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A Brief History of Author-Publisher Relations and the Outlook for the 21st Century

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A BRIEF HISTORY OF AUTHOR[1]-PUBLISHER[2] RELATIONS AND THE OUTLOOK FOR THE 21ST CENTURY

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INTRODUCTION

The Fiftieth Anniversary Edition of the *Journal of the Copyright Society of the U.S.A.* provides a particularly appropriate forum in which to discuss the current state of the copyright system.[3] By some accounts, U.S. copyright law has been fabulously successful, encouraging the growth of industries whose copyrighted products both enrich American culture and contribute significant value to the economy.[4]

Others, however, take a somewhat different view. Some argue that the quality and diversity of copyrighted works have declined as economic pressures encourage producers to replicate commercially successful formulas over and over again.[5] Others note that several amendments to the

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[1] The term "author" is an all-encompassing one, including, for example, a screenwriter and a computer programmer. I use the term in a more limited sense in this Article to refer (unless otherwise indicated) to authors of the printed word who make their living by writing.

[2] Like "author," the term "publisher" can encompass a broad range of actors. In this Article, "publisher" refers (unless otherwise indicated) to those who directly contract with authors to obtain rights in the authors' works.

[3] I use the term "copyright system" to refer not simply to copyright law, but also to other laws such as contract and antitrust, that affect the manner in which copyrighted works are developed and marketed.

[4] In 2001, the "core" copyright industries accounted for 5.24% of GDP, employed 4.7 million, and exported $88.97 billion in products. STEPHEN E. SIWEK, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2002 REPORT 3-4, 9 (2002) (defining "core" copyright industries to "include newspapers and periodicals, book publishing and related industries, music publishing, radio and television broadcasting, cable television, records and tapes, motion pictures, theatrical productions, advertising and computer software and data processing").

[5] *See, e.g.*, C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311 (1997); Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 564 (2000) (citing Baker as showing that producers "provid[e] information and cultural products that have relatively wide appeal and gloss over, rather than tend to, the diversity of actual interests and

Copyright Act in the latter half of the twentieth century broadened the scope of the exclusive rights.[6] These changes coincided with a period of remarkable growth in the copyright industries in dollar terms.[7] But increasing revenues may result from broader rights enabling producers to increase prices to consumers and impose levies on new distribution technologies: In other words, the ostensible growth in the copyright industries may reflect a redistribution of wealth rather than productive activity.[8]

The copyright story, then, may not be one of unmitigated success, and measuring the copyright system's performance is likely more complicated than simply measuring output of copyrighted works in dollar terms. Unfortunately, the complexity in quantifying and evaluating all of the policy choices inherent in the copyright system may well be intractable. This Article thus concentrates on a particular issue — the distribution of the (by all accounts) large copyright "pie" between authors and publishers. Even this one issue, however, raises questions that may well be unanswerable with reference to any readily quantifiable empirical evidence. But the relationship between authors and their publishers even in the self-publishing era of electronic technology, largely determines who creates what types of copyrighted works and whether those works' distribution promotes the public welfare. Therefore, considering that relationship and the market structure of the copyright industries against the backdrop of copyright law's goals can help better inform the debate over whether copyright law is, in fact, achieving its aims.

Copyright law's goals of encouraging the production and dissemination of creative works likely seem harmonious at least at first glance. Relations between authors and their publishers have, however, never been smooth — quite the opposite. Although their interests coincide in many respects, they diverge in others.[9] Also, authors have historically suffered

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needs of finer divisions within the body of the mass audience"); Joan Anderman, *Hit-song Predictions Get a Scientific Spin*, BOSTON GLOBE, May 9, 2003, at A1, A40 (describing a system that compares new songs to past hits to assess the probability of market success, and noting that some in the industry contend that "popular music is increasingly derivative and homogeneous").

6 *See* Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 901 (2001) (noting that the years between 1977 and 1996 were marked by "several substantial expansions in copyright protection").

7 *See id.* at 899 (quoting Senator Hatch's statements in support of the Digital Millennium Copyright Act).

8 *Id.* at 900-01.

9 *See, e.g.*, F. Willem Grosheide, *Copyright Law From a User's Perspective: Access Rights for Users*, 23 EUR. INTELL. PROP. REV 321, 322 (2001) ("[A]uthors and publishers have always taken . . . different approaches to time, risk and reputation. . . . [A]uthors are likely to have a shorter time-

from a lack of bargaining power that permits publishers to extract more of the surplus associated with exploitation of their copyrighted work than the creators themselves. Interestingly, though, the foundational constitutional clause speaks not directly of publishers but of "promot[ing] the Progress of Science, by securing for limited Times to *Authors* . . . the exclusive Right to their . . . Writings."[10]

In recent years, scholars have debated the meaning of the term "author," and, indeed, whether any such thing as "authorship" even exists.[11] Consequently, they have spent less time considering whether authors fare appropriately in the marketplace in the sense of receiving returns that foster rather than thwart copyright law's goals.

In this Article, I attempt to tackle this issue. My analysis shows the timeless nature of both debates about the appropriateness of the level of authors' compensation and the relative lack of success of regulatory mea-

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horizon, to be more risk-averse and to have other concerns with reputation than publishers. Besides, authors and publishers are driven by different motives. For authors the importance is appearing in print, making works of good quality or reaching a particular audience. From their side, publishers will have one or more of the following motives: to fulfill certain social, cultural and political needs and simultaneously to optimize financial revenue and economic efficiency.").

[10] U.S. CONST. art. I, § 8, cl. 8 (emphasis added). Note, however, that implicit in the clause is the assumption that some means of distribution will emerge, since otherwise the grant of exclusive rights would not promote "Progress." *See infra* notes 35-37 and accompanying text.

[11] *See generally* PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 31-32 (1994) (noting the difficulty of identifying the author and even the work itself when it is computer generated); THE CONSTRUCTION OF AUTHORSHIP (Martha Woodmansee & Peter Jaszi eds., 1994) (containing a number of articles from leading scholars discussing conceptions of authorship); MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (1993); Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293 (1996); Keith Aoki, *Adrift in the Intertext: Authorship and Audience "Recoding" Rights – Comment on Robert H. Rotstein, "Beyond Metaphor: Copyright Infringement and the Fiction of the Work,"* 68 CHI.-KENT L. REV. 805 (1993); Margaret Chon, *New Wine Bursting from Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship*, 75 OR. L. REV. 257 (1996); Rosemary Coombe, *Authorial Cartographies: Mapping Proprietary Borders in a Less-Than-Brave New World*, 48 STAN. L. REV. 1357 (1996); Alan L. Durham, *The Random Muse: Authorship and Indeterminacy*, 44 WM. & MARY L. REV. 569 (2002); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455; David Lange, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium*, 55 LAW & CONTEMP. PROBS. 139 (1992). For a comprehensive list of scholarship through the early 1990s, see Rosemary Coombe, *Challenging Paternity: Histories of Copyright*, 6 YALE J.L. & HUMAN. 397, 398 n.1 (1994) (book review).

sures intended to enhance authors' bargaining power. It also highlights the difficulty of concluding with certainty that authors' lack of bargaining power in fact undercuts copyright law's goals.

Like any other group, authors achieve better deals when the buyers of their services (publishers) compete vigorously. At least some of the copyright industries have become more concentrated over time. I thus address the question whether such consolidation has adversely affected authors' compensation by limiting competition for their services. Evidence on whether market structure is affecting authors' returns and leading to results inconsistent with copyright law's policies is mixed, although it does seem that some reason for concern exists.

I then consider some of the proposals suggested by others to help authors better their bargaining position. I conclude that the best course for authors in the immediate future is to rely not on Congress' enacting new legislation but rather enforcement of antitrust and contract law. I propose that courts refuse to enforce contractual terms that transfer rights to distribute works in media yet to be developed. Additionally, the U.S. should monitor how a new German law designed specifically to provide minimum returns to authors fares in that country. Depending on how it works there and how markets develop domestically, Congress may, in the future, find it appropriate to enact not copyright legislation but rather an antitrust exemption that permits certain authors' and publishers' representatives to set minimum contracting standards. Regardless of what legal steps are or are not implemented, authors should engage in self-help both by educating themselves about their rights under copyright law and continuing to explore the alternatives electronic technology offers.

I. HISTORY

A. The Rise of Copyright Law and the Realities of Author-Publisher Bargaining

The first copyright system primarily protected publishers[12] as a means

[12] I use the term "publisher" here in an all-encompassing sense. The relative power of various constituencies — printers, booksellers, and publishers — changed over time. *See, e.g.*, J. Alan White, *Public Lending Right, in* RAYMOND ASTBURY, THE WRITER IN THE MARKET PLACE 25 (1969) ("In Caxton's day [circa. 1476] the printer was also the publisher. In the eighteenth century the bookseller . . . was the publisher. Only in the nineteenth century did the publisher as we know him today emerge as a separate agent specializing in the financing, production, warehousing, promotion and sale of books. With the emergence of the modern publisher, the printer and binder came to be paid outright by the publisher and therefore ceased to be concerned with the choice of or copyright in the works they manufactured.").

for the Crown to exert control over the press.[13] The English monarchy essentially granted the trade a monopoly over printing and bookselling in return for assistance in enforcing its censorship policies.[14] The Stationers' Company, chartered in 1557, enforced those policies, printing only those books licensed by the Crown.[15] The Company consisted of publishers who effectively created the first copyright regime as a system of private law among its members: Essentially, "the stationer's copyright was a right recognized among members of the company entitling one who published a work to prevent any unauthorized printing of the same work [in perpetuity]" — that is, a right to reproduce a particular work for sale free from unauthorized competition.[16] The company itself granted the copyright not to authors but to its members as protection against rivals.[17]

Authors were excluded from membership in the Stationers' Company, often relying on private patrons for income.[18] Yet the stationers generally sought the author's permission to publish, and recognized the need to pay for the work, usually buying the right to print and distribute a

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13 LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 4-5 (1968); Giuseppina D'Agostino, *Copyright Treatment of Freelance Work in the Digital Era*, 19 COMPUTER & HIGH TECH. L.J. 37, 50 (2002).

14 Peter Jaszi & Martha Woodmansee, *Introduction*, *in* CONSTRUCTION OF AUTHORSHIP, *supra* note 11, at 6; PATTERSON, *supra* note 13, at 6, 21 ("[C]opyright was not created because of censorship, nor would the absence of censorship have prevented its creation, but censorship did aid private persons, publishers and printers, in developing copyright in their own interest with no interference from the courts and little from the government.").

15 PATTERSON, *supra* note 13, at 36-37, 42-43; John Feather, *From Rights in Copies to Copyright: The Recognition of Authors' Rights in English Law and Practice in the Sixteenth and Seventeenth Centuries*, *in* CONSTRUCTION OF AUTHORSHIP, *supra* note 11, at 191, 195 (stating that the royal grant of a printing and bookselling monopoly "was no mere benevolence," as the Crown made it clear that "[t]he Company's role was to control the output of the press, and to ensure that no book was printed unless it was properly licensed by the censors appointed by the Crown"). Before the Stationers' Company was officially established, the booksellers and printers were organized as a guild which could enforce rights only against guild members. PATTERSON, *supra* note 13, at 27. Additionally, the Crown occasionally granted "printing patents" to a select few, giving the grantees exclusive rights to publish the protected works. *Id.* at 5. This practice continued after the Crown chartered the Stationers' Company but declined in importance. *Id.* at 5-6.

16 PATTERSON, *supra* note 13, at 43-44 (noting that "the stationer's copyright was essentially a right to be protected in the receiving of profits from publication, without the fear of piracy").

17 *Id.* at 71.

18 *Id.* at 64-65.

work for a one-time, lump-sum payment.[19] They also recognized authors' rights to control modifications of the work: Such rights did not undercut the exclusive right of reproduction that the stationers relied on for income.[20] Members of the company would sometimes compete against each other for the right to publish new books, allowing some authors to bargain for better deals, such as by authorizing the publisher to print only a limited number of copies.[21] As one author puts it, "[i]t would be perverse to claim that authors' rights were widely recognized in pre-revolutionary England; it would be more accurate, although still perhaps a slight exaggeration, to suggest that they were dimly perceived."[22] At least by the 1690s, even authors without patrons could live by their writings, although their existence was often a precarious one, particularly in the freelance trade.[23] The so-called Grub Street hacks who wrote for newspapers and periodicals on a freelance basis lived primarily a day-to-day existence.[24]

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19 *Id.* at 69; D'Agostino, *supra* note 13, at 53 & n.110 (describing compensation arrangements as including: (1) lump-sum payouts; (2) subscriptions; (3) profit-sharing; and (4) self-publishing, and stating, "Stationers did acknowledge an obligation to pay authors and obtain permission prior to printing their works. But not all authors were commissioned. Patron-less authors would think up a title and propose the future work to the first bookseller who was willing to pay anything for it"); *see also* GOLDSTEIN, *supra* note 11, at 41 ("A Stationer would, typically, purchase from the author for a lump sum the right to print and distribute a text; the only property right the author had in his work was in the physical manuscript, the paper and ink in which he expressed himself. . . . Since only a Stationer was allowed to print a book, the author's sole rights were in the terms that controlled the text's first publication."); Feather, *supra* note 15, at 191 (stating that stationers paid authors as early as the 1640s).

