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Copyright and Contract Law: Regulating Creator Contracts: The State of the Art and a Research Agenda

Martin Kretschmer

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COPYRIGHT AND CONTRACT LAW: 
REGULATING CREATOR CONTRACTS: THE STATE OF THE ART AND A RESEARCH AGENDA

Martin Kretschmer

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I. INTRODUCTION: THE DIGITAL SHIFT

Contracts lie at the heart of the regulatory system governing the creation and dissemination of cultural products in two respects:

(i) The exclusive rights provided by copyright law only turn into financial reward, and thus incentives to creators, through a contract with a third party to exploit protected material.

(ii) From a user perspective, purchases of protected material may take the form of a licensing contract, governing behaviour after the initial transaction.

The renewed interest in the relationship between copyright and contract law can be traced quite precisely to the mid-1990s. There was a major technological shift, with the rapid adoption of the World Wide Web as a consumer medium (Netscape’s Navigator browser was released in 1994). In parallel, the media and entertainment sector experienced a wave of consolidation, with multinational enterprises keen to hedge their bets in the rapid growth of Internet services (in 2000, AOL merged with Time Warner to create what was then the world’s largest media company).

In the new “private ordering of cyberspace,” contracts played a major part, as there was a sudden question mark over who owned the rights to new digital uses of existing works. Changing contractual practices began to cover these new forms of exploitation, and (if permitted by the governing law) unforeseen uses. Creators deride these new practices as “rights grabbing”; publishers and producers characterise them as “due diligence.”

The digital environment also changed the contractual relationship between buyers and sellers. Traditionally, the producers and distributors of copyright


3 Symposium COPYRIGHT, CONTRACT AND CREATIVITY held at Bournemouth University on 25 September 2009 [hereinafter Bournemouth Symposium], available at http://www.cippm.org.uk/symposia/symposium-2009.html. The Symposium was organised as panels with experts from professional organisations of journalists, illustrators, photographers, film directors, composers, songwriters, and featured artists. It formed part of the evidence gathering process for the study THE RELATIONSHIP BETWEEN COPYRIGHT AND CONTRACT LAW funded by the UK Strategic Advisory Board for Intellectual Property Policy (SABIP) which is reported in three articles of this journal.
materials were not much concerned about the consumers’ after-sale behaviour. General principles relating to trading standards and the sale of goods applied. Once a physical carrier was bought in good order, the relationship to the right owner was severed—at least in the private sphere. A consumer could read, play, modify, or even copy a work. The purchased book or record could also be sold under the doctrines of “first-sale” (U.S.), or “exhaustion of rights” (EU).4 In the digital world, the relationship between buyer and seller may persist after the initial transaction, prescribing conditions of use that have no source in copyright law.

This Article deals with contracting at the beginning of the value chain, i.e., contracts between creators and intermediaries, the first step in bringing a work to the market. Since the Article is based on a study for the UK Strategic Advisory Board for IP Policy (SABIP), the focus is on British and European law, with other jurisdictions consulted primarily to assess the range of possible regulatory options.

II. THE CONCEPTUAL RELATIONSHIP BETWEEN COPYRIGHT LAW AND COPYRIGHT CONTRACTS

Under the standard economic conception of property rights, it is copyright law that allows contracts to be written: copyright law defines the characteristics of the work and the property rights in the work—that is, the contract space.

According to the economic literature underpinning these arguments, authors’ livelihoods depend on copyright law in the following way: Copyright structured as an exclusive property right gives authors something to sell to a third party for exploitation. Income is then derived from the contract assigning or licensing the copyright, typically to a publisher or producer. As Richard Watt sums it up in his article in this journal issue: “[C]opyright itself is not an incentive mechanism, but (assuming that it is enforced) it does allow an incentive mechanism, namely contracts, to operate.”5

A core methodological problem is how conceptually to distinguish the role of statutory copyright in these contractual arrangements. Consider two simple examples:

- The literary author: a typical contract may assign the copyright in a work to a publisher, against an advance and a royalty on copies sold.

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4 In the EU, the underlying principle for exhaustion is ensuring the free movement of goods and services; the discussion in the United States focuses on market failure. See Estelle Derclaye & Marcella Favale, Regulating User Contracts: The State of the Art and a Research Agenda, 18 J. INTELL. PROP. L. 65 (2010)

The professional footballer: a typical contract may bind a footballer exclusively to a club against a signing-on fee and salary payments that depend on appearances and success.

The former is a copyright contract, the latter a contract not based on a right defined by statute, yet their commercial features resemble each other. Under various economic models (again, see Richard Watt's article), we would expect copyright law to affect contracts, depending on time preferences (patience); risk and risk aversion; outside and inside options; and the extent of asymmetric information between the parties—but there is little evidence that this is empirically the case.

What looks like a copyright advance plus royalties is, in the case of the footballer, simply a contract. There is no Berne Convention for footballers. Would it have made a difference if footballers' performances were statutory subject matter? *Vice versa,* could not the literary author's copyright contract be conceptualised as a bilateral agreement? Without the existence of copyright, an author may still be commissioned for delivery of a novel, just as a footballer is paid to play football. Similarly, the author may contractually receive royalties, just as the footballer may receive a bonus for winning a title, or making an agreed number of appearances.

The point can be illustrated with a sophisticated early publishing agreement. In 1794, Friedrich Schiller and publisher Johann Friedrich Cotta concluded a contract for the *Horen* journal (one of the most important periodicals of the German enlightenment). At that time, there was no statutory copyright law in the jurisdiction where the publishing house *Cottaische Buchhandlung* was established (the Southern German state of *Württemberg*), and unauthorised reprints in other German language jurisdictions were common. The *Horen* contract includes advances, royalties, options, and even a moral right type clause. Clause (5) reserves the right of the author to make modifications. Clause (8) provides that an essay submitted to the journal may not be re-printed elsewhere until the end of four years after the publication in *Horen*. Clause (9) secures an option to the publisher on all future writings of the contributors, provided that they are not already contracted elsewhere. Clause (15) promises a

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royalty to the contributors of one third of profits on sales beyond 2000 copies. Although this agreement looks uncannily like a copyright contract, it is simply a bilateral agreement over the supply of a service (which we only now recognise as the exploitation of a copyright work).

Another strand of literature suggests that an author may negotiate what a publisher can or cannot do, but both author and publisher have little contractual influence over the behaviour of competitors and consumers after publication. Here copyright law matters. To return to the soccer analogy, anybody may copy Ronaldo's step-over, but not the turn of phrase that is a substantial part of a copyright work. And presumably, the effects of subsequent copying are discounted in the price a publisher is prepared to pay for a work, depending on "indirect appropriability." 8

If the relationship between creator (author) and investor (publisher/producer) with respect to duration, royalties, and options can be negotiated as a bilateral legal relationship sans droit d'auteur, it is only by conceptualising the further relationship of right holders to competitors and consumers that the regulatory function of copyright statutes becomes visible. In limiting competition, copyright statutes enable right owners to charge higher prices. Empirically, it remains an open question if this translates into higher earnings for the creator. 9

III. CONTRACT BARGAINING AND THE DYNAMICS OF THE CULTURAL INDUSTRIES

If "copyright law only lays down the rights of creators and performers, not their conditions of work," 10 are there any methodologies for examining the effects of copyright contracts? One promising approach may start from the empirical phenomenon of artistic production and consider the professional lives of authors. As authors need to make a living in order to be productive, it should be possible to generate a taxonomy of possible sources of earnings (of

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8 Under the concept of "indirect appropriability" developed by Stan Liebowitz, record companies or journal publishers may be able to charge higher prices because of unauthorised private copying. See S.J. Liebowitz, Copying and Indirect Appropriability, 93 JOURNAL OF POLITICAL ECONOMY 5, 945–57 (1985). For further discussion, see R. Watt (ed.), Indirect Appropriability: 20 Years On, 2 REV. OF ECON. RES. ON COPYRIGHT ISSUES 1 (2005).

