fair dealing exception and the statutory licence limitation in relation to the copyright terms implemented in the open and freemium music business model. As earlier stated, the international treaties – Berne Convention, the TRIPS Agreement and the WCT- are applied as a benchmark for the analysis.

4.2.1. Copyright terms and the scope of the exclusive rights framework

(a) The right of reproduction

As highlighted in Chapter two of this study, the reproduction right (along with the performing rights) has been the oldest and most prevalent value metric for the exploitation of music content.¹⁴ For example, in South Africa, the reproduction right applies to all the categories of works and consists of the vesting of the exclusive right to reproduce or to authorize the reproduction of the applicable work “in any manner or form”.¹⁵ Article 9(1) of the Berne Convention to which both South Africa and Nigeria are signatories secures the right of reproduction in relation to copyright works. According to that provision, “authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.” Further, art 9(3) clarifies that sound and video recordings are to be considered to be reproductions.

¹⁴ See Section 2.2.1, above.

¹⁵ See the following provisions of the South African Copyright Act: Section 6(a) regarding literary or musical work, Section 7(a) regarding artistic works, Section 8(a) regarding cinematograph films, Section 9(a) regarding the “making directly or indirectly, a record embodying the sound recording”. See also Sections 10(a) and 11B(a) regarding broadcasts and computer programs respectively.

Neither the TRIPS Agreement nor the WCT replicate these provisions. However, both art 9(1) of the TRIPS Agreement and art 1(4) of the WCT require Contracting Parties to comply with them. As an “internet treaty”, which seeks to address the challenges posed by internet technology for the copyright ecosystem,¹⁶ the Agreed Statement on art 1(4) of the WCT is apposite for the open and freemium music business model. In particular, the Agreed Statement provides that:

The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.

Given that the storage of a protected work in digital form in an electronic medium such as a digital platform is recognised as a reproduction of that work, it will be immaterial that the form of the relevant copyright work was significantly modified during the process of copying. In this way, the digitisation of a given copyright work would still be considered as a reproduction of that work. This would mean that the reproduction right applies to every use of the work in the online context no matter how ephemeral or economically irrelevant they might be. This approach has led to the suggestion that the level of copyright protection in the online context may be unduly higher than the physical environment given that the nature of the internet generally necessitates reproducing the work even if temporarily.¹⁷

To avoid such unwholesome interpretation, legislators in many jurisdictions sought to provide exemptions to individuals and firms who only engage in acts of reproduction of copyright works in situations necessitated by the very nature of internet use or at the behest of

¹⁶ Wipo.int. (2015). [online] Available at: http://www.wipo.int/copyright/en/activities/internet_treaties.html [Accessed 31 Jan. 2017].

¹⁷ See Hugenholtz and others 2012 *supra* at 116-8.

users of the services provided by such individuals or firms.¹⁸ These attempts led to the enactment of s512 of the US DMCA 1998 and the E-Commerce Directive in the EU, which are the two main global models for the safe harbour regime. As described earlier in Chapter three, above, the safe harbour regime provides a limitation of liability framework, which protects providers of hosting (and other internet-related) services from liability for their users' reproduction of copyright-protected content unless they received actual notice or became aware of facts or circumstances indicating infringing content or activity.

However, with the emergence of new business models and approaches to deploying digital platforms, there have been calls to abolish or considerably reform the safe harbour regime particularly as it applies to hosting services.¹⁹ Specifically, the regime has been identified as underpinning the copyright terms in the context of the open and freemium music business model.²⁰ Also, the regime has been held responsible for the paltry payments or revenue from the platform firms and alleged to be unsupportive of copyright law's objective of incentivising creativity. The claim is that the regime enables massive reproduction of music content and thus, that the platform firms exploit the reproduction right to the detriment or to the exclusion of copyright owners.²¹ Seen from this perspective, the

¹⁸ For historical context, see Pollack, W.M. (1999). Tuning in: The future of copyright protection for online music in the digital millennium. *Fordham L. Rev.*, 68, p.2445. Traphagen, M. (2002). The unfinished business of copyright: A look forward from the Digital Millennium Copyright Act. *Int'l Intell. Prop. L. & Pol'y* 63(7), p.1. Urban, J.M. and Quilter, L. (2005). Efficient process or chilling effects-Takedown notices under Section 512 of the Digital Millennium Copyright Act. *Santa Clara Computer & High Tech. LJ*, 22, p.621; Rosati 2016 supra.

¹⁹ Edwards, L. (2011). *Role and responsibility of the internet intermediaries in the field of copyright and related right*. [online] WIPO, pp.29-30. Available at: http://www.wipo.int/export/sites/www/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf [Accessed 31 Jan. 2017].

²⁰ See IFPI 2017 supra at 34.

²¹ Ibid.

failure to ascribe liability to platform firms for the actions of users of the platform in streaming the music content on the grounds that such should be regarded as authorised or induced by the platform firms is held to be a fault arising from the safe harbour regime. This argument as conceptualised in the “value gap” statement, is that such platform firms should not be able to enjoy the safe harbour protection. Instead, the platform firms should enter into licensing agreements with copyright owners because they are involved in the exploitation of the reproduction right through their users.

Value gap is the most cited example of the challenge for the copyright system arising from the open and freemium music business model, and has been described as a form of unfair competition.²² According to the IFPI, the value gap makes licensed music platforms to compete unfavourably with unlicensed music platforms. In this regard, the extant copyright law is identified as clearly compelling subscription-based services such as Spotify to seek and obtain a licence from relevant copyright owners prior to operating its platform and deploying the use of music content available on their platform. Conversely, in the case of ad-based services which rely on music content uploaded by the users of the platform to operate their core services, the provisions of the extant copyright law which may require such firm to seek licences *a priori*²³, is weakened. The requirement of licence in this case being to avoid being held liable for authorising the user uploads. This is because the safe harbour regime will not attach infringement liability on the platform firms for platform users’ reproduction of music content unless it is shown that the platform firm has the requisite knowledge of infringement. In other words, the enabling of user-upload of music content is interpreted as obliging the

²² *ibid* at p.25.

²³ See Faturoti 2017 *supra*.

platform firm to seek a license. Therefore, the safe harbour exemption which is made on the basis that platform firms are not to be held liable for enabling (or authorising) their users' actions in uploading or reproducing music content, is held to be problematic.²⁴ According to the IFPI:

The value gap describes the growing mismatch between the value that user upload services, such as YouTube, extract from music and the revenue returned to the music community – those who are creating and investing in music. The value gap is the biggest threat to the future sustainability of the music industry... Inconsistent applications of online liability laws have emboldened certain services to claim that they are not liable for the music they make available to the public. Today, services such as YouTube, which have developed sophisticated on-demand music platforms, use this as a shield to avoid licensing music on fair terms like other digital services, claiming they are not legally responsible for the music they distribute on their site.

This statement, when applied to the open and freemium music business context, means that a value gap exists when platform firms are able to procure unfair licensing terms²⁵ from copyright owners for the use of their music content within the platform. The licensing terms under which platform firms either procure a royalty-free, revenue-free licence or unilaterally impose revenue-sharing arrangements on terms favourable only to them are considered to be unfair.²⁶ Such conduct results in the platform firm being able to enjoy the benefits of the music content with little or no corresponding revenue to the copyright owner.²⁷ The objective of incentivising creativity is allegedly derailed in so far as copyright owners are unable to recoup their investments or exploit the right to reproduce their works as a consequence of the conduct.²⁸ The principal concern is that the business model of the

²⁴ IFPI 2017 supra at 24 – 28.

²⁵ See IFPI 2017 supra at 33.

²⁶ Ibid.

²⁷ Ibid.

²⁸ The existing link between the exclusive rights and competition in the music copyright industry has already been scrutinized in Chapter 2, on the relationship between copyright and competition.

music copyright industry, which involves making considerable investments in music production and artist development, and expectation of revenue from reproduction becomes unsustainable.²⁹ Platform firms are then able to overrun the copyright owners, resulting in lesser revenue for new (but significant) uses of the copyright owners' creative outputs.³⁰

To understand better why the copyright terms established in the open and freemium music business model is asserted as creating a value gap, some considerations deserve attention. A subscription-based service, which involves a platform firm personally uploading music content on to its platform, is interpreted as directly engaging in the act of reproduction or making available of the music content to the public. As explained in Chapter three of this thesis, such platform firm will require the licence of the relevant copyright owners if it is to avoid liability for copyright infringement.³¹ Accordingly, such platform firm may literally be "at the mercy" of copyright owners whose music content is required to attract subscribers to its platform.³² Licensing arrangements in such cases are somewhat on a more equitable terrain or more accurately, the copyright owner is able to exercise the control that copyright law intends as it may refuse the licence.³³ However, in the case of the open and freemium music business model, licensing arrangements between the platform firm and the copyright owner are not made before the commencement of the platform firm's services. This is because the reproduction and making available of the music content is made primarily by users of the

²⁹See IFPI 2017 *supra* at 33.

³⁰ *Ibid.*

³¹ See section 3.4.1.

³² Ritala 2013 *supra* at 42-3.

³³ Of course, they may overstep their bounds. See Ritala 2013 *supra* at 42-3; Also, Teague 2012 *supra* at 27– 8.

platform and because upon meeting the specified conditions, the safe harbour regime exempts platform firms from liability for their users' actions, liability for storing or hosting the copyright-protected content, including any rights of the copyright owner to compel a licence, arises after the fact. In explaining the existence of a value gap, a comparison between payments from "prior licensed" platform firms and payments from "post-licensed" platform firms shows the revenue from the latter coming up short.³⁴ For this reason, the IFPI and several copyright owner groups have lauded proposed legislative reforms to copyright law that would require platform firms that rely on user-uploads to seek licensing arrangements *a priori*.³⁵ Such legislative changes are expected to close the value gap and address the competition concerns. Specifically, the IFPI supports the proposed reforms in the EU in terms of the so-called value gap proposal embodied in the proposed art 13 (1) of the Proposal for a directive on copyright in the Digital Single Market (DSM).³⁶ Article 13 of the proposed DSM Directive provides that:

1. Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers. Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate. The service providers shall provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter.
2. Member States shall ensure that the service providers referred to in paragraph 1 put in place complaints and redress mechanisms that are available to users in case of disputes over the application of the measures referred to in paragraph 1.

³⁴See IFPI 2017 *supra* at 33.

³⁵ *Ibid.*

³⁶ See Directive of the European Parliament and of the Council on copyright in the Digital Single Market - COM(2016)593.

3. Member States shall facilitate, where appropriate, the cooperation between the information society service providers and rightholders through stakeholder dialogues to define best practices, such as appropriate and proportionate content recognition technologies, taking into account, among others, the nature of the services, the availability of the technologies and their effectiveness in light of technological developments.

Indeed, the cases instituted in the EU and in the US against platform firms as discussed in the previous chapter, have sought to address the reproduction of copyrighted content arising in the business model context, with specific focus on the perceived “mismatch” between the value from platform firm’s use of music content and the corresponding value received by the music industry.³⁷ The objective in each of these cases was to prevent platform firms from creating a value gap in the music industry by failing to adequately reward copyright owners for the exploitation of the reproduction right which is exclusive to the copyright owner.³⁸ In this regard, the U.S. and EU courts have often elaborated similar perspectives, refusing to accept that the respective copyright owners had a valid claim to licensing from platform firms because of their (platform firm) users’ activities.³⁹ While it is to be noted that the value gap proposal has experienced criticisms peculiar to its conflict with other EU Directives such as the prohibition against the imposition of a general monitoring duty,⁴⁰ the similarities in the outcomes of these cases help to explain the misconstruction inherent in the conceptualisation of the value gap as a challenge to the copyright system.

³⁷ See *Viacom v Youtube* supra; *GEMA v YouTube*, District Court of Munich (Landgericht (District Court) Munich I, 30 June 2015, 33 O 9639/14); Court of Appeal of Hamburg (Oberlandesgericht (Court of Appeal) Hamburg, 1 July 2015, 5 U 87/12) □ Higher Regional Court of Munich Judgment of 28 January 2016 – Case Ref.: 29 U 2798/15.

³⁸ *Ibid.* See also, IFPI 2017 supra at 33.

³⁹ In the relevant cases, the courts in both jurisdictions declined to hold the platform firms liable for their users’ activities.

⁴⁰ See Rosati, E. (2016). Neighbouring rights for publishers: are national and (possible) EU initiatives lawful?. *IIC-International Review of Intellectual Property and Competition Law*, 47(5), pp.569-594 (hereafter, Rosati 2016a).

As identified in Chapter three, apart from providing a platform for user uploads of music content and storing music content at the direction of users, the platform firm's activities in relation to the music content and in the implementation of the licensing terms involve indexing, categorization, deletion and filtering of music content as a way of attracting and retaining customers to the platform.⁴¹ Accordingly, it is argued that the perception that the implementation and application of the copyright terms sits in opposition to the exploitation of the reproduction right is misguided. By extension, the perception that the safe harbour regime requires massive reform, which may exclude platform firms from the safe harbour protection, or require licensing for user-uploads is largely unwarranted. In reality, the crux of the copyright terms in the open and freemium music business model as evident from Chapter three, is hinged on access to the consumer, consumer's data and consumer's attention.⁴² Remarkably, the payments and accounting for open and freemium music business models are not connected to the traditional exploitation of the reproduction rights but have been developed by advertising calculations, which are hinged on consumer reach or access.

The copyright terms in particular, serve the purpose of gaining access to the copyright owners' consumers, consumers' data in terms of their likes and dislikes/tastes, and promotion for the artist (copyright owner). While proponents of the value gap proposal see reproduction rights as the main value metric in the copyright terms, the evidence points to access to the consumer and consumer's data as the main value metric. In the circumstances, it is argued that one of the key copyright law implications of the open and freemium music business model is the erosion of the significance of the reproduction right.

⁴¹ See sections 3.3 and 3.4, above.

⁴² See section 3.4.1, above.

The argument that the value and utility of the reproduction right diminishes in the context of the copyright terms of the open and freemium music contributes to the plethora of calls in the literature for a shift in focus for copyright regulation. Concerning the view that the reproduction right as presently constituted should no longer be the exclusive preserve of the copyright owner, it is evident that the reproduction right involving user uploads particularly in the open and freemium music business model context does not result in (much) economic value.⁴³ Rather, it is the indexing, storage and optimisation of user uploads and the provision of access to customer for the purposes of advertising, that generates economic value in the open and freemium music business model context.

A case in point concerns the introduction of an ancillary copyright protection for press publishers in Italy, Spain and Germany.⁴⁴ By virtue of this protection, press publishers have the exclusive right of press products' communication to the public for commercial purposes within one year after being published.⁴⁵ In Germany, this right required Google to pay press publishers for its (Google's) use of links to news items from press publishers in its Google News service.⁴⁶ In effect, the legislature and the participants considered reproduction rights to be the revenue generator – in other

⁴³ See Angelopoulos, C. (2016). *EU copyright reform: Outside the safe harbours, intermediary liability capsizes into incoherence - Kluwer Copyright Blog*. [online] Kluwer Copyright Blog. Available at: <http://copyrightblog.kluweriplaw.com/2016/10/06/eu-copyright-reform-outside-safe-harbours-intermediary-liability-capsizes-incoherence/> [Accessed 26 Dec. 2017].

⁴⁴ See Rosati 2016a *supra* at p.572; Vesterdorf, Bo. (2015). The effect of failure to notify the Spanish and German ancillary copyright laws. *European Intellectual Property Review*, (5), Forthcoming. Available at SSRN: <https://ssrn.com/abstract=2558029> [Accessed 5 Sep. 2017].

⁴⁵ See Jing-jing, Y.A.N. (2015). Review of the 8-(th) Amendment of the German Copyright Act: Ancillary copyright for press publishers: A backward legislation step in the era of the Internet?. *Journal of Science, Technology and Law*, 2, p.5.

⁴⁶ *ibid.*

words, the platform firm, Google, was exploiting the reproduction right held by the press publishers. The expectation was that the provision for the ancillary copyright would enable press publishers to earn revenue whenever their press content is reproduced and made available through freemium-based services on search engines.⁴⁷

Despite this provision, the press publishers in those countries failed to receive any revenue and even lost "traffic" (access to readers/consumers) when they sought to exploit/enforce the reproduction rights.⁴⁸ In the case of Germany, the press publishers were "forced" to provide Google with a *gratis* licence regarding the ancillary copyright. In *VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH v Google Inc.* ("German Press Publishers"), the Press Publishers represented by its collecting society, VG Media instituted an antitrust complaint before the German competition regulator, *Bundeskartellamt* against Google arguing that Google's market power enabled it to successfully procure a *gratis* licence despite the objective of the ancillary copyright which was to provide revenue for press publishers.⁴⁹ The *Bundeskartellamt* declined to initiate formal proceedings against Google on grounds, inter alia, that it accepted that there was objective justification (i.e. avoidance of damages for copyright infringement) for Google's actions and as such it cannot be compelled to exploit the ancillary copyright.⁵⁰ Accordingly, the

⁴⁷ See Rosati 2016a supra at 471-73.

⁴⁸ Ibid. See also, Stadler 2007 supra at 903 where Stadler makes a convincing argument against the utility of the reproduction rights for copyright owners.

⁴⁹ van Loon, S. (2012). The power of Google: First mover advantage or abuse of a dominant position?. *Google and the law: Empirical approaches to legal aspects of knowledge-economy business models*, 22, p.34 (hereafter, van Loon 2012).

⁵⁰ *Bundeskartellamt*, decision of 9 September 2015, case B6-126/14, *VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH v Google Inc.*,. An English translation of the decision is available at:

monetisation of the news content was not crucial to Google's services as Google could profitably run its services without the exploitation of the ancillary copyright in the news content. The press publishers' suit before the German Regional Court failed on the same grounds and they subsequently appealed. However, the appeal has stalled because the appeal court had questioned the competence of the ancillary copyright in the light of EU law. In this regard, the court referred the matter to the CJEU and the reference in this case concerned whether the law conferring the ancillary copyright on Press Publishers should have been notified to the EU in terms of Directive 98/34/EC (as amended by Directive 98/48/EC).⁵¹ This requirement, if applicable, may mean that the ancillary copyright is unenforceable in the first place. From the perspective of economic theory of copyright, the Court's explanation for the revenue generator in open and freemium business models involving news content shows the utility in focusing on the platform firms' designation of earnings and source of revenue, as a determinant of what rights, if any, are being exploited. In this case, the ancillary right or reproduction right proved to be no revenue earner.⁵² One cannot escape though the self-evident viewpoint arising from an analysis of Google's sources of revenue, none of which arise from the reproduction right and the majority of which arise from advertising and data in terms of "traffic".

http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B6-126-14.pdf?__blob=publicationFile&v=2. (hereafter, Bundeskartellamt 2015).

⁵¹ *VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH v Google Inc, C-299/17*.

⁵² See Ramalho, A. (2016). *EU competence to create a neighbouring right for publishers? The small pieces make up the big picture - Kluwer Copyright Blog*. [online] Kluwer Copyright Blog. Available at: <http://kluwercopyrightblog.com/2016/09/05/eu-competence-create-neighbouring-right-publishers-small-pieces-make-big-picture/> [Accessed 26 Dec. 2017]. Höppler, T. (2017). *EU copyright reform: the case for a related right for press publishers*. CREATe Working Paper 2017/08 (April 2017).

A paradigm shift from reproduction rights exploitation towards access to consumers can be noticed, particularly in the approach of the platform firms in the open and freemium music business model context. Today, more and more platform firms stress the importance of the access to the consumer by creating ticketing and concert opportunities based on music content that platform users and consumers love.⁵³ Therefore, it is argued that it behoves copyright owners to monetise access to the consumers of their music content. Further, the copyright terms should not be viewed as an exploitation or exercise of reproduction rights or based on the safe harbour regime, but rather as a method deployed by the platform firms to gain access to the consumers and consumers' data.

In this context, the deployment of the open and freemium music business model necessarily entailed a new approach to the analysis of the scope of copyright protection, particularly the parameters of the reproduction right as value metric. The fact that the source of revenue within the business model flows from advertising may be interpreted to mean that the copyright system based on and the economic right of reproduction of music content (or any copyrighted content) have been jettisoned as the value metric in the copyright ecosystem. The new value metrics operate outside the reproduction of content to generate revenue from the interaction with the content. In these cases, the exploitation of the reproduction rights is discarded, and its "monetisation" superseded by other income streams. The open and freemium music business model introduces revenue streams that are more external to the remuneration system based on the reproduction of music content. As such, a copyright law system focused on the expectation of revenue from every reproduction of copyright-protected content blurs the consideration of other viable revenue opportunities

⁵³ See Hu 2017 *supra*.

that free and/or uninhibited reproduction may have offered. It is argued that such restriction is disadvantageous because digitization involves such rampant reproduction to the extent that making reproduction exclusive to the copyright owner is near futile. The focus is no longer on leveraging on the reproduction rights *per se*; the focus is on the consumer. The very implication of the copyright terms within the open and freemium music business model is to remove the focus on copyright protection system based on reproduction and place it squarely on the consumers of the “business” created by the music content. It follows that the platform firm’s activity cannot be properly assessed through the lens of reproduction. The focus here is on the activities of the platform firm itself, which clearly does not amount to reproduction of the music content.

(b) The right of communication to the public

According to the Berne Convention, the authors of literary and artistic works shall have the exclusive right to authorise the communication of their works to the public.⁵⁴ The Convention does not explicitly define the right of communication to the public. However, that provision appears to restrict the application of the right to places where without being in the same place and at the same time where the transmission or communication is taking place, the recipients of the communication would not be able to perceive the work.⁵⁵ According to Ficsor, communication to the public within the meaning of the Berne Convention, is restricted to:

A transmission by wire or wireless means, of images or sounds, or both, making it possible for the images and/or sounds to be perceived by persons

⁵⁴ See Berne Convention, Articles 11, 11bis, 11ter, 14(1)(ii) and 14bis(1). Dreier, T. (2006). Berne Convention for the protection of literary and artistic works. In Dreier, T. and Hugenholtz, P.B. eds., *Concise European copyright law* (Vol. 2). Kluwer Law International, 49.

⁵⁵ See Berne Convention, Article 11bis (1).

outside the normal circle of a family and the closest social acquaintances or the family, at a place or places the distance of which from the place where the transmission is started is such that, without the transmission, the images or sounds, or both, would not be perceivable at the said place or places, irrespective of whether the said persons can perceive the images and/or sounds at the same place and at the same time, or at different places and at different times.⁵⁶

Given that the Berne Convention predates the emergence of the internet and new media, it is unsurprising that the scope of the right under the Convention appears to be narrowly defined as to exclude those means of communication.

Article 9(1) of the TRIPS Agreement require Contracting States to recognise the right of communication to the public as provided in the Berne Convention. Nevertheless, art 8 of the WCT expands the scope of the right of communication to the public to include the “making available to the public of works in such a way that members of the public may access them from a place and at a time individually chosen by them”.⁵⁷ While no explicit definition is provided for the right of communication to the public under the Treaty, the inclusion of the “making available” ambit clearly accommodates communication on the Internet and new media in which each person determines when and where to access a given copyright-protected content. However, notwithstanding this broad inclusion, the “Agreed Statement concerning art 8” in indicating that “the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of [the WCT] or the

⁵⁶ See Ficsor, M. (2003). *Guide to the copyright and related rights treaties administered by WIPO: And glossary of copyright and related rights and terms*. WIPO, 275.

⁵⁷ Angelopoulos, C. (2011). Creative Commons and related rights in sound recordings: Are the two systems compatible? In L Guibault & C Angelopoulos (eds.), *Open Content Licensing: From Theory to Practice*. Amsterdam University Press, p.247-8.

Berne Convention,” appears to have reduced the scope of art 8 in relation to the Internet. In this regard, it may be argued that as far as the right of communication to the public is concerned, the person or firm who did not create, but merely facilitated the dissemination of infringing content, will not be construed as communicating the work to the public.⁵⁸

In these circumstances, mere facilitation of the distribution of music content may be outside the scope of the protected use involved in the right of communication to the public.⁵⁹ However, there is no definition of what kind of activity would qualify as a “mere provision of physical facilities” under the Treaty. Applying the literal rule of interpretation,⁶⁰ would suggest that only the provision of hardware is excluded and that acts of installation of the physical facilities or of the provision of services that use them may fall within protected use. However, it is possible to argue that the services in the nature of digital facilities that enable distribution of protected content are excluded from the scope of protected use.⁶¹ This may be particularly so when the activities in question are restricted to enabling distribution only. Significantly, it is to be noted that the Agreed Statement is limited to the act of communication to the public and there is no mention of the reproduction of copyright protected works. Accordingly, where the same act constitutes both reproduction and communication to the public, it appears that the Agreed Statement may not exempt the

⁵⁸ International Bureau of WIPO (1997). *WIPO National Seminar on Digital Technology and the New WIPO Treaties (WIPO/CNR/SEL/97/1)*.

⁵⁹ Ibid.

⁶⁰ The Literal Rule requires that where the statutory provisions appear to be clear and unambiguous, they should be interpreted according to their literal meaning or in their usual grammatical sense. See *Nabhan v Nabhan* [1967] 1All NLR47 at 54; *Faturoti* 2017 supra at 7.

⁶¹ Koelman, K. and Hugenholtz, P. (1999). *Online service provider liability for copyright infringement, Workshop on service provider liability*. [online] Available at: https://pure.uva.nl/ws/files/3363649/6027_wipo99.pdf [Accessed 8 Feb. 2015].

platform firm from liability for the act of reproduction.⁶²

As evidenced from the foregoing analysis, the international copyright instruments (Berne Convention, the TRIPS Agreement and the WCT) when analysed individually offers both guidance and certain leeway to Member States in the construction and scope of the right of communication to the public, particularly in the digital era. The EU, for instance takes advantage of this. In the case of the EU, the Copyright Directive⁶³ adopts the WCT approach providing a broad discretion to EU Member States in making their domestic laws. Like the WCT, art 3(1) of the Copyright Directive does not define the concept of “communication to the public”. In the absence of an explicit definition, the CJEU has relied on the stated objectives of the Copyright Directive, which includes ensuring a high level of protection of intellectual property and for authors, to define the scope of the right of communication.⁶⁴ Further, in a long line of cases on the construction of the right of communication to the public,⁶⁵ the CJEU has

⁶² See Angelopoulos 2016 supra at 139.

⁶³ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society; [2001] Official Journal L 167, 22/06/2001 P. 0010 - 0019

⁶⁴ See Recital 24 of the Copyright Directive.