20 PATTERSON, *supra* note 13, at 71.

21 Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 ECONOMICA (New Series), May 1934, at 177, *available at* http://www.compilerpress.atfreeweb.com/Anno%20Plant%20Copyright.htm (last visited May 16, 2003).

22 Feather, *supra* note 15, at 207-08 (noting that authors could use the Stationers' Company to protect themselves against unauthorized or inaccurate printing and that the Company, in protecting its own investment, could also protect the author's reputation).

23 D'Agostino, *supra* note 13, at 53-54 (discussing the evolution in compensation schemes for writers, and noting that freelance authors could live by their writings by 1690); *see also* Feather, *supra* note 15, at 209 (noting that some authors had been able to make a living by writing since the sixteenth century).

24 D'Agostino, *supra* note 13, at 53-54 (describing the conditions of freelancers as a "'precarious independence [that] gave them the kind of moral assurance, in that heavy interval between their cups and their whores, to sneer at patron-seekers like Dryden'").

As the Crown's interest in censorship waned and certain laws buttressing the stationers' monopoly expired, competition from non-members of the Company became widespread.[25] In seeking restoration of the old order, the established members of the trade effectively cast themselves as vindicators of authors' rights, arguing that without reformation of the book trade, they could neither publish nor compensate authors.[26] The resulting Statute of Anne was "a trade-regulation statute enacted to bring order to the chaos created in the book trade . . . and to prevent a continuation of the booksellers' monopoly," not an authors' rights enactment.[27] The statute essentially codified the stationers' copyright (for a limited term) but opened copyright ownership to all, including authors, and vested authors with the ability to renew the copyright term.[28] Nevertheless, the publishers' successful invocation of the "author" coupled with a rise in the romantic idea of authorship changed the terms of copyright law's debate for the future to focus on authors rather than publishers.[29]

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25 Jaszi & Woodmansee, *supra* note 14, at 6; *see also* GOLDSTEIN, *supra* note 11, at 42 (describing how the expiration of royal licensing laws affected the stationers).

26 Jaszi & Woodmansee, *supra* note 14, at 6 (noting the "[n]ew competitive forces at work both within the Company and outside," stating that the established trade now claimed to own not just books themselves but also their content, and stating, "Although the London booksellers who were the remnant of the Stationer's Company pushed for reregulation to restore the old commercial order, their campaign invoked a new rhetoric of individual interest and individual entitlement — both their own and, somewhat curiously, that of the "authors" who provided them with manuscripts"); GOLDSTEIN, *supra* note 11, at 43-44 (discussing the stationers' strategy of emphasizing rights of authors and readers).

27 PATTERSON, *supra* note 13, at 143, 147 ("Emphasis on the author in the Statute of Anne implying that the statutory copyright was an author's copyright was more a matter of form than of substance. The monopolies at which the statute was aimed were too long established to be attacked without some basis for change. The most logical and natural basis for the changes was the author. Although the author had never held copyright, his interest was always promoted by the stationers as a means to their end. Their arguments had been, essentially, that without order in the trade provided by copyright, publishers would not publish books, and therefore would not pay authors for their manuscripts. The draftsmen of the Statute of Anne put these arguments to use, and the author was used primarily as a weapon against monopoly.").

28 *Id.* at 13, 143, 146. The Statute of Anne also provided an additional twenty-one years of protection for works already covered by the stationers' copyrights (that formerly were considered protected in perpetuity). *Id.*

29 *Id.* at 226 ("Copyright changed from a publisher's right to an author's right for reasons that had little to do with the interest of the author."); D'Agostino, *supra* note 13, at 57 (describing the vision of the author as "genius" during the eighteenth century).

However, authors, apart from those with established reputations[30] did not necessarily fare much better under the Statute of Anne than the earlier system because publishers required a transfer of authors' rights as a condition of publication.[31] Authors were still often compensated by lump-sum payments that gave them no share of the proceeds received when their books were published and copies were sold.[32] Over time, profit-sharing arrangements became more common, although publishers retained a good deal of control over the accounting processes that determined the author's payout.[33] In 1965, a study in Great Britain found that "of the 1587 writers co-operating in the survey, as many as one third earned from their books no more than thirty shillings a week, and nearly two thirds less than £6."[34]

The U.S., as a former British colony, was naturally influenced by the British experience, and the states and later the federal government modeled copyright enactments on England's Statute of Anne.[35] The state laws generally focused on authors' rights, which may not be surprising since most of them were passed at the behest of Noah Webster who traveled from state to state seeking protection for a spelling book.[36] The federal constitutional clause primarily reflects a goal of promoting knowledge

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30 Plant, *supra* note 21, at 180 (noting that authors enjoying "individual popularity and reputation" had a "much better bargaining position" under the Statute of Anne because "they needed only to avoid committing themselves far ahead in any one contract, for if their books sold well they could rely on booksellers to bid up each other").

31 PATTERSON, *supra* note 13, at 152.

32 William Cornish, *The Author as Risk-Sharer*, 26 COLUM. J.L. & ARTS 1, 2 (2002) ("[T]he general run of scribblers, tune-smiths and illustrators were for centuries expected to surrender their manuscripts and their rights for a lump sum, often no more than small change."); D'Agostino, *supra* note 13, at 55-56 ("Authors often sold their works for a flat fee and gave up rights to publication and any further royalties because booksellers printed works at will.").

33 Cornish, *supra* note 32, at 3 (noting that profit-sharing became common in England in the Victorian age and that "it was in the U.S. that the notion of a royalty on receipts (i.e., without any deduction of costs) seems first to have taken hold").

34 White, *supra* note 12, at 28.

35 PATTERSON, *supra* note 13, at 180.

36 *Id.* at 188-89 (emphasizing that state legislators, in light of the Statue of Anne as well as a resolution of the Continental Congress recommending that states adopt copyright laws in favor of authors *or* publishers, were well aware that they could enact copyright as either an author's or a publisher's right, and noting that a number of the preambles of state enactments mention a purpose of "securing to the author the profit of his works"); *see also* H.R. REP. NO. 60-2222, at 2 (1909) (describing Noah Webster's success in convincing 12 of 13 states to adopt a copyright law).

through the means of compensating authors for their works.[37] Yet implicit in the clause's reference to promoting progress is the goal of disseminating copyrighted works. After all, how would protecting works advance the common good if authors failed to circulate their creations? Thus, that some system of publication and dissemination would emerge was a premise of the constitutional grant of power to Congress.

Interestingly, the first Copyright Act, enacted by Congress in 1790, seemed to emphasize not so much either the promotion of knowledge or protection of authors, but rather the notion that only the government may grant a copyright and, in so doing, it may limit the scope of the rights.[38] As in England, gradually, the rights began to protect not just the ability to print a work free from competition but also the content of the work itself.[39] The extent of these latter rights in content expanded over time ostensibly also as in England — publishers pressed the generally sympathetic cause of authors.[40] Moreover, the process of copyright revision in the U.S. evolved to include interested parties — primarily authors and publishers — drafting the legislation itself, which naturally led to more expansive rights for copyright owners.[41] The irony, of course, is that these broader

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37 PATTERSON, *supra* note 13, at 193-96 (describing the several ideas behind the constitutional provision, including promoting learning, protecting authors, providing a statutory privilege, and limiting monopoly).

38 *Id.* at 198-201 (arguing that the enactment did not rely on an author's natural rights but instead created certain limited rights for the author, representing "a complete reversal of ideas from a recognition of natural rights in the author in the state statutes. So complete a change in so short a time is almost impossible to explain satisfactorily").

39 *Id.* at 215 (noting also that the monopoly harm associated with each type of exclusive right differs); *see also supra* note 26 (noting a move from an exclusive right to print to exclusive rights in content).

40 *See* PATTERSON, *supra* note 13, at 216 ("Since copyright was the sole protection available to the author after publication, it was almost inevitable that the scope of protection enlarge, in view of the fact that authors' rights were viewed as natural rights. The idea that copyright was an objectionable monopoly was difficult to maintain in the absence of any monopoly of the book trade like that which had occurred in England and in the face of the idea that copyright was an author's right protecting his natural rights. . . . Thus, the fear of monopoly abated, with a consequent expansion in the scope of copyright supported by the socially acceptable aim of protecting the author.").

41 *See* Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275 (1989); Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987) (discussing how Congress invited affected interest groups to negotiate compromises then enacted in the copyright acts, and also noting that not everyone with an interest could be represented). A notable "interested party" largely excluded from representation in these negotiations was the user of copyrighted works. Litman, *Copyright Legislation*, *supra*, at 311-12. Over the years, though, groups representing

rights often ended up with the publishers themselves as they demanded that authors assign their copyrights as a condition of publication.[42]

In the early days of copyright in the U.S., publishers customarily did not pay American-born writers much, in part because "pirating" foreign works was more profitable.[43] As one author noted, during the eighteenth century, the opportunities for many domestic professional writers were limited to newspapers because the public still demanded books from England, and "the marketplace was small, publishers were little more than local job printers, [and] advertising and distribution were difficult . . . ."[44] Authors with sufficient means could finance production of their own works in book form, thus assuming some or all of the risk of success and receiving a corresponding reward if a particular work were successful.[45] Those who could secure royalty deals often suffered at the hands of publishers who manipulated the costs of production or charged a commission.[46] Unsurprisingly, only the very few could obtain contracts under which publishers bore all risk associated with distribution, paying the author whether or not the work ever sold.[47]

In the nineteenth century, authors generally benefited from the rise of periodicals, although they did not always receive pay for their contributions.[48] By the middle of the century, expanding population, better transportation, and technological advances in printing made publishing an

users have become better organized and more effective in expressing their views as part of the legislative process.

42 *See* PATTERSON, *supra* note 13, at 216; *see also* D'Agostino, *supra* note 13, at 61 (quoting a source noting that the traditional incentive theory of copyright largely ignores "'the step where authors transfer their bundles of sticks to the publisher who then holds sole proprietary interest over the work and continues to profit with very little going back to the authors'").

43 WILLIAM CHARVAT, LITERARY PUBLISHING IN AMERICA 1790–1850, at 40-41 (1959).

44 RONALD WEBER, HIRED PENS 18-19 (1997) (noting also that some viewed writing as "the domain of a privileged few" not to be sullied by the less privileged).

45 CHARVAT, *supra* note 43, at 42-43 (noting that a lack of capital in the publishing industry helped lead to authors taking some risk in publication).

46 *Id.* at 43-44 (noting that Herman Melville borrowed against new books and was charged interest such that "he was in debt to [his publisher] for almost his entire career").

47 *Id.* at 44 (giving the examples of Washington Irving and James Fenimore Cooper as authors who could secure such deals, and noting that such arrangements foreshadowed the practice "whereby established authors got contracts and payments for works before they were completed or even written").

48 WEBER, *supra* note 44, at 18-21 (1997) (noting that the number of magazines increased from around twelve in 1800 to approximately 600 by 1850 but that "payment remained rare").

attractive investment, and offered writers new opportunities.[49] Publishing houses hired a number of writers to churn out "dime" novels that followed a formulaic plot, and compensated the authors at a living wage.[50] Later, pulp magazines largely replaced the dime novels, expanding the market further for writers.[51] By the turn of the century, "'The author no longer [sought] the publisher with the faint hope that [one would] befriend his unrecognized genius. It [was] now the publisher who searche[d] for the author as for hid treasure.'"[52] Established magazine writers received about two cents a word; new-comers about one cent, and the most sought-after writers could make five figures in a year.[53]

Magazines remained important sources of income for authors through the first half of the twentieth century.[54] According to one author, "the death of the Saturday Evening Post . . . [in] 1969, effectively, if crudely, mark[ed] the end of the golden age of print."[55] Opinions differ, but generally, freelance writers in particular now have many fewer outlets for their works: "[S]tory papers, pulp and slick magazines, newspaper syndicates, and newspaper Sunday editions have all vanished, or very largely so, as important paying markets for independent writers. What remains, with exception here and there, is mostly book writing — or just the reverse of the situation that once confronted . . . the first generation of American writers for hire."[56]

Today, deals between authors and publishers run the gamut from assignment of copyright for a lump-sum payout to a non-exclusive license for specified royalties, with arrangements varying both by and within copyright industries. Authors who band together to seek remuneration or employ reasonably powerful intermediaries seem, unsurprisingly, to have a better bargaining position than those who go it alone. For example, composers and music publishers formed the American Society of Composers, Authors, and Publishers (ASCAP), a collective rights organization that has been successful in providing composers with some return when their music is publicly performed.[57] Screenwriters unionized, giving up ownership of their copyrights in return for residual payments and control over

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[49] *See generally id.* at 62.