9 The effects on authors' earnings from digital rights management systems (DRM) are even harder to gauge. Some proponents of DRM technologies claim that by tailoring prices to the customer's ability to pay, DRM protected markets become more efficient: "The prescription, then, is to so structure rights that they enable differential pricing, except where transaction costs — the costs to copyright owners and users of locating and negotiating with each other — will defeat the practice, as they presently would with book resales." Paul Goldstein, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 201 (Stanford Univ. Press, Rev. ed. 2003). Even if this proposition held, what would follow for the author's share of the surplus? See J. Litman, DIGITAL COPYRIGHT (Prometheus, 2001).

10 Bournemouth Symposium (notes by Professor Ruth Towse), supra note 3.
which copyright contracts will be only one!) that can be empirically captured for each occupational group. However, there are very few studies that can be used as a starting point for this exercise. It is part of artistic folklore that many authors have lived at some stage of their career on the breadline, are holding down second jobs, or are supported by members of their family. But is this true? If so, does it hold equally for all occupations copyright law treats as authorial in the sense of the Berne Convention: e.g., novelists, journalists, photographers, composers, screen-writers, or architects? To what extent does it apply to professions that are populated by non-Berne artists, such as musical performers and actors (who are protected by related rights), or television format developers, sound engineers, set designers, or gourmet chefs (who may have no statutory rights at all)?

A. FOUR SOURCES OF EARNING

In an earlier paper, I have developed four categories under which the earnings' portfolio of cultural professionals should be analysed for the purposes of copyright policy:

1. Statutory Right: Individually Negotiated Income. This type of income is likely to be based on publishing or production contracts and poses conceptual problems in identifying the effects of the underlying statutory right.

2. Statutory Right: Collectively Negotiated Income. This type of income is collected and distributed via collecting societies, typically for secondary use of protected subject matter that is difficult to monitor. These fees can often be directly linked to regulatory intervention, such as a statutory licence or a licence set in a copyright tribunal.

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3. Income from Artistic Activity: Non-Statutory Subject Matter. This type of income includes fees for live appearances (such as performances or readings), grants, and teaching in the artist's field.

4. Income from Non-Artistic Sources. This category includes income from any non-artistic "day time job," family support, capital income, and benefits derived from the social security system.

Empirical data in these four categories are not easily available, unless collected through a specifically designed questionnaire instrument. In addition, there is a body of income, tax, and insurance data available from government statistical sources that can be used to interpret the creative professions. A third source of information is surveys of artists' labour markets conducted by cultural economists. Finally, it is possible to make inferences on the likely balance of incomes from the published distributions of copyright collecting societies.14

The next two sections summarise what we know empirically about the working conditions of professional creators.

B. DISTRIBUTION OF EARNINGS: SUMMARY OF EMPIRICAL FINDINGS

A useful baseline for comparing the situation of creators is the earnings profile of the working population as a whole. National statistics offices collect such data. In the UK, the median, or midpoint, annual national wage in 2005 was £19,190 (about $35,000 at 2005 exchange rates). In other words, 50% of the employed population earned £19,190 or less. In the U.S., the 2005 median personal income for all individuals was $25,149.15

14 Collecting societies licence copyright works on behalf of rights holders for uses that are difficult to contract individually. Most publish annual accounts, and there have been a number of inquiries by competition authorities that yielded useful data (Performing Rights, MONOPOLIES AND Mergers Commission (HMSO, 1996)). The UK collective licensing bodies include: Authors Licensing & Collecting Society (ALCS) – licenses secondary reproduction and audio-visual rights in the literary and dramatic copyright area; Broadcasting Dataservices – licenses programme listings; Christian Copyright Licensing International (CCLI) – licenses the reproduction of songs and hymns; Copyright Licensing Agency (CLA) – licenses reprographic copying of literary works; ComPact Collections – licenses cable re-transmission rights for films; Design and Artists Copyright Society (DACS) – administers reproduction rights for visual artists; Educational Recording Agency Ltd (ERA) – licenses recording off-air by educational establishments; Filmbank and Motion Picture Licensing Corporation – licenses the showing of films in public; MCPS – administers mechanical reproduction rights of composers, lyricists, publishers; Newspaper Licensing Agency (NLA) – issues licences for copying of newspapers; Phonographic Performance Limited (PPL) – licenses certain uses of copyright sound recording; Publishers Licensing Society (PLS) – administers certain rights on behalf of publishers; PRS – administers performing rights of composers, lyricists, publishers; Video Performance Limited (VPL) – licenses certain uses of music video recordings. There are currently more than 150 collecting societies acting for right holders in the EU. Europe's largest society is Germany's GEMA (administering music performing and mechanical rights) with an annual turnover exceeding €800m (Annual Report 2008).

15 The UK Office for National Statistics (ONS) conducts an Annual Survey of Hours and
Two studies designed by this author surveyed 25,000 literary and audiovisual writers in the UK and Germany in 2006, and 5,800 designers, fine artists, illustrators, and photographers in the UK in 2010. The first study found that the median self-employed income (from writing) of UK literary and audiovisual professional writers was £12,330 (before tax) (about $23,000 at 2005 exchange rates). In Germany, it was €12,000 (before tax) (about $16,000 at 2005 exchange rates).

These findings are consistent with other studies of creators. Australian cultural economist David Throsby has conducted a series of studies on the economic circumstances of Australian artists over a period of twenty years. His latest report Do You Really Expect to be Paid? was published in 2010 on the basis of a 2009 interview survey of 1,030 writers, visual artists, craft practitioners, actors, directors, dancers, choreographers, and “community cultural development workers” (of a total estimated population of 45,000 Australian professional artists, defined as those “who operate at a level and standard of work and with a degree of commitment appropriate to the norms of professional practice within their artform”). He finds that half of Australian artists (median) earned $7,000 (before tax) (US $5,600) or less from their principal artistic occupation, and $18,900 or less (before tax) from all art-related sources (US $15,100).

Apart from low median earnings, a second striking characteristic of creators’ income is the winner-take-all distribution of earnings. That is, while typical earnings (ASHE) based on a 1% sample of the PAYE tax register. The U.S. Census Bureau surveys personal income for all individuals over the age of eighteen. The 2005 figures for those age twenty-five or above were $32,140 (median), and for full-time workers $39,336 (median). Since the mean (average) of earnings tends to be skewed by the presence of high earners, the median is the preferred measure for comparing earnings data.

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16 Martin Kretschmer & Philip Hardwick, Authors' Earnings from Copyright and Non-copyright Sources: A Survey of 25,000 British and German Writers, Bournemouth (CIPPM 2007), at http://www.cippm.org.uk/alcs_study.html.


18 Professional writers for the purposes of the study were defined as those who allocate 50% and more of their time to writing. This excludes occasional or amateur authors who may not be the focus of copyright policy.


20 Numerous other studies using different methodologies arrive at similar findings. An example from the U.S. is a web survey of 2,755 self-declared musicians conducted in 2004 by the Pew Internet & American Life Project. It found that only 11% were “success stories” (defined as musicians who spend thirty or more hours per week in music-related activities, and drawing 80% or more of their income from these activities). M. Madden, ARTISTS, MUSICIANS AND THE INTERNET 2 (Pew Research Center 2004).
incomes are low, the population of creators includes some unusually high earners.

In the total population of UK employees, the bottom 50% earn about 20% of the total income. The top 10% of earners earn about 20% of total income. This income distribution is reflected in a Gini coefficient of 0.36 (a fairly common distribution for the developed world).

Studies of the income of creators consistently show a more skewed distribution of earnings. In the UK, the bottom 50% of composers/songwriters earn less than 5% of total income; the bottom 50% of literary authors earn under 10% of total income, the bottom 50% of visual creators earn about 10% of total income. The top 10% receive a disproportionately large share (visual creators: 45%; literary authors: 65%; composers/songwriters: 80% of total income). The respective Gini coefficients are: for visual creators 0.55, for literary authors 0.63, for composers/songwriters 0.88.

C. EARNINGS FROM COPYRIGHT AND NON-COPYRIGHT ACTIVITIES: SUMMARY OF EMPIRICAL FINDINGS

The working conditions in cultural markets (characterised by very high earners and low median income) pose a basic question about the sustainability of creative lives: if the majority of authors and artists cannot live on the fees derived from publishing or production contracts, how do they balance their books?