⁶⁵ See the following cases, *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, C-306/05, EU:C:2006:479 (“SGAE”); *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etaireia*, C-136/09, EU:C:2010:151 (“Organismos Sillogikis Diacheirisis”); *Circul Globus Bucures ti (Circ & Variete Globus Bucures ti) v Uniunea Compozitorilor s i Muzicologilor din România -Asocia&ia pentru Drepturi de Autor (UCMR - ADA)*, C-283/10, EU:C:2011:772 (“Circul Globus Bucures ti”); *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08)*, EU:C:2011:631 (“FAPL”); *Airfield NV and Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam) (C-431/09) and Airfield NV v Agicoa Belgium BVBA (C-432/09)*, EU:C:2011:648 (“Airfield”); *Società Consortile Fonografici (SCF) v Marco Del Corso*, C-135/10, EU:C:2012:140 (“SCF”); *Phonographic Performance (Ireland) Limited v Ireland and Attorney General*, C-162/10, EU:C:2012:141 (“PPI”); *ITV Broadcasting Ltd and Others v TV Catch Up Ltd*, C-607/11, EU:C:2013:147 (“TV Catch Up”); *Nils Svensson and Others v Retriever Sverige AB*, C-466/12 (“Svensson”), EU:C:2014:76; *OSA - Ochranný svaz autorský pro práva k dílům hudebním os v Léčebné lázně Mariánské Lázně*

consistently identified that the essential components of the right of communication to the public are “an act of communication”, which is directed to a “public”.⁶⁶ Where the act of communication consists in making the work available to the public, the CJEU has also identified other relevant prerequisites.⁶⁷ These include considerations such as the indispensable intervention of the person or firm making the communication and the knowledge and awareness⁶⁸ of the maker of the communication regarding the consequences of his/its communication or intervention.⁶⁹

In *Stichting Brein v Jack Frederik Wullems*,⁷⁰ the CJEU held that the notion of “communication to the public” would include the sale of a multimedia player on which there are pre-installed add-ons, available on the internet, containing hyperlinks to freely accessible websites on which copyright works have been made available to the public without the authorisation of the copyright owners. The Court took the view that an intervention like the one of the provider of a multimedia player is to be regarded as enabling access to unlicensed

as, C-351/12, EU:C:2014:110 (“OSA”); *BestWater International v Mebes and Potsch*, C-348/13, EU:C:2014:2315 (“BestWater”); *C More Entertainment AB v Linus Sandberg*, C-279/13, EU:C:2015:199; *Sociedade Portuguesa de Autores CRL v Ministério Público and Others*, C-151/15, EU:C:2015:468 (“Sociedade Portuguesa de Autores”); *SBS Belgium NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM)*, C-325/14, EU:C:2015:764 (“SBS Belgium”); *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA)*, C-117/15, EU:C:2016:379 (“Reha Training”); *GS Media BV v Sanoma Media Netherlands BV and Others*, C-160/15, EU:C:2016:644 (“GS Media”); *Stichting Brein v Jack Frederik Wullems, also trading under the name Filmspeler*, C-527/15, EU:C:2017:300 (“Filmspeler”); *Zürs.net Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger registrierte Genossenschaft mbH (AKM) v Zürs.net Betriebs GmbH*, C-138/16, EU:C:2017:218 (“Zürs.net”); and *The Pirate Bay* supra.

⁶⁶ Rosati 2017 supra at 3.

⁶⁷ Ibid at 5.

⁶⁸ Rosati 2017 supra at 11-2.

⁶⁹ Ibid at 3.

⁷⁰ *Filmspeler*, para. 31.

content that would be otherwise more challenging to find. As such, an intervention of this kind falls within the scope of art 3(1) of the Copyright Directive on the making of communication to the public.⁷¹

Regarding the “public” to which the work is being communicated or made available in the online context, such would include any unspecified number of people such as the users of the platform (including advertisers)⁷² as held *Stichting Brein v Ziggo BV and XS4All Internet BV (“The Pirate Bay” or “Pirate Bay”)*, either where the copyright owner was not the one who uploaded or authorized the uploading of his work.⁷³ *The Pirate Bay* is particularly notable in that it dealt with a situation where the communication to the public is construed as being made by a platform firm. Accordingly, it is particularly apposite to this study, which focuses on the activities of the platform firm and whether such may be construed as communicating the music content to the public. This differs from the safe harbour regime and the consequent value gap proposal where the platform firm may be considered liable for copyright infringement because of the actions of the platform users themselves. In other words, the protection is particularly applicable in secondary liability cases where the platform users have to be primary or direct infringers.⁷⁴

In *The Pirate Bay*, the Dutch Supreme Court sought guidance from the CJEU on the question of whether the operators of a website like the Pirate Bay, which operated a system that indexed and categorized protected works for users, are to be regarded as making

⁷¹ Ibid at paras 31 and 37.

⁷² *The Pirate Bay* para. 37.

⁷³ See *The Pirate Bay* paras 39 and 45.

⁷⁴ See Rosati 2017 supra at 13; Riordan, J., 2016. *The liability of internet intermediaries*. Oxford University Press, para 12.11.

acts of communication to the public within the meaning of art 3(1) of the Copyright Directive. While the CJEU decision has several implications particularly for the notions of primary and secondary liability,⁷⁵ the focus here lies on the CJEU's interpretation of the activities of the Pirate Bay (as a platform firm) vis-à-vis the act of communication to the public. The CJEU held inter alia that: the right has two key components – (1) an “act of communication” (2) directed to a ‘public’.⁷⁶ The act of communication need not involve actual transmission of the protected work. Mere making available of the work suffices. According to the CJEU, the right also involves other inter-related,⁷⁷ complementary criteria, which include: the indispensable role played by the platform firm⁷⁸ (“indispensability”) and the profit-making nature of the communication at hand (“profit-making”).⁷⁹ Specifically, while the interpretation of the act of communication to the public will depend on the facts of each case, “as a rule, any act by which a user, with full knowledge of the relevant facts, provides its clients with access to protected works is liable to constitute an “act of communication” for the purposes of art 3(1) of Directive 2001/29”.⁸⁰ This follows the CJEU decision in cases such as *Svensson*, *BestWater*, *GS Media*⁸¹ and *Filmspeler*.⁸²

More importantly (for the purposes of this study), the CJEU

⁷⁵ For instance, by requiring knowledge (actual or constructive) on the part of the platform firm before primary liability may be imposed, the *Pirate Bay* seems to have conflated the requirements for primary and secondary liability. See Rosati 2017 supra at 11.

⁷⁶ *The Pirate Bay* supra at para 24.

⁷⁷ *The Pirate Bay* supra at para 25.

⁷⁸ *The Pirate Bay*, para 26.

⁷⁹ *The Pirate Bay*, para 29.

⁸⁰ *The Pirate Bay*, para 34.

⁸¹ *The Pirate Bay*, para 32.

⁸² *The Pirate Bay*, para 33.

held that a platform firm would be making an act of communication where it provides and manages a platform that provides users with access to the works concerned. In such circumstances, the platform firm satisfies the indispensability requirement and may be regarded as playing a crucial role in making the works available.⁸³ In the case of the *Pirate Bay*, this was satisfied by its indexing of torrent files to allow users of its platform to locate and share the protected works.⁸⁴ Further, the actions of a platform firm in indexing, categorizing, deleting or filtering user-uploaded protected work constituted more than “mere provision of physical facilities.”⁸⁵ Such actions were held to constitute an “intervention” by the operators of the *Pirate Bay*. It is immaterial that these activities were undertaken automatically or using algorithms.⁸⁶

Given that the protected works were uploaded by platform users (and in some cases, copyright owners themselves), it was required that the primary liability of the platform firm depended on its communication being directed to a “new public”, that is, a public not in the contemplation of the copyright owners when they authorized the initial communication. The CJEU held that a platform firm would satisfy this requirement where it is informed that its platform provides access to works published without the relevant copyright owner’s consent.⁸⁷ This “new public” requirement is also met where given the sheer number of protected works shared on the platform and the fact that the platform was operated for the purpose of making profit, the platform firm is presumed to be not unaware of the absence of the

⁸³ *The Pirate Bay*, para 37.

⁸⁴ *The Pirate Bay*, para 36.

⁸⁵ *The Pirate Bay*, para 38.

⁸⁶ Rosati 2017 supra at 11.

⁸⁷ *The Pirate Bay*, para 45.

copyright owners' consent in some of the works published.⁸⁸ In this case, advertising revenue was held to satisfy the "profit-making" intention.⁸⁹ Again, this follows the CJEU's reasoning in the cases of *GS Media* and *Filmspeler*.

The analysis of the CJEU jurisprudence on the right of communication to the public particularly in the *Pirate Bay*, highlighted some important elements, concerning: a) the function of the right of communication to the public in relation to the open and freemium music business model; b) the role of copyright terms; and c) the legal approach developed to tackle the use of music content in the business model context.

Regarding the first point, activities consisting of indexing, categorizing, filtering and deleting relevant music files containing copyright content could be regarded as engaging in an act of communication to the public.⁹⁰ Further, and, secondly, the indexing of the music files, compilation of view count, generating playlists, to enable users of the platform to locate the music content supports both the *gratis* licensing system and the revenue-based licensing system. According to the CJEU in the *Pirate Bay*:

... it is clear from the observations submitted to the Court that, in addition to a search engine, the online sharing platform TPB offers an index classifying the works under different categories, based on the type of the works, their genre or their popularity, within which the works made available are divided, with the platform's operators checking to ensure that a work has been placed in the appropriate category. In addition, those operators delete obsolete or faulty torrent files and actively filter some content. In the light of the foregoing, the making available and management of an online sharing platform, such as that at issue in the main proceedings, must be considered to be an act of communication for the purposes of Article 3(1) of Directive 2001/29.⁹¹

⁸⁸ Ibid.

⁸⁹ The *Pirate Bay*, paras 46 and 47.

⁹⁰ Rosati 2017 *supra* at 9-11.

⁹¹ See paragraphs 38 and 39.

In either case, the licensing terms are formulated to address the fact that the platform firm is taking further independent steps to communicate the music content to the public and in making the work available to the public.⁹² Indeed, it appears that this interpretation of the copyright terms is similar to the legal approach adopted by the PRS in its analysis of Soundcloud's behaviour in *PRS V Soundcloud*.⁹³ In this context, the PRS seems to have considered Soundcloud's conduct as infringing in the absence of a PRS licence for the relevant music content.

In the course of 2015, the PRS sent a letter to Soundcloud stating that given the nature of its activities on the soundcloud.com website, the latter required a license from the PRS to continue to undertake the specified activities.⁹⁴ Through this formal step, the copyright owner (that is, the PRS) indicates the copyright content made available without its licence. The requirements for this sort of letter under the notice and takedown procedure and/or the safe harbour regime are strict and specific. However, copyright owners whose copyright has been infringed directly and primarily by platform firms may proceed to sue for copyright infringement against the platform firm and may not be obliged to request a takedown *per se*. In this regard, the PRS provided a list of works to which it owned copyright and which were made available on the Soundcloud platform. Negotiations, which were commenced between the two organisations eventually, broke down leading to the commencement of the suit. However, the parties still picked up negotiations in the course of the suit leading to an out-of-court settlement in 2016. A complete history of the case is well beyond the scope of this section, as the purpose is

⁹² Rosati 2017 *supra* at 10.

⁹³ See Section 3.4, above.

⁹⁴ See Greenstein 2016 *supra* at pp.212-3.

to address the facts relevant to the present study.⁹⁵ Here, the focus is on the main legal features emerging from the case, so as to show its link with the *Pirate Bay* case and how both may apply to the South African and/or Nigerian regulatory framework.⁹⁶ The institution of the suit was justified as “the works are made available from the UK and/or are targeted at members of the public in the UK”.⁹⁷ As the PRS argued, the copyright owners allegedly damaged by SoundCloud’s conduct obtained copyright protection on the basis of UK copyright law.⁹⁸ Hence, action by the PRS was considered appropriate. This is the correct approach because, even in the face of choice of law provisions, music content on digital platforms would still be subject to the copyright laws of the conferring country.⁹⁹ In South Africa, copyright holders seeking enforcement of their rights rely mainly on the Copyright Act. According to s 44(1) of the Copyright Act, “no copyright or right in the nature of copyright shall subsist otherwise than by virtue of this Act or some other enactment in that behalf”.

The legal features emanating from the *PRS v SoundCloud* case concerned the conduct of Soundcloud in relation to the exclusive rights of the PRS including whether such conduct infringed on the PRS’ copyright, the alleged existence of a duty to seek/obtain licence,

⁹⁵ Also, relevant activities of Soundcloud have already been presented in Chapter 3, above.

⁹⁶ In the absence of case precedent, both South Africa and Nigeria may rely on foreign precedent for clarification. See the Nigerian case of *Adetoun Oladeji Nig Ltd v NB Plc* supra; *Moneyweb (Pty) Limited v Media 24 Limited and Another* supra at para 103.

⁹⁷ See paragraph 13.2.3 of the *PRS v Soundcloud* Particulars of Claim.

⁹⁸ See paragraphs 1 and 2 of the *PRS v Soundcloud* Particulars of Claim.

⁹⁹ See *Viacom v Youtube* supra; *GEMA v YouTube*, District Court of Munich (Landgericht (District Court) Munich I, 30 June 2015, 33 O 9639/14); Court of Appeal of Hamburg (Oberlandesgericht (Court of Appeal) Hamburg, 1 July 2015, 5 U 87/12) □ Higher Regional Court of Munich Judgment of 28 January 2016 – Case Ref.: 29 U 2798/15. In these cases, the suits were validly instituted in the relevant jurisdictions despite the choice of laws chosen by the platform firms.

and the reliefs sought. The next paragraphs will focus on the analysis of the PRS's line of reasoning. Due to the settlement reached by the PRS and Soundcloud in 2016 and given that the terms of settlement was not disclosed, the analysis of the parties' reasoning will be based mainly on the arguments emerging from the originating processes and the outcome of the announced settlement. Also, the appropriateness or otherwise of the court settlement reached in this case will not be addressed as the analysis is only relevant for the purpose of highlighting the potential of the copyright law regulatory framework for the open and freemium music business model in relation to South Africa and Nigeria.

One of the pertinent issues deserving due attention concerned the PRS' rights protected by copyright law and implicated in the context of the open and freemium music business model. The PRS, it was contended, is an exclusive assignee of copyright in over 6 million songs (music content) and had the right *inter alia* to communicate the said music content to the public within the meaning of the UK Copyright Act.

The claimant/the PRS had alleged that Soundcloud had implemented an infringing behaviour aimed at denying the PRS the proceeds of exploitation of PRS' exclusive rights.¹⁰⁰ Such a conduct consisted in the inducement/authorisation of infringing reproduction of PRS' music content and engaging in unauthorised acts of communication to the public. It was alleged that Soundcloud had implemented this infringing behaviour after getting users of its platform to upload copyright-protected music content on its soundcloud.com

¹⁰⁰ Two of the PRS' claims were for damages and an account of profit. See page 17 of the Particulars of Claim in the PRS v Soundcloud; Ginsburg 2017 *supra* at 81-5.. See also Olubiyi 2014 *supra* at 93 on the import of the remedies available for copyright infringement.

platform.¹⁰¹ To avail itself of the protection of the safe harbour regime, Soundcloud policy outlined a free, non-exclusive licensing scheme which it required all users to adhere to in uploading their copyright-protected content. After the upload of the music content and its acceptance by the over 160 million Soundcloud user community, Soundcloud interacted and dealt with the content in such manner as to highlight its “compatibility” with other content and to highlight “compatible” artists as per its “explore” section.¹⁰² Soundcloud was alleged to have infringed on the PRS’ exclusive right of communicating the relevant music content to the public.¹⁰³

In support of its allegation that Soundcloud was engaged in acts of communication to the public, the PRS highlighted the primary goal pursued by Soundcloud. Soundcloud had a policy of open music, promoting those freely available to the public and uploaded by its users who are expected to be copyright owners or who have the requisite authority to upload such music. By its own admission, SoundCloud transcoded the music files,¹⁰⁴ operated automated indexing and search facilities¹⁰⁵ and also, provided automated content recommendations.¹⁰⁶ However, it argued that these activities do not amount to using the music content in any manner pertaining to the exclusive rights of the copyright owner and as such, it had no obligation to seek a license.

In addition, Soundcloud also sought to rely on the existence of the safe harbour regime, which it felt shielded it from any potential

¹⁰¹ See paragraph 6 of the Particulars of Claim.

¹⁰² See particularly, paragraph 6.6 of the Particulars of Claim.

¹⁰³ See particularly, paragraph 13.1 of the Particulars of Claim.

¹⁰⁴ Paragraph 35 Statement of defence.

¹⁰⁵ Paragraph 40 and 41 Statement of defence.

¹⁰⁶ Paragraph 47 Statement of defence.

obligation to seek a license or face liability for infringement. Such a regime would impose an obligation of notification on the part of the PRS to enable Soundcloud takedown the content uploaded by users on its platform. This is similar to YouTube's stance that its Content ID licensing scheme was not obligatory.

While there is no judicial precedent emanating from this case given the out-of-court settlement, the fact of the settlement and the fact the parties have entered into and maintained formal licensing arrangement post-settlement supports the conclusion that the platform firms have a hand in the exploitation of the exclusive right. By extension, the licence of the copyright owner is required and a share of realised revenue, expected. However, the acceptance of the interpretation of the activities as one requiring a license and affecting the copyright owners' exclusive rights depends on the specific legal framework. In the *PRS v Soundcloud* case, the right of communication to the public under UK's Copyright Act was allegedly infringed by the activities of Soundcloud itself. This raises the question of the availability and potential of the right of communication to the public under South African and Nigerian copyright law.

The conduct was interpreted as resulting in a claim for damages and account of profit for primary copyright infringement perpetuated by Soundcloud, due to its alleged interaction with the music content. The PRS' position recalls the principle that "where the court orders an account of profits, by that order it takes from the wrong doer all the profits he has made from his piracy and gives them to the party who has been wronged as the nearest approximation which it can make to justice".¹⁰⁷ Again, the availability of such remedies

¹⁰⁷ See Olubiyi 2014 supra at 93. See also *Plateau Publishing Co. Ltd & Ors v. Chief Chuks Adophy* [1986] 4 NWLR 205; Halsbury's Laws of England, vol. 9, 4th ed., paragraph 938.

depends on the availability of the right, which must have been infringed. By extension, the availability and application of the right in the case of South Africa and Nigeria depends on their respective copyright laws, which are examined in Sections 4.3 and 4.4, below.

4.2.2. Copyright terms and the scope of the limitations and exceptions framework

As earlier stated, the parameters of what users of protected work can do in relation to any protected work depends, not only on the scope of copyright protection, but also on the limitations and exceptions to copyright protection.¹⁰⁸ Put differently, the scope of limitations and exceptions to copyright protection may determine whether or not a copyright user's activities require a licence.

Article 9(2) of the Berne Convention to which both South Africa and Nigeria are signatories provides the parameters for Member States to formulate limitations and exceptions to copyright protection. These parameters provide a test widely referred to as the "three-step test". The first step of this test requires the identification of the particular purpose the limitations and exceptions would serve (that is, the limitations and exceptions should be dedicated to "certain special cases"). The second step requires the limitations and exceptions not to conflict with a normal exploitation of the work. The third step considers whether the limitations and exceptions would otherwise unreasonably prejudice legitimate interests of the author or copyright owner.¹⁰⁹ In the case of the Berne Convention, this test is limited to the reproduction right. Article 9(2) of the Berne Convention provides that: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases,

¹⁰⁸ See Chapter two, above.

¹⁰⁹ See Senftleben 2004 *supra* at 47-51; Samuelson 2017 *supra* at 35.

provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author”.

Article 13 of the TRIPS Agreement expands the scope of the three-step test to apply to all the exclusive rights granted to authors and copyright owners. It provides that: “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder”. Further, by requiring Member States to “confine limitations or exceptions to exclusive rights” in terms of the three-step test, the TRIPS Agreement somewhat reconfigured the test into a check for the appropriateness of the limitations and exceptions adopted by Member States. It also provided a process by which Member States can challenge another Member State’s adoption of limitations and exceptions that fail the three-step test.¹¹⁰ The WCT specifically permits Contracting Parties to “devise new exceptions and limitations that are appropriate in the digital network environment”.¹¹¹

Member States of these treaties have in their copyright laws adopted many limitations and exceptions to the exclusive rights, which they consider to be compliant with the three-step test.¹¹² For instance, specific exceptions such as the fair dealing exceptions available in many jurisdictions including South Africa and Nigeria as indicated in Chapter two, above are considered compliant with the three-step test.¹¹³ Few cases have analysed the meaning of each of the steps of

¹¹⁰ See Article 64 of the TRIPS Agreement.

¹¹¹ See Agreed Statement concerning Article 10. Article 10 refers to the three-step test and the limitation and exceptions to copyright protection, generally.

¹¹² See Samuelson 2017 *supra* at 24-5.

¹¹³ Schonwetter 2009 *supra* at 89-91.

the three-step test.

In resolving the dispute between the EU and the US over an exception to the rights holders' copyright in US copyright law,¹¹⁴ the WTO panel's decision extensively analysed each of the steps. On the first step, the WTO panel held that the scope of any limitation to copyright protection must be known and particularised.¹¹⁵ On the second step, the WTO panel took the view that the term "normal" consists of a dynamic element capable of taking into account technological and market developments.¹¹⁶ Essentially the panel established that not only actual but also potential effects are to be considered when assessing the permissibility of copyright exceptions and limitations.¹¹⁷

With respect to the third step test, the WTO panel stated that the analysis would require the following stages: a definition of the "interests" of right holders at stake and which attributes make them "legitimate", then, an understanding of the term "prejudice" and the level of prejudice that may be considered "unreasonable".¹¹⁸

Regarding the meaning of "interests", the WTO panel observed that "interests" are not necessarily confined to actual or potential economic issues.¹¹⁹ It further noted that the term "legitimate" refers to both lawfulness and legitimacy "in the context of calling for the protection of interests that are justifiable in the light of the objectives

¹¹⁴ United States – Section 110(5) of the U.S. Copyright Act, document WT/DS160/R. For a detailed examination of the panel decision and a brief outline of the WTO dispute settlement procedure, see Oliver, J., 2001. Copyright in the WTO: The Panel Decision on the Three-Step Test. *Colum. JL & Arts*, 25, p.119.

¹¹⁵ See para. 6.108 of the decision.

¹¹⁶ *Ibid* at para. 6.166):

¹¹⁷ *Ibid* at para. 6.180.

¹¹⁸ *Ibid* at para. 6.222.

¹¹⁹ *Ibid* at para. 6.223.

that underlie the protection of exclusive rights”.¹²⁰ On the question of what degree of “prejudice” would be necessary to qualify as “unreasonable”, the panel concluded that the “prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner”.¹²¹ However, the WTO panel adopted the view expressed in the Guide to the Berne Convention¹²² that the prejudice contained in the third step of the three-step test may not be unreasonable if the rights holder is equitably compensated, for example through a system of non-voluntary licensing with equitable remuneration.¹²³

While the WTO decision has been criticised for focusing exclusively on economic interests, there is no doubt that it has shed some light on how the test is to be understood. In general terms, most courts have, in line with the WTO Panel decision adopted a rather restrictive and rights holders-focused.¹²⁴

In the *Mulholland Drive* case,¹²⁵ for instance, the claimant argued that some technological protection measures (TPMs) unlawfully prevented him from exercising his rights under the private copy exceptions. The French Supreme Court held inter alia that the private copying exception was, at least in relation to movies and audiovisual works, usually in conflict with the normal exploitation of the work and therefore in breach of the second step of the three-step test. In this context, the French Supreme Court expressly stressed the

¹²⁰ Ibid at para. 6.224.

¹²¹ Ibid at para. 6.229.

¹²² See WIPO Guide to the Berne Convention (1978) 55-6.

¹²³ [See para. 6.229 of the decision.](#)

¹²⁴ Geiger, C., 2008. Rethinking Copyright Limitations in the Information Society: The Swiss Supreme Court Leads the Way. *IIC*, 39(8), p.943.

¹²⁵ French Cour de Cassation, 1st Civil Division, decision of 28 February 2006.

importance of the DVD market for the movie industry for recovering the costs of producing a movie.

It appears from the foregoing cases that the test favours a specific provisions approach as a general clause exception or limitation may be more likely to violate the requirements contained in the first step of the three-step test.¹²⁶ It also appears that the “prejudice” contained in the third step of the three-step test may not be unreasonable if the rights holder is, for instance, equitably remunerated through a system of non-voluntary licensing.¹²⁷

These considerations may have informed the approach of many jurisdictions, which have made provisions for compulsory or statutory licences as a limitation to exclusive rights in that they permit certain uses of protected works subject to an obligation to pay for such use under a compulsory or statutory licence.¹²⁸

In the case of usage and access terms implemented in the open and freemium music business model, these indicate inter alia, the uses to which platform firms may put the music content. Such uses have been described in Chapter three and include storing and indexing of the music content in a manner that will optimise search engine uses of the music content.¹²⁹ Further, such uses enable platform users to engage with and interact with the work in the course of social consumption and production.¹³⁰ The pertinent question is

¹²⁶ Schonwetter 2009 supra at 106.

¹²⁷ See para. 6.229 of the WTO decision.

¹²⁸ Samuelson 2017 supra at 12.

¹²⁹ See Rosati, E. (2017). *Linking for profit, technical means and burden of proof - German BGH applies CJEU case law to Google's Image Search*. [online] ipkitten.blogspot.com.ng. Available at: <http://ipkitten.blogspot.com.ng/2017/12/linking-for-profit-technical-means-and.html> [Accessed 23 Dec. 2017].

¹³⁰ Elkin Koren 2011 supra.

whether such use may be regulated by the scope of limitations and exceptions to copyright protection. As Samuelson rightly points out, “users’ interests are often examined through the prism of Limitations and Exceptions (L&E) to copyright”.¹³¹ Accordingly, the potential for applying copyright law to regulate the open and freemium music business model is evident where the consideration is whether the restrictions imposed by the copyright terms are over and above those covered by the scope of copyright protection and/or limitations thereto.

In the case of *Society of Composers, Authors and Music Publishers of Canada v Bell Canada (“Bell”)*,¹³² the plaintiff challenged as infringing, the activities of the defendant in permitting its customers to listen to 30-second preview of songs to enable them make a decision regarding downloading the full song for a fee. The defendant denied that such conduct amounted to infringement and instead argued that its permission of 30-second song preview was in fact, within the research category of the fair dealing exception. The Canadian Supreme Court agreed with the defendant’s argument that 30-second song previews could be treated as consumer research and would therefore qualify as fair dealing. The Court concluded that “limiting research to creative purposes would also run counter to the ordinary meaning of ‘research’, which can include many activities that do not demand the establishment of new facts or conclusions. It can be piecemeal, informal, exploratory, or confirmatory. It can in fact be undertaken for no purpose except personal interest”.¹³³

Similarly, the Canadian Supreme Court in *Alberta (Education) v*

¹³¹ See Samuelson 2017 *supra* at p.12. See also, Elkin Koren user rights *supra* at pp. 4, 12-14.

¹³² 2012 SCC 36, [2012] 2 SCR 326 (“Bell”).

¹³³ *Bell supra* at para 22.

*Canadian Copyright Licensing Agency (“Alberta Education”)*¹³⁴ interpreted “private study” (a fair dealing category) widely in holding that it may include teacher instruction. The Court therefore held that private study “should not be understood as requiring users to view copyrighted works in splendid isolation”.¹³⁵

These decisions indicate the possibility that the fair dealing exception and indeed, other limitations and exceptions to copyright may be interpreted broadly and applied to a wide range of innovative uses that do not require the consent of copyright owners.¹³⁶ However, whether the fair dealing exception may be interpreted as extending to the copyright terms in the open and freemium music business model context depends on two factors. These involve the consideration of whether the activities may be construed as research, private study or other specific activities listed under the fair dealing category and whether such use is fair.¹³⁷

Furthermore, there is also the possibility, as discussed in Chapter six, of treating the platform firm’s activities as regulated use and apply a compulsory and statutory licence as a limitation to the copyright protection covering the music content.¹³⁸ The interpretation of digitisation and indexing of protected works for library collections as fair use is instructive. In the US, the courts have accepted as fair use, the making of copies of texts and images for the purpose of indexing

¹³⁴ 2012 SCC 37, [2012] 2 SCR 345 (“Alberta Education”).

¹³⁵ *Alberta (Education)* supra at para 27.

¹³⁶ Katz, A. (2013). Fair use 2.0: The rebirth of fair dealing in Canada. *The copyright pentalogy: How the Supreme Court of Canada shook the foundations of Canadian copyright law*, p.93.

¹³⁷ See Geist, M. (2013). Fairness found: How Canada quietly shifted from fair dealing to fair use. *The copyright pentalogy: How the Supreme Court of Canada shook the foundations of Canadian copyright law*, p.176-7.