[50] *Id.* at 65 (describing Beadle dime novels and noting that authors generally received between $75–$150 dollars for their writing).

[51] *Id.* at 78.

[52] *Id.* at 79 (noting that this was the case for books, newspapers, and magazines).

[53] *Id.*

[54] *Id.* at 247 (stating that the "glory days of big-circulation magazines and dominant editors lingered on into the postwar period").

[55] *Id.* at 250.

[56] *Id.* at 252.

[57] *See* GOLDSTEIN, *supra* note 11, at 68-76 (describing the formation and operation of ASCAP).

the credit they receive when works are broadcast.[58] In the book trade, writers who produce marketable text may be able to hire a literary agent to represent them in negotiations with publishers, although agents reject around 98% of the authors who seek their assistance.[59] Royalty rates vary, with 10–15% of the hard cover retail price common.[60] Although bestselling authors can earn six or more figures annually, most published authors rely also on other sources of income for their livelihood.[61]

Freelance newspaper and magazine writers who generally tend not to employ agents earn from around ten cents to $3 per word.[62] Annual incomes may be as high as $30,000 to $40,000, although some claim that freelance wages have actually declined by a sizable amount or at least have not increased since the 1960s.[63]

Many authors, although certainly not all, continue to lack bargaining power in their negotiations with publishers. As a result, they often capture little of the surplus associated with exploitation of their works. Although the "golden age of print" referenced above[64] may be something of an exception, many regard authors' lack of bargaining power as a historic fact. Professor Cornish states, "[E]ntrepreneurs have secured copyright in the name of the author but use their contractual deals to reap most of the

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58 *See* John M. Kernochan, *Ownership and Control of Intellectual Property Rights in Audiovisual Works: Contracts and Practice – Report to the ALAI Congress, Paris, September 20, 1995*, 20 COLUM.-VLA J.L. & ARTS 379, 402 (1996).

59 Jeff Herman, *More Questions and Answers About Agents, Editors, and the Publishing Industry*, *in* WRITER'S GUIDE TO BOOK EDITORS, PUBLISHERS, AND LITERARY AGENTS 695-96 (Jeff Herman ed., 13th ed. 2002) (stating that it's easier to obtain an agent than publisher but that agents reject most submissions).

60 Sherri L. Burr, *Negotiating the Book Contract*, *in* THE WRITER'S HANDBOOK (Sylvia K. Burack ed., 2000 ed.) (noting also that royalties are lower on paperbacks, and that some smaller publishers offer royalties based on net profits rather than retail price).

61 Herman, *supra* note 59, at 703.

62 Lisa Richardson, *Victory for Freelancers Leaves Librarians at a Loss*, L.A. TIMES, July 10, 2001, at E1, *available at* 2001 WL 2501843; *see also* James H. Johnston, *Free-Lance Writers Lost in Cyberspace*, LEGAL TIMES, June 3, 2002, at 28 (noting a wide variety in compensation rates from simply a byline to $2 per word, depending on the identity of both the publication and the author).

63 Stephanie Smith, Note, The Next Chapter in the Battle for Freelancers' Rights: Analyzing the Contract Law Defense of Unconscionability, 26-27 & nn.152-54 (2003, draft, on file with author) (citing sources, including the National Writers Union Web site); *see also* Richardson, *supra* note 62 (citing National Writers Union spokeswoman Dian Killian: "'Studies have shown . . . that the real income of freelancers has not increased since the 1960s'").

64 *See supra* text accompanying notes 52-55.

advantages from the exclusive right. So it was in the beginning, with . . . the Statute of Anne . . . and so no doubt it ever shall be."[65]

B. An Alternative View of History – Authors as the "Problem"

Opinions differ on whether this historic lack of bargaining power undercuts copyright law's goals of advancing social welfare by optimizing the quality and quantity of works produced and distributed. Indeed, another theme has recurred throughout history that is entirely different (in fact almost opposite) from the argument that under-compensation of authors should be cause for concern from a copyright perspective. Since the early days of publication, some commentators have always contended, put simply, that too many authors turn out too many works of too low a quality, and that this state of affairs conflicts with copyright law's goals.[66] In short, society as a whole would be better off if some authors devoted their talents to efforts other than writing.[67] The market signals quality — that some authors' wages are low simply reflects the inferior quality of their works. There is simply no under-compensation problem requiring solution.

I discuss later why market signals may not be entirely accurate in the case of copyrighted works.[68] Here, I simply note that some evidence supports the argument that the market for authors suffers from oversupply. Cognitive difficulties lead authors to overvalue their works, and barriers to entering the field are generally low.[69] However, it is difficult to show a correlation between those who leave the field because they cannot make a living and those who write the qualitatively "worst" works.[70] This is un-

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65 Cornish, *supra* note 32, at 2.

66 *See, e.g.*, Plant, *supra* note 21, at 183 (citing testimony before a commission in 1876–78 in which the witness stated, "'What we want, I believe, is more good books and cheaper good books; but we do not want more books; we have too many books at present. Some persons . . . wish to do away with copyright in order to diminish the number of books, and to reduce the number of those who make authorship a trade"); White, *supra* note 12, at 28 ("Doubtless some of the writers earning thirty shillings a week or less were misapplying their energy in writing at all and their publishers at fault in deciding to publish them," but also noting the general lack of correlation between quality and remuneration).

67 *See supra* note 66.

68 *See infra* Part II.A.

69 *See* Avishalom Tor & Dotan Oliar, *Incentives to Create Under A "Lifetime-Plus-Years" Copyright Duration: Lessons from a Behavioral Economic Analysis for* Eldred v. Ashcroft, 36 LOY. L.A. L. REV. 437 (2002) (describing the problem of optimistic bias).

70 Note, for example, that when certain well-established freelance writers sued the *New York Times* for failing to respect their copyrights, the *Times* responded by refusing to accept their works. *See* Wayne Robins, *Sharpening*

surprising because quality is extraordinarily difficult to measure. "One man's treasure is another man's trash," and today's flop tomorrow's classic. As one editor states, "Many highly talented writers never get published. Many mediocre writers do get published — and a number of them make a lot of money at it."[71] The truth is, "as Dame Rebecca West has said, 'that a writer who cannot maintain himself or herself may be a very good writer indeed.'"[72]

What this also shows, however, is the risky nature of publishing: Returns are highly speculative while costs to produce and distribute the work may be quite high.[73] Author compensation rates that appear low may be justified as a premium to publishers for assuming the risk of marketing and distribution. Indeed, the historically relatively modest rate of return in the book publishing industry[74] suggests that, at least in that market segment,

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Their Lance, EDITOR & PUBLISHER, Dec. 3, 2001, at 16, *available at* 2001 WL 30412103 (describing an internal *New York Times* memo directing staffers not to hire certain writers, including those who had sued the *Times*, although also stating that describing the memo as a blacklist was "hyperbolic in the extreme").

71 Herman, *supra* note 59, at 696.

72 White, *supra* note 12, at 28 (stating also that "[i]t is a common fallacy that any writer 'worth his salt' must inevitably succeed later if not sooner," and noting that "seven successive books by Henry James (including *The ambassadors* and *The golden bowl*) . . . failed . . . to earn the modest advance . . . paid to him by the publisher"); *see also* David Lange, *A Comment on* New York Times v. Tasini, 53 CASE W. RES. L. REV. 653, 655 (2003) ("I have friends who consider themselves to be (and whom I myself regard as being) serious screen writers — but who have not sold a screenplay in twenty five years. And far from being unusual, theirs is the typical experience of the creative artist in the motion picture industry. If you have in mind working in the movie business, then have in mind working at something else that you can make a living from, because the likelihood that you will do it in the film industry is very close to zero."). Lange argues that eliminating copyright would help fix these problems by removing "a system of monopolies," (*see infra* Part II.A where I discuss the structure of the copyright industries) and also suggests another alternative — permitting anyone to use copyrighted works so long as they pay for their use. Lange, *supra,* at 655-56.

73 *See* Herman, *supra* note 59, at 703 ("Large houses invest tens of millions of dollars to acquire, manufacture, market, and distribute anywhere from fifty to a few hundred "new" books. A small number of big-ticket individual titles will by themselves represent millions of dollars at risk. Most titles will represent less than $50,000 in risk on a pro-rata basis. In practice, most of these . . . titles will fail. The publisher will not recoup its investment. . . . But it's expected that enough . . . will survive to generate an overall profit and significant . . . annuities well into the future."); Plant, *supra* note 12, at 182 (stating that "Four books out of five which are published do not pay their expenses. . . . The most experienced person can do no more than guess whether a book by an unknown author will succeed or fail").

74 *See infra* Part II.A.

authors in the aggregate may be appropriately compensated, even though particular individuals might suffer from one-sided deals.

This makes all the more puzzling authors' advocates' longstanding objections to lump-sum payouts under which a publisher essentially purchases the copyright for a one-time payment.[75] Authors then receive no income if the work succeeds — nor, of course, do they have to return the payment if the work fails. Indeed, the lump-sum payment may make good economic sense from both the author's and publisher's perspective. It ensures the author a risk-free return, and helps the publisher mitigate the risk inherent in bringing the work to market. Such arrangements may help to increase the quantity if not necessarily the quality of works circulated, because publishers can finance the riskier works of untested authors with the money earned on successes.

Nevertheless, particularly authors of books tend to prefer sharing the risk, receiving royalties rather than lump-sum payments.[76] Authors generally, as creators of works, have some normative claim to profit (or not) from their works' exploitation and their tendency to overvalue their works may lead them to believe that royalties will compensate them more than a lump-sum payment.[77] Some freelancers also object to lump-sum payments because their terms usually preclude the authors from earning additional money by re-using the material, and often they view the payment as insufficient.[78] Indeed, there is a general feeling that lump-sum payments are too low, more than compensating the publisher for the risk it assumes.

What can one make of all this? Certainly, there are tenable arguments on both sides of the question whether authors or some subset of them in fact suffer from a lack of bargaining power that undercuts copyright law's goals. Empirical evidence that would definitely answer that question is difficult, if not impossible, to come by. The intuitive sense that

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75 I discuss steps lawmakers have taken to blunt the effect of lump-sum payouts *infra* Part I.C.

76 Cornish, *supra* note 32, at 3-4.

77 *Id.* at 4 (discussing how economists are puzzled by creators' preferences for royalties and discussing their theory of regret which holds that authors fear disappointment if they fail to participate in profits from a success). Cornish also states that authors' motives in seeking royalties may not be susceptible to a strict economic analysis: "Maybe [their preferences reflect] just that undue optimism which makes the artist believe that each work will be more successful even than the last. Maybe there is a host of other conditions of mind and feeling which cannot easily be encapsulated in an economic theory." *Id.*

78 *See* Maureen A. O'Rourke, *Bargaining in the Shadow of Copyright Law After* Tasini, 53 CASE W. RES. L. REV. 605 (2003) (noting also that not all freelancers find marketable opportunities for re-publishing their works); *see also infra* Part II.B (discussing the effect of electronic distribution on freelancers' compensation).

one who reads copyright history finds hard to avoid, though, is that the market does not work as well as we might like, and, certainly, some quite good authors have been underpaid and/or overlooked. The question might be reformulated, then, as whether society can take cost-effective steps that enhance authors' bargaining power without reducing publishers' incentives. Legislators throughout the years have tried to do just that. A review of the measures they've taken demonstrates the inherent difficulties in striking such a balance.

C. *Copyright and Other Law's Traditional Responses to Problems of Unequal Bargaining Power*

1. The U.S. Approach

a. The Copyright Act

Termination of Transfers and Works for Hire

The U.S., from the first Copyright Act of 1790 until the effective date of the 1976 Act, provided authors with a renewal right along the lines of the Statute of Anne.[79] The 1909 Act's legislative history explained that vesting the renewal term with authors helped ensure their adequate compensation: "It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success . . . it should be the exclusive right of the author to take the renewal term."[80] However, authors and their heirs could assign the renewal term to a third party like a publisher, and such assignments became standard terms in many agreements, thwarting the purpose of the renewal provision.[81]

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[79] H.R. REP. NO. 60-2222, *supra* note 36, at 14 (discussing the evolution of the renewal right and the duration of copyright).