In order to make progress on this question, it needs to be defined more precisely who counts as a member of the population for which copyright earnings should matter. Perhaps the relevant population should be reduced to


22 The Gini coefficient is a measure of inequality, calculated by plotting cumulative population percentages against income percentages. A Gini coefficient of 1 means that one member of the population earns all the income ("perfect concentration"). A Gini coefficient of 0 means that every member of the population earns the same income ("perfect equality"). A large gap between mean and median earnings will be reflected in a high Gini coefficient. The Economist reports from OECD and Word Bank data that "America's Gini coefficient has risen from 0.34 in the 1980s to 0.38 in the mid-2000s. Germany's has risen from 0.26 to 0.3 and China's has jumped from 0.28 to 0.4" (Economist, 22 January 2011). For a detailed recent analysis of UK data, see POVERTY AND INEQUALITY IN THE UK: 2009 (Institute of Fiscal Studies, 2009).

23 Kretschmer et al., supra notes 16–17. The 2007 report includes a literature review of quantitative data about artists' labour markets (surveys of Austrian, Australian, British, German, Finish, and U.S. artists, as well as an analysis of tax and insurance data compiled by government departments).

24 No studies as yet have explained the reasons for these sectoral differences. One proposition worth exploring is that the greater the presence in globalised English speaking markets, and the less dependent on localised "live" activity, the more tilted earnings will be towards winners.
those creators in each discipline who can live, or at least aim to earn a living from their principal artistic activity. Conceptually, this may be defined by a threshold amount of creative earnings, or a threshold amount of time allocated to creative activity. From one perspective, copyright law could be said to be designed only for best-sellers. From another perspective, the relevant population for the formulation of copyright policy may be constituted by all potential cultural workers from whose activity society would benefit.

There are only a small number of studies that have attempted to capture the professional earnings profile of specific groups of creators at this level of detail. The defined population relies on an element of sustained practice, expressed by membership of a professional organisation, or allocation of the majority of working time to the principal artistic activity. By focusing on professional creators, these empirical studies tend to steer a middle way between aspirational and best-selling perspectives.

Even if aspirational or occasional creators are excluded from the analysis, noncopyright income remains important to writers and artists. Most professional creators have earnings from another source (such as a second job, capital income, or a partner).

David Throsby finds that, on average, Australian professional artists allocate 47% of their working time to the principal artistic occupation. A study of self-employed artists in Germany captures the contribution of artistic earnings to household income. On average, German literary authors contribute 42%, visual artists contribute 42%, musicians contribute 53%, and performing artists contribute 67%.

This author’s studies of UK creators found that 44% of visual creators (designers, fine artists, illustrators, photographers) earn all their income from self-employed artistic sources. Thirty-five percent of visual creators and 60% of literary authors had a second job.

In many countries, the legislature has attempted to mitigate the volatility of these labour markets by regulating copyright contracts. The following Part will identify such interventions through a comparative review of provisions that intervene in the contractual freedom of parties with the aim of improving the financial position of authors.

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26 Kretschmer et al., supra notes 16–17.
27 Throsby & Zednik, supra note 20, at 121.
28 C. Dangel, M.-B. Piorkowsky & Th. Stamm, SELBSTSTÄNDIGE KÜNSTLERINNEN UND KÜNSTLER IN DEUTSCHLAND — ZWISCHEN BROTLOSER KUNST AND FREIEM UNTERNEHMERTUM? 17 (Deutscher Kulturrat, 2006).
29 Kretschmer et al., supra notes 16–17.
IV. THE REGULATION OF COPYRIGHT CONTRACTS

This comparative review of copyright contract laws will summarise a range of regulatory options, survey the empirical evidence on their effects, and identify the gaps in knowledge that need to be filled. The perspective is empirical, rather than doctrinal. The characteristics of provisions regulating contracts over the exploitation of copyright works will be examined under the following headings:

- Ownership
- Specific contract formalities
- Scope of grant
- Rights to remuneration
- Effects on third parties
- Provisions relating to the revision and termination of contracts
- General doctrine relating to unfair contracts

A. OWNERSHIP

Under the so-called "creator doctrine" (underlying the concept of literary and artistic works in the Berne Convention), the initial owner of the copyright in a work is the natural person who created it.30 However, in all countries reviewed, there are certain ownership rules and assumptions for specific, more entrepreneurial kinds of work, and for works created under employment.31

From an economic perspective, it is not initial ownership but transferability that matters. It may be useful to briefly illustrate the UK position for works created under employment, commissioned works, and moral rights.32

1. Creation Under Employment. Under the Copyright, Designs and Patents Act of 1988, for works made "by an employee in the course of his employment, his employer is the first owner."33 The language preserves earlier case law.

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30 Berne Convention, supra note 6. Article 2 of the original 1886 Berne Convention referred to authors and their successors in title (les ayants cause). Since 1948 (Brussels Conference), Art. 2(4) has included a less ambiguous reference to the effect that the protection of literary and artistic works "shall operate for the benefit of the author and his legal representatives and assignees."

31 For related or neighbouring rights, national laws typically are silent on the question of first ownership.

32 For the U.S., a good starting point is Robert P. Merges, The Law and Economics of Employee Inventions, 13 HARVARD TECHNOLOGY L.J. 1 (1999). Merges identifies three common law rules for employer ownership of inventions: (i) the employee was hired to invent, (ii) the invention was within the responsibility of the job, (iii) the employers' resources were used.

In *Stevenson Jordan v. MacDonald & Evans*, an employed accountant who gave public lectures on budgetary controls could not be ordered to prepare lectures. The employee owned the copyright. In *Missing Link Software v. Magee*, a programmer was employed to write programs of the disputed kind. The court found the employer owned the program even though the program was produced outside working hours on the employee's own equipment. In *Noah v. Shuba*, a consultant created copyright material in the course of employment (in this case by the National Health Service). Still, the court implied a term that the employee owned the copyright because it was customary for the employee to assign copyright to a publisher and collect royalties.

Indicators that inform assessment of employer ownership include the contractual scope of employment, level of responsibility, creation during work time, use of work resources (equipment) and the financial risks taken by the employee. However, it is important to note that the default position on employee ownership can be changed both by the employment contract and by longstanding practice.

2. Commissioned Works. For commissioned work, the default ownership remains with the creator. In *Robin Ray v. Classic FM*, a consultant produced a database of recordings under commission for commercial radio station Classic FM. An implied licence to Classic FM was inferred but not for subsequent exploitation of the database abroad.

3. Moral Rights. Article 6bis of the Berne Convention, incorporated by the 1928 Rome revision, states:

Indepently of the author's economic rights and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.

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These so-called “paternity” and “integrity” rights are also known as droit moral from their roots in nineteenth century French case law. The UK gave formal recognition to these rights with the Copyright, Designs and Patents Act of 1988. The main provisions in question are the right to be identified as author or director, and the right to object to derogatory treatment. However, there are extensive exceptions for computer programs, newspapers, reference works, and works produced under employment. Moral rights can be waived, on fail for lack of assertion.

If moral rights could not be waived (and it is the intention of the Berne provisions that they persist “after the transfer” of the economic rights), they would have the effect of an automatic term written into any exploitation contract. In most civil law countries (e.g., Belgium, France, Germany), moral rights are inalienable.

B. SPECIFIC CONTRACT FORMALITIES

Many countries regulate the formalities of copyright contracts. In the UK, copyright is transmissible by assignment, by testamentary disposition, or by operation of law, as personal or moveable property. However, an “assignment of copyright is not effective unless it is in writing.” Equitable assignments are possible only in very limited circumstances, for example “if the Client needs in addition to the right to use the copyright works the right to exclude the Contractor from using the work and the ability to enforce the copyright against third parties.”

Requirements of form may offer an encouragement to negotiate. However, the issues are similar for shrink-wrap, click-wrap, and browse-wrap licences.