¹³⁸ See section 6.3.1(i) and (ii), below.

their contents and showing parts of same in search results.¹³⁹ Similar consideration has been extended to non-profit organisations indexing books to develop a searchable database that will assist researchers in the case of *Authors Guild, Inc. v. HathiTrust*.¹⁴⁰

In these circumstances, it appears that the activities of platform firms as embodied in the copyright terms may be interpreted as fair use or fair dealing using an expansive interpretation of the latter. However, the fact that the indexing and optimisation in the case of the platform firms is undertaken for profit may change the tenor of such interpretation. Indeed, such indexing differs from that undertaken in the context of (non-profit) libraries, which is usually for the purpose of lending the books to the public. Accordingly, while the said activities may be permissible, the platform firm may be obligated to pay a fee under a compulsory licence. The commercial context of such activities may provide the rationale for the creation of a compulsory license for the implementation of the copyright terms in the context of the open and freemium music business model.¹⁴¹

4.2.3 Conclusive remarks on the international copyright treaty and the copyright terms

Evidently, the Berne Convention, TRIPS Agreement and the WCT offer significant leeway or flexibilities for Member States in designing the scope of the exclusive rights and the parameters of the limitations and exceptions to such rights. In this case, such flexibilities relate to the freedom to define and determine the scope of the right of communication to the public in terms of business models as well as

¹³⁹ See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003); *White v. West Pub. Corp.*, – F. Supp. 2d – (S.D.N.Y. 2014).

¹⁴⁰ 755 F.3d 87 (2d Cir. 2014). See also *A.V. v. iParadigms, LLC*. 562 F.3d 630 (4th Cir.2009); Samuelson 2017 supra at 18-9.

¹⁴¹ Samuelson 2017 supra at 27.

freedom (subject to compliance with the three-step test) to delineate limitations and exceptions to the right. The CJEU jurisprudence on the construction of the right of communication to the public and the Canadian Supreme Court jurisprudence on the construction of the fair dealing exceptions offer a veritable example of how these flexibilities may be deployed.

Regarding the right of communication to the public, the result of the foregoing analysis would be that the indexing, tagging and optimizing of music content based on users' preferences in the context of the open and freemium music business model may constitute acts of communication to the public which may require the relevant copyright owner's consent. While libraries are increasingly involved in similar conduct of indexing and tagging of protected works to aid their digital public lending services, they procure and reproduce the works themselves as against the case of the platform firms that rely on user uploads to index and tag protected content. Particularly, the ability to participate and actual participation of libraries in digital public lending has been subject of debate in many jurisdictions particularly in the EU and within the EU Member States.¹⁴² Indeed, there have been concerns regarding the role of libraries as custodians and distributors of creative products, the economic interests of authors as distinct from those of publishers, the legal categorization of public lending practices and the appropriate regulatory approach to the issue of e-lending or public lending of digital books.¹⁴³ There is however significant consensus on the need for regulation of public lending practices and the undesirability of continued self-regulation in that field.¹⁴⁴ This

¹⁴² Sganga, C. (2016). Public e-lending and the CJEU: Chronicle of a missed revolution foretold. *Journal title Opinio Juris in Comparatione*, p.7.

¹⁴³ *Ibid* at pp. 6-7 10-11.

¹⁴⁴ *Ibid* at pp. 12-3.

debate and the increasing demand for access to e-books appear to have brought the indexing and search optimisation by libraries closer to the issues expressed for the open and freemium music business model. This is especially so when the import of the platform firms' activities is considered. However, the import of such indexing and related activities differ from that undertaken by libraries because of the background of the platform firm as advertising firms rather than authors and due to the profit-making nature to the communication in question as evidenced by the receipt of advertising revenue.¹⁴⁵ This means that providing a *gratis* licence in the context of the licensing rule is likely to result in loss of revenue that would have accrued to the copyright owner.¹⁴⁶ Without adequately remunerating these copyright owners (especially when they are SMEs), the implementation of the open and freemium music business model copyright terms may lead to revenue losses and anticompetitive effects on the copyright marketplace.¹⁴⁷

Conversely, the activities of the platform firms may in certain circumstances be treated as captured within the scope of permissible uses. The application of the cited decisions of the Canadian Supreme Court in that regard may result in such interpretation. However, such use may require the payment of a fee under a compulsory statutory licence due to profit-making nature of the use.

The next two sections explore the current state of the South African and Nigerian copyright regulatory framework in relation to the copyright terms. Specifically, the rights of reproduction and communication to the public and the limitations and exceptions

¹⁴⁵ Rosati 2017 *supra* at 5.

¹⁴⁶ See Ginsburg 2017 *supra* at 74.

¹⁴⁷ See Section 3.5, above. The anticompetitive effects of inadequate or no remuneration for SMEs is discussed in Chapter 5, below.

pertaining to these rights in relation to the open and freemium music business model, are considered.

4.3 Copyright terms and the South African copyright system

Under the South African Copyright Act, the reproduction right applies to all the categories of works and consists of the vesting of the exclusive right to reproduce or to authorize the reproduction of the applicable work “in any manner or form”.¹⁴⁸ Section 1(1) of the Act provides some clarification regarding the scope of the reproduction right. “Reproduction” in the Act is defined thus:

“Reproduction” in relation to- (a) a literary or musical work or a broadcast, includes a reproduction in the form of a record or a cinematograph film; (b) An artistic work, includes a version produced by converting the work into a three-dimensional form or, if it is in three dimensions, by converting it into a two-dimensional form; (c) any work, includes a reproduction made from a reproduction of that work; and references to “reproduce” and “reproducing” shall be construed accordingly.

In this regard, reproduction essentially means copying of a work either in the same medium or in some other form such as record, cinematograph film or three-dimensional form. Another indication of the scope of the reproduction may be found in the definition, which the Act ascribes to “infringing copy” as a copy of the work infringed.¹⁴⁹

The granting of the exclusive right of reproduction “in any manner or form”, has been suggested to mean that the right covers both digital and analogue reproductions.¹⁵⁰ Indeed, in the case of *Pastel Software (Pty) Ltd v Pink Software (Pty) Ltd*,¹⁵¹ the court recognised that reproduction may take place electronically even if

¹⁴⁸ In respect of the South African Copyright Act, see Section 6(a) regarding literary or musical work, Section 7(a) regarding artistic works, Section 8(a) regarding cinematograph films, Section 9(a) regarding the “making directly or indirectly, a record embodying the sound recording”. See also Sections 10(a) and 11B(a) regarding broadcasts and computer programs respectively.

¹⁴⁹ See Section 1(1) of the Act. See also, Harms 2012 supra at p. 218.

¹⁵⁰ See Dean 2006 supra at 39.

¹⁵¹ 399 JOC (T).

such reproduction was short-lived. The broad reach of the right is in line with the regulatory approach to copyright protection in South Africa, as stated in the Preamble to the Copyright Act. Also in keeping with the broad range of the reproduction right, the concept of “material form” has a wide meaning by virtue of s 2(2) of the Act where reference is made to a work being written down, recorded, represented, in digital data or signals or otherwise reduced to material form. In this way, the Act is aligned with the WCT in recognising that the digitisation of a work constitutes a reproduction of said work. According to Dean,

The wide meaning given to “reproduction” is of considerable significance in the electronic age and in e-commerce. Examples of what would constitute reproduction, whether in a material form or otherwise, for purposes of the Act include loading software and data into a computer; operating a computer program, (this entails a reproduction of the program being made internally in the computer); downloading material from the Internet; displaying material on a computer screen, including material sourced from the Internet; and incorporating material in a website. Electronic communications and the Internet bring about new situations with which copyright law must deal. It is necessary to adapt or extend classical copyright concepts so as to cater for these new situations, which have arisen in the electronic age.¹⁵²

Furthermore, the use of the expression “includes” in delineating the scope of the reproduction right highlights s 1(1)’s intention of defining the right of reproduction expansively to include different uses of the copyright-protected subject-matter. This non-exhaustive approach suggests that the storage of music content by platform firms in the context of the open and freemium music business model would fall within the scope of the exercise of the right of reproduction, which is exclusive to the copyright owner. Similarly, given that partial copies of a work are also covered by the reproduction right irrespective of the

¹⁵² See Dean 2006 *supra* at 40; Harms 2012 *supra* at p. 218.

weight or size of the copied portion, the indexing and tagging of music content whether by an automated process is likely to qualify as a protected use under this interpretation. However, there is presently no court decision regarding the import of indexing or storage in the digital context.

South Africa is yet to ratify the WCT. However, the Copyright Amendment Bill 2017, in proposing the introduction of a mandatory exception to the reproduction right in the case of temporary copies, may apply to ameliorate the strictness of such interpretation. Section 12 of the Amendment Bill includes a new s 13A which provides that:

13A. (1) Any person may make transient or incidental copies of a work, including reformatting an integral and essential part of a technical process, if the purpose of those copies or adaptations is— (a) to enable the transmission of the work in a network between third parties by an intermediary or any other lawful use of the work; or (b) to adapt the work to allow use on different technological devices, such as mobile devices, as long as there is no independent economic significance to these acts.¹⁵³

This provision of the Bill, if passed into law, may likely absolve access providers from direct liability for e.g. proxy caching for the sake of network efficiency or the transient copying necessary for the operation of search engines. The services of host providers, on the other hand, may not be covered by the exception, because the indexing and storage involved in hosting services may not be temporary or transient. As a result, hosting providers may still be liable for direct copyright infringements of the works they store.¹⁵⁴

¹⁵³ This provision bears strong resemblance to art 5(1) of the EU's Copyright Directive.

¹⁵⁴ See *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others*, CJEU, C-360/13, 5 June 2014. See also, Sag, M. (2009). Copyright and copy-reliant technology. *Nw. UL Rev.*, 103, p.1607 (hereafter, Sag 2009);; Sag, M. and Flynn, S. (2017). *Lessons From South Africa: Protecting Non-Expressive Uses In Copyright Reform*. [online] Intellectual Property Watch. Available at: <https://www.ip-watch.org/2017/07/11/lessons-south-africa-protecting-non-expressive-uses-copyright-reform/> [Accessed 13 Nov. 2017].

However, s 75 of the ECTA adopts the global model provided by the US DMCA and the EU E-commerce Directive, in exempting hosting providers from liability for storage of protected content once the said storage is at the behest of the user of the storage or related services and subject to certain conditions stated in that section. While there is presently no decision of the South African courts on the scope and/or application of s 75 of the ECTA, a close reading of that provision (and the proposed s 51 of Nigeria's Copyright Bill 2015) shows that it is similar to art 14 of the EU E-Commerce Directive and s 512(c) of the US DMCA.¹⁵⁵ That said, the safe harbour protection envisaged in the preceding statutes, to the extent that they impose liability on platform firms on the basis of the primary liability of users/uploaders, is not considered apposite for the purposes of this thesis.¹⁵⁶

With respect to the right of communication to the public, such is currently provided only for sound recordings. Section 9(e) of the Act provides that "copyright in a sound recording vests the exclusive right to do or to authorise the doing of any of the following acts in the Republic: communicating the sound recording to the public". Apart from sound recordings, communicating literary works, musical works and other categories of protected work to the public is not included within the scope of the exclusive rights under the Act. Further, the concepts of "communication" and "public" are not defined in the Act. This is unlike the EU where the WCT approach is adopted in art 3(1) of the Copyright Directive. Accordingly, in the absence of explicit statutory provision, clear statutory definition and/or judicial interpretation, it is uncertain whether the following constitutes the exercise of the right of communication to the public:

¹⁵⁵ See Aganga 2013 *supra* at 8-9.

¹⁵⁶ See section 1.3, above.

- (a) Communication to a public not present at the place where the communication originates; or whether local communications, such as public performance, recitation and display, are excluded;¹⁵⁷. This is different from Recital 23 of the EU Copyright Directive, which involves a broad interpretation of the right of communication to the public as to cover all communication to a public not present at the place where the communication originates. Indeed, what is pertinent is whether the public to which the communication is transmitted in a different place from where the communication originates.¹⁵⁸
- (b) Mere provision of physical facilities for the distribution of the sound recording. This differs from Recital 27 of the EU Copyright Directive, which repeats the Agreed Statement on art 8 almost verbatim, thus introducing the WCT's deference for the mere provision of physical facilities to the EU legal landscape.
- (c) Making available to the public the sound recording in such manner that once completed, members of the public are able to access the sound recording from a place and at a time individually chosen by them, i.e. on demand. This is unlike the approach of the WCT.
- (d) Services that involve the provision of the sound recording to a user in circumstances that the user has no control over when and where to access the sound recording (so-called “non-interactive services”). Examples of such non-interactive services include regular television and radio transmissions,

¹⁵⁷ See Riby-Smith, M. (2017). South African copyright law—the good, the bad and the Copyright Amendment Bill. *Journal of Intellectual Property Law & Practice*, 12(3), pp.218-219 (hereafter, Riby-Smith 2017).

¹⁵⁸ See Bechtold, S. (2006). Directive on the harmonisation of certain aspects of copyright and related rights in the information society. In Dreier, T. and Hugenholtz, P.B. eds., *Concise European copyright law* (Vol. 2). Kluwer Law International, p.360.

webcasting and internet radio services.

- (e) Services that involve the provision of sound recording to a user in circumstances that the user may control when and where she accesses the sound recording (so-called “interactive services). For instance offers to download a work from a public website or online streaming services, which allow the consumer to access the work at her convenience.

Again, similar to the case of the right of reproduction, the Copyright Amendment Bill 2017 seeks *inter alia* to provide for a right of communication to the public in terms of the WCT. In this regard, Clause 4 of the Amendment Bill amends s 6 of the principal Act which concerns copyright in a literary or musical work to include in subsection (eA), the right to communicate “the work to the public, by wire or wireless means, including by means of internet access and the making of the work available to the public in such a way that any member of the public may access the work from a place and at a time chosen by that person, whether interactively or non interactively”. The same right is provided for in the case of artistic works by amending s 7 of the principal Act,¹⁵⁹ cinematograph film by amending s 8 of the Principal Act,¹⁶⁰ sound recording by amending s 9(e) of the Principal Act.¹⁶¹

However, until these provisions are enacted into law through the amendment of the Copyright Act, the right of communication to the public as stipulated in the Berne Convention and also the WCT remains external to the South African copyright system.

¹⁵⁹ See Section 5 of the Amendment Bill.

¹⁶⁰ See Section 6 of the Amendment Bill.

¹⁶¹ Section 7 of the Amendment Bill. This amendment clarifies the boundaries of the right of communicating the sound recording to the public, which is part of the current 1978 Act.

The fair dealing exceptions contemplated by s 12(1) of the Copyright Act have not been subject of judicial interpretation until the case of *Moneyweb (Pty) Limited v Media 24 Limited and Another*. However, the fair dealing exception examined in that case pertained to “reporting current event in a newspaper, magazine or some other periodical” as contained in s 12(1)(c)(ii) of the Act.¹⁶² Currently, it is uncertain whether the activities of the platform firm in the context of open and freemium music business model would fall within any of the fair dealing categories. At this point, however, it becomes important to acknowledge two things: First, it is possible to stretch the meaning of the specific fair dealing exceptions to accommodate the activities undertaken by the platform firm in the context of the open and freemium music business model. In the *Bell* case discussed above, the court interpreted the “research” fair dealing exception to include consumer research. Second, the copyright law reform process currently on-going in South Africa and Nigeria present an opportunity for the fair dealing exception to be specifically accommodating of the activities of the platform firms. However, this approach has the potential to engender conflicting interpretations. In the circumstances, it appears the best viable solution is to ensure that fair dealing exceptions need to offer a measure of legal certainty. In the absence of such certainty, users of copyright-protected content may err on the side of caution by avoiding uses of such content in any manner that is not explicitly permissible. As a result, creativity may be stifled.

It has been suggested that the bouquet of exceptions in the Copyright Amendment Bill be expanded to include such copying for indexing and storage purposes on the grounds that while such use involves copying, the copying does not affect the copyright owners’

¹⁶² *Moneyweb (Pty) Limited v Media 24 Limited* supra at paras 101-5.

market.¹⁶³ Conversely, expanding the scope of exclusive rights to cover such uses may engender similar results as occurred in the *German Press Publishers'* case discussed above. Again, the inclusion of a *gratis* licence scheme within the copyright terms discussed in Chapter three, above lends credence to this argument.

In the light of the foregoing, it is argued that the copyright terms and the copyright system in South Africa are not aligned. However, the Copyright Amendment Bill 2017 in adopting the WCT approach to the right of communication to the public shows some promise. Indeed, the Government Communication regarding the Amendment Bill made explicit reference to the possible introduction of appropriate steps to address various instances of “value gap” in the copyright industry.¹⁶⁴ The consideration of this possibility by the South African Government therefore strongly suggests recognition of the pertinent issues and a resolve to consider and possibly adopt appropriate steps to address them within the copyright law framework. However, there is still need for considerable efforts to realise the potential of the communication to the public. Indeed, in failing to define the scope of the right of communication to the public to include communication made for profit, the Copyright Act gives platform firms the power to define the scope of the property rights by enabling them to use copyright works without corresponding revenue.

A properly clarified right of communication to the public could redefine the process, reduce unnecessary restrictions on copyright user access to the music content and generate revenue for copyright owners. But in its current form, the South African Copyright

¹⁶³ See Sag 2009 *supra* at pp.1607-1682; Sag, M. (2012). Orphan works as grist for the data mill. *Berkeley Technology Law Journal*, pp.1503-1550. Jockers, M.L., Sag, M. and Schultz, J. (2012). Digital archives: Don't let copyright block data mining. *Nature*, 490(7418), pp.29-30; Riby-Smith 2017 *supra*.

¹⁶⁴ *ibid*.

Amendment Bill merely provides for the right without any clarification regarding key concepts such as what constitutes communication, definition of “public” and the import of profit-making intention. In effect, such approach encourages innovators with new technologies to enter the copyright sector but results in the adoption of copyright terms that delivers value to platform firms at the expense of copyright owners and even other copyright users.¹⁶⁵

4.4 Copyright terms and the Nigerian copyright system

With respect to the creation of a reproduction right that applies to all the categories of works and consists of the vesting of the exclusive right to reproduce or to authorize the reproduction of the applicable work “in any manner or form”, the Nigerian Copyright Act is quite similar to its South African counterpart.¹⁶⁶ Further similarities exist with respect to the definition of “reproduction” and the wide scope of the reproduction right itself. Section 52(1) of the Nigerian Copyright Act defines “reproduction” to mean “the making of one or more copies of a literary, musical or artistic work, cinematograph film or sound recording”.¹⁶⁷ This definition has been confirmed in several cases such as *Oladipo Yemitan v. The Daily Times (Nigeria) Ltd and Another*¹⁶⁸ and the case of *Peter Obe v. Grapevine Communication Limited*¹⁶⁹, where the Nigerian courts accepted that verbatim reproduction or copying of a protected work was the exclusive preserve of the copyright owner and as such, amounted to

¹⁶⁵ Rens, A. (2017). *Department repeats mistakes of others in bid to alter copyright law*. [online] Available at: <https://www.businesslive.co.za/bd/national/2017-10-13-department-repeats-mistakes-of-others-in-bid-to-alter-copyright-law/> [Accessed 16 Oct. 2017].

¹⁶⁶ See Ss 6, 7 and 8 of the Copyright Act.

¹⁶⁷ See s 51(1) of the Copyright Act.

¹⁶⁸ (Unreported Suit No: FHC/L/1/1980).

¹⁶⁹ (Unreported Suit No. FHC/L/CS/1244/97).

infringement when undertaken without the consent of the copyright owner.

Regarding the scope of the right of reproduction, the Nigerian Copyright Act also uses the expression “in any manner or form”, which suggests that the right extends to both digital and non-digital reproductions of a protected work.¹⁷⁰ Furthermore, the fact that s 51(1) defines the reproduction right to mean the making of one or more copies of the work indicates that the storage of music content by platform firms in the context of the open and freemium music business model would fall within the scope of the exercise of the right of reproduction. Similarly, the indexing of music content is likely to qualify as a protected use given that use of the expression “in any manner or form” indicates that partial copies of a work irrespective of the weight or size of the copied portion, is covered by the reproduction right.

To further constrain the expansive boundaries of the reproduction right, the Copyright Bill 2015 like its South African counterpart seeks *inter alia* to introduce an exception to the reproduction right in the case of temporary copies. Section 20(1) of the Copyright Bill provides thus:

The rights conferred in respect of a work by sections 8 to 12 of this Act do not include the right to control -

(p) temporary acts of reproduction which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable a transmission in a network between third parties by an intermediary; or for other lawful use, where such use has no independent economic significance.

Again, like its South African counterpart, this provision bears strong resemblance to art 5(1) of the EU’s Copyright Directive. Further, while this provision may protect access providers from direct liability, it may not avail service providers engaged in the act of permanent copying for the purpose of indexing and storage of protected content. Instead,

¹⁷⁰ See Ola 2014 *supra* at 20-21.

such activities may be safe from the boundaries of protected use by virtue of s 51 of the Copyright Amendment Bill, which offers safe harbour to hosting providers similar its South African counterpart. A close reading of this provision shows that like the case of South Africa, it is similar to art 14 of the EU E-Commerce Directive and s 512(c) of the US DMCA.¹⁷¹ However, until the Copyright Amendment Bill is enacted into law, the position remains that temporary and permanent copies and indeed reproduction in any manner or form would fall within the boundaries of the reproduction right. Similarly, no safe harbour regime is available to hosting service providers unless s 51 of the Copyright Amendment Bill is enacted into law.

Regarding the right of communicating the work to the public, such is presently is restricted to communication “by a loud speaker or any other similar device” in the case of a literary or musical work¹⁷² and is associated with the reproduction of the work in the case of a sound recording. Section 6(1) of the Act provides that, “copyright in a sound recording shall be exclusive right to control in Nigeria- (a) the direct or indirect reproduction, broadcasting or communication to the public of the whole or a substantial part of the recording either in its original form or in any form recognisably derived from the original”.

Further, the notion of “communication to the “public” is given a non-exhaustive meaning in that the Act defines it to “include, in addition to any live performance or delivery, any mode of visual or acoustic presentation, but does not include a broadcast or re-broadcast”.¹⁷³ However, similar to the case of South Africa, it is uncertain whether in the absence of clear statutory definition and/or judicial interpretation, linear and non-linear services, interactive and/or

¹⁷¹ See Aganga 2013 *supra* at 9-10.

¹⁷² Section 6(1)(a)(vii) of the Copyright Act.

¹⁷³ Section 51(1) of the Copyright Act.

non-interactive services are within or outside the scope of the right.

The Copyright Bill does not provide authors with the exclusive right of communication to the public in the manner provided by the WCT. Instead, Art 15 of the WIPO Performances Phonograms Treaty (WPPT) is adopted to provide for remuneration for exercising the “making available” right. In this regard, s 14(7) of the Bill provides that: “sound recordings made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as if they had been published for commercial purposes”. Publishing for commercial purposes entail the payment of “a single equitable remuneration for the direct or indirect use of sound recordings”.¹⁷⁴ Performers and producers of sound recordings are entitled to such payment through their collecting societies.

In providing for the making available right in terms of commercial purposes, the Copyright Bill 2015 offers potential for the adoption of a compulsory licensing scheme that would apply to activities related to the copyright terms. Such approach aligns favourably with a revenue-based licensing terms within the open and freemium music business model.¹⁷⁵ However, by placing collecting societies at the centre of revenue collection¹⁷⁶ and performers and producers at the centre of revenue negotiation,¹⁷⁷ it appears the implementation of s 14(7) may be quite problematic given the potential for monopolistic abuses on the part of collecting societies.¹⁷⁸ In this

¹⁷⁴ See s 14(1) of the Bill.

¹⁷⁵ See Ritala 2013 supra at 42-3; Teague 2012 supra at 27 - 28.

¹⁷⁶ See s 14(5).

¹⁷⁷ See s 14(3).

¹⁷⁸ On the monopolistic abuse by collecting societies, see generally: Jiang, F. and Gervais, D., 2012. Collective management organizations in china: practice, problems and possible solutions. *The Journal of World Intellectual Property*, 15(3),

regard, it calls to mind the scenario in the *German Press Publishers'* case cited above. The platform firms may still be able to procure a *gratis* licence leaving the collecting societies with no payment to enforce. Consequently, even if the Bill is adopted in its current form, the lacuna created by the dichotomy between the personnel for revenue negotiation and that for revenue collection, persists.

In any event, it remains to be seen what provisions of the Bill would make it into the substantive Copyright Act.

4.5 Conclusion

This chapter has endeavoured to provide a comprehensive overview of the copyright terms implemented in the open and freemium music business model within the current copyright system in South Africa and Nigeria and identify points of friction, opportunities and challenges. Using specific provisions of international copyright treaties such as the Berne Convention, the TRIPS Agreement and the WCT as benchmarks, the chapter considered the copyright terms to check their compatibility with the copyright framework. It was shown that instead of the right of reproduction, the copyright terms appear more closely related to the right of communication to the public. This is evidenced by the CJEU jurisprudence on the construction of the right of communication as more particularly highlighted by the *Pirate Bay*.

Apart from the current copyright system in South Africa and Nigeria, the chapter also considered the proposed amendment to the copyright statute presently going on in both South Africa and Nigeria. The proposed amendments were briefly analysed in relation to the WCT to determine whether they take advantage of the leeway in

pp.221-237; Schroff, S. and Street, J., 2017. The politics of the Digital Single Market: culture vs. competition vs. copyright. *Information, Communication & Society*, pp.1-17; von Lewinski, S., 2014. EU Challenges and Solutions in the Field of Collective Management of Copyright and Related Rights. *Soc. Persp.-J. Legal Theory & Prac.*, 1, p.104.

international treaties to provide the necessary regulatory framework for the business model to be deployed. In this regard, neither South Africa nor Nigeria has appeared to take full advantage of the guidance and leeway to provide a better-aligned regulatory framework for the open and freemium music business model. This is problematic as it leaves the business model largely unregulated despite the issues arising from its deployment.

The identification of these issues as concerns is based on the interpretation of the purport of the exclusive rights and its boundaries in terms of users' rights and exceptions to copyright protection. Therefore, it is imperative to have *a priori*, legal framework that will address these concerns and ensure that the open and freemium music business model meets the objectives of copyright law in promoting competition. While the legislative changes proposed in the literature may not be applicable to address the identified copyright implications of the open and freemium music business model, the proposed amendments to the copyright statutes in South Africa and Nigeria may be amenable to being applied to regulate the business model. Accordingly, after exploring the competition law angle relating to the copyright terms in the next chapter, this study will aim at proposing ways in which the copyright law framework may be applied to regulate the open and freemium business model.

Chapter Five: Competition Consequences

5.1 Introduction

As explained in Chapter two, above, competition law complements copyright law in the achievement of its objectives. In this regard, competition law may apply to restrict the exercise of copyright to protect the public interests as copyright and other IPRs do not stand in the way of competition law application. Competition law may also apply to ensure that dominant and economically powerful firms, be they distributors or even copyright owners themselves, do not derail the legitimate distribution of copyright products. Accordingly, copyright owners, users of copyright-protected content including platform firms are in the focus of competition law so long as they are involved in economic activities.¹

Platform firms, as described in Chapter three, are owners and operators of multisided platforms dealing with copyright owners on one hand and with consumers and advertisers on the other hand. The application of competition law to platform firms generally, and to the relationship between platform firms and other firms using their services or rendering similar services, in particular, is quite controversial.² The platform firms as identified in the context of this thesis are in practical terms, multisided platforms. The activities of multisided platforms have been the subject of much debate in the EU and in the US, particularly with respect to the appropriateness or otherwise of applying competition law rules to regulate them. Of particular concern to this thesis is how competition law in South Africa

¹ Competition law only applies to economic or commercial activities. See Section 3(1) of the South African Competition Act; Section 2(1) of the Nigerian Competition and Consumer Protection Bill.