[80] *Id.*

[81] REGISTER'S REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 53-54 (1961) [hereinafter REG. REP.] (noting also that making assignment of the renewal right inalienable might not help authors because the "value of their copyrights might be diminished in many instances if they were unable to contract for the use of their works beyond the end of the first 28-year term. And, during the later years of that term, they might well find that publishers, motion picture producers, and other users who need assurance of continued use for an extended period, would be reluctant to undertake exploitation of that work"). The rate of renewals varied widely. According to the *Register's Report*, "less than 15 percent of all registered copyrights are being renewed . . . . During a recent year . . . renewals ranged from 70 percent of the eligible motion pictures, down through 35 percent for music, 11 percent for periodicals, 7 percent for "books" . . . to less than 1 percent for technical drawings." *Id.* at 51. The *Register's Report* concluded by recommending elimination of the renewal right because "it has largely

The 1976 Act adopted a unitary copyright term but provided authors with an essentially inalienable right to terminate transfers. The general rule applicable to transfers occurring on or after January 1, 1978 permits the author to terminate the transfer "at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant . . . ."[82] The termination right does not, however, apply to works made for hire (those created by an employee and certain specially commissioned works)[83] because copyright ownership never vests in the creator.[84] Instead, ownership resides with the employer or the one who commissions the work because: "(1) the work is produced on behalf of the employer [or commissioning party] and under his direction; (2) the employee [or commissioned party] is paid for the work; and (3) the employer [or commissioning party], since he pays all the costs and bears all the risks of loss, should reap any gain."[85] Thus, for example, a freelance writer who authors an article for a magazine on a work-for-hire basis cannot publish the article again as, say, part of a book. The termination right is therefore most useful to authors who can retain ownership of copyright initially and whose works' popularity endures until the termination period.

According to the legislative history, "[a] provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited."[86] The legislative history may, however, be less illuminating of congressional intent than normal. Authors' and publishers' groups explic-

failed to accomplish the purpose of protecting authors and their heirs against improvident transfers." *Id.* at 92.

82 17 U.S.C. § 203(a)(3) (2000). Transfers (of the renewal term) made before January 1, 1978 are governed by § 304(c) which provides generally, "Termination of the grant may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1978, whichever is later." *Id.* § 304(c)(3). Section 304(d) adjusts the termination right in recognition of the enactment of the Sonny Bono Copyright Term Extension Act in 1998. *Id.* § 304(d). (The Bono Act, inter alia, added twenty years to the term of already existing copyrights. Pub. L. No. 105-298, Title I, § 101 et seq., 112 Stat. 2817 (1998)). Section 304(d) provides that authors of works whose copyrights were in their renewal term and whose termination rights had expired without exercise by the effective date of the Bono Act could terminate a grant "at any time during a period of 5 years beginning at the end of 75 years from the date the copyright was originally secured." *Id.* § 304(d).

83 *Id.* § 101 (defining "work made for hire").

84 *Id.* § 201(b) (vesting authorship in the employer or commissioning party when the work is made for hire); *id.* § 203(a); *id* § 304(c) (providing that authors' termination rights do not apply to works made for hire).

85 REG. REP., *supra* note 81, at 85.

86 H.R. REP. NO. 94-1476, at 124 (1976).

itly negotiated the boundaries of the termination and work-for-hire provisions, and Congress simply adopted their compromise.[87]

Mistaken expectations on both sides may lead the termination and work-for-hire provisions to work to authors' disadvantage. Authors, whose cognitive limitations lead them to overvalue their talents, presumably believed both that their works would still be economically viable at the time they could terminate *and* that they could largely avoid having to agree to work-for-hire contracts. However, the low rate of renewal (less than 15% in the aggregate) under the 1909 Act suggests that termination rights will not be meaningful for most works, although they will likely be more useful in some contexts than others.[88] For example, the renewal rates for types of copyrighted works ranged from around 70% for motion pictures to 35% for music to under 1% for technical drawings.[89] Also, a Congressional Research Service study showed that "only about 2% of copyrights between fifty-five and seventy-five years old retain commercial value . . . [with] books, songs, and movies of that vintage still earn[ing] about $400 million per year in royalties."[90] The data thus suggests that termination rights will likely not have much value for most authors, with exceptions more usual in certain industries than others. For some authors, like freelance writers who focus on news of the day, termination rights will have no value at all. But in many negotiations, publishers can use authors' overvaluations to pay less initially. Indeed, publishers likely are bargaining in good faith. As risk averse entities unable to accurately quantify how much a work is worth before marketing it, they likely also overvalue authors' termination rights.

Of course, publishers can avoid termination rights altogether by contracting on a work-for- hire basis. The definition of what commissioned works[91] may be considered made for hire reflects a compromise between

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87 Litman, *Copyright and Compromise*, *supra* note 41, at 865-69.

88 *See supra* note 81.

89 *Id.*

90 Eldred v. Ashcroft, 123 S. Ct. 769, 804 (2003) (Breyer, J., dissenting).

91 The debate over whether sound recordings may be considered made for hire illustrates that authors and publishers also have different expectations about how the Act should be interpreted. In 1999, Congress amended the Copyright Act to include sound recordings in the list of works eligible for made for hire status. Statement of Rep. Coble, Work Made for Hire and Copyright Corrections Act of 2000, 146 Cong. Rec. H7744 (daily ed. Sept. 6, 2000). After recording artists objected, fearing loss of termination rights, Congress repealed the earlier legislation without resolving the question whether sound recordings could qualify as works for hire. *Id.*; *see also* Statement of Sen. Hatch, Making Certain Corrections in Copyright Law, 146 Cong. Rec. S10,498 (daily ed. Oct. 12, 2000). Ostensibly, the record labels continue to believe their contracts with recording artists are work-for-hire agreements, and no termination right applies.

authors' representatives and exploiters including publishers and movie studios.[92] Authors' groups feared that freelancers would routinely be forced to sign work-for-hire contracts and exploiters worried about termination provisions applying to works they had always considered made for hire.[93] The resulting compromise, although it limits commissioned works to those often created by a number of authors (e.g., contributions to a collective work like a newspaper or magazine), in fact resulted in just what authors' groups feared — freelance writers often transfer their copyrights to publishers under work-for-hire agreements.[94]

Compulsory Licenses

A more direct approach to assuring authors some level of compensation is to provide for it in the statute. The Act contains compulsory licenses that aim, at least in part, to ensure adequate remuneration for the author.[95] For example,[96] since the 1909 Act, the statute has included a

92 Litman, *Copyright and Compromise*, *supra* note 41, at 890-91.

93 *Id.* at 890.

94 *Id.* at 890-91; *see also* 17 U.S.C. § 101 (2000) (treating as works for hire "a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire").

95 Some compulsory licenses also seek to decrease transaction costs. *See, e.g.*, 17 U.S.C. § 111 (2000) (compulsory license for certain secondary transmissions by cable systems). The legislative history notes that the "Committee believes that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs. The Committee recognizes, however, that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system." H.R. REP. NO. 94-1476 (1976). Again, though, comments in the legislative history may be less probative than normal because Congress simply adopted verbatim the deals struck by interested parties. *See* Litman, *Copyright, Compromise, and Legislative History*, *supra* note 41, at 869.

96 The Act contains a number of compulsory licenses. Some actually function primarily to encourage dissemination of information rather than compensation to authors. *See, e.g.*, 17 U.S.C. § 116 (2000) (the jukebox compulsory license which also acts to protect that industry); *Id.* § 118 (compulsory license for noncommercial broadcasting). In 1995, in response to changing technologies, Congress amended the Act to provide copyright owners of sound recordings the exclusive right "to perform the copyrighted work publicly by means of a digital audio transmission." Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 1, 109 Stat. 336. The exclusive right is, however, subject to a compulsory license in §114.

compulsory license for the making and distribution of phonorecords.[97] Although adopted to combat monopoly power in the market for record distribution,[98] the license reflects a balancing of the interests of authors, distributors, and the public. The 1909 Act's legislative history reveals discussion of how to ensure a return to composers for exploitation of their music by mechanical means while not harming the public by inadvertently creating a monopoly in the distribution of that music:

> [The] committee have felt that justice and fair dealing . . . required that when the copyrighted music of a composer was appropriated for mechanical reproduction the composer should have some compensation for its use . . . .
>
> [I]t has been a serious and a difficult task to combine the protection of the composer with the protection of the public, and to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies, which might be founded upon the very rights granted to the composer for the purpose of protecting his interests.[99]

By the time of the 1976 Act, composers and music publishers were arguing that the compulsory license undercut the composers' rights to control commercial exploitation of their works, and particularly that the statu-

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The legislative history does indicate a concern with assuring composers and record labels adequate compensation. S. REP. No. 104-128 (1995), *reprinted in* 1995 U.S.C.C.A.N. 356, 357, 361-62 (stating, inter alia, "The purpose of [the bill] is to ensure that performing artists, record companies and others whose livelihood depends upon effective copyright protection for sound recordings, will be protected as new technologies affect the ways in which their creative works are used"). I concentrate here on the mechanical license because of its long history and its direct impact on composers.

97 17 U.S.C. § 1(e) (1909) (repealed 1976); 17 U.S.C. § 115 (2000). Note, however, that one might also view this compulsory license as preventing copyright's exclusive rights from limiting dissemination of recorded material. GOLDSTEIN, *supra* note 11, at 20 (describing the compulsory license as a "safety valve" to ensure that works are not protected by overly broad exclusive rights).

98 "During the course of the hearings . . . it was learned that one dominant record company, anticipating the establishment of an exclusive recording right, had contracted with the leading music publishers for the exclusive right to record all their music. To forestall the danger that this company would acquire a monopoly in the making of records, the committees adopted the device of the compulsory license. . . . The danger of a monopoly . . . was apparently the sole reason for the compulsory license." REG. REP., *supra* note 81, at 32-33.

99 H.R. REP. No. 60-2222, *supra* note 36, at 6-7.

tory rate was too low.[100] Congress responded by retaining the license but raising the rate in an effort to ensure that copyright owners received an adequate return.[101] The compulsory license, though, illustrates the problem inherent in Congress' setting compensation rates. The statutory rates will set the ceiling for authors' compensation and either under- or over-compensate them depending on whether the rate is too low or too high relative to the optimal. Certainly, composers tend to argue that the mechanical license royalty is too low.[102]

Congress, then, has historically inserted provisions in the Act with the primary or secondary purpose of assuring adequate compensation for authors. Whether these measures have been successful is another question. The market values any rights Congress gives to authors, with some of those rights likely worth little, particularly if authors mistakenly overvalue their works and publishers can avoid authors' rights altogether by, for example, seeking a work-for-hire agreement to nullify termination rights. When Congress expressly sets rates of compensation, it likely does not set the appropriate level.

State contract law, because it interprets copyright licenses within the particular setting in which they are concluded and is more flexible than the generally one-size-fits-all copyright law, might actually be better placed than federal law to police unequal copyright bargains.

b. State Law Approaches

Since copyright law is exclusively federal, states are limited in their ability to take direct approaches to regulating author-publisher relations.[103] State contract law, however, can determine whether parties have in fact entered into a copyright license or assignment, and courts may use doctrines such as unconscionability or good faith and fair dealing to police

100 REG. REP., *supra* note 81, at 34.

101 H.R. REP. NO. 94-1476, *supra* note 86, at 107-11 (noting that Congress intended to clarify the mechanics of the compulsory license, drop some formalities, and provide sanctions against those who failed to follow the requirements of the license).

102 *Cf.* Letter of Marilyn Bergman, President & Chairman of ASCAP, *available at* http://www.ascap.com/musicbiz/futureofmusic.html (last visited June 18, 2003) ("History has shown that in most cases the compulsory license fee is determined at a value far less than the fair value we could negotiate with those who want to use our music.").

103 One state, California, has enacted a statute permitting the creator of a work of fine art to receive 5% of the sale price each time the work is resold. CAL. CIV. CODE § 986(a) (Deering 1990). While this resembles setting authors' compensation, I will not focus on the California legislation because it has not been widely adopted and might even be preempted by federal law.

particular terms.[104] The Copyright Act itself provides certain formalities that help to protect against unknowing waivers of rights. For example, the Act requires that exclusive licenses and assignments of copyright ownership be in writing as a condition of enforceability.[105] It also limits what works can be considered made for hire as specially commissioned works, and requires a signed writing for such works to fall within that category.[106] State law has been relatively reticent about redefining bargains embodied in copyright licenses, perhaps in part because the Act itself contains these protections.

The question occasionally arises whether a license's language encompasses a particular use. For example, does a license grant to "print, publish and sell the work in book form" include the right to publish the work electronically?[107] General principles of contract interpretation require considering the language of the contract and the parties' intent.[108] A recurring problem is, of course, how to interpret the contract when intent is unclear — such as when the technology to enable the new use did not exist when the contract was formed.[109] Some courts adopt an approach limiting the grant to only those rights expressly licensed while others permit the licensee to engage in any uses that reasonably fall within the "penumbra" of the license.[110] Interestingly, the old contract law interpretation rule to construe ambiguity against the contract's drafter does not make much of an appearance in the case law — if it did, results would likely favor licensors/authors more often because licensees/publishers usually draft agreements.