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40 Laurent Pfister, L’AUTEUR, PROPRIÉTAIRE DE SON ŒUVRE. LA FORMATION DU DROIT D’AUTEUR DU XVIÈME SIÈCLE À LA LOI DE 1957 (thèse), Université de Strasbourg (1999).
41 CDPA, supra note 33.
42 Id. §§ 77–79.
43 Id. §§ 80–83.
44 Id. §§ 79, 81.
45 Id. § 87 (“[A]ny of those rights may be waived by instrument in writing.”).
46 Id. § 77(1) (right to be identified “not infringed unless it has been asserted in accordance with § 78”).
47 Some countries also have non-Berne disclosure and retraction rights that derive from personality interests, i.e., le droit de divulguation (France): right to decide whether at all, when, and how to release a work to the public; le droit de repenir (France, Germany: Rückrechts; Italy, Spain): right to withdraw a work from circulation.
48 CDPA, supra note 33, § 90(1).
49 Id. § 90(3). The rule can be traced back to the House of Lords decision in Jeffreys v. Boosy, [1854] 4 HLC 815. Similar provisions can be found in Belgium, France, Greece, Ireland, Portugal, Spain, and the US, among others.
where non-negotiable terms are standard practice.\footnote{See Derclaye & Favale, supra note 4.} According to Guibault and Hugenholtz,\footnote{Lucie Guibault & P. Bernt Hugenholtz, STUDY ON THE CONDITIONS APPLICABLE TO CONTRACTS RELATING TO INTELLECTUAL PROPERTY IN THE EUROPEAN UNION 32 (Univ. of Amsterdam Inst. for Infor. L. 2002).} the copyright legislations of Austria, Denmark, Finland, and Sweden contain no requirement of form, and thus appear to allow oral transfer of rights.

C. SCOPE OF GRANT

Many civil law jurisdictions have either by statute or through case law developed doctrine on the interpretation of copyright contracts. An example of the statutory approach is Germany's Zweckübertragungstheorie ("theory of the purpose of grant") under which author contracts have to specify uses to which a work is put.\footnote{See Urheberrechtsgesetz [hereinafter UrhG] [Copyright Act], Sept. 9, 1965 BGBl. I at 1273 (F.R.G.). Section 31(5) UrhG specifies: If the types of use to which the exploitation right extends have not been specifically designated when the right was granted, the scope of the exploitation right shall be determined in accordance with the purpose envisaged in making the grant. Appropriate factors to consider for the question of whether a right to use is granted, is whether it concerns a simple or exclusive right to use, the extent of the right to use and the right to prohibit, and what restrictions affect the right to use.} Uses not envisaged by the parties at the time of the contract traditionally remained outside the scope of contract (i.e., the rights were retained by the author). Under the new Urhebervertragsrecht of 2002, authors can now transfer rights to yet unknown exploitations but subject to "equitable participation" (angemessene Beteiligung).

Under the legislation of several European states (e.g., Belgium, France), copyright contracts must specify the duration, place of exercise, and the amount of remuneration for each of the rights transferred.\footnote{A. Lucas-Schloetter, LES DROIT D'AUTEUR DES SALARIES EN EUROPE CONTINENTALE, Institut de Recherche en Propriété Intellectuelle Henri-Desbois (2004).}

UK law does not have any special principles applying to the interpretation of copyright contracts and recognises "global" assignments of rights (i.e., for all jurisdictions and all uses). In line with general principles on the interpretation of contract, copyright licences do not extend to uses not contemplated at the time of the contract. Non-expressed licences can only be implied if necessary to give business efficacy to the contract. For example, in Robin Ray v. Classic FM,\footnote{[1998] F.S.R. 622.} Ray's consultancy agreement for creating a database for use in the UK did not imply a licence to exploit the database abroad, through deals with foreign radio stations. Similarly, in Grisbrook v. MGN,\footnote{[2009] EWHC 2520 (Ch); [2010] EWCA Civ 1399. In the High Court, Patten, L.J., said at}
Newspapers was held to infringe copyright in photographs supplied under a licence for print publishing by marketing back editions containing these photographs through a website.

Giuseppina D'Agostino argues from a review of 19th century case law that UK courts resolved contractual ambiguities about copyright transfers and licences mainly in favour of authors. 57

In the United States and Canada, there has been high profile litigation regarding the interpretation of contracts of freelance journalists. Did assignments from the analogue era envisage the transfer of rights for digital exploitation? In the case of Robertson v. Thomson, 58 the Canadian Supreme Court implied a permission for CD-ROM re-publication of articles by the commissioning newspaper (but not database exploitation), and affirmed the primacy of contract (thus allowing global assignments in the future). In Tasini v. New York Times, 59 again the newspaper had engaged free-lance journalists under oral contracts that did not contemplate electronic publication. The U.S. Supreme Court held that the New York Times could not license back issues of the newspaper for inclusion in electronic databases such as LexisNexis. 60

D. RIGHTS TO REMUNERATION

A right to remuneration may either be introduced as a direct regulation of contract terms, or through rights that will be exercised by collecting societies (either voluntarily or by statute).

1. Collecting Societies. Copyright collecting societies are often seen as operating for the benefit of right holders only. Where the transaction costs of individual licensing are too high, it appears advantageous for copyright owners to inject exclusive rights into a collective organisation that monitors use, issues licenses, and distributes royalties to its members. 61 As a collectively negotiated income stream, royalty terms can also be more advantageous to authors than might be achieved in individually negotiated markets. Almost inadvertently, collective licensing may also turn out to deliver important user benefits. A

65: "any licence represents a derogation from or relaxation of the copyright owner's statutory rights. It must therefore be for the defendant to justify (absent any express agreement) the basis for extending the licence to cover what would be otherwise separate acts of infringement."

57 G. D'AGOSTINO, COPYRIGHT, CONTRACTS, CREATORS: NEW MEDIA, NEW RULES, at chs. 4, 9 (Edward Elgar, ed. 2010).

58 15 CPR (4th) 147 (SCJ) (2001); 34 CPR (4th) 161 (Ont. CA) (2004); 2006 SCC 43: "Parties are, have been, and will continue to be free, to alter by contract the rights established by the Copyright Act." 25 Robertson SCC (at 58). See G. D'Agostino, Canada's Robertson Ruling: Any Practical Significance for Copyright Treatment of Freelance Authors?, 29 EUR. INTELL. PROP. REV. 66 (2007).


60 Id.

radio station, for example, gets easy access to the world repertoire of music; libraries may offer generous dissemination arrangements.

In European countries, the regulatory strategy of creating statutory rights that can only be exercised by collecting societies has taken hold since the 1965 German Urheberrecht law that introduced a claim to remuneration for unauthorised private copying, compensated via a levy on copying media and equipment.\textsuperscript{62} Several European Directives have created rights that can only be exercised via collecting societies.\textsuperscript{63}

The behaviour of collecting societies has been challenged under European Competition Law\textsuperscript{64} since they are joint ventures creating a super-dominant market position in at least two respects: towards users and right holders. The Article 82 (now Art. 102 TFEU) case law on collecting societies falls into two groups: abusive conduct towards members, and abusive conduct towards users. These will be briefly summarised.