² See inter alia, Polverino 2012 supra 3-4; Gal and Rubinfeld 2015 supra at 3-5; Wagner-von Papp, F. (2015). Unilateral conduct by non-dominant firms: A comparative reappraisal. ASCOLA Series, pp. 13-5 (hereafter, Wagner 2015).

and Nigeria may be applied to regulate the concerns arising from the copyright terms of the open and freemium music business model, particularly, the position of copyright owners as both suppliers to and users of the services of the relevant platform firms. Competition law enforcement can be much more challenging and technical than copyright law in this instance because it requires the platform firm to be dominant in a clearly defined relevant market and/or for the conduct of the platform firm to adversely affect competition in such relevant market.³ In this context, the definition of “market” usually relies on monetary exchanges so that in the case of the open and freemium music business model where music content is distributed free-of-charge; it may be difficult to define the relevant market.⁴

This notwithstanding, the copyright terms of the open and freemium music business model may raise competition concerns for both the copyright owners and the users of music content on the platforms. This is because the open and freemium music business model represents a context where the need to address the interests of all relevant stakeholders – copyright owners, platform firms, creative users and consumers – is heightened and where competition in one sector/industry may potentially affect competition in another sector. A typical example is the case of competition in the advertising and online search market affecting competition in the music copyright industry. On the one hand, it seems important to encourage the platform firms’ investments in deploying the business model to provide consumers with free access to music content, and to refrain from intervening in

³ See section 5.3 below.

⁴ See Gal and Rubinfeld 2015 supra at 3-5; See also, Bakhoun, M. (2017). Abuse Without Dominance in Competition Law: Abuse of Economic Dependence and its Interface with Abuse of Dominance. In: P. Paul Nihoul, ed., *Abuse Regulation in Competition Law: Past, Present and Future*, 1st ed. [online] Edward Elgar, ASCOLA series, p.15. Available at: <https://ssrn.com/abstract=2703809> [Accessed 10 Mar. 2017] (hereafter, Bakhoun 2017); Drexl 2013 supra at 73.

their pursuit of profit from their business activities. On the other hand, the recognition and protection of the economic interests of platform firms should be addressed alongside the need to incentivise and reward copyright firms for their investments in creating music content, and the need to enhance access to music content in the interest of competition. Failure to address any of these goals may preclude competition in the market for the creation and distribution of music content and may lead to considerable losses for society as a whole.⁵ The impact on societal welfare has been identified through the prism of ensuring that artists and record labels have enough incentive for continued creativity while promoting technological advancements by platform firms. Indeed, in letter to the Department of Trade and Industry (DTI), the Copyright Alliance pointed out the likely impact on societal welfare, of rules that do not permit the copyright owners to earn revenue from the use of their works.⁶

As noted earlier, the existence of copyright and other IPRs do not restrict the application of competition law.⁷ Particularly in the case of the open and freemium music business model, which involve platform firms that utilise the availability of copyright-protected music content to procure advertising revenue, the potential of competition law application has been explored.⁸ Within the EU, the EU competition authority (the European Commission) has beamed the competition law

⁵ See Libguides.wits.ac.za. (2017). *LibGuides: Copyright and Related Issues: Copyright Amendment Bill 2017*. [online] Available at: http://libguides.wits.ac.za/Copyright_and_Related_Issues/SA_Copyright_Amendme nt_Bill_2017 [Accessed 24 Nov. 2017].

⁶ The Copyright Alliance is comprised of the Southern African Music Rights Organisation (SAMRO), the Composers, Authors and Publishers Association (CAPASSO), the Dramatic, Artistic and Literary Rights Organisation (DALRO), the Recording Industry of South Africa (RiSA), the South African Music Performance Rights Association (SAMPRA), the Musicians Association of South Africa (MASA) and the Music Publishers Association of South Africa (MPA SA).

⁷ See Chapter 2, above.

⁸ Drexl 2013 *supra* at 42-4.

searchlight on the potential anticompetitive conduct implemented by undertakings that facilitate access to copyright products in the open business model context.⁹ In particular, the European Commission, although recognising that the open business model in itself “does not raise competition concerns”¹⁰ also noted that it could raise competition concerns in relation to business practices, policies or contractual rules surrounding its implementation.¹¹ In South Africa, while platform firms within the context of this thesis, have not been the subject of competition law scrutiny, the activities of firms which like platform firms, own and operate distribution systems for copyrighted content have been scrutinised as discussed in Chapter two, above.¹² Such activities and conduct have been reviewed under s8 of the South African Competition Act, which prohibits abusive conduct by dominant firms. Similar prohibition of abusive conduct by dominant firms is made in s73 of the Nigerian Competition and Consumer Protection Bill 2016 currently undergoing legislative processes.¹³

This chapter considers the legal framework of abuse of dominance in place under competition law for the protection of competition in South Africa and Nigeria. The copyright terms of the open and freemium music business model identified in Chapter three, above are analysed to see whether they are aligned with the

⁹ See for example, European Commission, (2016). *Antitrust: Commission sends Statement of Objections to Google on Android operating system and applications*. [online] Available at: http://europa.eu/rapid/press-release_IP-16-1492_en.htm [Accessed 6 Jan. 2017] (Hereafter, Google Android Statement).

¹⁰ Ibid.

¹¹ Ibid. In particular, the Commission stated that its concerns “relate to the conditions for use of Google's proprietary apps and services on Android devices, which are not open source”.

¹² See *DW Integrators* supra; *Mandla Matla Publishing* supra. In these cases, the competition enforcer did not find any offensive conduct under the Competition Act.

¹³ Article 102 TFEU and Section 2 of the Sherman Act. Also, see Bakhoun 2017 supra at 4.

competition law framework. To conduct the analysis, section 5.2 discusses the interface between the platform firms' copyright terms and competition law. It highlights how the copyright terms constitute economic activities, which may affect the structure of the market and thereby have competition law implications. The section focuses particularly on the competition issues arising from the implementation of the copyright terms within the open and freemium music business model. Because the application of competition law is restricted to economic activities between firms¹⁴, section 5.2 examines the copyright terms from that perspective. This provides a benchmark for the analysis conducted in section 5.3 regarding the South Africa and Nigerian competition law perspectives. Section 5.3 deals with the legal approach to the application of the concept of unilateral abusive conduct in South Africa and Nigeria. This analysis is relevant because unilateral conduct concerns the behaviour of platform firms in deploying the open and freemium music business model. In dealing with the legal approach, the section reviews the main criteria put forward under competition law and by the competition authorities in applying the concept of abuse of dominant position. It further highlights how the enforcement approach to unilateral conduct in South Africa and Nigeria may regulate the competition issues identified from the copyright terms. The section also considers the issue especially from the perspective of South Africa and Nigeria, which as stated earlier, are developing jurisdictions with copyright owner firms who are small businesses/SMEs and platform firms facing competition from international platform firms.¹⁵ Section 5.4 concludes

¹⁴ The Competition Act (in the case of South Africa) and the Competition and Consumer Protection Bill (in the case of Nigeria) do not explicitly define "economic activity". However, Section 3(1)(e) of the South African Competition Act clearly excludes "concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose" from activities regulated by the Act.

¹⁵ See section 1.2, above.

the chapter.

5.2 Copyright terms from a competition law perspective

In each market, there are several market participants, which include firms engaged in different economic activities, their suppliers, customers and/or consumers. A key feature of markets is the existence of firms, which are not equal in size, market reach and/or consumer size. In practical terms, firms in both vertical relationships¹⁶ and horizontal relationships¹⁷ differ in size and economic strength. It is possible for inequality of economic power in vertical relationships to affect the ability of horizontally related firms to compete.¹⁸ Put differently, economic inequality between vertically integrated firms may affect competition in markets in which firms are horizontally integrated. From the perspective of the dominant or economically stronger firm, such economic imbalance may reinforce its market power in the relevant market apropos its competitors. From the perspective of the weaker firm, it may affect its ability to effectively compete on the downstream market for the production of goods.¹⁹ As a market regulatory legal tool which is concerned only with the effects which the conduct of market participants have on a given market,²⁰ competition law will interfere with the freedom of market participants to enter into business dealings as long as the business transactions affects the relevant market.

¹⁶ “Vertical relationship” means the relationship between a firm and its suppliers, its customers, or both. See Section 1(xxxiii)(ii) of the South African Competition Act.

¹⁷ “Horizontal relationship” means a relationship between competitors; See Section 1(xiii) of the South African Competition Act.

¹⁸ See Boy, L. (2006). Abuse of market power: controlling dominance or protecting competition?. In: H. Ullrich, ed., *The Evolution of European Competition Law: whose Regulation, which Competition?*, 1st ed. Cheltenham and Northampton, MA,: Edward Elgar, p.216 (hereafter, Boy 2006).

¹⁹ In terms of copyright, the downstream would be the market for the creation and production of music content

²⁰ Bakhom 2017 supra at 4.

By itself, the mere fact of the relationship and economic strength of the copyright owner firm and that of the platform firm may not constitute sufficient grounds for competition law intervention. Nor would such provide the appropriate impetus to assess the effect of the open and freemium music business model on competition. The decision to give away its work for free in the case of the *gratis* licensing scheme is entirely the decision of the copyright owner based on its assessment of its economic interests.²¹ As held by the US Court in *Jacobsen v Katzer*²²:

The lack of money changing hands in open source licensing should not be presumed to mean that there is no economic consideration, however. There are substantial benefits, including economic benefits, to the creation and distribution of copyrighted works under public licenses that range far beyond traditional license royalties. For example, program creators may generate market share for their programs by providing certain components free of charge. Similarly, a programmer or company may increase its national or international reputation by incubating open source projects...The Eleventh Circuit has recognized the economic motives inherent in public licenses, even where profit is not immediate.

Nonetheless, the open and freemium music business model, the participating entities and the copyright terms implemented in deploying the business model do not stand alone, independently, from the copyright market. The copyright terms, being contractual provisions are legal instruments used to formalize business dealings and are therefore, capable of changing the structure of the copyright market. As contracts, the copyright terms formalize economic dealings between the various market participants, viz: the copyright owner, the platform firm, the consumers and the advertising companies.²³

There is a close connection between competition and market participation, which, from a legal perspective, occurs through

²¹ Ibid.

²² *Jacobsen v. Katzer supra*; *Planetary Motion, Inc. v. Techsplosion, Inc.*, 261 F.3d 1188, 1200 (11th Cir. 2001)

²³ See First, H. and Waller, S. (2013). Antitrust's Democracy Deficit. *Fordham Law Review*, 81, p.2571.

economic relationships and contractual terms, set by (or between) market participants.²⁴ From a competition law perspective, specifically, economic relationships and contractual terms are regulated for the purpose of eliminating and penalising anticompetitive conduct and/or conduct that restrict competition. Such conduct may be cartels, abuse of dominance or specified restrictive agreements. In the case of mergers, competition law regulates contractual provisions and relationships by monitoring (and approving or refusing to approve) prospective contractual relationships that have the likelihood of affecting the openness and competitiveness of a market. The purpose of these regulatory activities is to protect and/or promote competition. It is this interface between the copyright terms of the open and freemium music business model (as embodying contractual provisions and economic relationships) and competition law in South Africa and Nigeria that this chapter seeks to explore. These copyright terms constitute the basis for evaluating whether open and freemium music business models processes preclude or promote competition.²⁵

The copyright terms represent the terms of the relationship between the platform firms, the copyright owners, copyright users and consumers and in some ways, advertisers. These rules are therefore contracts which are legal instruments used to formalize business dealings. As contracts, the copyright terms are intertwined with the market and as such, they may affect the structure of the market. As competition law regulates the general legal environment where transactions take place, it may apply to ensure that the copyright terms are implemented in respect of competition law rules.

²⁴ Market participants include firms and their suppliers or firms and their customers and/or consumers.

²⁵ See Google Android Statement *supra*. In commencing investigation against Google, the European Commission was vociferous in condemning the contractual rules and relationships set and reinforced by Google in relation to the dissemination of the Android software.

Competition law applies to ensure that the implementation of the copyright terms does not affect competition adversely. Several aspects of the copyright terms raise specific competition law questions. These include the import of the platform firm's ability to obtain a *gratis* licence in respect of the music content, the exclusion of copyright owners based on firm size and repertoire size as evident from the revenue-based licensing terms, amongst others.²⁶

As noted in Chapter three, the *gratis* licensing term within the open and freemium music business model relates to the grant of a royalty-free or *gratis* licence by each person uploading music content to the relevant platform.²⁷ This particular provision is aimed at ensuring that the platform firm may deploy the music content in providing its advertising services, without incurring liability for copyright infringement. The import of such *gratis* licence in relation to the platform firm's use of the music content particularly in cases where the uploader is not the copyright owner has been discussed in Chapter four, above from the perspective of copyright law.²⁸

As a business entity investing creative efforts and funds towards the production of music content, the grant of a *gratis* licence to platform firms particularly for the use of the music content in a commercial context may create concerns for copyright owners. Indeed, as Chapter four of this thesis has shown, copyright owners are increasingly concerned about the viability of the music copyright sector in the face of the open and freemium music business model. The consideration of the effect of the open and freemium music

²⁶ See Alexiadis, P. (2017). Forging a European Competition Policy Response to Online Platforms. *Business Law International*, 18(2), pp.93-7 (hereafter, Alexiadis 2017); Verhaert, J. (2014). The challenges involved with the application of article 102 TFEU to the new economy: a case study of Google. *ECLR*, 35(6), pp.265-7.

²⁷ See Section 3.4.1, above.

²⁸ See section 4.2, above.

business model in Nigeria and South Africa on competition may be undertaken from various respects. It may relate to a distribution system or a platform, a long-standing business relationship between two firms or the services that are required for the copyright market²⁹ to function properly. Competition may be affected where a firm (such as a platform firm) depends on another firm (a supplier³⁰) to distribute copyright products or where a firm (such as the copyright owner) depends on another firm (a distributor³¹) to distribute its copyright products. From the perspective of competition law, there is the question of the effect, which the *gratis* licence may have on the copyright market.

Apart from the *gratis* licence, the licensing terms also provide for a revenue-based licensing regime. In this regard, selected copyright owners can share advertising revenue received by the platform firms for the use of the music content to render advertising services. Music content identified by participating partners is excluded from the platform and those uploaded by the said participating partners are monetized through advertising. The conditions for acceptance into the revenue-based licensing scheme vary across platforms. In most cases, selected copyright owners are obliged to own exclusive rights to a substantial body of original material that is frequently uploaded by the platform users. By implication, smaller copyright owners are excluded from the revenue-based licensing scheme.³² Furthermore, by implementing contractual provisions

²⁹ See Ritala 2013 *supra* at 25; Drexl 2013 *supra* at 42.

³⁰ Based on this perspective, Ritala suggests that the US removes the dichotomy between interactive and non-interactive service in order to have compulsory licensing apply for all firms operating as a digital music service. See Ritala 2013 *supra* at 25.

³¹ See the subject of the dispute in the case of *Attrakt v Google* *supra* discussed below.

³² See Section 3.4.1, above.

regarding the payment and termination of payment, the revenue-based licensing terms may have a significant effect on competition in the copyright market. Similar to the case of the *gratis* licensing rule, the question is whether there is compatibility between competition law and the parameters for exclusion or inclusion of copyright owners from the revenue-based licensing scheme. Additionally, there is also the question of how the conduct of platform firm in relation to the copyright terms affects competition in terms of market participation by copyright owners and/or other platform firms. Possible issues relate to the feasibility for smaller platform firms to put such a system in place and whether the licensing terms in particular, impedes market entry for other platform firms by unduly raising their costs.

As stated in previous chapters, the open and freemium music business model plays a crucial role in today's information-based economy. In deploying the business model, the platform firms make it possible for consumers to enjoy music content free-of-charge, resulting in greater access to copyright products.³³ The platform firms also utilise the "supply" of copyright-protected music content that enable them to enjoy competitive advantage in their own sphere of operation. For instance, the provision of advertising services requires copyright owners to provide "content" that platform firms may use to attract consumers, which in turn attracts payment from advertising companies.³⁴ This scenario, it is argued, correlates to a vertical

³³ Rizk 2010 supra at 490; Elkin-Koren 2011 supra at 341; Santos 2013 supra at 621.

³⁴ See Li, Z. (2016). Legal Boundaries of Competition in the Era of the Internet: Challenges and Judicial Responses. *Internet Competition & Regulation Of Online Platforms*, [online] p.143. Available at: <https://www.competitionpolicyinternational.com/wp-content/uploads/2016/05/INTERNET-COMPETITION-LIBRO.pdf> [Accessed 3 Feb. 2017]; Hughes, P., 2009. Business strategy and EC competition law: two systems separated by a common language. *International Company and Commercial Law Review*, 11, pp.387-9 (hereafter, Hughes 2009).

relationship between the copyright owner and the platform firm.³⁵ Where the economic power in such vertical relationship is disproportionate, it may affect competition in the horizontal relationship,³⁶ between competitors such as other platform firms. From the perspective of the platform firm, the (limitless) “supply” from the copyright owner as a “trading partner” may strengthen its market power in the relevant market apropos its competitors in the platform provision business. From the perspective of the copyright owner, it may affect its ability to effectively compete in the creation and distribution of the music content (the “copyright market”). The distribution of copyright work is an ancillary market for the platform firms in this context. For example, Google, which owns YouTube, is primarily in the advertising business rather than music distribution.

There are two dimensions to the promotion and/or protection of competition, which is explained hereunder. First, it is to be understood that the broad principle behind the protection of competition through competition law is the definition and calibration of a “relevant market”. Whether any unilateral or concerted conduct (whether by or between horizontally or vertically related firms) restricts competition is assessed from the standpoint of a relevant market. Similarly, assessing whether the conduct of any firm is anticompetitive (abuse of dominance) requires that such firm enjoys a dominant position in a relevant market and abuses such dominant position.³⁷ To define and assess dominance, competition law examines the economic status or

³⁵ See Gal and Rubenfield 2015 supra at 9-11.

³⁶ See Boy 2006 supra at 216. See also, Bakhoun 2017 supra at 22.

³⁷ This is the approach to the concept of abuse of dominance in South Africa. See *Sasol Oil (Pty) Ltd v Nationwide Poles CC* (49/CAC/Apr05). This approach is largely based on the influence of competition law in the EU. See also Bakhoun 2017 supra at 1.

influence³⁸ of market participants – the “market” having been defined prior. As such, the conceptual approach to assessing economic influence, under competition law, relies on market power³⁹ and/or market share⁴⁰ of the participants in a relevant market. Accordingly, whether the copyright terms and resultant economic relationships are directed to exclude competitors or to exploit suppliers and/or consumers, the primary requirement is that such rules or relationships must affect competition in the relevant market. Otherwise, such rules or relationships may not be painted with the anticompetitive brush.

Second, competition law may protect and promote competition by scrutinising the conduct of one party in a contractual or business relationship, even where such party does not hold a dominant position in relation to any relevant market.⁴¹ In such instance, it may hold that competition may also be restricted or adversely affected when a market participant enjoys a stronger economic position vis-à-vis its supplier or trading partner and relies on its position of economic strength to decimate the weaker trading partner’s ability to compete or remain in its business.⁴² Competition is affected in such instance even in the absence of a dominant position in the regular competition law sense⁴³ because the choices available to a market participant to

³⁸ Ibid.

³⁹ See Drexl, J. (2008). The Relationship Between the Legal Exclusivity and Economic Market Power. Links and Limits. In: I. Govaere and H. Ullrich, eds., *Intellectual Property, Market Power and the Public Interest*, 1st ed. Lang, pp. 16-18 (hereafter, Drexl 2008).

⁴⁰ South African Competition Act 1998 assesses dominance from a combined market share and market power approach. See Section 7 of the Act.

⁴¹ See Drexl 2013 supra at 42. See also, Bakhoun 2017 supra at 26...

⁴² See Hughes 2009 supra at 389-392.

⁴³ Competition statutes usually stipulate legal and economic criteria for assessing dominance.

conduct its business are undermined.⁴⁴ Indeed, competition law has been applied to cases where an undertaking, which is a distributor of copyright products, exercises its proprietary rights in the distribution system to the detriment of the copyright market.⁴⁵ In this regard, as explained in Chapter two, competition authorities may apply a test, which aims at achieving the identified applicable goals of competition law.

From a competition law perspective, the open and freemium music business model may be nonthreatening where the economic freedom of each market participant is not undermined. The consumer's access to the music content is guaranteed; the platform firms continue to innovate in providing products and services that suit their customers (including the advertising firms) and the copyright owner's choices in terms of participating in the copyright market are not unjustifiably limited.⁴⁶ Such state of affairs constitutes the process in which competition law complements copyright law in achieving its objectives.⁴⁷

Corollary to the foregoing, there is need to consider how competition law rules may be applied to regulate the copyright terms as implemented in the open and freemium music business model. This thesis argues that even in cases such as the *gratis* licensing scheme where the relevant market participants accept the policies within the open and freemium music business model and consumers enjoy access to the music content free-of-charge, the policies

⁴⁴ Bakhoun 2017 *supra* 5 at 2 and 21; Këllezi, P. (2008). Abuse below the threshold of dominance? Market power, market dominance, and abuse of economic dependence. In *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?*. Springer, Berlin, Heidelberg, p. 62 (hereafter, Këllezi 2008).

⁴⁵ See Drexl 2013 *supra* at 167.

⁴⁶ See *Attrakt v Google* *supra*. Here, Google was required to justify its withdrawal advertisement.

⁴⁷ Gal and Rubenfield 2015 *supra* at 3.

determine the economic influence of the copyright owners and platform firms. There is need for the application of competition law to regulate the open and freemium music business model to ensure that the business model may promote competition in copyright markets.⁴⁸ This is mainly from the perspective that competition law intervenes to promote access of music content to the market. The need for regulation is made more pressing by the nature and impact of the policies in the open and freemium music business model and the economic weight of the copyright owners as small businesses in Nigeria and South Africa's music industries. For instance, the revenue-based licensing scheme may provide for contractual terms that require that copyright owners agree on the denial of access to the platform or revenue share on any stated or unstated grounds. Another applicable instance may be the exclusion of copyright owners from participating in the revenue-based licensing scheme because of firm size and/or repertoire/catalogue size; the unilateral imposition of a gratis licence as a condition for copyright owners to upload their music content on the platform and the challenges in terms of resources required by copyright owners to monitor and challenge the removal of their music content from platforms that have them without the copyright owners' consent. Although the competition challenges of these instances is yet to be considered in court, it is submitted that these instances have the potential to engender anti-competitive effects. Such contractual terms may raise potential competition concerns because they challenge the boundaries between the freedom of the platform firms to deploy their business models and competition in copyright markets. The boundaries between these two are set by the specific goals of competition law in each jurisdiction. These goals provide the pro-

⁴⁸ See Drexl 2013 *supra* at 167.

competitive justification for antitrust intervention.⁴⁹ As argued more fully in Section 5.3.1, below, this is even more pertinent where the competition statute, like South Africa's, has the goal of protecting the interests of small businesses.

In Italy, the Court of Milan, dealt with a case that illustrates, in the advertisement sector, how contractual provisions may affect the economic freedom of a market participant and thus, competition in a given market. The contractual terms may strengthen the economic power and position of a market participant vis-à-vis its competitors. The rules may also limit the freedom and ability of other market participants to participate in other markets. In the case of *Attrakt S.R.L. v Google Ireland Limited*, ("*Attrakt v Google*")⁵⁰ Google, which is active in the search engine and advertising business, created two separate contractual relationships with its search engine and advertising partner, Attrakt S.L.R., an Italy-based search engine company. These two contracts were linked to each other and used by Google to control the contractual relationship and create a situation where its conduct undermined the continued participation of Attrakt in the market.

With Attrakt as a trading partner, Google agreed on a publishing and revenue share service that enabled Google to display advertisements on Attrakt's website and share accruing revenue from the advertisements with Attrakt.⁵¹ Parallel to that, there was another contract for Google to provide advertising services to Attrakt which enabled Attrakt to display its website links on Google's site and advertising network (referred to as "Adword") upon payment to

⁴⁹ Ibid at 5.

⁵⁰ See *Attrakt v Google* supra.

⁵¹ *Attrakt v Google* para 5.

Google.⁵² These contracts are interrelated such that Attrakt paid Google to attract users to its (Attrakt's) site based on the AdWords agreement and relied on Google to make returns from these payments, based on the AdSense agreement. The AdSense agreement obliged Google to pay Attrakt when users clicked on the ads appearing on Attrakt's website. With Attrakt and indeed each AdSense partner,⁵³ Google was exclusively in charge of selecting ads to be included as part of the search results depending on the particular website user. Google's selection could not be modified and only Google knew and could account for remuneration earned from clicks.⁵⁴ Provisions were inserted in the AdSense contract directing Attrakt to follow Google's directives and to permit Google to control announcements and position of announcements on Attrakt's site, links and search results.⁵⁵ In addition to these provisions that obliged Attrakt to largely conduct its business based on Google's directives, additional provisions related to Google's exclusive control of revenue accounting and payments were included.⁵⁶ A limitation of liability clause states that Google's liability in the event of any breach is limited to a stated sum. This provision prevents the AdSense partner from collecting actual monies owed by Google in the event of a suit or from collecting potential damages as may be assessed by a court. This may result in huge losses especially for a small firm. In the light of all these provisions, the Court accepted the existence of a dependency between Google and its trading partner, Attrakt. The Court concluded that a situation of economic dependence existed

⁵² Ibid.

⁵³ *Attrakt v Google* supra at para 6.1.

⁵⁴ *Attrakt v Google* para 6.

⁵⁵ *Attrakt v Google* para 6.1.

⁵⁶ Ibid.

between the parties.⁵⁷ Further, the court took the view that Google's conduct amounted to an abuse of dominance as well.⁵⁸

Analyzed individually, Google's position and actions under the AdSense contract was a legitimate exercise of its right to run its business as it sees fit and to accept or refuse to deal with any business entity or individual.⁵⁹ Indeed, the Court acknowledged that: "it is certainly true that in fixed term contracts, withdrawal is permitted, in order to reflect the need to avoid an obligatory binding agreement from persisting perpetually..."⁶⁰

However, analysed together, with regard to their actual effects on the market, the two contracts allow Google to "create" a firm (Attrakt) that is economically dependent on it. The Court found that:

An examination of the contracts and correspondence exchanged by the parties to the action reveals a decidedly unbalanced picture in favour of the defendant Google, which, from the setting-up of the contractual relationship until its conclusion, dictated the conditions, time schedule and modifications to be implemented on the site owned by Attrakt. It continually made demands of Attrakt of all kinds, aimed basically at monitoring developments in the contractual relations and the possibility of growth on the part of Attrakt. The continual requests for information, the directives and controls constitute clear evidence of the fact that, apart from a business form, unbalanced in favour of the defendant, who decided the fees to be paid and the shares, on the other hand, to which it was entitled for intermediation activities, the Google company was aware of the operations carried out by Attrakt, and hence no increase or anomalous development in the advertising displayed could escape it, unless it was permitted by the company or, even encouraged. The increase in turnover stemming from the contracts was always observed with interest by Google, which, on its part, encouraged the AdWords campaign and received punctual, immediate replies from Attrakt – as it acknowledged itself in the correspondence – on the operating methods used to earn profits, with regard

⁵⁷ *Attrakt v Google* para 6.2.

⁵⁸ See *Attrakt v Google* para 9.

⁵⁹ Both parties had similar termination rights. See para 7.1 of the judgment citing relevant portions of the Article 7 of the AdSense contract. Indeed, in its correspondence with Attrakt, Google indicated that "[it] understood that [Attrakt] may want more information about [its] account activity. However, because we have a need to protect our proprietary detection system, we are unable to provide our publishers with any details about their account activity". See *Attrakt v Google*, para 5.