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104 *See, e.g.*, Marx v. Globe Newspaper Co., 15 Mass. L. Rep. 400 (Mass. Super. Ct. 2002), *available at* 2002 WL 31662569 (rejecting the argument that the defendant *Boston Globe* newspaper breached an implied covenant of good faith and fair dealing by requiring freelance writers to relinquish claims to copyright infringement as a condition of future employment).

105 17 U.S.C. § 204 (2000).

106 *See supra* notes 92-94 and accompanying text.

107 Random House, Inc. v. Rosetta Books, LLC, 150 F. Supp. 2d 613, 615, 624 (S.D.N.Y. 2001) (holding the grant insufficient to confer rights to publish an e-book).

108 *Id.* at 618 ("In New York, a written contract is to be interpreted so as to give effect to the intention of the parties as expressed in the contract's language.").

109 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.10[B], at 10-89 (2000) (noting that lack of uniformity in precedent reflects courts' reliance on intent and that "[m]ost often in fact there is no . . . single intent. Either each party had a different intent . . . or more likely, there simply was no intent at all at the time of execution with respect to [the] issue insofar as it relates to whether the grant includes a new use developed at a later time").

110 *Id.* at 10-90 (stating that the latter approach which is more generous to licensees is "preferred").

Publishers can, of course, avoid the messiness of litigating intent by entering into work-for-hire agreements, contracts providing for assignment of copyright, or licenses granting rights under all media now existing or hereafter developed.[111] Courts generally enforce such provisions under contract law so long as the parties are rational, informed, and not necessitous. In other words, the Copyright Act provides authors and publishers alike with certain options, and courts will enforce contracts made in the shadow of copyright law unless unconscionable.

2. *The Approach of Other Countries*

Perhaps unsurprisingly, continental European countries from the moral rights tradition have generally taken a more activist approach to "shor[ing] up the contractual earnings of authors" than their counterparts (including the U.S.) who emphasize a utilitarian rationale[112] as justifying copyright law's existence.[113] Such countries restrict contractual freedom in a number of ways such as, for example, by construing language strictly in holding that licenses do not extend to technology unknown at the time of the license, providing for minimum royalties, prohibiting the transfer of copyright in future works, and requiring that each aspect of a copyright assigned be specifically enumerated.[114] France has gone so far as to ban

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111 *See Marx*, at *1-*2 (describing the *Boston Globe's* changing license agreements for freelancers, including a 1996 agreement under which the freelancers' works would be considered made for hire, and the 2000 agreement which licensed rights to use the works "in any form or medium whether now or hereafter known throughout the world").

112 Interestingly, as early as the eighteenth century, one such country — England —considered (but never enacted) a bill that would prohibit authors from selling their copyright for more than a ten year period: "[T]he true Worth of Books and Writing[s] is in many cases not found out till a considerable Time after the Publication thereof; and Authors who are in necessity may often be tempted to sell and alienate their Right . . . before the value thereof is known, and may thereby put it out of their Power to alter and correct their Compositions, therefore . . . no Author shall have the Power to sell . . . the Copyright for any longer than Ten Years." PATTERSON, *supra* note 13, at 156-57. However, since publishers heavily influenced the drafting of the bill, one can assume they did not believe this provision would affect their interests adversely. *Id.* at 157 ("[T]he language . . . indicates how little fear the booksellers had of the authors' interference with their monopoly; they were willing that an author should retain a control over his works, as they were interested only in profits from publishing.").

113 Cornish, *supra* note 32, at 4-6.

114 *Id.* at 5-6; REG. REP., *supra* note 81, at 92-93 (noting that it would be desirable to provide for authors to "renegotiate their transfers that do not give them a reasonable share of the economic returns from their works," noting the limitations on freedom of contract that some countries have adopted, and sug-

most lump-sum transfers in an effort to ensure that authors participate in the flow of earnings associated with exploitation of their works.[115]

In 2002, Germany adopted "a Law to strengthen the contractual Position of Authors and Executing Artists."[116] One of the law's proponents explained that in Germany, because authors always own their copyrights (Germany lacks a work-for-hire doctrine), they do not see the same need as their American counterparts in the music and screenwriting fields to organize collectively.[117] The result is that:

> American standard-form contracts, used outside . . . U.S. borders, not only deprive the creators of their rights, but even frustrate the aim and intention of the copyright laws of their home countries and, in the long run, create a situation that is a threat to the sources of creativity of such countries and to their cultural standards.[118]

The new law permits assignment of rights but provides authors and performing artists with an inalienable right to reasonable remuneration.[119] An author may seek reformation of a contract providing an inadequate return.[120] An "appropriate remuneration" is generally the rate set by collective contracts or "the compensation which is to be paid under fair use . . . . An appropriate remuneration . . . ordinarily cannot be covered by a one-time lump-sum payment, but by an appropriate share of the earnings."[121]

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gesting that Congress put a time limit on transfers that do not call for ongoing royalties).

115 Cornish, *supra* note 32, at 7-8 (noting also the many administrative questions that arise under such a system).

116 Wilhelm Nordemann, *A Revolution of Copyright in Germany*, 49 J. COPYR. SOC'Y 1041, 1043 (2002).

117 *Id.* at 1042.

118 *Id.* There is some indication that the legislators intended the law to adjust for conditions of unequal bargaining power between German authors and German exploiters also. *See id.* at 1044 (noting a legislative concern with "unfair compensations paid to authors in Germany [including] journalists outside employment status [and] interpreters of novels and comics").

119 *Id.* at 1043.

120 *Id.*; *see also* Cornish, *supra* note 32, at 10 (noting that authors would be unlikely to sue for adequate compensation, fearing they would be blacklisted, but that the new law addresses this by creating a framework for collective activity).

121 Nordemann, *supra* note 116, at 1044-45 (explaining that "usual" compensation can be unfair, and that lump-sum payments may sometimes be permissible "e.g., if repeated when a certain sales level is reached, if the author or artist is focused on an immediate unique payment, or for musicians from some developing countries who may not be sure that a later transfer of money would reach them"). Nordemann also discusses cases in which remunera-

The Act creates a structure intended to encourage independent authors to act collectively.[122] Representative associations of authors and users may establish "common remuneration standards."[123] These groups may agree to seek mediation or one party may request it.[124] "The mediation panel must make a reasoned settlement proposal for an agreement containing the general remuneration standards to the parties. The proposal will be taken to be accepted if within three months of its receipt it is not rejected in writing."[125] Thus, a panel's decision on remuneration standards is, effectively, not binding, "[b]ut the new provisions blend compulsory legal process and a moral persuasion which is often enough the key in modern labor relations."[126]

Whether these approaches have been successful is another question. The French law raised a number of interpretive issues that had to be addressed,[127] while the German law is too new to evaluate. Interestingly, although the U.S. is a worldwide leader in the production of copyrighted works, France produces a higher number of books per capita.[128] Of course, though, since a number of factors influence the rate of production, one cannot reliably conclude that either the French or U.S. approach is "better" from a social welfare perspective, or that France's relative success derives from its protection for authors. Nevertheless, at least some in

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tion is appropriate at the time the contract is concluded but later becomes inappropriate because the work is so successful "that the remuneration granted diminishes markedly out of proportion to the profits and advantages gained by the work's exploitation . . . . It would be against the sense of justice and fairness to exclude the author, to whom the producer and exploiter owe their success, from a fair share of earnings." *Id.* at 1045. The new law contains a provision that provides such authors with a legal right to alter their contracts. *Id.*

122 Cornish, *supra* note 32, at 10.

123 German Law on Strengthening the Contractual Position of Authors and Performers, *translated in* 33 IIC 842, 845 (2002) (translating § 36 of the law on "Common Remuneration Standards").

124 *Id.* (translating § 6(3) on mediation procedures).

125 *Id.* (translating § 36(4)).

126 Cornish, *supra* note 32, at 11.

127 *Id.* at 7-8 (enumerating the issues and noting that "[e]xpert legal practitioners must be at hand to guide both sides through the legal maze which the French law establishes").

128 ANDRE SCHIFFRIN, THE BUSINESS OF BOOKS 7 (2000) (reporting 70,000 new books a year in the U.S., around the same in England whose population is 20% of the U.S.'s, 20,000 in France with one-fourth the population and 13,000 in Finland).

France believe that its law provides greater security to authors, and has proven beneficial to the development of French culture.[129]

The economics of the French approach are unclear. As I discussed above, lump-sum payments may make good economic sense for both the author and publisher, such that prohibiting them would likely not be advisable. The German approach raises antitrust concerns. Without an antitrust exemption (which the German law ostensibly provides), groups of authors and publishers in the U.S. could not join together to set "common remuneration standards." Even if one decided that such a combination would be advisable and an antitrust exemption were forthcoming, both authors and publishers might prove uninterested: Authors are generally wary (with some exceptions) of organizing collectively and may be too numerous to do so effectively, and publishers would likely prefer one-on-one negotiations conducted without any background list of reasonable remuneration standards. In other words, a constituency for passing such legislation appears lacking. Nevertheless, however, legislation rather similar to the German law has been proposed in the U.S. I discuss its feasibility in Part III below.

The measures other countries have taken to protect authors indicate likely at least in part their belief that something is wrong in the bargaining process between authors and publishers. As the historical analysis above revealed, the U.S. ostensibly agrees, but has not been as willing as other countries to regulate explicitly the terms of contracts between authors and publishers. The following considers whether anything in market structure has changed to disadvantage authors further. It concludes that making a causal link between whatever concentration exists and a decline in authors' bargaining power that threatens copyright law's goals is difficult, but some reason for concern exists.

II. THE TWENTY-FIRST CENTURY COPYRIGHT LANDSCAPE

The premise is simple: "Keen competition between publishers will enable . . . authors, whose copyright monopoly they are anxious to share, to make better bargains."[130] The data, though, is more ambiguous.

A. Industry Consolidation

1. The Copyright Industries

According to one author, "[i]n 1998, around two-thirds of all exploitation of copyrighted works throughout the world were in the hands of" five

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[129] Cornish, *supra* note 32, at 8 (discussing the views of M. Vessilier-Ressi who argues that freeing authors from the need continually to seek funding and/or other jobs, permits them to create and advance culture).

[130] Plant, *supra* note 21, at 191.

or six companies.[131] This aggregate view, however, obscures the distribution across different copyright industries.

Only around thirty-four cities in the U.S. have competing daily newspapers, and only a few national papers exist.[132] Economies of scale help to explain this phenomenon. Fixed costs in the industry are high and variable costs low such that, for example, "a newspaper with 50,000 circulation is far less expensive to publish than two newspapers each with 25,000 circulation."[133] The effect on prices to consumers and advertisers is unclear, with some arguing that "'consumers pay higher prices under monopoly with no compensating increase in quality or quantity of product,'" while others note that rates to advertisers may or may not increase.[134] The return on revenue varies widely across firms and from year to year, but in 1997, the median net profit margin of thirteen of the largest publicly held newspaper companies was around twice as high as that of the median for the *Fortune 1000* companies.[135] Operating margins historically ranged from 10–15%, but have reached 20–30% more recently in the case of papers owned by publicly traded companies.[136]

In contrast to the newspaper industry, the magazine industry might be described as "monopolistically competitive."[137] Magazines number in the thousands but can be grouped by topic, and within a particular topic category, only a few publications may compete.[138] A single publisher likely offers a number of titles to take advantage of economies of scale.[139] Entry barriers are generally low because magazines often contract out typeset-

131 Nordemann, *supra* note 116, at 1041, 1041-42 (setting forth the shares of Time Warner, Walt Disney, Viacom, Bertelsmann, and News Corp., and noting that Sony should be included but its numbers were unavailable).

132 BENJAMIN M. COMPAINE & DOUGLAS GOMERY, WHO OWNS THE MEDIA? 512-13 (3d ed. 2000) (noting that "500 cities and towns had two or more competing newspapers in the 1920s, including 100 cities with three or more papers, by 1998 that figure had decreased to 34 cities, including those with federally mandated . . . joint operating agreements. Only New York . . . could maintain more than two").

133 *Id.* at 37.

134 *Id.* at 38 (discussing a study by John Langdon finding that concentration seems to increase ad rates but also acknowledging that the study itself was incomplete and that mergers can decrease rates because of increased circulation).

135 *Id.* at 4-6 (charting returns on revenue for 1997, and noting that publishing and printing ranked seventh in the *Fortune 1000*).