\textit{a. Members.}

- Collecting societies cannot discriminate on grounds of nationality.\textsuperscript{65}
- There can be no preferential treatment for groups of members, but threshold conditions to full membership, and distribution variations according to genre and cultural value have been tolerated.\textsuperscript{66}
- There must be maximum freedom for members to decide which repertoire to inject into collective administration. However, collecting societies can insist on transfer of whole groups of rights, and rights in future works if that is indispensable to the operation of the society.\textsuperscript{67}

\textsuperscript{62} UrhG, \textit{supra} note 53.
\textsuperscript{64} Articles 81 and 82 EC Treaty became Arts. 101 and 102 of the Treaty on the Functioning of the EU (which entered force on Dec. 1, 2009). For ease of reference, case law references to Arts. 81 and 82 are retained in this article.
\textsuperscript{65} Membership and collection cannot be restricted to domestic citizens or residents. \textit{GEMA I}, O.J. (L134/15), June 20, 1971; Phil Collins v. IMTRAT Handels-GmbH, 3 C.M.L.R. 773 (1993). Foreign members (authors and publishers) cannot be excluded from participating in the governance of a society, nor from socio-cultural benefits (GVL).
\textsuperscript{66} \textit{GEMA II}, O.J. (L166/22), July 6, 1972. However, there is a recent policy trend requiring that royalty distribution must match actual use as closely as possible (MMC on PRS report, \textit{supra} note 53). There is no case law yet to that effect.
\textsuperscript{67} A required blanket assignment of all present and future rights was ruled to be abusive in BRT v. SABAM, [1974] E.C.R. 313. In \textit{GEMA I}, O.J. (L134/15), the Commission identified seven categories of rights members may assign separately: (1) public performance, (2) broadcasting, (3) film performance, (4) mechanical reproduction, (5) film synchronisation, (6)
• Right holders must be able to withdraw from membership, and assign their repertoire elsewhere. Collecting societies can insist on lengthy notice periods. 68
• Collecting societies can limit the influence of members who are economically dependent on users (e.g., if a publisher is part of the same parent company as a record label). However the least restrictive measure has to be adopted. 69
• There is no specific ECJ case law on the freedom (or otherwise) of collecting societies to refuse the administration of individual rights and right-holders. 70
• There is no ECJ case law on the legitimacy of socio-cultural deductions.

b. Users.

• As a dominant undertaking, a collecting society cannot refuse to license a user in its own territory without a legitimate reason. 71
• Refusal to license only part of the repertoire is acceptable if necessary for the functioning of a society. 72

video reproduction and performance, (7) new categories of right. The MMC on PRS report, supra note 53, added for the UK the rights to live performances. A mandatory requirement to assign on-line exploitation was held to be an unfair trading condition under Art. 82(a) (Banghalter & Homem Christo v. SACEM, COMP/C2/37.219 (Aug. 6, 2002)). Authors also must be able to assign different groups of rights to different societies in different countries (Greenwich Film Production, Paris v. SACEM, [1979] E.C.R. 3275, [1980] 1 C.M.L.R. 629). However, collecting societies can resist cherry-picking (for example, only having those rights assigned that are expensive to administer).

68 In GEMA II, O.J. (L 166/22), the commission allowed a minimum membership term of three years. Retaining the right for five years after a member’s withdrawal is likely to be unfair (SABAM, [1974] E.C.R. 313). In Cisc v. Commission, Case COM/C2/38.698 (July 16, 2008), the Commission prohibited membership clauses, applied by twenty-three collecting societies, that prevent an author from choosing or moving to another collecting society.

69 For example, conditions on the exercise of votes are acceptable; exclusions from membership are not (GEMA I, O.J. (L 134/15)). Restrictions can be imposed that strengthen a society’s negotiation power toward users (SABAM, [1974] E.C.R. 313 para. 9). In GEMA III, O.J. (L 94/12), Dec. 4, 1981, the Commission authorised the society statutes imposing uniform effective rates of remuneration (thus preventing members from making payments to users).


71 There are no specific rulings on refusal to license with respect to collecting societies. Again, the general Article 82 case law on refusal to supply applies (ICI, [1974] E.C.R. 223).

72 In the French Discothèques cases, the impracticability of setting up a monitoring system in
Excessive pricing of licences is abusive but hard to prove. Price discrimination between large and small users has been raised as an abusive trading condition, but the Court did not rule on the point. There is no ECJ case law on the nature, or lack of, an appeals procedure making tariffs contestable. Case law is awaited on the introduction of competition between societies.

It appears that the European Courts accept trading conditions with respect to collecting societies that would be considered abusive in many other contexts. The main line of reasoning is a familiar principle of proportionality: restrictive conditions are justified if they are required for the society to carry out its activities on the necessary scale. However, there is no explication of the function of collective administration beyond managing private interests. What are the activities that are necessary? The ECJ has tolerated, not always consistently, a number of practices relating to collective bargaining, licensing conditions, and redistribution of royalties that can only be justified on social and cultural policy grounds.

73 If tariffs in other member states are appreciably different, the collecting society needs "to justify such a difference by reference to objective and relevant dissimilarities between copyright management." Lucazeau [1989] E.C.R. 02811, at 33. Including a mechanical fee for public performances in a discothèque is acceptable in the context of differences in national licensing systems. Basset v. SACEM, [1987] ECR 1747, [1987] 3 CMLR 173.

74 In the French Discothèques cases, the appellants complained that large-scale users, such as radio and TV broadcasters, obtained lower tariffs. Lucazeau, [1989] E.C.R. 02811; Ministère Public v. Jean-Louis Tournier, [1989] E.C.R. 02521. Stamatoudi argues that the line of cases on price discrimination looks at clients in competition with each other, not treating customers in different situations in the same way. I.A. Stamatoudi, The European Court's Love-Hate Relationship with Collecting Societies, 19(6) EUR. INTELL. PROP. REV. 289 (1997).

75 According to Advocate General Jacobs' opinion in Tournier, the fact that there was no regulatory control of the price charged by a society is relevant. Germany and the UK are the only EU countries with a formalised appeals procedure. For analysis of the jurisprudence of the UK Copyright Tribunal, see W. Cornish & D. Llewelyn, INTELLECTUAL PROPERTY § 13:54-58 (6th ed. 2007); L. Bently & B. Sherman, INTELLECTUAL PROPERTY LAW 299-301 (3d ed. 2009).

76 In CISAC v. Commission, Case COM/C2/38.698 (July 16, 2008), the Commission declared territorial restrictions unlawful that prevent a collecting society from offering licences to commercial users outside their domestic territory. It was found to be a concerted practice in violation of Article 81 EC and Article 53 EEA, resulting in a strict segmentation of the market on a national basis. Reciprocal representation contracts between collecting societies in effect make it impossible for commercial users to obtain pan-European licences. The Commission Decision is under Appeal to the General Court (formerly CFI). CISAC v. Commission, Case T-442/08. The French Discothèques cases (Lucazeau, Tournier) hinted at problems with SACEM's administrative overheads due to lack of competition, but had left the issue to national regulation.
2. General Entitlement to Equitable Remuneration. The German copyright contract law of 2002 (Urheberrechtsgesetz) introduced into the Copyright Act (Urheberrechtsvertrag (UrhG)) a new general entitlement to equitable remuneration (Section 32—angemessene Vergütung) from any copyright contract. Section 32 was said to codify a long established principle in German copyright jurisprudence. Before 2002, a so-called bestseller clause (Bestseller-Paragraph) existed. It was applied only in the very few cases where the courts held that the contractually agreed remuneration was “strikingly disproportional” (in einem groben Mißverhältnis, Section 36 UrhG pre-2002) to the publishers’ profits. The 2002 amendment extended the scope of application of this principle considerably. According to the parliamentary records, the new copyright contract law attempted to “achieve contract parity.” Authors who have received a non-equitable remuneration (or no remuneration at all) are entitled to a retrospective variation of their contracts up to a level that the courts regard as “common and honest practice in the trade” (Section 32(2)—üblicher-und redlicherweise) at the time the contract was concluded.

Section 36 of the 2002 copyright contract law provides that collectively negotiated tariffs are deemed to be equitable. However, up to 2009 it was only the writers’ professional body VS (Verband der Schriftsteller, a subsection of the services union Vereinigte Dienstleistungsgewerkschaft VERDI) that succeeded in reaching an agreement on recommended tariffs (Gemeinsame Vergütungsregeln) with a number of publishers in 2005. Greece imposes a minimum royalty for books sales (10% per 1,000 copies), and repeat broadcasts (50% of original fee for first repeat). Other countries have so-called bestseller clauses similar to the German model that are supposed to ensure the participation of authors in disproportionate profits.

From an economic perspective, regulating the terms and conditions of copyright contracts may not lead to higher payments for authors and artists. Remuneration clauses within individual contracts are difficult to implement and monitor, and residual ties generally increase the uncertainty of investment decisions. There has been little systematic research comparing individually and collectively negotiated contracts.

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77 For decisions of BGH and Reichsgericht, see A. Wandtke & W. Bullinger, PRAXISKOMMENTAR ZUM URHEBERRECHT (Beck 520, 2009). Many thanks to Dr. Friedemann Kawohl for suggesting references on German copyright contract jurisprudence.