⁶⁰ *Attrakt v Google* para 7.1.

to the interdependent relationship between the two AdWords and AdSense contracts, as well as the technical aspects with which users were redirected to the Attrakt landing-page.⁶¹

The two contracts enabled Google to plan and coordinate its advertising distribution services. The costs to leave the Google platform or to shift to another platform were high enough to deter Attrakt from leaving the platform. In this regard, Attrakt's profits were exclusively reliant on the difference between the income received through the AdSense contract, and the spending it made on the Adwords contract.⁶²

It is evident from the foregoing that the economic powers of the parties were clearly unequal, with Google being the economically dominant party. Further, in both contracts executed by the parties, Google clearly had the upper hand and significantly, could terminate the contract at any time.⁶³ The foundation of Attrakt's business was based on Google's direction and will.⁶⁴ It was therefore important that termination of the contract by Google must be made for good reason and preferably, followed with payments of any monies due Attrakt.⁶⁵ In the absence of these steps necessitate by the very nature of the

⁶¹ *Attrakt v Google* para 6.2.

⁶² *Attrakt v Google* para 6.2.

⁶³ By virtue of Clause 7 of the AdSense contract, Google "may, at any time, terminate all or part of the programme, terminate this Contract and suspend or terminate the participation of any Property in the Programme, either in whole or in part." See *Attrakt v Google* para. 7.1.

⁶⁴ For instance, Clause 6.2 of the AdSense contract provided that Google's share of profits on advertising announcements of third party advertisers would be established by Google "at its discretion" and that payment would be calculated "exclusively on the basis of registers kept by Google". See also, Clause 11.3 of the AdSense contract by virtue of which Google's liability cannot "exceed 125% of the net amount paid by Google to Attrakt over the last 12 months immediately prior to the moment at which liability first arose". See *Attrakt v Google* para. 7.1.

⁶⁵ According to the court, "In the event, therefore, of proven disparity between the strengths of the contracting parties, an assessment by the court as to whether or not the withdrawal was abusive must be wider and more rigorous, and may be made regardless of whether negligence or specific intent to harm are involved. See *Attrakt v Google* para. 7.

contractual relationship and economic position of the parties, Google exercise of its termination powers and failure to pay outstanding monies to Attrakt resulted in the pronouncement of a “death sentence” on Attrakt’s business.

This contractual relationship with the creation and use of a platform highlights how the copyright terms of the open and freemium music business model in particular, can be used to restructure the market by stabilizing or enhancing the market share of an economically stronger party and by limiting the freedom to compete of the weaker party.⁶⁶ The implementation of the contractual rules may also result in the abuse of a dominant position, which is an anticompetitive conduct.⁶⁷ On an extensive analysis, it becomes apparent how contractual terms regarding a *gratis* exchange can work to re-order the structure of the market and thereby affect competition.⁶⁸ The example of the *Attrakt v Google* case is not an isolated case. While this case is not from the copyright sector, it is instructive because the contractual terms pertinent to the case are on all fours with *AdSense*, which is one of the copyright terms of YouTube in Nigeria and South Africa.⁶⁹

Certain approaches to business practices in open and freemium music business models may in fact extend the reach of competition law to vertical contractual relationships between firms, which are not competing in the same market or in any defined market and which do not hold a dominant position as per a specific market. In protecting the ability of market participants to compete, competition

⁶⁶ See *Attrakt v Google* para 8; Boy 2006 supra.

⁶⁷ See *Attrakt v Google* supra at para 9.

⁶⁸ See Bakhoum 2017 supra 5 at 7 recommending Farjat’s “substantial approach” as contained in Farjat, G., 1986. L’importance d’une analyse substantielle en droit économique. *Ride*, p.9; Boy 2006 supra at 11.

⁶⁹ Section 3.4.4 above.

law goes beyond encouraging formal economic equality between market participants⁷⁰ and keeping the market open and competitive.⁷¹ Competition law aims to rectify the adverse effects of inequalities in contractual relationships, which erodes competition.⁷² This is particularly the case in jurisdictions, which have concentrated markets and where copyright markets are not functioning due, inter alia, to concentration of economic power.⁷³ In the case of open and freemium music business model in Nigeria and South Africa, where majority of copyright owner firms are small businesses/SMEs, it is argued that the copyright owners may be the weaker trading partners requiring competition law intervention in certain instances.⁷⁴

The imbalances in the relationship of the market participants within the open and freemium music business model, generally and between copyright owners and platform firms specifically coupled with the copyright terms of the business models, have the potential to erode competition. Indeed, the copyright terms and their implementation – in particular, rules regarding access to the revenue-based licensing scheme and justification for acceptance – may require competition law regulation. Such regulation would ensure that the open and freemium music business model may be better aligned with the goals of competition law which include enhancement of consumer welfare and ensuring that market participants (especially copyright

⁷⁰ Bakhoun 2017 supra at 4-5.

⁷¹ See Drexl 2008 supra at pp. 16-18.

⁷² See Hughes 2009 supra at 392; Wagner, 2015 supra at 10-15.

⁷³ See Bakhoun, M. (2011). A dual language in modern competition law? Efficiency approach versus development approach and implications for developing countries. *World Competition*, p.495; Gal, M.S. and Fox, E.M. (2015). Drafting competition law for developing jurisdictions: learning from experience. In: M. Gal, M. Bakhoun, J. Drexl, E. Fox and D. Gerber, eds., *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law*, 1st ed. Cheltenham and Northampton, MA,: Edward Elgar, pp.296-356 (hereafter, Gal and Fox 2015).

⁷⁴ See Bakhoun 2017 supra at 16.

owners as small businesses/SMEs) have an equitable opportunity to participate in the copyright market.⁷⁵

The strategy of locking in owners of copyright in music content is a common feature in the open and freemium music business model. Weighing the criteria adopted by the Italian court in evaluating whether Google's conduct was abusive and as such, anticompetitive, it appears that the open and freemium music business model may exhibit the potential to restrict competition or derail the realization of the goals of competition. This is because the business model is subject of contracts that create economic dependences and their abuse, curtailing the freedom of copyright owners to compete.⁷⁶ In addition, the economic inequalities necessitate an enquiry as to the protection and promotion of competition in copyright market.⁷⁷

Contracts remain a crucial factor in the sustenance of the business model and the copyright owner is compelled to relinquish its control of these contracts to the platform firm. The popularity of the music content is the catalyst for the realization of the economic interests of the copyright owner. As such, the copyright owner is reliant on the platform firm to indicate the popularity levels through number of views, number of clicks on ads displayed during music consumption; number of subscriptions and/or the number of "downloads". The popularity levels trigger market forces as they determine the revenue, if any that accrues from interaction with the music content embodying the copyright work. The operation of market forces in the open and freemium music business model in Nigeria and South Africa result in heightened reliance on platform firms, which

⁷⁵ Section 2(e) South African Competition Act; Section 1(a) Nigerian Competition and Consumer Protection Bill 2016.

⁷⁶ Bakhom 2017 *supra* at 17.

⁷⁷ *Ibid.*

dictate contractual rules that could undermine the economic freedom of the copyright owner.⁷⁸

The concentration of economic powers in the hand of the platform firm affects not only the structure of the market, but also the individual freedoms of copyright owners as market participants. As suggested by Bakhoun, the difference between economic freedom represented in voluntary contractual agreements and that represented in market participants' respective opportunity to compete is the determinant of competitiveness.⁷⁹ In the case of the open and freemium music business model, parties have clearly exercised "formal" economic freedom as copyright owners place their music content on platform that enable consumers to access the content at zero prices. However, there is the likelihood that the economic freedom of the copyright owners to compete in the market created by the platform firm's copyright terms may be limited.⁸⁰ In a revenue-based licensing arrangement, which has the effect of locking in copyright owners, the freedom of competition of the weaker party to shift to another distributor may be considerably restricted. Switching to another platform firm or taking the existence of other platforms into consideration without considering the mileage that has accrued on any specific platform is unlikely to expose the competition risks of the copyright terms of a specific platform. This is because, as explained, the popularity levels established on one platform may determine revenue levels on the platform and from other avenues such as live performance events, social media and brand relationships.⁸¹ Indeed, number of social media followers, number of concerts in a given

⁷⁸ See section 3.5, above.

⁷⁹ Bakhoun 2017 *supra* at 17.

⁸⁰ Heald 2014 *supra* at p. 313.

⁸¹ Cooke, C. (2015). *Dissecting the Digital Dollar, Part One: How streaming services are licensed and the challenges artists now face*. Music Managers Forum report.

period, social media post views are all metrics that corporate brands look at to select brand ambassadors.⁸² Due to the fact that popularity levels generated on a specific platform is crucial for revenue generation, there is the fear that a decision by the platform firm to shut out the copyright owner from the platform may result in economic losses for the copyright owner. Protecting economic freedom and freedom to compete may justify antitrust intervention to protect the copyright market against “structural restrictions” and the “individuals against coercion”,⁸³ two elements of economic freedom. As pointed out, with the examples of the *Adword* and *Adsense* contracts in advert distribution agreements,⁸⁴ openness and free access may affect the structure of the market because of the way they are implemented.⁸⁵

As already discussed, the relative dominance of platform firms may affect the individual freedom of copyright owners, in the case of open and freemium music business models where, the copyright owner as a supplier or a distributor depends “exclusively” on the facilitating platform as a distributor or a supplier and does not have equivalent alternatives. Exclusivity in this case may arise as a result of the unique offerings of each platform firm. This enables platform firms to take over audience previously “acquired” by another platform firm.⁸⁶ In such cases, the individual freedoms of the copyright owner may be

⁸² See Booth and Matic 2011 *supra* at 187.

⁸³ Bakhom 2017 *supra* at 21.

⁸⁴ See Cardoso, R. and Ren, Y. (2016). *European Commission – Press Releases - Press release - Antitrust: Commission sends Statement of Objections to Google on Android operating system and applications – Factsheet*. [online] Europa.eu. Available at: http://europa.eu/rapid/press-release_MEMO-16-1484_en.htm [Accessed 7 Mar. 2017] (hereafter, Google/Android Fact Sheet). See also *Attrakt v Google supra*.

⁸⁵ Gal and Rubinfeld 2015 *supra* at 3.

⁸⁶ See Evans, D. (2016). Multisided Platforms, Dynamic Competition, and the Assessment of Market Power for Internet-Based Firms. *Coase-Sandor Working Paper Series in Law and Economics*, p.799.

restricted. Indeed, access to the services of the platform firm may be a prerequisite for effective competition in the market for the provision of music content in Nigeria and South Africa.⁸⁷ In such situation, antitrust intervention or scrutiny may be necessary to promote competition in such copyright markets.⁸⁸

The copyright terms are used to create an avenue for the distribution of music content. However, for copyright owners of those music content, the copyright terms may limit their freedom to compete in that market. Given the potential conflicts amongst the different individual economic freedoms, safeguards are necessary to protect and coordinate individual freedoms as such freedoms are not absolute rights.⁸⁹ Hence, there is need to regulate the exercise of the economic freedom of the platform firms.⁹⁰ This is especially so in the case of the open and freemium music business model where openness (including the consequent freedom to use the copyright work) may be threatened by the implementation of contractual or copyright terms made by platform firms. The concentration of economic powers in the hand of platform firm affects not only the structure of the market, but also the individual freedoms of copyright owners as market participants.

5.3 Copyright terms and the respective competition law regimes in South Africa and Nigeria

This section considers the copyright terms of the open and freemium music business model in the light of the regulatory framework provided by competition law in South Africa and Nigeria, respectively. The conduct of economically strong or dominant firms and the effect of

⁸⁷ See Drexl 2013 *supra* at 175.

⁸⁸ *Ibid.*

⁸⁹ See Drexl, J. (2010). Competition Law as Part of the European Constitution. In *Principles of European Constitutional Law*. Hart, pp. 633-674.

⁹⁰ *Ibid.*

such conduct on competition are addressed by the competition law concept of abuse of dominance. It is be noted that the consideration of the competition law framework in Nigeria is hypothetical given that there is no competition statute and it is a parliamentary bill (i.e. the Competition and Consumer Protection Bill 2016) that is being considered.

5.3.1 South Africa

After the abolition of apartheid and the subsequent removal of trade sanctions, the government commenced a process to comprehensively reform competition law through the Department of Trade and Industry (DTI) in 1997. The aim was to devise a framework that ensures that the days of monopolies and highly concentrated markets were over and that real opportunities existed for all South Africans to participate in world markets.⁹¹ Consequently, South Africa enacted the Competition Act 1998, which became fully operative in September 1999. The Competition Act 1998 repealed the Maintenance and Promotion of Competition Amendment Act, 1990 and previous related laws thereto.

The South African competition enforcers (Competition Commission, Competition Tribunal and Competition Appeal Court) are yet to deliberate on the import of the use of copyright-protected music content in the context of the open and freemium music business model. Yet, the debate about the application of competition law to the activities of platform firms as distributors of copyright products continues unabated. As multisided platforms, the activities of platform

⁹¹ Chabane, N. (2003). An evaluation of the influence of BEE on the application of competition policy in South Africa. In *Trade and Industrial Policy Strategies Annual Forum, Johannesburg*. (hereafter, Chabane 2003); Dale, S. (2016). *Case Study: South Africa — Equal opportunity to compete*. [online] IDRC - International Development Research Centre. Available at: <https://www.idrc.ca/en/article/case-study-south-africa-equal-opportunity-compete> [Accessed 25 Nov. 2016]; Hartzenberg 2005 supra at p.667.

firms have been the subject of much debate in the EU and in the US, particularly with respect to the appropriateness or otherwise of applying competition law rules to regulate them.⁹² The prohibition against unilateral conduct amounting to abuse of dominance is dealt with under s8 of the Competition Act. This provision may be applied to assess the implementation of the copyright terms implemented in the context of the open and freemium music business model. Such conduct, termed “abuse of dominance” include charging of excessive prices, refusal of access to an essential facility, requiring or inducing a supplier or customer to not deal with a competitor; refusing to supply scarce goods to a competitor when supplying those goods is economically feasible; selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract; selling goods or services below their marginal or average variable cost; or buying-up a scarce supply of intermediate goods or resources required by a competitor.⁹³ Each of these conduct, apart from excessive pricing and refusal of access, is presumed anti-competitive unless the firm concerned can show technological, efficiency or other pro-competitive gains that outweigh the anti-competitive effect of the Act.

There are significant similarities between South Africa’s approach to applying abuse of dominance provisions and that of the EU. For instance, the abuse of dominance provisions in s8 of the Competition Act is similar to that found in s102 of the EU’s TFEU. It is therefore reasonable to anticipate that in cases of alleged abuse of dominance, South Africa’s competition enforcers will apply competition law in a similar manner as its EU counterpart. Similar to the position

⁹² See inter alia, Polverino 2012 supra at 3-4; Gal and Rubinfeld 2015 supra at 3.

⁹³ See s8 of the Competition Act.

within the EU competition law framework, South African competition law is applied to economic activities on the basis of whether such activity affects the competitive process or efficiency in the marketplace. In relation to conduct which amounts to abuse of dominant market position, antitrust intervention requires that the alleged offending firm be in a dominant position;⁹⁴ and the conduct complained of must affect competition in a relevant market.⁹⁵ Each criterion, in turn, requires a specific approach.

Dominance is assessed based on the existence of market power which is analysed vis-à-vis other competitors' market shares in the relevant market.⁹⁶ According to s7 of the Competition Act, a dominant firm is one that holds at least 45% of a given market; or at least 35% of the market in the absence of proof that it has market power or less than 35% of the market and market power. "Market power" under the Competition Act, means the "power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers".⁹⁷ In defining market power, the South African Competition Act adopts the EU approach in the decision of the court in the case of *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*⁹⁸ where market power was

⁹⁴ International Competition Network (ICN) (2008). *Report on Abuse of Superior Bargaining Position*. [online] Japan, p.10. Available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc386.pdf>. [Accessed 9 Mar. 2017] (hereafter, ICN Report 2008); Bakhoun 2017 supra 5 at 16. Under EU law, abusive behavior can only constitute an infringement if performed by a dominant firm.

⁹⁵ ICN Report 2008 supra at 10. Also, see Bakhoun 2017 supra at 16.

⁹⁶ See ICN Report 2008 supra at 19; Bakhoun 2017 supra at 17; Section 7 of the South African Competition Act.

⁹⁷ See Section 1(xiv) of the Competition Act.

⁹⁸ [1978] ECR I- 00207, para. 65 (United Brands); C-85/76, *Hoffmann-La Roche/Commission* [1979] ECR I-00461, para. 38.

defined as the power of a firm to behave independently towards its competitors, customers and consumers.⁹⁹ In that case, the court accepted the behaviour of United Brands as evident of its dominant position because it found that United Brands was able to enjoy a position of “economic strength” which enabled it to “prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”.¹⁰⁰ The court held that such behaviour by an undertaking in a dominant position where it succeeds in eliminating a competitor established in the market, would have repercussions on the “patterns of competition”.¹⁰¹

In the context of the open and freemium music business model as described in this study, the question, as earlier stated is whether the copyright market is a “valid” market in which the *gratis* licencing terms and the other copyright terms enabling its establishment and implementation may attract competition law scrutiny under s8 of the Competition Act. The dominance in question largely relates to the relationship between the platform firms and the copyright owner so that the considerations highlighted in Chapter two,¹⁰² regarding the issuance of a compulsory licence under competition law, may be more apposite for a copyright law-based statutory licence.¹⁰³ The relationship between the platform firms and the copyright owner amounts to a vertical relationship as copyright owners may be

⁹⁹ See *United Brands* supra at para 38. See also ICN Report 2008 supra at 22.

¹⁰⁰ FitzPatrick, M.H. (1979). *United Brands Company v. Commission of the European Communities: Window to price discrimination law in the European Economic Community*. *Nw. J. Int'l L. & Bus.*, 1, p.338; Maliszewska-Nienartowicz, J. (2007). *The abuse of the dominant position within the internal market of the European Community: From theoretical assumptions to practice*. *Interdisciplinary Management Research*, 3, pp.429-448.

¹⁰¹ See *United Brands* supra at para 112.

¹⁰² See section 2.3, above.

¹⁰³ See section 6.3.1(i) and (ii), above.

suppliers to or, customers of the platform firm.¹⁰⁴ Furthermore, by providing a free platform that enables massive reproduction of music content, platform firms occupy a unique and powerful position in relation to the distribution of music content. Accordingly, while the platform firm may not have the requisite 35% and/or above 35% of the market for the production and distribution of music content, it does have the power to behave independent of the copyright owners and other users of its platform (market power).¹⁰⁵

However, the behaviour of a dominant firm would only be abusive if such behaviour falls under the conduct prohibited as such under the Act.¹⁰⁶ In the case of South Africa, s8 of the Competition Act contains a closed list of conduct prohibited for dominant firms. Therefore, unlike art 102 TFEU which prohibits “any abuse” by a dominant firm and contains a non-exhaustive list of conduct considered abusive, South African Competition Act appears to consider only the listed conduct in s8 as abusive.¹⁰⁷ Accordingly, while art 102(2) TFEU does not exclude the possibility of recognising abuses not mentioned in art 102(2) TFEU,¹⁰⁸ s8 of the Competition Act may not recognise conduct outside the list provided in the Act.

¹⁰⁴ See Section 1(xxxiii)(ii) of the South African Competition Act.

¹⁰⁵ See for example, the Swiss Cartel Act which modifies the definition of “dominance” provides that, “The term “enterprises having a dominant position in the market” means one or more enterprises being able, as regards supply or demand, to behave in a substantially independent manner with regard to the other participants (competitors, suppliers or customers) in the market”. See art 4 II Swiss Cartel Act (Federal Act on Cartels and Other Restraints of Competition of 6 October 1995, Systematic Compilation of Federal Law (SR) 251), amended pursuant to Paragraph I of the Federal Act of 20 June 2003, in force from 1 April 2004 (AS 2004 1385, 1390; BBI 2002 2022). See also, Këllezi 2008 *supra* at p.66.

¹⁰⁶ See Drexl 2013 *supra* at p. 111.

¹⁰⁷ Section 8 uses the expression: “it is prohibited for a dominant firm to...”. Cf art 102(1) TFEU which uses the expression “any abuse”.

¹⁰⁸ See Case C- 95/04 P *British Airways v Commission* [2007] ECR I- 2331, paras 57- 59 where it was held that competition law enforcers are not prevented from recognising abusive conduct relating to rebates beyond the requirements of art 102(2)(b) TFEU.

Some specific aspects of the copyright terms that raise competition law questions include: the potential of the *gratis* licensing scheme to exclude copyright owners from the copyright market based on loss of revenue; the aspect of the revenue-based licensing rule that excludes copyright owners with smaller number of music content. These issues may be considered in relation to s8(c) of the Competition Act given that other paragraphs of s 8, as indicated in Chapter two of this thesis,¹⁰⁹ deal with specific matters such as excessive pricing¹¹⁰, refusal of essential facilities to a competitor,¹¹¹ tying¹¹² and the like.¹¹³ While excessive pricing covered by s 8(a) relates to instances where a dominant undertaking, which holds dominant market power, charges prices that are above the competitive pricing level; refusal of essential facilities prohibited under s 8(b) relates to cases where the dominant firm has a product or facility which is considered crucial for competitors to compete.¹¹⁴

Section 8(c) of the South African Competition Act contains a catch-all provision on exclusionary acts. It prohibits dominant firms from engaging in any action that prevents or impedes another firm entering into, or expanding within a market (exclusionary act).¹¹⁵ Such

¹⁰⁹ See section 2.3, above.

¹¹⁰ See s8(a) of the Act.

¹¹¹ See s8(b) of the Act.

¹¹² See s 8(d)(iii) of the Act. "Tying" is defined as a dominant firm (or firm with substantial market power) selling one product (the tying product) only on the condition that the buyer also purchases a different (or tied) product, or agrees that it will not purchase the tied product from another supplier. See

¹¹³ See Parr, G. (2011). Squeezing the margin squeeze abuse into the South African Competition Act. In: *University of Johannesburg: conference on competition law and economics, 3-4 October 2011..* [online] Available at: <http://www.compcom.co.za/wp-content/uploads/2014/09/UJ-Margin-Squeeze-Geoff-Parr-26-Sept-2011.pdf> [Accessed 23 May 2018].

¹¹⁴ See the cases of *DW Integrators* and *Mandla-Matla Publishing*, respectively discussed in section 2.3, above.

¹¹⁵ "Exclusionary act" means an act that impedes or prevents a firm entering into, or expanding within, a market". See s1(x) of the Act.

conduct is only prohibited if it is shown that the anti-competitive effect of the exclusion outweighs its technological, efficiency or other pro-competitive gain. Accordingly, in the case of the *gratis* licensing term where the copyright owner may be inhibited from investing in creative and distributive efforts due to the absence of revenue, the question is whether the anti-competitive effect of such exclusion outweighs any pro-competitive gains. In the case of the revenue-based licensing term smaller copyright owners are excluded based on the size of their copyright portfolio. Similarly, the question from a competition law perspective is whether the anti-competitive effect arising from treating copyright owners differently based on the quantity of content in which rights are held outweighs the pro-competitive or other gains from such exclusion.

It seems from the wording of s8(c) that the onus lies on the copyright owner to show that the anti-competitive effect of such exclusion outweighs its technological, efficiency or other pro-competitive gain. By extension, there appears to be a presumption that “exclusionary acts” by dominant firms are pro-competitive *ab initio* or at least are not sufficiently anti-competitive.¹¹⁶ The exercise of dominance resulting in excluding a market participant is, in most cases, perceived as evidence of competition and controlling such dominance and concentration of economic power is likely to restrict competition. In the case of South Africa, it has been posited that because a small business will typically hold a market share of 10% or less in any defined market, it would be unlikely that the exit of the small business will provide proof of sufficient anti-competitive effect as

¹¹⁶ See Gal and Fox 2015 *supra* at p. 332. See also, Fox, E. (2006). Comment: abuse of a dominant position: the Americanization of European competition law? The critical role of perspective. In: Hanns Ullrich (ed.), *The Evolution of European Competition Law: whose Regulation, which Competition?*, Cheltenham and Northampton, MA, Edward Elgar, p. 235 (hereafter, Fox 2006).

to trump other pro-competitive gains in the market.¹¹⁷ Viewed from this perspective, it may be an uphill task to challenge the business practices that led to the exclusion or exit of the copyright owner (as a small business) as sufficiently anticompetitive. The following statement made by the South African Competition Commission confirms this reasoning:

The hurdle for proving abuse-of-dominance cases are significant, they require extensive legal and economic analysis. This is evident in the small number of cases where abuse of dominance has been found and the extensive evidence that has been required for these findings...¹¹⁸

[...it] should be noted that cases that deal with abuse of market power are often difficult to prove in practice. Specifically, complaints relying on those sections of the Competition Act wherein a small business must prove a substantial prevention or lessening of competition in a particular relevant market are often unsuccessful.¹¹⁹

Prohibited practices are prosecuted under the Competition Act either as restrictive agreements, which have the effect of substantially preventing or lessening competition in a market (Ss 4 and 5), or as an abuse of a dominant position (Ss 8 and 9). The abuse of dominance provisions of the Competition Act in particular, outlaw a range of exclusionary acts that are most likely to affect small businesses as existing firms or new entrants seeking access to markets. While the prohibited practices in Chapter two of the Competition Act may

¹¹⁷ See Kampel, K. (2004). *Competition law and SMEs: Exploring the competitor/competition debate in a developing democracy* (No. 30655). University of Manchester, Institute for Development Policy and Management (IDPM). See also Du Plessis, L. (2015). *How does competition law enforcement benefit small business*. [online] Competition News, Edition 53. Available at: <http://www.compcom.co.za/wp-content/uploads/2015/03/Competition-Commission-September-Newsletter.pdf>, p.8 [Accessed 5 Mar. 2017] (hereafter, Du Plessis 2015).

¹¹⁸ See Compcom.co.za. (2017). *Abuse of dominance | The Competition Commission of South Africa*. [online] Available at: <http://www.compcom.co.za/abuse-of-dominance/> [Accessed 6 Feb. 2017].

¹¹⁹ See Du Plessis 2015 supra at 8.

engender a consideration of the interests of small businesses or firms,¹²⁰ the likelihood of finding antitrust liability in most of these cases when the offending effect is the exit of a small firm, is low.

It is possible to argue that where the copyright owner as a market participant loses the opportunity and freedom to compete within the economy and to access alternatives both as supplier and “buyer”, the *gratis* licensing term has the effect of substantially reducing competition.¹²¹ Here, it is to be noted that as indicated in previous chapters, the protection of the economic freedom of the copyright owner contributes to keeping the copyright market open and competitive. The existing link between competition and SMEs participation in the market has already been drawn in Chapters two and three, above. Sometimes the exclusion of protected works from the market does not have significant effect. The crucial competition issue here is the exclusion of the copyright owner, a small business/SME from the economy and economic participation. It is argued that in the open and freemium music business model, the *gratis* licensing terms as embodied in the Terms of use or service, create a situation where the economic freedom of the copyright owner depends largely on the platform firm. Indeed, in some instances, leveraging on such economic dependence presents dire consequences for competition in the copyright market. The fact that the platform firms deliberately refrain from taking proportionate measures to prevent the availability of infringing content, taking advantage of the delays and inefficiencies that come with notice and takedown procedures (i.e. the copyright owner first has to identify the content, notify the platform and await takedown), may lend credence to the anticompetitive assessment. Also, the question of whether it is

¹²⁰ *Ibid* at 7.

¹²¹ Bakhoum 2017 *supra* at 15.

feasible for copyright owners and/or smaller platforms to put such a system in place and whether such will raise their costs (thereby impeding their market entry) may be proof of anti-competitive effect.

The European Commission in its investigations and complaints against Alphabet Inc. took a similar approach where the Commission indicted Google (which has Alphabet as its parent company) for the contractual terms which Google stipulated for the use of its Android¹²² software in mobile phone operating systems.¹²³ The result of the Commission's investigation considered Google as dominant in the markets for "general internet search services, licensable smart mobile operating systems and app stores for the Android mobile operating system". Google was found to hold market shares of more than 90% in each of the identified markets in the European Economic Area (EEA).¹²⁴ Having established Google's market dominant position, the Commission went on to identify the potentially infringing conduct inherent in the business practices and contractual stipulations for using the Android open business model.