136 C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 881 n.200 (2002).

137 COMPAINE & GOMERY, *supra* note 132, at 519.

138 *Id.* at 519.

139 *Id.* at 178 ("There is a good reason why most magazines are published by multimagazine groups: a single periodical, especially one of limited audience circulation, must carry too great a burden of overhead to make economic sense.").

ting and subscriber services, and use the postal service as their delivery arm — their primary costs relate to content.[140]

In the recording industry, five firms dominate with 80% of the market.[141] "The majors block new entrants and control the contracts and distribution of virtually all the major music stars in the world . . . [The companies form] a strong oligopoly, able to maintain barriers to entry to protect their dominant market positions."[142] Rates of return associated with record distribution are difficult to obtain because the major firms are part of larger conglomerates with diverse interests. In 2000, the Federal Trade Commission (FTC) concluded that record labels and retailers overcharged consumers by almost $500 million between 1996 and 1999, suggesting supra-competitive returns at least during those years.[143]

Six studios dominate the motion picture business with 90% of the box office.[144] Three firms dominate radio broadcasting.[145] TV programs originate primarily with the Hollywood studios, and although a "vast array of cable channels" exists, most are owned at least in part by a major cable or media company.[146]

Data on the book industry is a bit speculative because many companies do not report sales data and large firms do not always break out income from publishing operations from their other interests.[147] Generally, it seems that a "loose oligopoly" characterizes publishing, with the top twenty firms accounting for 93% of sales, and thousands of other companies competing for the rest.[148] Historically, returns on revenue have aver-

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140 *Id.* at 159-60.

141 *Id.* at 485, 516-17 (identifying Universal Music Group, Warner Music Group (Time Warner), Sony Music Group, Bertelsmann Music Group, and EMI Group PLC as the "Big Five" of the music industry).

142 *Id.* at 344.

143 Jennifer Ordonez, *For Music Buyers, a Deadline Is Approaching to File Claims In a Big CD Price-Fixing Case*, WALL ST. J., Feb. 5, 2003, at D1, *available at* 2003 WL-WSJ 3958525 (describing also a proposed settlement under which consumers may receive $20 each to compensate them for purchases of music during the time when record labels threatened retailers with retaliation if they engaged in discounting).

144 COMPAINE & GOMERY, *supra* note 132, at 485, 514-19, (identifying Disney, Paramount Pictures (Viacom), Sony Pictures, Twentieth Century Fox, Universal Pictures and Warner Brothers (Time Warner) as the major studios).

145 *Id.* at 520-21 (explaining how the Telecommunications Act of 1996 relaxed ownership restrictions, triggering a wave of mergers such that by 1999, Hicks Muse, CBS, and Clear Channel dominated the industry, followed by Disney and Cox).

146 *Id.* at 210-14.

147 *Id.* at 63-64.

148 *Id.* at 135, 517-18 (stating that "through the 1980s and 1990s about half the books sold in the United States were published by a dozen companies"); SCHIFFRIN, *supra* note 128, at 3, 142 (giving the 93% figure and stating that

aged between around 5 and 10%.[149] As media conglomerates have bought out small, privately held publishing companies, the pressure to increase the rate of return has intensified.[150] The conglomerates generally believed they could obtain enhanced returns by eliminating duplicative overhead costs.[151] In the past, such efforts proved unsuccessful, and some large companies divested themselves of their publishing operations.[152] It remains to be seen whether today's conglomerates will follow suit. As I discuss below, some argue that so far, the result of the current consolidation trend has been a decline in the quality if not the quantity of work produced.[153]

2. Defining the Market

Simply listing the statistics of different copyright industries does not provide much information because one segment may compete with another. In other words, depending on cross-elasticities of demand, the relevant market for assessing concentration may encompass more than one or even more than a few of the copyright industries. Opinions differ widely on how to define the relevant market:

> In the media context . . . the F[ederal] C[ommunications] C[ommission (FCC)] has maintained for the last twenty years

Time Warner has around $31 billion in sales; Disney (Hyperion) $24 billion; Viacom/CBS (Simon & Schuster) $19 billion, and noting that around 53,000 publishers exist in the U.S.).

149 Herman, *supra* note 59, at 703; SCHIFFRIN, *supra* note 128, at 104, 118 ("For much of the twentieth century, trade publishing as a whole was seen as a break-even operation. . . . In American publishing since the 1920s, throughout periods of prosperity and depression, average profit for all of the houses was around 4 percent after taxes."). The book publishing industry is currently in a slump, with sales down 8% — "April [2003] was the 15th consecutive month that book sales lagged other retail sales." David Mehegan, *Off to Sell the Wizard: Ailing Book Industry Hopes for Lift from New 'Harry Potter,'* BOSTON GLOBE, June 19, 2003, at A1, *available at* 2003 WL 3402584.

150 SCHIFFRIN, *supra* note 128, at 103-09, 115 (describing how mergers increased the pressure for profit immediately on first publication and how Bertelsmann, after taking over Random House, stated it expected the company to make a 15% profit which would translate into an increase from a $1 million profit annually to $150 million).

151 JASON EPSTEIN, BUSINESS OF BOOKS 10-11 (2001) (listing the five publishing "empires": Bertelsmann, Holtzbrinck, Longmans Pearson, News Corp., and Viacom, and stating that "[b]y liquidating redundant overheads these corporate owners hope to improve the low profit margins typical of the industry").

152 *Id.* at 33 (noting that CBS, ABC, RCA, and MCA-Universal, all of whom acquired publishing houses in the 1970s and 80s, "eventually found them a burden on their balance sheets and disgorged them").

153 *See infra* Part II.A.3.

> that all information and entertainment media are part of the same product market, implicitly treating them as substitutable. The main rival view is that each media form is a separate product category, as the courts have usually held in respect to newspapers, and the Department of Justice has concluded in respect to radio broadcasting.[154]

Professor Baker, who views media markets as separate, notes:

> Not only will many consumers distinguish between the New York Times . . . Metro Section and a Disney movie, they will even distinguish it from the Los Angeles Times' Metro Section. A price change in the Disney movie or the LA Times will have little effect on their willingness to buy the [New York Times]. Many advertisers will likely also distinguish these media products — a department store in Los Angeles is not likely to find the movie or the [New York Times] to be plausible vehicles for advertising its weekend sale. Whenever products are not substitutable, and the provider of one cannot cheaply switch and supply the other, concentration should be evaluated for antitrust purposes in relation to the separate markets.[155]

Thus, even within a copyright industry, like newspaper publishing, there may be more than one relevant market.[156]

Some firms own assets in a number of industry sectors. For example, the media conglomerate Time Warner markets magazines, films, music, and books.[157] Others, like News Corp., Viacom, and Walt Disney market two or more such products.[158] The FCC's recent rule change permitting

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154 Baker, *supra* note 136, at 856.

155 *Id.* at 889.

156 Note also that content creation and content delivery are likely separate products. *Id.* at 887-88 (arguing that "content and content delivery are very different, non-substitutable products. . . . Imagine that delivery is much more expensive than content creation, that there are ten roughly equal sized 'media' firms, with nine providing delivery and only one . . . engaged in content creation. With each having about ten percent of the revenue . . . [c]ompetition would appear robust. Clearly, however, one company controlling all content bespeaks monopoly. Problematic concentration likewise exists if there are too few distributors and entry into the distribution business is difficult").

157 COMPAINE & GOMERY, *supra* note 132, at 482 (noting also that Time Warner owns cable assets and provides electronic information services).

158 *Id.* (News Corp. owns magazines, broadcast and cable TV assets, and produces and distributes films and books; Viacom owns broadcast and cable TV assets, film production, distribution and exhibition assets, and publishes books; Disney owns magazines, broadcast and cable TV assets, radio stations, and produces and distributes films).

the same firm to own both a daily newspaper and a radio or TV station in the same market may lead to an increase in common ownership across industry segments.[159]

That market definition in an antitrust sense may not capture all of the relevant policy concerns further complicates the analysis. As Professor Baker explains, if society values diversity of opinions, opportunities for speech, lack of "political or cultural manipulation by one or a few firms," or "broad distribution of opportunities for democratic discursive participation," it may have a different view of what level of concentration is acceptable than conventional antitrust analysis.[160] A firm that lacks power over price can nevertheless have power over content, raising concerns of how to ensure a diverse "marketplace of ideas" essential to democracy.[161] As conglomerates use the same content in a number of different channels of distribution, diversity may decline: For example, a newspaper may buy a radio station and use the same news inputs in both businesses.[162]

Professor Baker and others raise these concerns to explain their advocacy for government regulation of the media and/or a weakening of intellectual property rights.[163] Indeed, some nexus likely does exist between strong intellectual property rights and whatever concentration exists in the industry.

Here, however, I accept the level of intellectual property rights as given and consider how the gains from their exploitation should be divided

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159 *See* Peter J. Howe, *Curbs Eased on Media Ownership*, BOSTON GLOBE, June 3, 2003, at A1 (stating that the "FCC lifted a ban on companies owning a newspaper and television station in the largest 80 percent of US media markets. And it raised the cap on TV station ownership to allow companies . . . to own stations reaching 45 percent of Americans, up from 35 percent.").

160 Baker, *supra* note 136, at 890-91.

161 *Id.* at 891-94 (explaining that different content can be produced for the same costs, but the consumers actually purchasing such content will differ depending on its quality, and providing three hypotheticals to show how different policy concerns lead to different views of media mergers). As Baker notes, "[I]n economic terms, . . . power [over content] describes a situation where the market does not lead [firms] to have an incentive to make choices that necessarily best satisfy consumer desires (at least to the extent that the forms are unable to price discriminate . . .). And even if the incentive was present, the competition does not dictate that the firm respond. Second, these market failures merely exacerbate any democratic concern with the distribution of uncontrolled power over information or public opinion created by the merger." *Id.* at 894.

162 *Id.* at 893-94.

163 *See generally id.* (advocating government regulation of the media industries); Yochai Benkler, *Intellectual Property and the Organization of Information Production*, 22 INT'L REV. L. & ECON. 81 (2002) (arguing that strong intellectual property rights lead to concentrated production and a lack of diversity in content).

between authors and publishers. How bargaining power is allocated between authors and publishers does also have implications for users. Generally, at least some of authors' interests are more aligned with users than publishers. Some argue that "[t]he disparities in [author-publisher bargaining power] . . . result[ ] in contractual arrangements by which all rights [a]re acquired, thereby causing original creators to lose control over their artistic output. As a result, this output may become less available to the public, and to its creators to exploit further."[164] Also, depending on their contractual arrangements, authors may prefer a higher output at lower prices than publishers.[165] Further, some authors of "good" books have so little bargaining power that their works may never be published, depriving the public of the knowledge contained therein. Thus, enhanced bargaining power may lead authors to seek at least some contractual terms that benefit the public as well. But to the extent that the publishing market is concentrated, they may lack the wherewithal to do so.

The preceding market view, however, focused primarily on a demand side perspective. This viewpoint, while probative of the conditions consumers face, may incompletely describe the supply side in which authors participate. Authors may have a different view of the cross-elasticity of demand than buyers of copyrighted works. For example, even if consumers viewed magazines, newspapers, and books as perfect substitutes, freelancers likely would not view the three types of publications as competitors to the extent each requires a different type of writing. Freelancers sometimes also seek to communicate their works to particular target audiences that may not perfectly overlap across media. At least some authors, then, likely generally view the copyright industries as separate markets regardless of whether some level of cross-elasticity of demand exists from the consumer perspective. Thus, concentration within particular copyright industries may indeed weaken authors' bargaining power.

Note also that concentration in certain distribution markets or agreements between publishers and distributors may also affect authors' returns. For example, chain "superstores" now dominate retail bookselling and impose conditions on publishers who then have less of a surplus to share with authors.[166] The FTC's investigation of the record labels dis-

164 THE ONE HUNDREDTH AMERICAN ASSEMBLY, ART TECHNOLOGY & INTELLECTUAL PROPERTY, Feb. 7-10, 2002, at 19.

165 Plant, *supra* note 21, at 184-85 (stating that authors generally seek a "larger edition and lower selling price than will pay the publisher best," and setting forth a diagram graphing the two parties' interests).

166 SCHIFFRIN, *supra* note 128, at 124-25 (stating, "the chains have grown dramatically in the United States and are now selling over 50 percent of all books available for retail. Independent bookstores are down to 17 percent . . . [T]he chains are now able to demand almost whatever terms they wish from the major publishers"); *see also* COMPAINE & GOMERY, *supra* note 132, at

cussed briefly above highlights the fact that agreements between publishers and retailers may adversely affect authors as much as consumers by limiting dissemination. Thus, while largely outside the scope of this Article, conditions in markets downstream from content creation and agreements between publishers and intermediaries can affect content creators themselves, and make conditions more or less conducive for optimal levels of production of copyrighted works.