79 http://www.bmj.bund.de/enid/Urheberrecht/Gemeinsame_Verguetungsregeln uf.html.


81 Slovenia appears to be the only country that has a system of mandatory collective administration for the “making available” right. It covers all online communications directed to the public. However, in practice no effective yet collecting society appears to exist that may administer the right. Maja Bogataj, Mandatory Collective Management for Making available in Slovenian..
The earnings data from studies summarised earlier in this Article indicate that the distribution of payments from collecting societies is more skewed than income from rights that are individually managed. For collecting society income, the top 10% of writers receive about 60% (Germany) to 70% (UK) of collecting society payments, while for total individual income from writing, the top 10% of writers account for 50% (Germany) to 60% (UK) of total wealth.82

Under another economic perspective, membership in a collecting society may be conceived of as being analogous to joining an insurance scheme.83 However, for risk mitigation, creators would need to agree to a “progressive” re-distribution of wealth from higher to lower earners.

E. EFFECTS ON THIRD PARTIES

In Barker v. Stickney,84 the company to which copyright in Barker’s book *The Theory and Practice of Heating and Ventilation* had been transferred went into liquidation. The copyright was sold to a third party (Stickney) who was found not to be bound to pay the royalties to Barker that had been agreed to in the original contract of assignment. The rule in *Barker v. Stickney* is one instantiation of the doctrine of privity of contract in English law, under which a third party cannot be burdened by a contract to which it is not a party. This rule has potentially severe consequences in an environment in which copyright assignments, and subsequent transfers to third parties, have become common.85

Across the countries reviewed, there is some variation about the ability of transferees to sell on, pledge, or secure acquired rights. Generally, consent of the author is required, but often that will be given in the initial contract assigning or licensing a work. The rule in *Barker v. Stickney* appears to be an anomaly.

F. PROVISIONS RELATING TO THE REVISION AND TERMINATION OF CONTRACTS

Common interventions by the courts include imposing duties on the assignee to promote and exploit, and presumptions in the construction of
contracts (for example, regarding uses unforeseen at the time of the contract, as discussed above under Part IV.C).

1. Restraint of Trade. In the UK, a contract doctrine surfacing frequently in copyright disputes is the principle that an agreement which unreasonably restricts a person’s ability to carry on his trade cannot be enforced. In Schroder Music Publishing Co. v. Macaulay, an extended term binding a songwriter for ten years without an obligation on the publisher to exploit was held by the House of Lords to be “in restraint of trade.”

2. Term Reversion. Renewable terms that fall back to the author, or reversionary terms, dramatically increase the bargaining power for authors of works that are still in demand after the first term expired. Under the Statute of Anne of 1710, copyright returned to the author after a term of fourteen years who could then assign it again for one further term. There is little evidence that much use was made of this provision. Authors continued to assign copyright outright by a contract that included the second term. Until the 1976 Copyright Act, the United States followed this structure, with an initial copyright term of twenty-eight years that could be renewed once. Under Section 304(c) of the 1976 Copyright Act, a copyright owner (or his or her heirs) can terminate all grants, licences, or transfers of rights (made prior to 1978) beginning on the fifty-sixth year after that assignment was made. For all grants of rights after 1977, Congress introduced an inalienable termination right for authors after a period of thirty-five years.


88 An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned, 1710, 8 Anne, c.19. PRIMARY SOURCES ON COPYRIGHT (1450–1900), eds. L. Bently & M. Kretschmer (http://www.copyrighthistory.org). The last section reads: “Provided always that after the expiration of the said term of fourteen years the sole right of printing or disposing of copies shall return to the Authors thereof if they are then living for another Term of fourteen years.” The original parchment copy of the act shows that the section was tacked on as a late addition in the legislative process. Deazley argues that the divided term was intended “to benefit the author and only the author.” Ronan Deazley, ON THE ORIGIN OF THE RIGHT TO COPY 43 (Hart 2004).

89 The 1814 Act extended the term to twenty-eight years, renewable once, or life. The 1911 Copyright Act provided that under certain circumstances, copyrighted works granted to a third party revert to the author’s heirs, successors, or legal representatives twenty-five years after the death of the author.

90 Termination notices can begin in 2003, with the earliest termination possible in 2013. Transitional measures are too complex to summarise here. For an excellent guide through this landscape, see L. Bently & J.C. Ginsburg, “The Sole Right... Shall Return to the Authors”: Anglo-American Authors’ Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright, 25 BERKELEY TECH. L.J. 1475 (2011). Bently & Ginsburg’s 2011 paper is an excellent guide through...
Under the Italian Copyright Act (Art. 122), publishing contracts are restricted to ten years, after which the remainder of the term falls back to the author. However, this is without prejudice to the rules governing employment contracts and contracts for services. It is unclear what effect Article 122 has in practice.

G. UNFAIR CONTRACTS

In the UK, the argument has been raised that the Unfair Contract Terms Act 1977 (as amended October 1, 2003) should be made applicable to copyright contracts.

Schedule 1 of Section 1(2)(c) does not extend its provisions to—

(c) any contract so far as it relates to the creation or transfer of a right or interest in any patent, trade mark, copyright [or design right], registered design, technical or commercial information or other intellectual property, or relates to the termination of any such right or interest;\(^91\)

The reason for this exclusion is unclear, but, in any case, the language of the Unfair Contracts Terms Act is intended to protect consumers and applies to clauses in agreements that attempt to limit liability, not to terms that create, transfer, or terminate an interest in intellectual property.

Thus, parties to a copyright contract have to rely on general contract doctrine, which will not normally review agreements that are otherwise lawful because they are lop-sided or “unfair.” Derclaye and Favale’s article in this journal issue contains a fuller doctrinal analysis of contract limits.\(^92\)

V. INTERIM CONCLUSIONS

We have robust knowledge about creators’ labour markets and earnings, derived from government statistics (labour market data, tax, and insurance audits) and several independent empirical studies: artists’ occupational profiles over time reveal self-employed, risky, often stuttering careers. Many more creators attempt to embark on artistic careers than are able to sustain them (“oversupply”). Earnings from non-copyright, and even non-artistic, activities are an important source of income for most creators. A small number of very high earners earn a disproportionate share of total income (“winner-take-all”). For most other creators, “portfolio lives” are typical: about two thirds of professional creators have earnings from other sources, including second jobs.

\(^{91}\) Unfair Contracts Terms Act, 1977, C. 50 Pt. 1 s.11 (Eng.).

\(^{92}\) Derclaye & Favale, supra note 4, Part V.E.
Overall, the income of creators is well below the national median income. There are some variations by sector, but broadly the picture is consistent across the developed world.

According to economic theory, copyright law will only have effects upon the contracts that are written when those contracts lie on the boundaries of the contractable space that copyright offers. However, we do not know where these boundaries lie, and therefore the empirical role of copyright law in remuneration remains uncertain. For example, the introduction of new rights (such as the rental right, or the droit de suite) does not automatically lead to higher earnings. A gallery (droit de suite) or record company (rental right) may simply pay the artist or performer a lower fee to allow for further earnings arising from secondary usage.

Overall, it remains an open question whether there is a negative or positive relationship between the strength of copyright protection and the total earnings of creators. We also do not know if there is a negative or positive relationship between the strength of copyright protection and the distribution of earnings of creators. Although the orthodox economic theory of copyright law assumes that there is a harmony of interests between creators and intermediaries (such as publishers and producers), much of the attempted legal regulation of copyright contracts assumes that the incentives of creators and intermediaries are not aligned.

The contractual bargaining outcomes are tilted towards bestsellers. Creators with a track record of success are able to negotiate contracts preserving their interests. For most others, in particular new entrants to the entertainment industries, assignments of rights are common. Part IV above identified a great variety of provisions through which legislators and courts have attempted to adjust contractual bargaining over copyright works. Yet, we know little about their empirical effects.

The next and final Part makes proposals regarding how these gaps in our knowledge about the interaction of copyright law and contract bargaining might be addressed.