While the Commission expressed the view that by itself, Android was pro-competitive, Google, in offering a platform that facilitated the deployment of an open business model (Android), stipulated contractual terms that raised antitrust concerns. According to the Commission, the following business practices were anticompetitive:

¹²² Android, owned by Google Inc. is an open-source operating system, meaning that it can be freely used and developed by anyone to create a modified mobile operating system. See Clark, T. (2016). *Google v. Commissioner: A Comparison of European Union and United States Antitrust Law*. *Seton Hall L. Rev.*, 47, p.1021.

¹²³ See Cardoso, R. and Ren, R. (2016). *European Commission – Press Releases - Press release - Antitrust: Commission sends Statement of Objections to Google on Android operating system and applications*. [online] Europa.eu. Available at: http://europa.eu/rapid/press-release_IP-16-1492_en.htm [Accessed 14 Mar. 2017] (hereafter, Cardoso 2016).

¹²⁴ Ibid.

- (a) Requiring manufacturers to pre-install Google Search and Google's Chrome browser and requiring them to set Google Search as default search service on their devices, as a condition to license certain Google proprietary apps;
- (b) Preventing manufacturers from selling smart mobile devices running on competing operating systems based on the Android open source code;
- (c) Giving financial incentives to manufacturers and mobile network operators on condition that they exclusively pre-install Google Search on their devices.

In considering the effects of the identified business practices and contractual rules, on the relevant markets, the Commission found that the conduct would have the following effects: (1) strengthen Google's dominant position in general internet search services; (2) impede the ability of Google's competitors in the mobile browsers market to compete with Google; (3) obstruct the development of operating systems based on the Android open source code; and (4) hinder the opportunities that the Android open source code would offer for the development of new apps and services.¹²⁵

Some scholars have condemned this approach as an inappropriate challenge to Google's very business model.¹²⁶ In particular, Colomo compared the facts of the investigation with the facts in *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schiligallis (Pronuptia)*,¹²⁷, arguing that the Commission needs to show that it assessed the

¹²⁵ Ibid.

¹²⁶ See van Loon 2012 supra at 34. See also, Colomo, P. (2016). *Android meets Pronuptia, or why software licensing is like a franchising agreement*. [online] Chillin'Competition. Available at: <https://chillingcompetition.com/2016/04/25/android-meets-pronuptia-or-why-software-licensing-is-like-a-franchising-agreement/> [Accessed 9 Mar. 2017].

¹²⁷ Case 161/84.

conditions of competition with and without Google's business practices before expressing competition concerns.¹²⁸ However, it is argued that analysis such as Colomo's sets a single agenda for competition law enforcement.¹²⁹ Such agenda relates to the application of competition law only when the competition process manifested in the absence of efficiency is affected. But, as Evenett rightly noted:

...competition law is a multifaceted tool and can be adapted to different circumstances. For example, the presence in many developing countries of a large informal sector in certain markets may alter assessments of the number of substitutes available to buyers and therefore the assessment of the market power of incumbent firms. This consideration may not be that important in implementing competition law in the highest income countries....¹³⁰

Conversely, despite the possibility that the incentive for continued investment in creative efforts may be reduced by the *gratis* licencing and circumstances regarding its grant and use, there is no compulsion under competition law for platform firms to procure a paid licence in every case. This is especially so in view of the requirement to show that the anticompetitive effect of such contractual term outweighs the "technological, efficiency or other pro-competitive, gain" resulting from such rule.¹³¹ Such proof may be hard to find when the efficiency in the distribution of music content arising from the

¹²⁸ Ibáñez Colomo, P. and Lamadrid de Pablo, A. (2017). On the notion of restriction of competition: what we know and what we don't know we know. In: Damien Gerard, Massimo Merola and Bernd Meyring (eds), *The Notion of Restriction of Competition: Revisiting the Foundations of Antitrust Enforcement in Europe*, Bruylant. Available at <https://ssrn.com/abstract=2849831> [Accessed 9 Mar. 2017]

¹²⁹ Evenett 2015 *supra* at 16-8.

¹³⁰ *Ibid* at 18. See also Bakhoun 2017 *supra* at 19.

¹³¹ See Section 8(c) of the Competition Act.

implementation of the copyright terms is considered.¹³² The likelihood of wider distribution of copyright products and the existence of incentive for continued creativity are key parameters for assessing competition consequences. This criterion was applied by the Japanese competition authority to promote competition in the distribution of sound recordings through ring tones. In the relevant cases, the complaint was that the actions of the distributor firm that owns the distribution system amounts to abuse of dominance.¹³³ For one, both parties benefit from the *gratis* licence: the platform firm is able to use the music content for advertising, the copyright owners benefit from the visibility and free distribution provided by the existence of the platform.¹³⁴ As evident from Chapter three, the savings from the cost of plugging may be quite significant for a small business.¹³⁵ Secondly, showing the absence of the usual hitches in the music content distribution process can offer proof of efficiency (or other pro-competitive gain) and by extension, provide a competition law defence for the platform firms. For example, collecting societies have relied on their administrative systems and databases to show their efficiency and necessity for the music copyright industry.¹³⁶ Indeed, YouTube and its Content ID tool may be prime example of technological and/or efficiency gain. From the database that offers a centralised location for a large volume of copyrighted content to the ability to monetise what may be infringing use, the Content ID tool

¹³² See Heald 2014 *supra* at pp.317-9; Okorie, C. (2014). *Use of music aggregation in the UK and Nigeria*. Masters. University of Strathclyde, pp. 24-7.

¹³³ See Japanese Fair Trade Commission (JFTC) decision of 26 April 2005, Case No. 3 (Kan) of 2005, Toshiba EMI Ltd; Drexl 2013 *supra* at 156.

¹³⁴ See Section 3.4.2, above.

¹³⁵ *Ibid.*

¹³⁶ See Hviid, M., Schroff, S. and Street, J. (2016). Regulating Collective Management Organizations by competition: An incomplete answer to the licensing problem. *J. Intell. Prop. Info. Tech. & Elec. Com. L.*, 7, p.256.

may be evidence of technological and efficiency gains. Furthermore, there is nothing stopping the copyright owners from designing their own distribution system. However, network effect is to be considered and also the fact that the systems are designed in such manner that illegal uploads will continue regardless of whether the copyright owner participates or not. So, then, it comes down to weighing the degree of pro- and anti-competitive effects.

Furthermore, given the fact that the copyright terms result in consumers enjoying (legal) access to the music content at no cost, it may be problematic to show that the anti-competitive effect of excluding some copyright owners based on a *gratis* licence granted to platform firms on their own volition outweigh such pro-competitive gain.¹³⁷ As the US explained in response to the question posed by the International Competition Network (ICN):¹³⁸

...in the absence of harm to competition, governments generally should make every effort not to interfere in privately-negotiated contracts. The package of terms that make up a contract between parties in a vertical relationship reflects the parties' agreement as to how to allocate rights and risks between them in an efficient manner.

Such position may exist in the context of the open and freemium music business model context.¹³⁹ Without substantial anti-competitive effect shown, it appears that the Competition Act may not be applicable to scrutinising the specific issues of exclusion arising from the copyright terms of the open and freemium music business model. However, it is argued that the showing of significant anticompetitive

¹³⁷ See van Loon 2012 *supra* at 35.

¹³⁸ The International Competition Network (ICN) had enquired as to why the United States' antitrust rules will not regulate or intervene in contractual relationships or positions. See ICN Report 2008 *supra* at 17. See also Katz and Veel *supra* at pp.144-145; Verizon Communications Inc. v. Law Offices of Curtis V. Trinko 540 U.S. 398 (2004).

¹³⁹ Drexl 2013 *supra* at 177.

effect requires a balancing between safeguarding competition in the market, respecting freedom of contract and protecting the freedom of competition of weaker parties against powerful business partners".¹⁴⁰ In this regard, the presence or existence of countervailing power on the part of the copyright owner is a factor in assessing the effect of the copyright terms on competition.¹⁴¹ The protection and promotion of competition in open and freemium music business models is not limited solely to the achievement of efficiency¹⁴² and/or consumer welfare goals.¹⁴³ The protection and promotion of competition is also curtailed when the economic freedom of copyright owners as market participants is denied.¹⁴⁴ At the foundation of competition law in South Africa, is the intent to control concentration of economic power in the public interests.¹⁴⁵ The open and freemium music business model creates new forms of concentration of economic power due to its very approach of openness and free (universal) access to music content. Such approach, as reflected in the copyright terms, gives platform firms (non-copyright firms), the latitude to concentrate economic power that dictates the pace of the music copyright industry. This

¹⁴⁰ Bakhom 2017 supra at 17-18; Boy 2006 supra at 218.

¹⁴¹ ICN Report 2008 supra at 26.

¹⁴² Behrens, P. and Fox, E. (2006). Abuse of market power: controlling dominance or protecting competition?. In: H. Ullrich, ed., *The Evolution of European Competition Law: whose Regulation, which Competition?*, 1st ed. Cheltenham and Northampton, MA,: Edward Elgar, p.228 (hereafter, Behrens and Fox 2006).

¹⁴³ Bakhom 2017 supra at 18.

¹⁴⁴ Ibid.

¹⁴⁵ See Hodge, J., Goga, S. and Moahloli, T. (2012). Public interest provisions in the South African Competition Act: A critical review. *The Development of Competition Law & Economics in South Africa*, p.10. See Fox, E.M. (2000). Equality, discrimination, and competition Law: Lessons from and for South Africa and Indonesia. *Harv. Int'l. LJ*, 41, p.579 (hereafter, Fox 2000). The intent to control concentration of economic power is a common foundational feature of competition law in many countries including the US, Germany and Japan. See Fox 2006 supra at p. 235. Also Gerber, D. (2003). *Law and competition in twentieth century Europe*. Oxford: Clarendon Press, p.232; Hiyashi, S. (2009). The goals of Japanese competition law. In: J. Drexler, L. Idot and J. Monéger, ed., *Economic theory and competition law*. Edward Elgar Publishing, pp.56-7.

concentration of economic power through openness and resulting contractual terms gives platform firms as stronger economic entities, leveraging powers vis-a-vis the copyright owners as small businesses and therefore, weaker trading partners. Where it reaches a critical level, such concentration of economic power is likely to affect the structure of the market and the freedom of competition of markets participants in economically weaker positions.¹⁴⁶

This situation can be illustrated in situations where the platform firm can terminate the contract for any and no reason. The timing and circumstances of such termination may be such that the copyright owner not only loses significant revenue but may also be limited in its ability to shift to another facilitating platform as a trading partner. These kinds of policies and their implementation may limit not only the economic freedom of the copyright owner as the weaker party (vertical approach), but may also strengthen the market power of the relatively dominant firm (horizontal approach). Consequently, the market may be affected.

To understand better how the open and freemium music business model create a situation of economic dependence between owners of platform firms or distributing systems and owners of copyright in music content, some considerations deserve attention. A technological or distribution platform which is essential to implement open and freemium music business models has a much higher value *ex post* than *ex ante*,¹⁴⁷ because at the start of the open and freemium music business model process, several alternative platforms may potentially be available. Once one platform has been involved and network effects set in, competition ends between platforms that may be foregone without significant financial consequences. As a concept,

¹⁴⁶ Bakhoum 2017 *supra* at 20.

¹⁴⁷ *Ibid* at 13; Wagner 2015 *supra* at 13.

network effects occur where a product or service gains additional value as more people use it.¹⁴⁸ For instance, in the case of the open and freemium music business model, a platform may become more valuable to a copyright owner because of the number of views the copyright owner's music content may have generated on the platform. It is clear, then, how the contractual rules of open and freemium music business models may well create a situation of economic dependence. To exercise and maintain its dominance in the distribution system, the platform owner may threaten to block the distribution of the music content by removing access to the platform.¹⁴⁹ That is why Ginsburg suggested that the recognition and enforcement of the entirety of the author and copyright holder's monetary and moral interests is the most viable way of securing the position of the author within copyright law.¹⁵⁰

However, the competitive effects of the open and freemium music business model have yet to attract the scrutiny of the South African competition regime. Such inattentiveness, it is argued, appears to be out of touch with the development needs of emerging economies such as South Africa where contractual processes and provisions between two economically unequal firms (one being dominant in relation to the other) are rife and may adversely affect competition in downstream markets.¹⁵¹

However, in addition to promoting efficiency, the Competition Act also includes provisions that hint at the possibility of considering

¹⁴⁸ See Katz, A. (2005). A network effects perspective on software piracy. *University of Toronto Law Journal*, 55(2), p.164. On the regulatory implications of network effects, see Lemley, M.A. and McGowan, D. (1998). Legal implications of network economic effects. *Cal. L. Rev.*, 86, p.479; Gal and Rubinfeld 2015 supra.

¹⁴⁹ Kellezi 2008 supra at p. 62.

¹⁵⁰ See Ginsburg 2017 supra at 81-4.

¹⁵¹ So-called "relative dominance". See Bakhoun 2017 supra at 21.

the economic and contractual position of firms in promoting competition in the South African economy.¹⁵² In this regard, s2(e) of the Act provides that one of the objectives of the Act is to: “to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy”. As Fox points out, South Africa’s Competition Act explicitly enables the promotion of competition in order to advance market access of SMEs, highlighting the important link between competition and inclusiveness and equity of market participants and market participation.¹⁵³ However, while the provisions of s2(e) of the Act seems to validate the call for the recognition of the effect of business conduct on small businesses and on loosely defined markets, the Competition Appeal Court in *Sasol Oil (Pty) Ltd v Nationwide Poles CC*¹⁵⁴ largely rejected such interpretation. The reason is probably because besides validating the role and position of small businesses, the requirement necessitated by s2(e) adds nothing further to the debate on what constitutes sufficient anticompetitive effect in the absence of an interpretation contrary to that, which is commonly accepted.

Because of the expressly stated requirement to consider the weight of the effect of the business conduct of dominant firms in relation to a clearly defined market, it clearly appears that any recognition of the role and position of copyright owners as small businesses as object of competition scrutiny is secondary to the recognition of the effect on competition relevant market as the object of competition enquiry. The result is that the available competition law remedies to enforce the recognition are limited to usage solely by the

¹⁵² See s2(e) of the South African Competition Act 1998. See also, Chabane 2003 supra at 4-5; Hartzenberg 2005 supra at 667.

¹⁵³ See Fox 2000 supra at 586; Chabane 2003 supra at 4.

¹⁵⁴ (49/CAC/Apr05) [2005] ZACAC 5 (13 December 2005).

proof of significant anticompetitive effect as the metric for competitiveness. Indeed, this eventuality is confirmed by several commentators, who have lamented the limited impact of the Act's recognition of small businesses in moving the competition law trajectory in South African competition law beyond the traditional difficulties related to market definition and anticompetitive effect.¹⁵⁵ For similar reasons, there have been suggestions that new competition law jurisdictions should forgo the economic model of market definition in assessing dominance and its abuse.¹⁵⁶

The combination of the approach embodied in s8(c) of the Act and the clear objective in s2(e) of the Act appears to suggest that the South African approach is more enlightened than its Nigerian counterpart (discussed below), particularly as there is room to apply the provisions of the Act in such a manner as to enhance the opportunities for small businesses to compete. It is, however, questionable whether the application of the Act can ever transcend the market identification and anticompetitive effect approach, as the competition enforcers continue to interpret effects in relation to a clearly defined market, and there are no interpretative mechanisms, which can be resorted to for the benefit of the specific transactions in the event of an abusive conduct.¹⁵⁷ The inability of this enforcement approach in South Africa to break away completely from that

¹⁵⁵ See Du Plessis 2015 *supra* at 8.

¹⁵⁶ See for example, Al-Ameen, A. (2015). *Application of abuse of dominance in new competition regimes: Unconscionability as a stabilising tool at time of indecision*. [online] Available at: [http://ascola-tokyo-conference-2015.meiji.jp/pdf/ConferencePapers/General%20Session%204/Abayomi%20Al-Ameen_competition%20and%20unconscionability%201%20\(1\).pdf](http://ascola-tokyo-conference-2015.meiji.jp/pdf/ConferencePapers/General%20Session%204/Abayomi%20Al-Ameen_competition%20and%20unconscionability%201%20(1).pdf) [Accessed 7 Mar. 2017].

¹⁵⁷ *Ibid.*

requirement to evaluate competitiveness from a defined market structural perspective remains a concern.¹⁵⁸

Nevertheless, it may be argued that the fact that there is room to even consider the interests of SMEs (of which a significant number of copyright owners in South Africa are) may yield results that enhance the position of copyright owners. As noted by one practitioner:

...Some of the Commission's interventions in this regard have had a positive impact on smaller businesses. For example, following complaints received related to exclusionary conduct by Sasol Nitro, a division of Sasol Chemical Industries (Pty) Ltd (Sasol Nitro) as well as collusive conduct with other participants in the fertiliser industry, the Commission uncovered various anticompetitive practices that were impeding the competitiveness and growth of South Africa's fertiliser industry. Following the Commission's investigation, Sasol Nitro reached a settlement with the Commission, and as part of the conditions to the settlement the firm was requested to divest its fertiliser blending facilities located in Durban, Bellville, Potchefstroom, Endicott and Kimberley. Subsequent research has shown that this is likely to have led to significant entry by several smaller players at the blending level of the fertiliser industry post the Commission's intervention".¹⁵⁹

The practitioner observes that:

Though the Tribunal did not succeed in its particular use of the public interest arguments in favour of small business in Nationwide Poles (where it was arguing for a different standard of showing substantiality where a small business is harmed), its remarks about the potential of competition law to

¹⁵⁸ See Roberts, S., Tapia, J. and Ybar, M. (2013). *The Same and the other: A comparative study of abuses of dominance in Chile and South Africa*. CCRED Working Paper 2; Roberts, S. and Tapia, J. (2015). Abuses of dominance in developing countries: a view from the south, with an eye on telecommunications. In: M. Gal, M. Bakhom, J. Drexl, E. Fox and D. Gerber, ed., *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law*. Cheltenham: Edward Elgar Publishing., p.357.

¹⁵⁹ See Makhaya, T. (2011). *The interface between competition policy and entrepreneurship*. [online] Compcom.co.za. Available at: <http://www.compcom.co.za/wp-content/uploads/2014/09/Competition-News-Edition-41-Dec-2011.pdf>, p.17 [Accessed 6 Feb. 2017].

contribute to an enabling environment for small business development have merit.¹⁶⁰

Notwithstanding the import of the acceptance that the Act provides mechanisms for small business to challenge business conduct that affect them and their enterprises, the question of whether such mechanism is efficacious or efficient in addressing the ability of those small business to stay competitive, remains. It appears that so long as any possible remedy is still linked to the conventional competition law proposition, which associates the harm to competition exclusively with harm to a clearly defined market and harm to efficient market processes, the application of the Act may not even take-off in the first place. This leads to the unavoidable conclusion that regardless of the recognition of the contractual position of small businesses, s8 is still inextricably intertwined with the traditional competition law proposition which reserves competition law remedies to cases where competition (in the form of efficient market processes) in a clearly defined market has been harmed. The inapplicability of the Act may foreclose the benefits of competition law enforcement which include the threat of exorbitant fines as a compelling force that may shape the conduct of platform firms.¹⁶¹ As exemplified in the European Commission's complaint against Google with respect to the Android operating system, Google made voluntary commitments to rectify the anticompetitive conduct rather than go through the hog of trial.¹⁶² Through the formal step of sending a Statement of Objection, the European Commission informs the firms subject to an investigation of

¹⁶⁰ Ibid. According to Makhaya, "the Competition Appeal Court was careful to make it clear that its decision did not seek to diminish the ability of small and medium businesses to "use the Act to protect their ability to compete freely and fairly" (case number 49CACAPRIL05).

¹⁶¹ For instance, see s 59 of the Act. Penalties for contravention of the Act may be up to 10% of the offending firm's annual turnover. See also, s 74(3) of the Draft Competition and Consumer Protection Bill 2016.

¹⁶² See Google Android Statement supra.

the objections raised against them. Sending a Statement of Objections does not prejudice the final outcome, as the Commission may still decide to close proceedings without a formal decision. In some cases, sending a Statement of Objections may result in the offending firm making voluntary commitments to rectify the alleged anticompetitive conduct.

Business practices that affect competition in a relevant market are subject of clear rules, which the courts and competition enforcers apply to resolve such matters.¹⁶³ These matters are decided by a definition of a market in terms of geographical location and in terms of products and services that are substitutable by consumers in such geographical location. The effect of the business practice on such defined market is what invites antitrust scrutiny.¹⁶⁴ Business practices that concern economic or contractual inequalities are somewhat more problematic.¹⁶⁵ It involves evaluating the objectives of competition law to ascertain whether it should be concerned with economic imbalances that may exist in contractual relationships.¹⁶⁶ The application of competition law to the contractual terms of open and freemium music business models and the likely abuses that may arise from the economic dependences that they create, is difficult because there is a presumption regarding the existence of competition. This presumption relates to the efficiency in the distribution of the music content and the achievement of consumer welfare in that the consumer's need for access to music content is met at no monetary costs to the consumer.¹⁶⁷ It therefore seems unlikely that South

¹⁶³ Hughes 2009 *supra* at 389-392.

¹⁶⁴ See for example, Lamadrid de Pablo, A. (2015). The double duality of two-sided markets. *Competition Law Journal*, p.7; Alexiadis 2017 *supra* at p.92-4.

¹⁶⁵ Bakhom 2017 *supra* at 9.

¹⁶⁶ *Ibid.*

¹⁶⁷ Bakhom 2017 *supra* at 9; Boy 2006 *supra* at 220.

African competition enforcers would find contravention of the Competition Act in the copyright terms of the open and freemium music business model simply on the basis that the ability of copyright owners to continue in business is hampered by the copyright terms set by the platform firms as part of their economic activities.

5.3.2 Nigeria

As indicated in chapter one, Nigeria has no competition statute and therefore, no provisions regarding the prohibition of unilateral conduct amounting to abuse of dominance. However, s73(1) of the current Draft Competition and Consumer Protection Bill, 2016, provides for the prohibition against abuse of dominant position similar to the position in South Africa and in the EU.

The criteria for ascribing dominance to any undertaking are stated in general terms. Section 71(1) provides that a firm is “considered to be in a dominant position if it is able to act without taking account of the reaction of its customers, consumers or competitors”. It seems that similar to the South African approach, this criterion does not exclude the possibility of recognising the dominant position of the platform firm in relation to the copyright owner. In addition to the general criteria for assessing dominance, the Competition and Consumer Protection Bill admits other criteria for assessing dominance. Such criteria as stated in s73(2)(a) to (h) of the Bill include the alleged dominant firm’s links with other firms, legal barriers to market entry experienced by other firms and even the ability of “opposite markets” to shift to other firms. Again, it is possible to consider platform firms in the context of the open and freemium music business model as being in a dominant position in view of their effect on the ability of copyright owners to shift to other platform firms. This consideration may be extended to the financial power of the platform firms who control the revenue system under the licensing

rule. The language of s73(2)(b) to (h) of the Bill seems to suggest that the prohibition against abuse of dominance under the Bill may apply to the copyright terms under the open and freemium music business model especially where the terms affect competition as protected by the Copyright Act.¹⁶⁸

In delineating what conduct may amount to an abuse of dominant position, the Bill differs from South Africa and is similar to the EU in employing an open-ended approach which accepts the possibility of recognising different forms of abusive conduct.¹⁶⁹ Section 71(2) considers any conduct that prevents effective competition as abusive when undertaken by a firm that occupies a dominant position in a relevant market.¹⁷⁰ Accordingly, the implementation of the copyright terms may be considered as abusive under the Bill if it prevents “effective competition”. However, the requirement of dominance on the part of the platform firm is to be assessed in relation to a relevant market. For the purpose of identifying the relevant market, the Bill stipulates criteria such as geography, demand-side substitutability¹⁷¹ and supply-side substitutability.¹⁷² Section 72 of the Bill which lists these criteria, employs the expression “includes”, suggesting that other criteria outside those listed in the section may be

¹⁶⁸ Section 73(2)(f) considers “actual or potential competition by undertakings established within or outside the scope of application of” the Bill.

¹⁶⁹ See *British Airways v Commission* supra at paras 57- 59.

¹⁷⁰ According to that section, “abuse of dominant position in a relevant market occurs where an undertaking enjoys a position of economic strength enabling it to prevent effective competition being maintained on the relevant market and having the power to behave to an appreciable extent independently of its competitors, customers and ultimately of the consumers”.

¹⁷¹ Demand-side substitutability relates to the extent consumers are able to substitute the demand for goods and services provided by other firms for those provided by another firm. See Regulation 19(2)(b) of the Competition Practices Regulations 2007.

¹⁷² See Section 72 of the Bill. Supply-side substitutability deals with the extent to which suppliers are able to supply goods and services that provide an alternative to consumers. See Regulation 19(2)(c) of the Competition Practices Regulations 2007.

considered in delineating the relevant market.¹⁷³ In this regard, it is argued that the production and distribution of music content in the context of the open and freemium music business model may be considered a relevant market in which the platform firm may be dominant. Similarly, the relationship between the platform firm and the copyright owner in the case of the *gratis* licensing term may, even though non-monetary, constitute a relevant market. The fact that a product or service is provided for free does not preclude the assumption of a market.¹⁷⁴

But, similar to the position in South Africa, the alleged conduct must prevent effective competition before it falls within the prohibited abuse of dominant market position.¹⁷⁵ The Bill does not define “effective competition”. However, s 73(3) will not consider conduct that may have efficiency, and/or technological benefits as prohibited abusive conduct. Nor will conduct that does not lead to substantial elimination of competition be considered as abusive. By excusing conduct that “contributes to the improvement of production or distribution of goods or services or the promotion of technological or economic progress, while allowing consumers a fair share of the resulting benefit”¹⁷⁶ and prohibiting conduct that “impede the transfer or dissemination of technology”,¹⁷⁷ the Bill seems to provide an indication of what it considers substantial elimination of competition. This provision is quite similar to the position in the case of s8(c) of the

¹⁷³ See Section 72 of the Bill. It provides that “for the purpose of delineating the relevant market under this Act, the criteria that shall be taken into account include:”

¹⁷⁴ See Gal and Rubinfeld 2015 *supra* at 3.

¹⁷⁵ According to Section 73(3), “An undertaking shall not be treated as abusing a dominant position if its conduct: (a) contributes to the improvement of production or distribution of goods or services or the promotion of technological or economic progress, while allowing consumers a fair share of the resulting benefit”.

¹⁷⁶ Section 73(3).

¹⁷⁷ Section 73(4).

South African Competition Act, as both provisions require a weighing of pro-competitive and anti-competitive effect. The existing competition framework in Nigeria's telecommunications sector as evident from the Competition Practices Regulations, 2007, lend credence to this position.¹⁷⁸ The application of the "jurisprudence" available from the Competition Practices Regulations, 2007 ("the Regulations") suggests that Nigeria may lean towards the EU and South African approach to enforcing competition law in the open and freemium music business model. Similar to these jurisdictions¹⁷⁹, the Regulations define dominance in terms of a relevant market clearly stipulating that "the evaluation of dominant position shall begin with the definition of the relevant communications market or markets". Also, similar to the position in South Africa, it is required that the alleged conduct must affect competition in terms of efficiency before it falls within the prohibited conduct.¹⁸⁰ Accordingly, the difficulties and opportunities applicable in the South African context may be experienced in the case of Nigeria.

This notwithstanding, it is not certain how this provision may be applied in practical terms. The proposed legislation will make Nigeria a young, amateur competition law jurisdiction, which would require guidance and flexibilities to properly apply and enforce the Bill if it becomes law.¹⁸¹

¹⁷⁸ While the provisions of the Competition Practices Regulations, 2007 do not apply to markets outside the telecommunications sector; they may have some practical application. See Nigerian Communications Commission (2009). *Consultation paper on dominance in selected communications markets*. Abuja. See *Emerging Markets Telecommunication Service Limited v MTN Nigeria Communications Limited and Visafone Communications Limited*, Suit nos. FHC/L/CS/130/2016 (unreported).