However, even if a particular relevant market were concentrated, authors might still receive their "fair share" of the surplus if, in effect, they met consolidation with consolidation.[167] For example, as noted earlier, authors who have organized in some sort of collective have been able to bargain more effectively than those who have not. Thus, authors participating in the movie and music industries where they have somewhat powerful representatives seem to do reasonably well even though the industries themselves are fairly concentrated. This is not to suggest, however, that screenwriters and composers find ready opportunities to have their works produced and distributed. Both still have to attract a publisher's attention — no easy task — then agree to the prevailing industry contracts.

Nevertheless, such groups seem to do better than freelancers who negotiate for themselves. These writers cannot match the bargaining power of newspapers and even magazines. This is unsurprising. The number of would-be authors is likely quite large in part because barriers to entry are low and at least the newspaper market is fairly concentrated.

3. Market Structure and Copyright Law's Goals

None of this matters very much (at least from a copyright law perspective) if copyright's goals are not implicated. Unfortunately, while those goals are easy to state, defining the optimal quantity and quality of copyrighted works is quite difficult. Moreover, questions of cause and ef-

122-33 (describing the bookselling trade in detail, and noting that "[b]y the mid-1990s, Borders, Barnes & Noble, Crown and Books-A-Million were selling half of all books sold" and that "[t]he superstores of the 1990s signaled an end of an era of independent bookstores"); EPSTEIN, *supra* note 151, at 15 (noting that Barnes & Noble and Borders "dominate[ ] the retail book trade"). Amazon.com, the major on-line seller arose to challenge the superstores, forcing them to establish on-line presences as well. COMPAINE & GOMERY, *supra* note 132, at 131-33.

167 This is not to suggest that users of copyrighted works do or should view this situation as optimal. They may be paying higher prices for copyrighted works in some areas because of market consolidation. My point is not that no worries exist when authors meet consolidation with their own combination, but that my interest here is on markets in which authors lack bargaining power.

fect abound — to the extent one could reliably determine a sub-optimal copyright state, could it be traced to market concentration and disparities in author/publisher bargaining power? The evidence is ambiguous, although indicators other than concentration raise questions about whether even a more competitive market would produce the optimal quality and quantity mix and appropriate compensation for authors.

For example, externalities may prevent the market from operating efficiently. To the extent that a copyrighted work contributes to social discourse, it confers positive externalities on society that the publisher may not recapture, leading it to undervalue the work.[168] Moreover, the non-efficiency values discussed briefly above may not be adequately quantified and reflected in a strict efficiency analysis.

In the book publishing industry, publishers formerly used some of their profits to underwrite production of "serious" literature likely to generate positive externalities and contribute to diversity of content.[169] As the industry has become more concentrated, however, pressure to generate higher rates of return has increased. This "doesn't sound radical or wrongheaded, but a downside has indeed developed — editors are discouraged from taking risks for literary or artistic rationales that are ahead of the market curve or even with an eye toward longer-term development and growth of a particular writer's readership."[170] As Andre Schiffrin puts it:

> While fiction and poetry may well be written by authors working full-time elsewhere, authors of important works of nonfiction require advances or some other form of assistance to enable them to undertake their research. It is in this area of important work that we have seen the sharpest decline. The "unborn Milton" of

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168 *See generally* Baker, *supra* note 136, at 879.

169 *Id.*

170 Herman, *supra* note 59, at 702; *see also* SCHIFFRIN, *supra* note 128, at 104 (stating that the new focus on the bottom line has led to the elimination of "a vast number of important works from catalogs" and a declining willingness to publish the works of the untested). Additionally, bestselling authors no longer provide sums to subsidize new works because the bargaining power of their authors permits them to extract deals from publishers that leave little to nothing to add to the publisher's coffers. *See* EPSTEIN, *supra* note 151, at 19-20 ("To retain [such] powerful authors publishers already forgo much of their normal profit, or incur severe losses, by paying royalty guarantees far greater than can be recouped from sales."); SCHIFFRIN, *supra*, at 106-08 (discussing how editors are measured by sales, making them "less willing to take a gamble on a challenging book or a new author"). Epstein does note that the reward the publishing companies receive on bestsellers is, in fact, commensurate with their efforts, because they no longer offer much in the way of editorial services to such authors. EPSTEIN, *supra*.

> Gray's *Elegy Written in a Country Churchyard* has been replaced by the "unborn Foucault," the thinker who does not have the wherewithal to write the book that will change the way we think, which may happen even if only a small number of people buy it.[171]

Some diversity may thus have been sacrificed because publishers are less likely to risk producing a book by an untested author: "This has necessarily led to a marked conservatism, both aesthetic and political, in what is chosen: a new idea, by definition, has no track record."[172] Pressure from large booksellers to produce works with wide appeal further pushes editors toward seeking bestsellers rather than riskier works.[173] Products thus tend to look quite similar as authors replicate commercially successful formulas at the behest of publishers, or on their own initiative in the hopes of securing a contract. The amount of "serious" non-fiction declines — for example, "in both the 1992 and 1996 presidential campaigns, virtually no books were published for the general reader that dealt with the big issues facing American citizens."[174]

Professor Baker argues that as in book publishing, "market dynamics" push newspaper publishers to cash out profits, and that the high profit demands of publicly traded newspaper owning corporations have led to "the steady deterioration of journalistic quality."[175] His research indicates that the public benefits from higher quality when independent owners rather than publicly traded firms own newspapers.[176] Others disagree, citing studies that show no relationship between competition and either quality or diversity of content.[177]

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171 SHIFFRIN, *supra* note 128, at 104.

172 *Id.* at 106.

173 *See generally id.* at 125-26 ("The major chains focus their very considerable resources on best-sellers, to the neglect of other titles, which in turn affects the decisions of publishers," and noting that one bookseller described "company guidelines mandat[ing] that if a book did not sell a certain number of copies per day during the first week on display, it would be moved to the back of the store and then returned . . . . [T]he percentage of books returned has crept steadily upwards from around 20 percent in the 1960s to over 40 percent today.").

174 *Id.* at 135 (arguing also that to the extent major issues were discussed, the presentation favored right-wing views because the books were subsidized by conservative foundations).

175 Baker, *supra* note 136, at 881.

176 *Id.* at 882.

177 COMPAINE & GOMERY, *supra* note 132, at 44-45 (giving several reasons why competition may not influence quality including that: (i) mass marketing requires time-tested formulas of presentation; (ii) editors share common training backgrounds; (iii) editors feel particularly responsible when theirs is the only paper in the area; and (iv) certain minimum standards are re-

The evidence is thus ambiguous and somewhat incomplete because it does not identify what publishers (or the shareholders to whom they may return profits) are doing with any increased returns: It is possible they devote the profits they earn to activities as valuable as producing more copyrighted works. Nevertheless, there is some support for the notion that concentration in either the publishing or distribution markets has both further decreased at least some authors' bargaining power and led to a decline in the production of quality works and less content diversity.

Whether one perceives a causal link among whatever concentration exists, authors' bargaining power, and declining quality may depend ultimately on one's view of market efficiency. Indeed, analyzing this issue requires resurrecting the historical debate set forth in Part I above — are authors under-compensated or is the market simply rewarding those who meet consumer demand and weeding out those who do not? Authors lack bargaining power when consumers do not value their works. In other words, "[t]he market . . . is a sort of ideal democracy. It is not up to the elite to impose their values on readers [by defining quality apart from market transactions] . . ., it is up to the public to choose what it wants . . . . [Any] higher profits are proof that the market is working as it should."[178]

Others would argue that market theory cannot be applied to the "dissemination of culture."[179] One does not, however, have to reject market theory to be concerned about leaving the direction of book publication solely to market decisions since those decisions may be flawed because of defects in the market itself. As noted above, market signals may be inaccurate because they fail to account for the positive externalities associated with certain types of works and to quantify non-economic values. The market that erroneously undervalues certain works necessarily undervalues the authors who write them.

Would results differ if the book publishing industry had fewer conglomerates? Perhaps. Certainly, some commentators argue vigorously that the public is best served by a number of relatively small, independent publishing houses.[180] Such firms do not face the same profit pressures as conglomerates which are often publicly traded. Additionally, profit pressures may always be higher in consolidated entities. When buying a publishing house, the purchaser may mistakenly overvalue the firm and, in any event, will have to recover whatever money it spends to purchase the firm's goodwill. Also, depending on the structure of the combined firm,

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quired to satisfy both customers and advertisers, and noting that quality may be measured by a number of different variables).

178 SCHIFFRIN, *supra* note 128, at 103.

179 *Id.*

180 *See generally id.* at 103-28.

pressure may mount to subsidize other parts of the operation with whatever profit can be squeezed out of publishing.

Consolidation in the book industry, then, may indeed have caused a decline in certain authors' bargaining power leading to a decline in quality works. However, if the market cannot reliably measure quality, it becomes exceedingly difficult to conceive of ways to approach the problem. As I discuss in Part III below, certainly antitrust regulators should police the copyright industries perhaps even more vigorously than others. But equally certainly, the debate would benefit from more research into the optimal structure of the copyright industries.

Another area in which there appears to be a nexus among concentration, declining bargaining power, and declining quality is that of freelance writing for newspapers. Some freelancers have left the profession because they can no longer make a living by writing. They take with them the specialized knowledge they've developed in their area of interest.[181] Because the newspaper market is fairly concentrated, the publications may not be as responsive to quality concerns.

The effect of concentration or a decline in authors' bargaining power on quantity is difficult to determine. Quantity in absolute terms varies over time, and the optimal level is indeterminate.[182] Interestingly, though, U.S. "title output" is lower per capita than a number of other countries like England, France, and Finland.[183] This lends some support to the contention that there may, in fact, be a causal connection between concentration and a failure to achieve copyright law's goals in the book publishing industry.

B. Electronic Technology

One might expect electronic distribution technologies to solve any problems of bargaining power disparities. Electronic distribution technologies could provide competitive alternatives for authors to use in negotiations with publishers.[184] In other words, market concentration may, in fact, decrease, because cross elasticity of demand may increase as, for ex-

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181 *See* Smith, *supra* note 63, at 31 & n.183 (arguing that "without freelancers, publications would be of much lower quality, given that freelance writers are highly specialized. This specialization, while contributing to the pool of knowledge and information available to the public, makes it harder for freelancers to find work, which further increases their dependence upon publishing companies").

182 *See, e.g.*, COMPAINE & GOMERY, *supra* note 132, at 71 (showing a decline in U.S. new title output from 46,193 in 1992 to 40,584 in 1994). By the late 1990s, however, new titles reached about 70,000 per year. *See supra* note 128.

183 *See supra* note 128.

184 Such technology may also give publishers leverage in dealing with distributors.

ample, the Internet can support "newspapers, books, records [and] television."[185] The reality, though, is that it is simply too soon to tell. While electronic technology including the Internet does provide new avenues of distribution that allow virtually anyone to express him- or herself, it remains unclear how the professional author who makes a living from writing can either do so electronically or leverage technology into better deals with traditional publishers. To date, it seems that electronic distribution has offered more options to authors of books than freelance writers of newspaper and magazine articles.

One interesting development giving some authors hope is the emergence of self-publishing firms which began in the late 1990s.[186] These companies charge authors for publication and publication services, with a break even sales figure of around 171 books.[187] The books may be available in hard copy and/or electronically.[188] "Unlike so-called vanity presses, self-publishers let the authors keep the rights to their books."[189] If an author can afford it, he or she may self-publish and, if the book is successful, attract a traditional publisher for the next creative effort.[190] Indeed, some self-publishing authors who can show sales of their book can obtain contracts not only for future works but even for further exploitation of their initial effort.[191]

Early in 2001, Random House announced a 50% royalty for its authors on net revenue from e-books, up from the previous e-book royalty of 15%.[192] The company emphasized the importance of "authors and publishers shar[ing] the economic interest," and indicated the 50/50 split would be the standard in most contracts.[193] While authors viewed this as a good deal,[194] e-books are not yet big enough sellers to generate significant revenue for either publishers or authors, and a number of companies went

185 COMPAINE & GOMERY, *supra* note 132, at 575.

186 Meredith Kesner, *Self-publishing Can Help Get Words Out*, CENTRE DAILY TIMES, May 11, 2003, at 9, *available at* 2003 WL 3271791.

187 *Id.* (discussing 1stBooks Library).

188 *Id.* (describing the services different companies offer, including print on demand, copy editing, and marketing).

189 *Id.*

190 *See id.*

191 Stephen Phillips, *Doing It for Themselves*, BOOKSELLER, Feb. 14, 2003, at 22, *available at* 2003 WL 12891201 (describing such cases and the large sums associated with them, although noting also their rarity and that self-publishing works better for some genres than others).