VI. RESEARCH GAPS

A. NORMATIVE AIMS OF CONTRACTUAL REGULATION

Research should be undertaken to analyse the aims of regulation. Why should policy intervene in the bargain between creators and intermediaries? Surprisingly, the brief for the UK government study on which this Article is based was silent on this issue. There are obvious conflicts between the aims

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93 See Watt, supra note 5.
94 See Bournemouth Symposium, supra note 3.
of competition law, the aims of copyright law to provide an incentive by excluding competition, the aims of droit d'auteur-inspired legislation to secure a livelihood for creators and protect their personality, and general principles of efficient contracting that may or may not conflict with other notions of fairness. The regulation of contracts may also have to take note of fundamental rights and freedoms (such as constitutional principles and human rights).

There are widespread assumptions about creators' interests and motivations that are frequently used in the policy discourse. Empirical work suggests that an incentive structure built on exclusive rights fails to motivate creators who often attempt to sustain careers from artistic earnings well below the median wage of comparable occupations. More robust evidence on creators' interests, including the relative importance of desires to be credited and desires to control, can only be gathered by primary research. Professional organisations that speak on behalf of creators have an important role here, but typically they are also subject to complex interdependencies with exploiters of copyright works. Research would have to be truly independent.

Economists regard copyright law in terms of its “efficiency” effects in providing an incentive to increase creative output rather than in terms of equity.95 There may not be an inherent clash between these views but economics has a much less developed view of fairness than of efficiency.

At the Bournemouth Symposium,96 panels of experts from professional organisations of journalists, illustrators, photographers, film directors, composers, songwriters, and performers/featured artists considered the following contractual trends to be unfair:

- In the UK, creators are routinely required to waive their moral rights in contracts.
- Creators are routinely required to sign contracts that assign all their rights to the publisher or producer (meaning the enterprise or organisation that publishes and distributes their work), and cover every potential use in a blanket manner.
- Contracts for digital use are just bolted on to standard “analogue” contracts and do not make provision for additional payment. If creators do not comply, others are found who will comply, especially young creators who need to break in.

Policy makers need to know if this picture is empirically accurate, and on which normative grounds they might want to intervene.

95 See Watt, supra note 5.
96 Bournemouth Symposium, supra note 3.
B. EMPIRICAL EFFECTS OF KEY REGULATORY TOOLS

There is a considerable need for systematic studies into the empirical effects of the key regulatory tools under discussion. However, these cannot be researched directly without comparison to some other “counter-factual” situation—hence the interest on the part of researchers in “with” and “without,” and “before and after” situations. Such studies have methodological challenges, as laws are never the only parameter of change, and possible differences may be explained by other causes (such as the economic cycle, changes in taste, etc.).

Feasible studies focussing on differences between countries, or studies capturing changes in the market before and after the introduction of new legislation include the following.

1. Effects of Rules on First Ownership. In the UK, film directors have been treated as authors only since July 1, 1994, when the 1993 EU Duration Directive was implemented, harmonising the copyright term. Previously, films were treated as entrepreneurial works. The first owner was the person who undertook the arrangements necessary for making the film (typically the producer).

   The question of why this change should have made any difference at all merits consideration, as the new right remains assignable. Yet it seems that a participation in revenues from certain secondary uses (that is, uses that have not been included in the primary exploitation contract with a producer or broadcaster) was negotiated as a result of that change. Economic theory predicts that primary producers would pay directors a lower fee to allow for further earnings arising from secondary usage. The “pie” does not automatically get bigger by creating new rights. There are also costs to the system needed to administer these new rights, possibly reducing the “pie” available for distribution. These are generic questions about the effects of new rights that would greatly benefit from empirical research.

2. Effects of Rules on Moral Rights. Moral rights are distinct from copyright as an economic (property) right in that they cannot be transferred or waived (at least in most civil law countries). For example, in Germany, moral rights (Persönlichkeitseigentum) are inalienable—in the UK, these rights can be waived. This difference in implementation is reflected in German commercial practice, which is more responsive to the author’s non-economic rights. Moral rights disputes

97 Id.
99 Copyright Act 1956, 4 & 5 Eliz. 2, c.74 (1956) (U.K.), and CDPA 1988 before it was amended.
(mainly relating to being credited as the author) are more than twice as likely in Germany (24.6% of professional German writers have had such a dispute, compared to 11.4% of professional UK writers), but the data is not conclusive on any effects on authors' earnings compared to the UK.\textsuperscript{101}

Did the introduction of moral rights in 1988 in the UK cause any change in contractual practices?\textsuperscript{102} As discussed above, in the UK, the right to be identified as author or director has to be asserted,\textsuperscript{103} and both (paternity and integrity) rights can be waived by way of agreement in writing.\textsuperscript{104} It is believed that contractual waivers of moral rights are inserted as a matter of routine in contracts for audio-visual works.

If made unwaivable, moral rights may improve the author's bargaining power. Alternatively, they could be seen as introducing inefficiencies similar to other limits on contractual freedom. An empirical study of attribution practices in certain media sectors is certainly feasible, using samples of publications over time. It should be possible to apply models about the economic effects of attribution developed in the economics of trademarks to the copyright environment.\textsuperscript{105}

3. Effects of Rights to Remuneration. As discussed in Part IV above, entitlements to remuneration can be introduced via collective management schemes or contractual regulation. The German copyright contract law (Urhebervertragsrecht) of 2002 introduced a new general entitlement to equitable remuneration from any copyright contract (with the express purpose of rebalancing the bargain between creators and intermediaries).\textsuperscript{106} The German legislation is the most far-reaching recent attempt at regulating author contracts directly and would benefit from research from a comparative perspective. Questions may include: Did the introduction of these changes have any effects

\textsuperscript{101} See Kretschmer & Hardwick, supra note 16, at 31. Other findings include that about 43% of professional UK authors have succeeded in changing the terms of a contract offered in 2005, compared to 44% in Germany. In both countries, only about 65% of professional authors take professional advice before signing a publishing or production contract. In both countries, authors who have engaged in disputes with their publishers or producers tend to earn significantly more than their more compliant colleagues. This is likely to be a two way relationship: publishers or producers who have engaged in disputes may only listen to authors with bargaining power—but equally engaging in bargaining may increase the author's bargaining power.

\textsuperscript{102} CDPA, supra note 33, \S 77-79 (right to be identified as author or director (paternity right)), \S\S 80-83 (right to object to derogatory treatment (integrity right)).

\textsuperscript{103} Id. \S 78.

\textsuperscript{104} Id. \S 87.

\textsuperscript{105} Since incomplete information (or informational asymmetry between buyers and sellers) about product quality is a form of market failure, any improvement in the provision of information could potentially enhance efficiency. William Landes & Richard Posner, The Economics of Trademark Law, in THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 166 (2003).

\textsuperscript{106} UrhG, supra note 41, \S 32, Angemessene Vergütung [equitable remuneration]. Section 36 provides that collectively negotiated tariffs are deemed to be equitable.
on the remuneration of authors? Why is it that only one tariff had been collectively agreed upon in Germany between 2003 and 2009? There are important issues surrounding the role of the institutional framework of collective bargaining that might be applicable to other countries.

It would be possible to study, both theoretically and empirically, the kinds of situations in which outright sale appears to hold more promise as an efficient mechanism than rental-type contracts. As Richard Watt argues, if the empirical analysis does point to the prominence of rental arrangements, whereas the theoretical analysis suggests outright sale, then the reasons for such a divergence should be addressed.

4. Effects of Term Reversion. Theoretically, reversing assigned rights to the author (after a fixed period, or because of non-exploitation) would be an effective way of improving the earnings of authors from works that are still in demand after reversion. Term reversion should also have access benefits to users in opening up archives of back-catalogues. Something similar to term reversion has re-surfaced as a regulatory tool in the proposed European Directive, extending the copyright term for sound recordings. Unfortunately,

107 Creators recovering the term will have an interest to re-disseminate works that are no longer exploited (e.g., out-of-print). There is a potential overlap between legal techniques used for term reversion, and registration or collective management schemes advocated in the orphan works discussion. Cf. U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS (submitted to the Senate Judiciary Committee on Jan. 31, 2006) and Green Paper: Copyright in the Knowledge Economy, COM (2008) 466/3 final. THE NEW RENAISSANCE, REPORT OF THE COMITÉ DES SAGES (commissioned by Neelie Kroes, Vice President of the European Commission for the Digital Agenda, and Androulla Vassiliou, Commissioner for Education and Culture), Brussels, January 2011.