¹⁷⁹ Section 7 of the South African Competition Act clearly defines "dominant firm" in relation to power and/or share in a clearly defined market.

¹⁸⁰ See s 73(3).

¹⁸¹ See Ani, L. (2012). Rethinking competition law and policy: Building a framework for implementation in Nigeria. *NIALS Journal of Business Law*, Maiden Edition, p.1.

5.4 Conclusion

In this chapter, it has been shown that there are specific problems in applying competition law on platform firms that rely on copyright-protected music content to provide their services to a specific customer segment. Platform firms are “content-oriented” rather than based on trading (in the e-commerce sense) per se. Many of the applicable competition law rules are inferred from s8 of the South African Competition Act which in many respects is similar to s73 of the Nigerian Competition and Consumer Protection Bill. These statutory provisions prohibit abuse of dominant position. They require the erring firm to be dominant in a relevant market and more significantly, for their conduct to have a high degree of anticompetitive effect. Where the conduct of the allegedly erring firm only leads to the exit of a small firm, the prohibition may not apply. In South Africa, the lack of decided cases upholding such weaker firms’ interests in antitrust interventions bears testimony to the apparent disregard of the enforcers in favour of the continued application of the ‘anticompetitive effect” approach. It has also been shown that the institutionalisation of similar requirement by Part II of the Nigerian Competition Practices Regulations of 2007, following the liberalisation of the telecommunication sector, may put Nigeria on the same pane as its South African counterpart, since it points the way for future competition law enforcement. In terms of differences between South Africa’s position and the Nigerian position considered in this chapter, what is clearly lacking in the case of Nigeria, but which is clearly present under s2(e) of the South African Competition Act, 1998, is the requirement to consider the continued ability of small businesses to participate in the economy.

Yet, this chapter has also demonstrated that competition is affected when platform firms, which deploy the open and freemium music business model, create economic dependences that threaten the freedom to compete of the copyright owners. In this regard,

because platform firms control the revenue flow and revenue share and may exercise termination rights without justification, the contractual terms set by these platforms may adversely affect competition in the marketplace for the distribution of music content and may lead to decreased incentive to produce. The current approach that considers only harm to consumer welfare or harm to competition in terms of market efficiency may result in the unhealthy assumption that the copyright market is competitive when the reverse may well be the case. In these circumstances, it is argued that there is a need for prohibition of abusive conduct for non-dominant platform firms and in cases where the freedom to compete is unduly fettered. This is especially so when the protection sought for the freedom of the copyright owners to compete is not a protection of their right to profit. Rather, the antitrust scrutiny is expected to ensure that protection is guaranteed for efficient, competitive copyright owners who can compete effectively in the market and whose freedom are restricted by dominant platform firms.¹⁸² Under such regulatory framework, the implementation of the copyright terms of the open and freemium music business model is expected to promote the freedom of the copyright owners to compete. As such, platform firms will be prevented from abusing their superior position as firms upon whom copyright owners are dependent. Indeed, there can be no competition without competitors.¹⁸³ In the open and freemium music business model where copyright owners are akin to both suppliers and customers, protection of the competition process would allow them to avoid exploitative as well as exclusionary practices that originate from dominant or relatively dominant firms.¹⁸⁴ Their protection as market

¹⁸² Bakhoum 2017 *supra* at 22.

¹⁸³ Behrens and Fox 2006 *supra* at 228.

¹⁸⁴ Fox 2006 *supra* at 237; Drexl, J. (2015). Consumer welfare and consumer harm: adjusting competition law and policies to the needs of developing jurisdictions. In: M.

participants in this case may be more important than their protection as end consumers.¹⁸⁵ Protecting the competition process guarantees the protection of all actors, be they big or small.

In the circumstances, the presumption that in providing wider access to music content, the open and freemium music business model offers a competitive and efficient market for those music content, may be problematic. Corollary to the foregoing, the argument is that there is no need to bring the business practices related to the business models under competition law scrutiny or to enquire if the business models achieve the cardinal purposes (encouraging the creation *and* distribution of copyright works) of copyright law. Such presumption, it is argued, does not take cognizance of the effect that the open and freemium business model may have on the market for music content, that is: the position of and the interaction between the participants in open and freemium music business model processes.

In brief, it is undoubted that the competition law framework develops interesting concepts and provides some helpful ideas. However, in comparison to the stated concerns, a stronger need for more protective regulatory framework is highlighted. Thus, it is to be recommended that the regulatory framework follow the principle of “prevention is better than cure”.

Gal, M. Bakhoun, J. Drexl, E. Fox and D. Gerber, ed., *The economic characteristics of developing jurisdictions: Their implications for competition law*, 1st ed. Cheltenham UK: Edward Elgar, pp. 289-290 (hereafter, Drexl 2015).

¹⁸⁵ See Drexl 2015 *supra* at 289; Evenett 2015 *supra* at 28-30.

Chapter Six: Conclusion: Regulating the open and freemium music business model

6.1 Introduction

This study aims at proposing ways in which South Africa and Nigeria may apply copyright law and the complementary legal framework of competition law to regulate the open and freemium music business model. The question is one that requires an understanding of how the platform firms deploying the business model uses copyright-protected music content and the import of such uses. This understanding is crucial to the application of the copyright law framework, which protects the music content used in the business model, and to the application of competition law, which regulates the economic activities of firms.

This final chapter summarises the arguments made in preceding chapters (at section 6.2) and then sets out suggestions on how South Africa and Nigeria may apply copyright law and competition law respectively, to regulate the open and freemium music business model (at section 6.3). Section 6.4 concludes the thesis.

6.2 Summative evaluation of the copyright and competition consequences

6.2.1 Copyright and competition

Following the introduction of the thesis in Chapter one, the arguments developed in Chapter two focused *inter alia* on the role and objectives of copyright law particularly in the business model context. The chapter was based on the premise that to apply copyright and competition law to regulate the open and freemium music business model in South Africa and Nigeria, it is important to first establish a link between copyright and competition law. In this regard, the analysis examined the role of copyright regulation in South Africa and

Nigeria in promoting competition through exclusive rights.¹ It was shown that one of the aims of the exclusive rights guaranteed by copyright law in the online context, is to provide opportunities for revenue generation. It was argued that the benefits of exclusivity lead firms to strive to create their own works to enjoy similar opportunities for revenue generation. Further, the nature of exclusivity eschews competition by imitation.

The analysis subsequently moved on to examine the various limitations and exceptions to copyright protection as well as other provisions that constrain the boundaries of the exclusive rights. In both South Africa and Nigeria, provision is made for the duration of copyright protection to ensure that at some point, users may access and make use of creative works without needing the license of the copyright owner.² Further, the eligibility requirements for copyright protection such as originality and the protection of expression of ideas rather than ideas themselves are parts of the copyright system that also encourage competition through creativity and substitution and eschew competition by imitation. In this context, South African and Nigerian copyright laws aim at promoting competition in copyright markets.

Chapter two also established the applicability of competition law to complement the goals of copyright and ensure that copyright owners have the opportunity to receive rewards for their creative efforts and that there is ample dissemination of copyright products.³ It was shown that competition law provisions, which prohibit restrictive agreements and unilateral abusive conduct may be applied in appropriate circumstances to protect copyrights and other IPRs.

¹ See Section 2.2.1, above.

² Section 2.2.2, above.

³ Section 2.2.3, above.

6.2.2 The open and freemium music business model

The arguments in Chapter two, which surveyed the copyright regime in South Africa and Nigeria and how competition law complements the efforts of copyright law in achieving its objectives, foreshadowed the analysis in Chapter three. In such context, the open and freemium music business model environment was considered from both South African and Nigerian perspectives. Regarding the open and freemium music business model, its significance and potential to both economies cannot be over-emphasized. This is evidenced by its contributions to the music industry in terms of revenue generation and spread of African music content.⁴

Copyright plays a central role in today's global economy and is a significant part of the open and freemium music business model. The core copyright-based terms in the open and freemium music business model are those relating to licensing, access and usage of the music content. Licensing terms relate to both the *gratis*, non-exclusive license procured by the platform firms and the revenue-based licensing agreement imposed by platform firms to use the copyright-protected music content. These terms form part of the unilateral Terms of use presented by the platform firms and which, users agree to, or are deemed to assent to upon use of the platform. Access terms consist of the nature of control which the platform firms permit over the music content available on the open and freemium music platform. On the other hand, usage terms involve the permissible uses, which both the platform firms, copyright owners and the public may make of the copyright-protected music content within the open and freemium music platforms.

⁴ Ouma 2004 *supra* at 919-920.

In each case, the import of these rules is to protect the platform firm from liability for copyright infringement and to enhance its competitiveness. It was further shown that there are several stakeholders with different interests within the context of the copyright terms of the open and freemium music business model. These include the platform firms deploying the business model, the copyright owners who are predominantly independent record companies and music publishers, the users of the platform and advertisers. A key feature of firms, which are copyright owners in South Africa and Nigeria, was shown to be that they are small businesses/SMEs with their attendant growth potential and concerns. Each stakeholder's interests are both distinct and at the same time conflate in significant respects. The revenue stream in the open and freemium music business model comes from the advertisers and this conflates the interests of the copyright owners with that of the platform firms because as business entities, both are interested in revenue generation. In the face of such use, which relies on the advertisers as the value metric, there are ample reasons to conclude that the revenue generation from music content is crucial to the growth and continued existence of copyright owners. Yet, not every copyright owner is accepted in the revenue-based licensing system and it was argued that the effect of this lack of acceptance may be particularly acute in the context of South Africa and Nigeria where the copyright owners are predominantly small businesses/SMEs with limited resources to vigorously pursue their interests. However, it was also shown that the revenue-based licensing term also involves the use of aggregators or partners already selected by the platform firms, to enable small-sized copyright owners participate in the revenue scheme (and the algorithmic copyright enforcement scheme).⁵

⁵ See section 3.4.1.

6.2.3 Copyright consequences

The generalities discussed in Chapters two and three dovetailed into specifics in Chapter four. The chapter examined the import of the uses of copyright-protected music content by platform firms, from a copyright law perspective. The platform firms create playlists with uploaded music content, provide tags to optimise song searches and create a user-friendly platform all connected to the music content and aimed at attracting the sort of attention that advertisers will pay for. The existence of these new uses led to question the alignment of the business model with the copyright law regulatory framework particularly its objective to eschew competition by imitation through exclusivity and limitations and exceptions to protection. It was found that the opportunities for the copyright owners to obtain revenue for the use of their works may become severely limited.

The platform firms' copyright terms regarding licensing, access and usage of the music content were analysed alongside the exclusive rights of reproduction and communication to the public, these being the most relevant rights in the online context. In this regard, relevant provisions in various international copyright treaties (the Berne Convention, the TRIPS agreement and the WCT) were analysed alongside the copyright terms to provide a benchmark for the analysis of the alignment between the business model and the regulatory frameworks in South Africa and Nigeria. This analysis led to the conclusion that the business model may not be aligned to the objectives of the regulatory frameworks regarding the promotion of competition through exclusivity and dissemination. It was further established that the international treaties offer some opportunities for regulating the business model through the exclusive rights framework. In particular, it was shown that the EU and the CJEU have taken

advantage of these opportunities to respectively provide for and expansively interpret the right of communication to the public.⁶ The chapter also discussed the CJEU jurisprudence on the right of communication to the public and how it applied the digital environment. Specifically, its decision in *The Pirate Bay* revealed the ways in which the right of communication to the public may be held applicable to the activities of the platform firms in terms of the copyright terms. South Africa and Nigeria's respective copyright laws have not taken advantage of the leeway and guidance provided by the treaties. Further, while the proposed reforms in the copyright laws of the two countries (the South African Copyright Amendment Bill 2017 and the Nigerian Draft Copyright Bill 2015) contain provisions that may, if adopted, address these deficiencies, they may not be entirely successful. The reason was found to be that the provisions do not sufficiently define the right of communication to the public in terms that may be applied to the open and freemium music business model.⁷ This inadequacy is telling as it is argued that while the platform firms may not be exploiting the reproduction right, it was possible that they were making a communication of the music content to the public.

Furthermore, it was shown that the import of the terms relating to access and usage within the open and freemium music business model may involve restrictions on the ability of the platform firms as copyright users to make certain uses of the music content and that such restrictions may sometimes be outside the scope of the exclusive rights available to copyright owners. However, this depends on the provision for and interpretation given to the limitations and exceptions to copyright protection, particularly the fair dealing exception. The jurisprudence emanating from the Canadian Supreme Court on the

⁶ Section 4.2.1(b)

⁷ Sections 4.3 and 4.4, above.

scope of the fair dealing exceptions was relied on to strengthen the argument that the copyright terms and the platform firms' activities may fall within the limitation and/or exception to copyright protection. In the case of limitations, the implementation of the copyright terms may be permissible under a compulsory licence given the commercial or profit-making nature of such uses. These possibilities further highlighted the misalignment between the copyright terms and the open and freemium music business model. This analysis was extended to the South African and Nigerian copyright laws respectively where it was shown that the existing limitations and exceptions may not be expansive enough to accommodate the activities of the platform firms and the copyright terms. Again, given the role of limitations and exceptions in stipulating the range of users' rights, the inadequacy in these frameworks robs the platform firm of legal certainty regarding their use of copyright-protected content.⁸

The chapter also considered the solutions proposed by the copyright law literature to regulate the business model and align it with the copyright law objectives. These include the so-called value gap proposal currently championed by the EU under the Digital Single Market Directive and the suggestions regarding the reform of the safe harbour regime applicable to hosting and storage providers.⁹ The importation of the value gap proposal into South Africa and Nigeria was found to be problematic and superfluous in varying degrees. In this regard, it was argued that the proposal is reliant on the uses to which users of the platform (not the platform firms themselves) may put the music content. Such uses and obligations on the platform firms

⁸ Section 4.2.2.

⁹ Section 4.2.1(a)

flowing therefrom relate more to secondary liability, which is more particularly regulated by the safe harbour regime.¹⁰

Chapter four also argued against the acceptance of the views of those scholars and industry experts calling for such modification of the safe harbour regime.¹¹ The main problem, as was noted, concerns the very rationale for the safe harbour regime, which both courts and statutory instruments have shown to be the protection of an open internet.¹² Further, the focus of the safe harbour regime on circumstances in which the platform firms may be held responsible for the actions of their users, mean that the safe harbour regime may be unsuitable in the instances where the activities of the platform owner is the very issue in contention.¹³ More importantly, it was argued that the focus of the EU value gap proposal on the safe harbour regime seems to indicate a visceral but misguided attachment to the right of reproduction as the revenue stream in the open and freemium music business model context. Having shown that the revenue stream in the business model is more tied to consumer access and as such communication to the public, it was argued that the focus on the safe harbour regime may not be an appropriate means for the application of copyright law in regulation of the open and freemium music business model.

The analysis underscored the significance of clearly defined exclusive rights for the regulation of the appropriate scope of business models such as the open and freemium music business model that involve the use of copyright-protected products. Without certainty regarding the definition of the exclusive rights, it might be difficult to

¹⁰ Sections 4.2,1(a) above.

¹¹ *ibid.*

¹² *ibid.*

¹³ *ibid.*

apply copyright law to the regulation of the open and freemium music business model through the application of copyright law. In this regard, attempts at clarifying the parameters of the right of communication to the public provide further proof of the significance of the right in the open and freemium business model context as well as the importance of clarity itself. Consequently, a structured substantive regulatory framework governing business models that involve new uses of copyright-protected products is currently lacking in South Africa and Nigeria, so that concerns for the regulation of the open and freemium music business model continue to abound. It was shown that the proposed amendments to the copyright law by South Africa and Nigeria as a way to mitigate this problem, have not provided the expected succour given that the guidance and/or leeway offered by the international treaties have not been adequately explored. These treaties address the notion of the relevant exclusive rights in a loose manner as to enable Member States adopt them in a manner that suits their individual circumstances within the spirit and intendment of the treaties. They also provide the three-step test that offer Member States freedom to stipulate expansive limitations and exceptions to copyright protection, subject to compliance with the test. Yet, South Africa and Nigeria are yet to sufficiently leverage on these available flexibilities.

6.2.4 Competition consequences

The generalities discussed in Chapters two and three were also specifically discussed in Chapter five from a competition law perspective. In this regard, relevant provisions of the South African Competition Act and the Nigerian Competition and Consumer Protection Bill were considered. However, because competition law addresses only economic activities, the analysis of the copyright terms was conducted from that perspective. In particular, the chapter considered the import of the terms on the copyright market as well as

on relationship between copyright owners as firms or business entities and the platform firms. It was explained how the implementation of the copyright terms may combine to place platform firms in a position where they control the distribution of music content and the revenue that may flow from such distribution. Using case law examples from Germany, Italy and the EU, generally,¹⁴ it was found that such position of economic power within the open and freemium music business model might lead platform firms to unduly exert their unique position, to the detriment of competition in the music copyright industry.

Other areas of misalignment was found that in the *gratis* licensing rule that had the potential to adversely affect the viability of the copyright owner as a small business/SME given that despite commercial use of music content, no revenue may accrue from the platform firm. Here, due to the control that the platform firm exerts over the revenue stream as well as the distribution of the music content, the viability of the copyright owner as a business entity is largely dependent on the platform firm.¹⁵ In the case of the revenue-based licensing scheme, it was shown that the criteria for selection of copyright owners leads to the exclusion of other copyright owners from the revenue system based on their size. Again, such exclusion may pose a challenge to the financial incentive that should or may otherwise accrue to the copyright owner. While excluded copyright owners have the option of participating in the revenue-based licensing scheme through the use of aggregators that have a direct agreement with the platform firm as described in Chapter three, it was argued that such arrangement even with its attendant efficiencies, places the

¹⁴ *German Press Publishers* supra; *Attrakt v Google* supra, *Google/Android Statement* supra.

¹⁵ Section 5.2.

copyright owner at the mercy of such distributors.¹⁶

It was established that while the South African competition statute contains an exhaustive list of conduct that may be considered abusive, the Nigerian competition Bill presents an open or non-exhaustive approach to abusive conduct thereby permitting the delineation of diverse conduct as abusive by the courts. It was also shown that both jurisdictions require evidence of substantial anticompetitive effect that outweighs the pro-competitive gains before applying competition law to abusive conduct.¹⁷ In this regard, it was argued that there is a presumption that any anti-competitive effect arising from the exclusion of small-sized copyright owners or from the insistence on *gratis* licence may be outweighed by the pro-competitive gains of efficient distribution of music content and algorithm-based enforcement of copyright. Also, the enforcement of the competition rules prohibiting unilateral exclusionary conduct requires the definition of a relevant market in which the platform firm is to be dominant.¹⁸ In the circumstances, it was found that the open and freemium music business model in which the dominance of the platform firm is in relation to the copyright owner and not to a defined market *per se*, and where consumers are enjoying music content free-of-charge, it might be difficult for the copyright owner to successfully challenge its exclusion from commercial uses of its music content. Accordingly, it was argued that the benefits of competition law enforcement such as exorbitant fines that compel lawful conduct may elude the copyright owner.¹⁹ Furthermore, even where a revenue-share arrangement exists, the position of the platform firm enables it to terminate the

¹⁶ Section 5.2.

¹⁷ Sections 5.3.1 and 5.3.2, above.

¹⁸ Section 5.3.1, above.

¹⁹ *Ibid.*

arrangement for any reason and termination in such circumstances may lead to the exit of the copyright owner from the copyright marketplace.²⁰ Yet, the analysis revealed that competition law rules might not consider such exit or exclusion sufficiently anticompetitive even when the statute in the case of South Africa, is meant to protect small businesses as part of its objectives.²¹ Accordingly, competition law-related challenges and opportunities exist in the open and freemium music business model but are not addressed due to the nuances and requirements of the existing regulatory framework.

6.3 Regulating the open and freemium music business model

“Attempting to impose rules which clash with strongly established norms, or making law in such detail that the ... user is not able to understand or comply with it, are not the only ways in which laws can be rendered meaningless. Law needs to regulate the reality which is faced by those who are subject to the law”.²²

In view of the challenges posed by the implementation of the copyright terms in the context of the open and freemium music business model and the present inadequacies of the regulatory framework, it is imperative to consider how South Africa and Nigeria may apply copyright law and competition law towards regulating the business model. Two possibilities arise here, namely: legislative changes and appropriate judicial interpretation of the legislative framework. Each solution is discussed below.

6.3.1 Legislative changes

It is important to consider legislative reforms within the copyright and competition law framework that may make these regulatory frameworks amenable to appropriately regulating the open and freemium music business model. Three key possibilities arise here,

²⁰ Ibid.

²¹ See Section 5.2, above.

²² Reed 2013 *supra* at p.151.

namely:

- (i) the introduction of a duly clarified exclusive right of communication to the public within the current copyright protection system;
- (ii) the expansion of the current bouquet of copyright limitations and exceptions; and
- (iii) provision for addressing anti-competitive effects of relative dominance within South Africa's existing competition framework and Nigeria's proposed competition law.

Each of these options is surveyed below.

(i) Clarified right of communication to the public

From the arguments developed in the previous chapters, it should be clear that one of the copyright challenges presented by the open and freemium music business model is closely related to the exclusive rights underlying the copyright terms. The understanding or the perspective taken regarding the regulatory framework may either encourage or discourage platform firms from adopting problematic copyright terms. Therefore, to address the highlighted concerns, it becomes imperative to provide a robust copyright regulatory framework that may serve as an *ex ante* tool for the regulation of the open and freemium music business model.

Besides the much debated value gap proposal and the calls for the reform of the safe harbour-based regime as it pertains to the platform firms, the literature makes subtle mention of a third option that may provide an avenue for the application of copyright law in regulating the open and freemium music business model. This framework is based on the clarification of the right of communication to the public as part of the copyright system in South Africa and Nigeria. As established in Chapter four, above, the expression, "communication to the public" is capable of expansive and restrictive

definitions as to require clarification, but there is no provision in the copyright legislation of South Africa and Nigeria explicitly defining the scope of the right.²³ The CJEU jurisprudence on the definition of the contours of the right of communication to the public offers a foundational basis for the formulation of this framework.²⁴ According to this framework, platform firms in using the music content to generate revenue from advertising may be making a “communication to the public” and would, therefore, be obliged to agree licensing terms with the relevant copyright owners of the music content being communicated. Such use, as already described in Chapters three and four,²⁵ above include the tagging, optimization, advertising and other conduct of the platform firm in the context of the licensing terms of the open and freemium music business model.²⁶ Clarification of the right of communication to the public along these lines will particularly influence the copyright terms in the open and freemium music business model environment.²⁷ In comparison with the other models, such an option seems to have various advantages, and avoids many of the concerns raised with respect to the value gap proposal and the related safe harbour regime.²⁸

First, such approach to the right of communication to the public is more likely to overcome the focus on the right of reproduction associated with the value gap proposal and safe harbour regime. Because of the focus on the reproduction right, platform firms have been able to take benefit of the music content without being obligated

²³ Section 4.2.3.

²⁴ See Section 4.2.1(b), above.

²⁵ See Sections 3.4.4 and 4.2.3, above.

²⁶ See Rosati 2017 *supra* at 15.

²⁷ Rosati 2017 *supra* at 11-2; Angelopoulos 2016 *supra* at p.14.

²⁸ See Section 3.4.4.

to share revenue or enter into appropriate licensing arrangements. Further, the focus on reproduction right continues a history of copyright owners expecting revenue from commercial, non-commercial and incidental uses of their works. The provision for and/or clarification of the right of communication to the public in South African and Nigerian respective copyright systems would eliminate these issues, as the recommendation focuses on uses of music content in the business model context. By specifically clarifying the scope of the act of communication to include the activities of the platform firms in the context of the open and freemium music business model, copyright law may be applied to regulate the business model.

Secondly, a system based on a clarified right of communication to the public would seldom raise concerns about potential copyright infringement or anticompetitive usage or algorithmic restraints.²⁹ Due to the certainties provided by such system, platform firms would be even less likely, to risk being involved in copyright infringement suits on account of what serves as the hub of its business model.³⁰ As evidenced by revenue-based licensing arrangements, many platform firms have elected to enter into duly negotiated licensing arrangements with some copyright owners, particularly in Europe and in the US. For instance, post the *PRS v Soundcloud* suit, Soundcloud has become licensed with major copyright owners.³¹ Similarly, YouTube negotiated licensing arrangements with Viacom and GEMA, post their respective suits. In this regard, the platform firms undertake to account for advertising revenue received in respect of the copyrighted content owned by selected copyright owners and to share

²⁹ See Litman, J. (2017). Fetishizing copies. In: R. Okediji, ed., *Copyright law in an age of limitations and exceptions*. New York: Cambridge University Press, p.111; Stadler 2007 supra at 958-9.

³⁰ Ibid.

³¹ See IFPI 2017 supra.

the revenue with them based on an agreed sharing formula. Although these arrangements have met with criticisms regarding the pre-selection criteria, which results in the exclusion of most copyright owners in South Africa and Nigeria who are small businesses/SMEs as highlighted in Chapters four and five, above³²; the basis for pre-selection itself and the revenue-sharing formula, they may also be interpreted as important steps towards the recognition and adoption of an open and freemium music business model based on the right of communication to the public.

Thirdly, the proposal to clarify the boundaries of the exclusive rights to recognise the conduct of the platform firms as falling within the communication to the public right should be beneficial towards ensuring continued participation by platform firms. Already, licensing arrangements in the US and EU with major labels and right-holders show that these platform firms are cottoning on to the idea that value should flow to copyright owners when the platforms derive financial benefit from their copyright-protected music content. Encouraging the continued deployment of the open and freemium music business model is particularly crucial when it is considered that non-continuation may considerably reduce the viability of the music copyright industry. Indeed, as was made clear in Chapter two, dissemination of copyright works is crucial to a competitive copyright industry. By providing legal certainty (through a clearly defined bouquet of rights), the risks of non-participation and abuses would be substantially reduced.

The dividends of the suggested framework make even more sense when the *PRS v SoundCloud* suit and the subsequent out-of-court settlement are considered. The claims made by the PRS have

³² Sections 4.2 and 5.2, above.

been shown to be of global application. Having the suggested framework in place would mean that platform firms would be unlikely to deploy the open and freemium music business model without considering the economic interests of the copyright owners. Rather, they would have been compelled to conclude licensing arrangements that ensured the continuation of their business model. Furthermore, by clarifying the boundaries of the exclusive rights, policymakers and lawmakers would better position the music copyright industry for more economic growth. Consequently, platform firms would not be virtually left to their devices at the risk of growth in the music copyright industry.

Fourthly, due to its focus on the very activities of the platform firms (as against the activities of the users of the platform) and its consideration of the profit-making nature of the activities, a duly clarified communication to the public regime may be potentially easier to enforce before a court than an undefined copyright usage framework or one, which widely interprets the reproduction right. It would also minimise or remove the focus on reproduction right as the source of value or revenue for copyright owners.³³

Finally, the described regulatory framework would ensure that both copyright owners and platform firms capture value from the deployment of the open and freemium music business model. This would hold true from an *ex ante* perspective, in the first place. It would also hold true *ex post*, since copyright and ancillary frameworks may both have roles to play in ensuring protection against market-wide harm resulting from contravening the regulatory provisions. Copyright infringement suits may be instituted on the basis of such clarified right of communication to the public, where appropriate.

³³ See Section 4.2.1(a).

It must be pointed out that the communication to the public approach may be in theory criticized, due to the allegation that it represents yet another attempt to widen the scope of copyright protection in the face of digital advancements.³⁴ The criticism lies in the fact that the components of the new definition may not take cognisance of the import of the usage terms in the open and freemium music business model's copyright terms as discussed in Chapter four, above.³⁵ Nevertheless, this appears to be a minor issue, especially when compared with the concerns raised regarding the EU value gap proposal and the focus on the safe harbour regime and given that this right already exists in international copyright treaties.³⁶ As identified in Chapters two and four, there is ample indication that both South Africa and Nigeria as signatories to the international copyright treaties; have the legislative leeway to apply this option. Indeed, in the case of South Africa, the Copyright Review Commission Report recommends this approach.³⁷ Calls for more detailed regulation of the area have been persistent in the relevant consultations and scholarly output.³⁸ As mentioned in Chapter one and considered in Chapter four, in January 2015, in their respective Government Communications, both South Africa and Nigeria commenced steps to amend their respective copyright law to make it fit for the digital age. While the process is still ongoing even at the time of writing this thesis, vigorous engagements from both government and industry stakeholders indicate the existence of higher chances that the result of the

³⁴ Katz 2013 supra at pp.216-7; Samuelson 2017 supra at pp.22-3.

³⁵ See Section 4.2.2, above.

³⁶Section 4.2.1(b).

³⁷ See Copyright Review Commission (2011). *Copyright Review Commission Report*. [online] Department of Trade and Industry, para.4.8.2. Available at: <https://www.gov.za/sites/www.gov.za/files/CRC%20REPORT.pdf> [Accessed 7 Jan. 2018].

³⁸ Sections 4.3 and 4.4.

amendment process may well provide some relevant solutions to the application of copyright law to regulate the open and freemium music business model. In all these, care must be taken to ensure that delineation of the parameters of the exclusive rights does not end up over-expanding the scope of the relevant rights. As earlier argued, setting the right of communication to the public squarely in the business model context and excluding personal use and/or mere reproduction may resolve the issue. Moreover, by providing for revenue share only in the case of business model, copyright law may be more suitably applied in the regulation of the open and freemium music business model as no one could argue that the copyright terms restricts creativity, access or usage.³⁹

Having highlighted the advantages of the communication to the public regime and rebutted likely criticism of the approach, it is necessary to evaluate its practical enforcement, the issue of implementation being up to the platform firms. Ideally, the codification of an appropriately clarified right of communication to the public will provide a copyright regulatory framework that may engender more acceptable copyright terms for the open and freemium music business model. However, bearing in mind that the law does not set or design business models for firms but rather provides an over-arching framework within which business models may be established, it is pertinent to consider how the suggested model may be enforced. The premise here is that platform firms may, if unchecked, still be able to work around those frameworks to thwart their principles. While the modification of the access and usage terms within the context of the suggested framework may be an easy pill for platform firms to swallow, it is likely that the modification of the licensing terms to permit a paid licensing regime may not enjoy a similar easy ride. As

³⁹ Sections 4.5 and 5.4, above.

demonstrated in Chapter four using the *German Press Publishers'* case, the creation or clarification of a new right may be inadequate. In that chapter, it was shown that in Italy, Spain and Germany, creating a new Press Publishers' right did not result in the licensing revenue sought for the Press Publishers as they were compelled to either license for free or risk the freemium service being discontinued in the territory.⁴⁰

Therefore, it is suggested that a middle ground may be to express the right of communication to the public in terms of copyright limitation imposed by a statutory or compulsory licence as discussed in the next paragraph. As the next paragraph shows, this suggestion is influenced by a consideration of the tests proposed in the EU cases of *Magill*, *IMS Health* and *Microsoft* respectively discussed in Chapter two of this thesis.⁴¹

(ii) Expanding the scope of limitations and exceptions

Providing for and/or clarifying the right of communication to the public mechanism alone would be of limited help in applying copyright law and competition law to regulate the open and freemium music business model. To apply copyright law to regulate the open and freemium music business model, it is also crucial to deal with the issue identified in Chapter four, above regarding the role of copyright limitations and exceptions in delineating rights of copyright users.⁴² This addresses the issues regarding whether the platform firms' use of the music content and their activities qualify as permissible uses of copyright products.

From the arguments developed in the previous chapters, it is to

⁴⁰ See section 4.2.1(a), above.

⁴¹ See section 2.3, above.

⁴² See section 4.2.2.

be noted that the activities of the platform firms in deploying the open and freemium music business model result in the free distribution and access to music content. Accordingly, given the objective of copyright and competition law in promoting wider dissemination of copyright products to consumers, there is need for caution in circumscribing the activities of the platform firms. However, given the profit-making intention of the platform firms in implementing the copyright terms, there is need for balance in addressing these two significant interests. In this regard, the bouquet of limitations and exceptions may, as highlighted in Chapter four, above play a role in regulating the business model.

Rather than leave the regulation of the open and freemium music business model solely to the clarification of the right of communication to the public, it is suggested that the canopy of copyright limitations and exceptions be applied to the activities of the platform firms and by extension, the implementation of the copyright terms. Specifically, the deployment of the open and freemium music business model should be considered as falling within the scope of the right of communication to the public but such right should be limited by permitting its exploitation upon the payment of an established licensing rate. Under this scheme, platform firms would be obligated to pay established licensing rates to copyright owners when they deploy the open and freemium music business model. Further, copyright owners will be unable to hold platform firms to ransom under this scheme. This serves the benefit of providing the platform firms, as copyright users with the clear legitimacy needed to make use of the music content in the business model context. It also continues the business model's "legacy" of providing music content to consumers free-of-charge.⁴³

⁴³ Samuelson 2017 *supra* at 35-71.

As pointed out in Chapter four of this thesis, the Nigerian Copyright Bill 2015 provides for a compulsory licensing scheme for copyright users that exercise the right of communication to the public in certain instances.⁴⁴ However, this is limited to producers and performers of sound recording. The suggestion is that the licensing scheme should be extended to other categories of authors and copyright owners with respect to music content. Further, rather than have the collecting societies set the rates with the attendant issues (already highlighted in Chapter four) regarding the monopoly of collecting societies and its abuse,⁴⁵ it may be best to set the rates through a rate-setting tribunal established by statute.⁴⁶

It is proposed that South Africa and Nigeria applying copyright law in this manner to regulate the open and freemium music business model would ensure that the law does not preclude the establishment and continuity of business models that make innovative uses of copyright content. The law will also not preclude increased access to music content afforded by the Internet through a restrictive application of the exclusive rights framework. Even though the *Magill*, *IMS Health* and *Microsoft* cases discussed in Chapter two were based on competition law, it is argued that the suggestion of adopting a compulsory licence approach to the open and freemium music business model under copyright law, aligns with the tests proposed in those cases.⁴⁷

The “innovation balance test” which seeks to balance the copyright owner’s incentives to create with the level of innovation in a

⁴⁴ See section 4.4.

⁴⁵ *ibid.*

⁴⁶ Daly, P. (2012). Courts and Copyright: Some Thoughts on Standard of Review. *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law*, pp.51-4 (hereafter, Daly 2012).

⁴⁷ See section 2.3.

given industry may be applied in considering the copyright owners' interests vis-à-vis the creativity represented in the use of music content in the open and freemium music business context. In line with those EU cases, the need to protect the copyright owner's incentives to create should not constitute an objective justification to the issuance of the compulsory licence.⁴⁸ Similarly, it is argued that the "new product test" which supports the issuance of a compulsory licence where the refusal to license by a copyright owner may prevent the appearance of a new product for which there is consumer demand, equally supports a compulsory licence under copyright law.

Accordingly, the "new product" and "innovation balance" tests have been adapted to support a "competition impact" approach to the application of copyright law in regulating the open and freemium music business model.

(iii) Addressing the effects of relative dominance

From the arguments proffered in Chapter two, the application of competition law rules prohibiting both restrictive agreements and unilateral abuse of market power can complement the copyright law regime in the achievement of its objectives.

As already discussed in Chapter five, the relative dominance of platform firms may affect the individual freedom of copyright owners, in the case of open and freemium music business models where, the copyright owner as a supplier or a customer depends "exclusively" on the platform firms as a distributor or a buyer and does not have equivalent alternatives.⁴⁹ Such dependence may also affect the freedom or ability of the copyright owner and other platform firms to compete in the distribution of music content. In such cases, the

⁴⁸ McMahon, K., 2007. Interoperability: Indispensability and "Special Responsibility" in High Technology Markets. *Tul. J. Tech. & Intell. Prop.*, 9, p.123.

⁴⁹ See section 5.2.

individual economic freedoms of the copyright owner where it is a firm, may be restricted. Indeed, access to the services of the platform firm may be a prerequisite for effective competition in the market for the provision of music content in Nigeria and South Africa. In such situation, there is evidently cause for worry for competition in such copyright markets. To address the identified effects of the undue exercise of the relative dominance and apply competition law towards the regulation of the open and freemium music business model, it is suggested to conceptualise the competition concerns as a situation of economic dependence whose abuse is prohibited. Accordingly, statutory provisions should be adopted against abuse of economic dependence either as a separate prohibition or where the statute adopts an open approach to prohibition of unilateral abusive conduct, within the prohibition against abuse of dominance. The work of the ICN in the approach to and implementation of prohibitions against abuse of economic dependence may be helpful in this regard.⁵⁰

The concept of economic dependence and its abuse is a creation of competition law in several jurisdictions.⁵¹ Specific statutory provision is present in Germany⁵² and France⁵³. In some other jurisdictions, the notion is represented in the interpretation of abuse of dominance provisions within competition law or in the provisions prohibiting unfair business practices or contractual arrangements.⁵⁴ The availability of diverse legal instruments for the regulation of

⁵⁰ See [Internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org). (2009). *International Competition Network*. [online] Available at: <http://www.internationalcompetitionnetwork.org> [Accessed 22 May 2018]; ICN Report 2008 supra.

⁵¹ See ICN Report 2008 supra; Bakhoun 2017 supra at 9-11; Kéllezi 2008 supra at 61-8.

⁵² See Act Against Restraints of Competition in the version published on 26 June 2013 (Bundesgesetzblatt (Federal Law Gazette) I, 2013, p. 1750, 3245), as last amended by Art. 5 of the law of 21 July 2014 (BGBl. I p. 1066).

⁵³ See Art L 420-2 of the Commercial Code.

⁵⁴ See ICN Report 2008 supra at 13-4; Bakhoun 2017 supra at 2.

economic dependence and its abuse highlights divergences in domestic legislative approaches to the recognised criteria for the conduct, recognised effects of the conduct and available remedies.⁵⁵ However, for the present purposes, the recommendation is based on the prevalent general criteria of a situation of economic dependence.

The major prerequisite for a finding of the existence of economic dependence is the absence or costs, for the dependent firm, of alternative firms or solutions to sell or to purchase its products or services in the market.⁵⁶ In such cases, the economic dependence stems either from the fact that the market is highly concentrated or from the nature of the relationship between the dependent firm and the independent firm.⁵⁷ A firm (dependent firm) is said to be economically dependent on another (independent firm) if the dependent firm is reasonably unable to or lacks sufficient means of switching to other firms, in order to continue its business.⁵⁸ In fact, whereas the independent firm can end the relationship without incurring a loss, such can engender significant economic damage for the dependent firm.⁵⁹

Such inability to switch may be present when the dependent firm:

- (a) is a small or medium size enterprise and regularly obtains from the dependent firm, “in addition to discounts customary in the trade or other remuneration, special benefits which are not granted to similar purchasers”⁶⁰;
- (b) is a retailer of branded or high-quality products produced by the

⁵⁵ See Bakhom 2017 *supra* at 10-11.

⁵⁶ See Këllezi 2008 *supra* at 69; Bakhom 2017 *supra*.

⁵⁷ See Këllezi 2008 *supra* at 69.

⁵⁸ *Ibid* at 64-5, 70.

⁵⁹ See Këllezi 2008 *supra* at 65.

⁶⁰ Section 20(1) of the German Act against Restraints of Competition. See also, Këllezi 2008 *supra* at 61.

independent firm and the former cannot afford not to have and sell the items in its shops;

- (c) is in a “long-standing relations” with the independent firm who is largely its major or only other business partner;
- (d) is involved in the distribution, purchase or sale of a product that is usually scarce;
- (e) is dependent on the independent firm for specific technical products.

The rationale underlying the prohibition against the abuse of economic dependence was the belief that the structure of the market and competition therein may be protected by providing protection to efficient⁶¹ but smaller (weaker) market operators from the incidence of dependence on bigger (stronger) operators.⁶² In this regard, an abuse of economic dependence occurs when a business operator upon which another operator depends, applies that dependence in a transaction or transactions to the detriment of the continued operation or existence of the dependent party.⁶³

The implementation of copyright terms in the open and freemium music business model context clearly provide a market for the distribution of music content. However, for copyright owners of the music content, the copyright terms may limit their freedom to compete in that market to the detriment of the continued operation or existence of the copyright owner.⁶⁴ Therefore, it is worth considering avenues to apply competition law in regulating the open and freemium music business model by addressing such restraints of economic freedom.

⁶¹ See Këllezi 2008 *supra* at 67.

⁶² See Këllezi 2008 *supra* at 61; Bakhoun 2017 *supra* at 14.

⁶³ For example, see French Competition Council, Decision 04-D-26 of 30 June 2004 in *SARL Reims Bio*. This decision was upheld by the Paris Court of Appeal, Decision of 25 January 2005, and the French Supreme Court, Decision of 28 February 2006.

⁶⁴ See section 5.3.1, above. See Këllezi 2008 *supra* at 84-5.

The copyright terms of the open and freemium music business model operate in such manner as to “exploit” the copyright-protected music content while only offering revenue for a select few chosen based on criteria set by the platform firms. It is suggested that the delineation of copyright terms with no revenue share attached to it despite use of copyright content to generate revenue can fall under the provision relating to abuse of economic dependence through a contextualized definition of the notion of dependence.

In neglecting to clarify the scope of the exclusive rights generally and, to explicitly involve financial benefit, lawmakers have provided leeway for the platform firms to use copyright content in deploying business models without needing to pay corresponding revenue to the copyright owners, thus promoting the dissemination of copyright products at the expense of other market participants such as the copyright owner. Conceiving of such scenario as creating a form of economic dependence would solve this problem and regulate the business model, at least in part, because it would focus the inquiry on the marketplace (that is where the money flows) and all market participants rather than on the act of reproduction which with digital technology is par for the course. More importantly, the rule against abuse of economic dependence would assist in addressing *ex ante* the issue of the creation of economic dependence, typically arising under the copyright terms. The remedies applicable to a finding of abuse of economic dependence will involve a positive order to stop the abuse as well as directives regarding what the abusive firm is required to do.⁶⁵

An additional consideration in the notion of economic dependence concerns the question of appropriate approach or

⁶⁵ See Këllezi 2008 *supra* at 87.

enforcement test. Again, different jurisdictions apply different tests, which may, in some cases, lead to a finding of no abuse, even when a situation of economic dependence exists and has adverse effects. For instance, under the French Commercial Code, a finding of abuse of economic dependence may only be made where, in addition to the requirement of absence of alternative solution, there is an adverse effect on the relevant market. This enforcement test (also known as “equally efficient competitor test”⁶⁶) will only classify exclusionary conduct as abusive and prohibited if such conduct can exclude an equally efficient competitor in the same market rather than or in addition to an efficient market participant who may not necessarily be a competitor.⁶⁷ In applying the test, there is a comparison between the efficiency of the independent firm and that of the alleged dependent firm.

Such tests fall into the same difficulties as that experienced within “efficiency-based” competition rules highlighted in Chapter five, above. Accordingly, it will be difficult to apply such test to the open and freemium music business context, which involves vertically-related firms (copyright owners and platform firms), which operate in different market stages. Bakhoun explains the requirement of this test and its inherent difficulties⁶⁸:

This requirement goes beyond the vertical relationships to consider the horizontal effect of a situation of economic dependence in a given market, from a horizontal and macroeconomic perspective. This combination of contractual (analysis of the dependence from the bilateral point of view) and competition (taking the market as a benchmark for a finding of abuse) related requirements made difficult the enforcement of the provision in practice... Such requirement expresses the difficulties in dealing with abuse

⁶⁶ Ibid at 86.

⁶⁷ See European Commission (2005). *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses*. Available at <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>. para 63 [Accessed 21 Feb. 2017].

⁶⁸ See Bakhoun 2017 supra at 15. See also Këllezi 2008 supra at 86.

of economic dependence with the traditional competition law approach, which requires that the market be affected.

Such test is however, not of universal application as exemplified in the case of countries such as Germany, Italy, and Japan, which do not require the market be affected or compare efficiencies of competitors in such market for a finding of an abuse of economic dependence. In these jurisdictions, a finding of abuse of economic dependence may be made where the freedom of choice of markets participants is unduly circumscribed because of the dependence of such participant on an economically stronger market participant. In such cases, the law is applied to restore the economic freedom of such economically weaker firms and protect the competition process.⁶⁹ For this reason, this enforcement criteria is suggested as better-suited to the regulation of the open and freemium music business model in the South African and Nigerian context.

Corollary to the foregoing is the issue of how the prohibition against abuse of economic dependence may become part of the law in South Africa and Nigeria. For South Africa, the proposed amendments to the Competition Act provides ample opportunity to recognise the notion of abuse of economic dependence. Indeed, it is argued that the notion of abuse of economic dependence may provide the much-sought balance between protecting the interests of small businesses and protecting the interests of platform firms as investors and innovators. As highlighted in Chapter three, above, platform firms make significant investments in designing the platforms, algorithms and “advertisement-enabling” features.⁷⁰

The South African competition enforcers have been quite

⁶⁹ See Bakhom 2017 *supra* at 26-7 arguing particularly for the adoption of such perspective within competition law and particularly in developing countries. See also, Këllezi 2008 *supra* at 85.

⁷⁰ See section 3.5 above.

insistent on applying the market-efficiency test in competition law enforcement and have resisted the recognition of conduct similar to the abuse of economic dependence described above, within the list of recognised competition law infractions.⁷¹ However, the proposed amendment to the Act can provide an avenue for a dual approach to competition law regulation, which may apply to the open and freemium music business model. Indeed, given that the same conduct may in some cases amount to both abuse of economic dependence and abuse of dominance, such dual approach is to be recommended.⁷²

In the case of Nigeria, the notion of economic dependence and prohibition against its abuse may be more easily incorporated within the Competition and Consumer Protection Bill as it is yet to be passed into law. As scholars such as Al Ameen suggest, competition law in developing countries and young competition law jurisdictions may be better served by the more appropriate abuse of economic dependence principles than by the prevalent “effects-based” competition law approach.⁷³

Regulating the open and freemium music business model through the competition law notion of restriction of abuse of economic dependence also has the benefit of engendering soft law initiatives such as an industry code of practice involving relevant stakeholders. Such code of practice may require that access terms should explain or delineate procedures for denial/refusal of access to platforms. For instance, platform firms may suspend the counting of views but retain

⁷¹ See section 5.2 above.

⁷² See *Attrakt v Google* supra; ICN Report 2008 supra at 20-22.

⁷³ See Al-Ameen, A. (2015). *Application of abuse of dominance in new competition regimes: Unconscionability as a Stabilising Tool at Time of Indecision*. [online] Available at: [http://ascola-tokyo-conference-2015.meiji.jp/pdf/ConferencePapers/General%20Session%204/Abayomi%20Al-Ameen_competition%20and%20unconscionability%201%20\(1\).pdf](http://ascola-tokyo-conference-2015.meiji.jp/pdf/ConferencePapers/General%20Session%204/Abayomi%20Al-Ameen_competition%20and%20unconscionability%201%20(1).pdf) [Accessed 7 Mar. 2017].

previous view count by showing still images of such music content with the most recent view count. Given the present feature of permitting partners to mute videos containing their copyright-protected music content, there is a strong possibility that this option is feasible. Such procedure may enable the copyright owners continue to “trade” on their publicity through view counts and ensuing social media and brand ambassador relationship, even when their music content no longer has access to the platform.⁷⁴

The provision for the notion of abuse of economic dependence can also engender stakeholder dialogues to define best practices for matters such as content recognition technologies. These standards or code of practice may contain:

- (a) Certifiable popularity index – Platform firms may be required to issue copyright owners with a document or “badge” that provide an accurate and verifiable record of matters such as view counts, number of “likes”, number of “followers” and the like.
- (b) Requirement of payment of undisputed sums prior to termination or takedown – Platform firms may be required under the code to adopt contractual provisions that ensure that they pay copyright owners all undisputed sums accumulated on the platform in the event that the platform firm intends to terminate its agreement with the copyright owner.

Such code of practice may eventually become a regional or international standard if properly drafted. The premise for this suggestion is that such industry code only addresses the pertinent areas of the open and freemium music business model that have been shown to be unaligned with competition law goals, while

⁷⁴ The significance of the view count as a value metric was explained in Sections 3.4.2 and 5.2, above.

leaving problem-free areas to market forces.

6.3.2 Application of judicial mechanisms

As a further alternative, the courts are not left out. Judicial interpretation, which takes cognisance of the identified effects of the copyright terms of the open and freemium music business model and their underlying causes, would boost the implementation of the suggested regulatory approach. This also has the advantage of applying regulation only in those particularly problematic areas where it is most needed (such cases naturally being more likely to make it before the court), while avoiding pushing the issue too aggressively in individual transactions.

If statutory provision is not made for defining the scope of the exclusive rights or expanding the limitations and exceptions, it is still open to courts to use their discretion to delineate such clarification as to regulate the business model. In this regard, an interpretation that fits with the reality of the value metric in the digital copyright market will offer a better approach to applying copyright and competition law in regulating the business model. As demonstrated in Chapters three and four, the new value metric of access to consumer and consumer's data, including advertisement-based revenue can be understood as a call to approach the perception of the copyright terms of open and freemium music business models, differently. Similarly, competition enforcers may interpret the effects of the copyright terms as an abuse of dominance in appropriate circumstances using the "unconscionability" test as opposed to the efficiency-based approach currently applied.⁷⁵

Speedy judicial enforcement of the suggestions made in this chapter may be aided by the use of a small claims court and/or

⁷⁵ Al-Ameen supra at 11-2.

copyright tribunals such as are already provided for under the existing respective copyright laws of South Africa and Nigeria. The proposed amendments to the copyright laws in both South Africa and Nigeria, have further expanded the utility of copyright tribunals in this regard.⁷⁶ In this regard, the criticisms regarding the expansion of the scope of the jurisdiction of the Tribunal under the Amendment may be addressed by providing an appropriate review system within the courts and/or strengthening the constitution of the tribunals by appointing copyright experts as members.⁷⁷

Of course, there is the risk that judicial interpretation may not provide the expected relief while it would also possibly result in precedents that perpetuates the status quo.⁷⁸ However, such risks are minimal particularly in the face of explicitly stated rules and enforcement approaches. More significantly, it is to be noted that very few copyright cases make it to court and the suggested regulatory approach will require litigation in order to activate judicial action.

In the case of competition law regulation, the commencement of investigation by the relevant competition enforcer may be all that is required to engender proper conduct by the platform firm. As highlighted in Chapter five, the threat of exorbitant fines may cause the platform firm to enter into commitments that will rectify the anticompetitive conduct.⁷⁹

⁷⁶ See the proposed Section 29A inserted by Clause 30 of the Copyright Amendment Bill 2017 in the case of South Africa. See Riby-Smith 2017 *supra* at 221.

⁷⁷ Daly 2012 *supra* at 51-4

⁷⁸ Court actions are instituted in the hope that the Judge will interpret the law in line with the plaintiff's arguments. But that may not be so. Indeed, the judgment in the cases of *Viacom v YouTube* *supra*, *GEMA v YouTube* *supra* were not quite what was expected.

⁷⁹ See section 5.3.1 above; Google/Android Statement *supra*.

6.4 Concluding remarks

Copyright serves the purpose of promoting competition. Properly applied, copyright protection provides the competitive environment required to enable firms to profit from their creative works. This encourages innovation effort and improves dynamic efficiency, to the ultimate benefit of consumer and societal welfare. Thus, copyright laws should be seen as encouraging firms to engage in competition, and in particular competition that involves risks and long-term investments. Corollary to the foregoing, it seems imperative that business models, which are founded on (dynamic) uses of copyrights, take cognisance of this competition-based objective. Indeed, any copyright-based terms used in the business model that fails to measure up to this objective is likely to affect the music copyright industry adversely. At the same time, any form of regulation of such copyright-based terms should recognise the ways in which the copyright-protected product is used and preserve the firms' incentives to invest in the market. The imperative is to ensure that business models operate in a manner as to benefit the society. To this end, South Africa and Nigeria should enforce a legal regime that ensures that commercial users of copyright-protected products work within the objectives of the copyright regime and the complementary competition law regime.

This being premised, the open and freemium music business model clearly represents a context where the use of copyrights may preclude competition in the copyright market. Abuse of economic dependence represents the most serious risk for copyright owners in the context of the open and freemium music business model, and offers a solid basis for concerns regarding competition in the music copyright industry. This opportunistic conduct may lead platform firms to gain undue economic advantages, at the expense of the copyright owners and the copyright system. The cause of the problem must be

identified in the copyright terms widely adopted so far by the open and freemium music platform firms. Such copyright terms raise several questions as to the best approach to reducing the risks to competition in the copyright industry whilst ensuring continued dissemination of music content. South Africa and Nigeria are representative of developing countries in Africa in this regard given their unique economic positions. South Africa possess significant elements of both developed and developing economies while Nigeria has striking features of both developing and least-developed economies. Both countries' music copyright industry is rife with copyright owners who as independent record companies and publishers qualify as small businesses/SMEs requiring the protection of competition to ensure a viable music copyright industry. In an industry characterised by "ubiquitous intermediation"⁸⁰ and prevalence of user-upload digital distribution platforms, where platform firms are crucial to ensuring that music content owned or produced by small businesses/SMEs reach consumers, where access to the consumer is the new way to monetize copyright and where platform firms are also equipped with more far-reaching technical powers in comparison to their older, analogue counterparts, it is imperative to secure the fate of the music copyright industry.

This thesis has made clear that, to apply copyright and competition law to regulate the open and freemium music business model, an improved legal regime should be put in place. Such a regime should be based on the *ex ante* clarification of the parameters of the relevant exclusive rights under copyright law and a balancing expansion of the scope of limitations and exceptions. Further rules on reducing and/or eradicating abuse of economic dependence should be included, as a means of influencing the implementation of the

⁸⁰ Angelopoulos 2016 *supra* at p.335.

copyright terms of the open and freemium music business model. Influencing the implementation of copyright terms, however, also means that undue restrictions on platform firms should be eschewed. Consequently, platform firms need not feel constrained in the manner they deploy their business model, particularly when this would lead to weaken or even destroy their business. The adoption of an improved legal regime based on protecting economic dependencies may also prove effective when considered from an *ex post* standpoint. A regime focused on addressing business practices, indeed, would better regulate the business model in the event of any opportunistic conduct. In this regard, this concluding chapter has developed an in-depth examination of the different approaches to copyright and competition law regulation, which could be potentially applied. Relief against abuse of economic dependence is certainly one effective regulatory approach.

Present and future challenges call for a deeper reflection on the scope and the role of the open and freemium music business model in the emerging global context. As this becomes the go-to business model in the music copyright industry and their activities are increasingly global, both copyright owners and platform firms will need to pay more attention to the legal frameworks and enforcement systems that may apply to them. This thesis has developed a thorough examination of the main risks to competition in the copyright industry arising in the context of the open and freemium music business model. The path proposed to apply copyright and competition law to regulate the implementation of its current copyright-based terms and protect competition will hopefully help the music copyright industry to navigate through this new business model.

Finally, it is worthy to note that even if none of these solutions is adopted, the copyright terms, their effects and underlying causes as identified in this study, could conceivably also be helpful for the

improvement of the business model and may possibly attract healthy scrutiny for the business model. In that context, regulatory and industry scrutiny can induce “good behaviour” and best practices. From this perspective, a “bottom-up” approach to regulation might, at the end of the day, be as effective as – and encounter less resistance than – a “top-down” approach. Either way, exploratory and doctrinal studies with regulatory outlooks, such as that provided in this thesis, are necessary.

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