If, after the moment at which, by virtue of Article 3 (1) and (2) in their version before amendment, the performer and the phonogram producer would be no longer protected in regard of, respectively, the fixation of the performance and the phonogram, the phonogram producer ceases to offer copies of the phonogram for sale in sufficient quantity or to make it 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, the performer may terminate the contract on transfer or assignment. Where a phonogram contains the fixation of the performances of a plurality of performers, they may terminate their contracts on transfer or assignment only jointly. If the contract on transfer or assignment is terminated pursuant to sentences 1 or 2, the rights of the phonogram producer in the phonogram shall expire.

The renewed interest in bringing non-exploited works to the market is also reflected in an amendment to the UK Digital Economy bill tabled by Conservative Peer Lord Lucas that proposes a compulsory licence if a work is not available in all common current electronic formats in all geographical regions within two years after first publication, or if it has not been published five years after its creation. Proposed Amendments of the Digital Economy Bill, House of Lords (Jan. 6, 2010): http://www.publications.parliament.uk/pa/ld200910/ldbills/001/amend/ml001-
there appears to be no live example of a functioning reversionary term regime. Publishers and producers appear to find contractual means around possible reversion.

It would be desirable to conduct both doctrinal studies on the implications of term reversion in the current framework of international and European law and historical studies on the empirical effects of past regimes.

5. Effects of Regulatory Authority Over Copyright Contracts. Where overreaching licence agreements are prevalent, competition concerns can be addressed through regulatory intervention, including pressures to find self-regulatory solutions, such as the use of model licences and codes of conduct. Concerns have been voiced that standard agreements (for example, those recommended by unions or professional bodies) may be in violation of competition law, specifically the prohibition against anti-competitive agreements and concerted practices.

The only UK body charged with reviewing copyright contracts is the Copyright Tribunal. It has a very narrow mandate, covering dispute resolution of certain collective licensing schemes. It has been estimated that the costs of a referral and full adjudication proceedings amounts to at least £250,000.

There are models for reviewing tariffs, contractual terms, and industry practices in other areas of public policy, such as the regulation of utilities.

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110 Art. 81, EC, Art. 101, Treaty on the Functioning of the EU. In Albany International and Brentjens, the ECJ ruled that agreements on compulsory pension schemes fall outside the scope of Article 81. Albany International BV v. Stichting Bedrijfspensionfonds Textielindustrie, [1999] E.C.R. I-5751, [2000] 4 C.M.L.R. 446; Brentjens v. SBVHB, [1999] E.C.R. I-6025, [2000] 4 C.M.L.R. 566. Advocate General Jacobs’ opinion in Albany laid down four conditions for disapplying Art. 81: the collective bargaining agreement (i) must have been made as part of normal collective bargaining; (ii) must have been made in good faith, rather than to conceal anti-competitive restrictions; (iii) must have dealt with core aspects of collective bargaining, such as wages or other conditions of work; and (iv) must not have affected third parties.

111 The Tribunal’s jurisdiction is defined in the CDPA, supra note 33, § 149, § 205(B), and Schedule 6. Some matters may be referred to the Tribunal by the Secretary of State even though collecting societies are not involved. For example, it can settle disputes between publishers of television programme listings and broadcasters over royalties payable.

112 Responses to UKIPO consultation on Reform of Copyright Tribunal Rules, UKIPO Workshop (April 9, 2009) (notes on file with the author).

113 The UK Utilities Contracts Regulations 2006, S.I. 2006/6, define services as utilities under
Here, regulation involves issues of market access, price control, and contractual supervision. Research may analyse the available instruments as applicable to the regulation of information markets and copyright contracts.\textsuperscript{114}

C. CONTRACTING FOR DIGITAL SERVICES

Digitisation appears to have a systemic effect on contracting. Digital services may require complex supply and demand side contracting, often simultaneously, with creators, producers, and users. Often, they will also involve some form of collective licensing. There has been a proliferation of new commercial arrangements. Private ordering appears well ahead of policy here. Examples include offering equity stakes in new services that are potentially infringing to major right holders (YouTube, Spotify). This avoids potential liability, but reports suggest that very little money from such services flows back to the smaller producers and creators.\textsuperscript{115} Other sensitive licensing issues surround digitisation initiatives (such as the Google books project), information aggregators, the treatment of user generated content on social networking sites, and the obligations of Internet Service Providers.

Following a flurry of initiatives by the European Commission,\textsuperscript{116} there is also a process of reorganisation of collecting societies under way, through the private ordering device of joint ventures.\textsuperscript{117} Again, the implications for creators, smaller intermediaries, and users have not been systematically explored.

114 The Digital Britain report, DEPARTMENT FOR BUSINESS INNOVATION & SKILLS, DIGITAL BRITAIN REPORT (2009), available at http://webarchive.nationalarchives.gov.uk/+/http://www.c ulture.gov.uk/images/publications/digitalbritain-finalreport-jun09.pdf, explicitly likens the digital information infrastructure to a utility, and proposes regulatory measures to curb copyright infringements in broadband networks. However, the debate has so far omitted analysis of the economic rationales for non-judicial intervention.


117 Examples include Armonia, a one-stop-shop licensing platform for online and mobile use of the repertoires of the collecting societies of Spain (SGAE), France (SACEM) and Italy (SIAE), and CELAS, a joint venture between the German collecting society GEMA and the UK’s MCPS-PRS for the European-wide administration of the repertoire of EMI Music Publishing for online
There are several methodological approaches that could be pursued here. Theoretical economic research could consider the degree to which contracts can substitute for copyright protection at all points along the value chain. Developing digital services could be researched using social science perspectives on private ordering, from a strategic management perspective on business models, or from a consumer perspective (acceptability of levels of payment and various levels of copy restrictions).

A starting point would be an observation of emerging contractual arrangements over time. There have been some limited reviews of collecting societies (mostly in the EU) from a legal perspective. These studies compile the rights managed collectively in each country, whether they are administered voluntarily or on a statutory basis, and what regulatory supervision (if any) is in place.

There have been no studies that take an approach based primarily in economic activity. The key questions here would be: (i) What kind of activity can copyright users (e.g., broadcasters, online aggregators, consumers) in each country undertake under collective licences? (ii) How are these activities priced? (iii) How are the licence fees distributed between the various right holders (intermediaries and creators)?

To give a few examples: blanket licences (musical works) for commercial radio stations are typically set at a percentage (often 2%-3%) of revenue. Blanket licences (musical works) for CDs are set as a percentage of the wholesale price (6%-9% of the published price to the dealer). Blanket licences/levies for private copying may be set as a percentage of the retail price (5%) of copying equipment/media. Blanket licences for course readers at universities may be priced as a fixed fee per student.

Since contracts over copyright materials may now be formed simultaneously on the supply side and the demand side (user-generated content) or be negotiated as bundles (ISPs/mobile services), it would be desirable to pursue such a research agenda in an integrated manner. How is the role of intermediaries changing? Can predictions of disintermediation be substantiated? To what degree can contracts substitute for copyright protection at all points along the value chain? Are developments sector specific? Such a
larger project is likely to be interdisciplinary, using multiple methods, and may subsume several of the research priorities identified above.

VII. CONCLUDING THOUGHT

This "supply side" analysis of the relationship between copyright and contract law has questioned the frequently made argument that copyright (in the words of Lord Macaulay) "is a tax on readers for the purpose of giving a bounty to writers."120 It turns out, rather, that the bounty to authors is a function of the contracts authors conclude with publishers and producers, not necessarily the exclusivity enforced against copyright users—and empirically it is a bounty for the few, not the many. Copyright policy has ignored, or misunderstood, the role of contracts in effecting or subverting policy aims. It can no longer do so.

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