192 Calvin Reid, *Random House Unveils New Royalty Agreement for e-Authors*, PUBLISHERS WEEKLY, Nov. 13, 2000, at 9 (stating also that Barron's Educational Series shares revenue from e-books equally with its authors).

193 *Id.*

194 *Id.*

out of business or restructured in 2001.[195] In 2002, though, Random House's e-book sales doubled.[196]

Authors were able to use their prior book contracts as leverage in extracting royalty arrangements for electronic distribution. Although these contracts did not usually give authors rights to sell their works in competition with their publishers, neither did they give publishers rights to electronic versions:

> This means that neither authors nor publishers may sell electronic editions of the majority of backlist titles until the parties reach a new agreement. In negotiating such an agreement authors and agents hold the stronger hand, reflecting not only the greater proportionate value of their contribution to the electronic product but also the relative strength of their bargaining position. Publishers cannot afford ethically or financially to withhold the large part of their backlists from electronic distribution, but most authors can afford to wait their publishers out while their agents negotiate for them as a group.[197]

Whether authors entering into contracts for entirely new works will receive meaningful compensation for electronic rights is a different question, with the answer still unclear.[198]

Freelance writers who contribute to newspapers and magazines have found it much more difficult to benefit from electronic distribution. Like the contracts of book authors, freelancers' contracts did not provide publishers with rights to make contributions available electronically. But freelancers' bargaining power is considerably less. Freelancers contribute only a part of say, a newspaper, permitting publishers realistically to threaten to withhold their contributions from electronic distribution. Furthermore, the newspaper industry is more concentrated than book publishing, leaving freelancers with fewer options. Rather than sharing whatever "pie" exists from electronic distribution, many editors have requested that freelancers now enter into work-for-hire or all-rights agreements that transfer

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195 Jim Milliot, *Publishing in 2001: Shake-Outs, Downsizing, and E-Book Disappointments*, *in* THE BOWKER ANNUAL, at 18-20 (47th ed. 2002).

196 Linda Knapp, *Technology Improving Readability of eBooks*, SEATTLE TIMES, Apr. 26, 2003, at C6, *available at* 2003 WL 3630678 (noting also that Simon & Schuster's e-book sales increased by "double-digit[s]").

197 EPSTEIN, *supra* note 151, at 25.

198 *See* Andrew Dolbeck, *A Paperless Novel Concept: E-Publishing*, WEEKLY CORP. GROWTH REP., Feb. 25, 2002, at 11,777, *available at* 2002 WL 10313947 (describing a warning issued by the Authors Guild to its members about an AOL Time Warner contract that "presented 'substantial legal risks and the loss of literary rights for little pay,'" including minimal royalties and rights extending beyond electronic publication).

electronic rights to already published as well as future works for no additional compensation.[199] Indeed, the inability of freelancers to derive any meaningful return from electronic exploitation of their works has been a rallying cry for those who seek legislative changes to enhance authors' bargaining power.[200]

Generally, it is too soon to know the effect of electronic distribution on authors' relations with publishers. It will likely take a few years before demand for e-books increases to a point at which authors and publishers receive non-trivial returns. Self-publishing, though, has and will increase the quantity of works available, and perhaps also their quality. Self-publishing, at least in the short-term, however, is not a viable strategy for those who rely on their writing for income. Certainly, at least some who make a living by writing have been squeezed out of the market because their publishers have refused to pay for electronic rights, and they lack the wherewithal to exploit the technology themselves.

If writers could find ways to turn electronic distribution into a real competitive threat to their traditional publishers, they could substantially increase their bargaining power. To date, though, a lack of funding and reliable tracking mechanisms, the difficulty of distinguishing oneself on the Internet, and the general reluctance to pay for content on-line has made it difficult for many print writers to use electronic distribution as a bargaining chip.

III. EFFORTS TO ENHANCE AUTHORS' BARGAINING POWER

Ultimately, with the empirical evidence ambiguous and tenable arguments on both sides, whether one supports steps increasing authors' bargaining power depends on how much one values maintaining an authorial class that makes its living independently by writing. The higher the valuation, the more likely one is to support measures targeted toward increasing authors' bargaining power, believing that such steps will move the system closer to the optimal quality and quantity mix of copyrighted works.[201]

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199 O'Rourke, *Bargaining in the Shadow of Copyright Law*, *supra* note 78, at 605, 605-06 & n.3.

200 *See infra* Part III (discussing briefly a bill intended to increase freelancers' bargaining power by enabling them to form collectives more easily).

201 *See* Cornish, *supra* note 32, at 12 (querying why there is any reluctance to buttress the protection of authors if copyright law derives its force from the act of creation, stating that society could choose instead a producers' investment law, and making the observation that "[w]hether you think the question is of much importance will in the end turn on your view of the significance of lively cultural expression, at various social levels, to twenty-first century existence. It is easy enough to take a jaundiced view of the pretensions of the authorial crafts: the grandiloquent voices that lead each high art as it seeks new fashions . . . the absurd earnings of the chart-toppers

Here, I review some proposals to use copyright law, labor law, contract law and/or some mix thereof to enhance authors' returns. Ultimately, I believe that the most effective approaches will come not from new legislation but rather from vigorous antitrust enforcement in the copyright industries and use of the common law to police the most egregious excesses. I do suggest that the U.S. adopt at least one limit on freedom of contract and monitor the new German law to determine whether its approach is desirable. Regardless of any steps legislators may take, authors should also seek to help themselves by learning about their rights under the law and seeking competitive outlets for their expression.

A. Changes to the Copyright Law and Some Limits on Copyright Licenses

1. Termination of Transfers

One organization, the American Assembly, has suggested that Congress amend the Copyright Act's termination of transfer provisions by "for example . . . provid[ing] for their vesting after a shorter period of time.[202] Certainly, shortening the time period would open the possibility of termination up to a larger number of authors.

Perversely, however, authors may do less well if the time period were shortened. Publishers would seek more work-for-hire agreements to avoid the risk of termination. Also, as I noted above, cognitive limitations cause authors to overvalue their works, leading them likely to overvalue whatever termination rights the statute gives them. Shortening the term would permit publishers to offer even less initially than they do now, and authors overvaluing the termination right will take that amount with only a dubious prospect (depending on the length of time before termination may be effected) of future income. Thus, many authors — particularly freelancers whose works often have an unusually short "shelf life" — would not receive any value later to compensate for that decline in the up-front payment.

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of the pop scene, the fat cat image of some professional promoters of the authors' cause . . . . I hope, however that you see these irritations are easily outweighed by the richness which flows from literary and artistic creativity to all of us lucky enough to live above starvation level").

202 ART, TECHNOLOGY & INTELLECTUAL PROPERTY, *supra* note 164, at 38. The American Assembly is a group established by Dwight D. Eisenhower to assess U.S. policy, and it has recently been considering how to "facilitate creators being able to share in the value of their creations" particularly as technology presents new opportunities for exploitation of copyrighted works. *Id.* at 38, 60.

2. Reversion of Copyright After Non-exploitation

The Assembly has also suggested something similar to shortening the time to terminate transfers — exploring "[l]egal or contractual provision for the reversion of the copyright to the creator where the work has lain fallow for some time."[203] Thus, an author would have a right to terminate a transfer based either on the lapse of the statutory time-frame (currently thirty-five years) or passage of time (something less than thirty-five years) plus non-use by the licensee. Presumably, this right would be inalienable, or publishers would simply require contractual waivers. Presumably also, however, like the termination right, this new right would not apply to works made for hire.

While an interesting suggestion, the effect on authors is far from clear. The same shortcoming associated with shortening the termination period — publishers' seeking more work-for-hire agreements — applies equally to this proposal. Also, it raises some interpretive issues. For example, what does it mean to lay "fallow," and may the parties define that term by agreement?

Also, it may be unlikely that this approach would provide the author with much additional income. If a publisher is generally economically rational, it would have exploited the work if it had value. Thus, while a reversion might make the creator "feel" better, it seems unlikely to enrich him or her except in unusual circumstances. And the risk of reversion may give publishers an excuse to pay less initially for the work even though the right itself may be valueless.

On the other hand, because quality is so difficult to measure, and predicting market demand highly susceptible to error, such a provision may work in some authors' favors. Publishers may fail to exploit a work that does have value simply because they mistakenly believe otherwise. By providing for reversion of the copyright to the creator, the chances that the work will be exploited increases. Such a provision may help even some subset of freelance writers (a small subset to be sure if the reversion right applies only in the absence of a work-for-hire agreement) — those whose articles are not time sensitive. Usually freelancers' works are published fairly quickly after creation in newspapers or magazines. If the work is not further exploited after some period of time, the freelancer could re-use it and obtain additional income. But, of course, if the article is about news of the day, a reversion right would not be worth much, if anything. In short, whether such legislation would be desirable depends on whether the benefits it would provide outweigh the costs of its administration, and whether publishers will find a way to define "lay fallow" cre-

[203] *Id.* at 38.

atively, and so effectively contract around the obligation to return rights if they do not market the work.

3. Limiting Contractual Terms

As I discussed above, some other countries place affirmative limits on the terms of contracts licensing copyrighted works such as, for example, severely restricting lump-sum payouts and banning clauses transferring future rights.[204] The U.S. should reconsider its reluctance to interfere with contracts not by banning lump-sum payouts but by holding unenforceable clauses transferring rights in media not yet developed at the time of contracting.

a. Lump-sum Payouts

The American Assembly also recommended considering steps to "[a]ssure creators a percentage or continuing share of the revenue generated by their works."[205] To the extent the Assembly means to suggest adoption of the French approach of generally banning lump-sum buyouts altogether, its proposal is overbroad. As I noted earlier, a lump-sum payment may be perfectly sensible for both parties.[206]

The Register of Copyrights made a more interesting proposal over forty years ago. The Register recommended "placing a time limit on transfers that do not provide for continuing royalties [to] afford a practical measure of assurance that authors or their heirs will be in a position to bargain for remuneration on the basis of the economic value of their works."[207] The Register "suggested that a period of twenty years would be ample to enable a lump-sum transferee to complete his exploitation of the work and to realize a fair return on his investment. . . . We do not believe that this time limit would hamper exploitation."[208] The Register's position thus appears to have been a compromise between the French approach and unfettered freedom of contract.

However, if the author has no obligation to negotiate a reasonable royalty after the twenty years, the new rule would simply effectively

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204 *See supra* Part I.C.

205 ART, TECHNOLOGY & INTELLECTUAL PROPERTY, *supra* note 164, at 38.

206 *See supra* Part I.B. The Register of Copyrights agreed that lump-sum payouts are not insidious in themselves: "Transfers are made in a wide variety of situations; terms that may be unfair in some cases may be appropriate in others. . . . [W]e would not forbid lump-sum transfers. In some situations — for example, where a contribution is published in a periodical, or where a novel is converted into a motion picture — the payment of a lump sum may be the only or most practical way of remunerating the author." REG. REP., *supra* note 81, at 93.

207 *Id.* at 93.

208 *Id.* at 94.

shorten the time period for termination of transfers, which, as I discussed above, may not help many authors. If the intent is to obligate authors to agree to a reasonable royalty at the end of the twenty year period, publishers might find the proposal more palatable than if it functions simply as an "early" termination right. For many authors, though, the work will have so declined in value by the end of the twenty years that the new "right" would be worth zero. It might provide a justification for publishers to offer a smaller lump-sum payout initially than in the absence of the right. Thus, on balance, the proposal might not provide significant benefits to many authors.

b. Provisions Licensing Rights to Media Not Contemplated At the Time of the License

As I discussed above, courts construing contracts sometimes face the question whether a license confers rights to distribute the work via a medium unforeseen at the time of contracting.[209] Although they have, with some exceptions, been fairly generous in interpreting licenses to include such unanticipated means of distribution, publishers have found a simple expedient to litigating the issue — simply require a transfer of rights to "all media now known or hereafter developed" at the time of contracting. As a matter of contract law, the term would likely be enforceable unless unconscionable. In light of copyright law decisions that construe license terms expansively in this context, the chances of an unconscionability finding are slim to none.

But if the new means of distribution were unforeseen at the time of contracting, then neither the author nor publisher factored them into account in calculating the value of the original contract — or, if they did, were likely wildly off in their estimates. Certainly, particularly when the new, unanticipated media supplants demand for the one in which the work was originally licensed and sold, the author's contractual expectations would be thwarted if the original license were construed to extend to the new media. If consumers are willing to pay for the work in the new form, there is no reason why authors would not consent to the new use in return for some remuneration. And that remuneration would likely be set at a reasonable level — witness how authors were able to achieve a 50/50 split when amending contracts to include electronic rights.

Courts have sometimes noted that publishers' need for an incentive to develop new distribution technologies at least in part justifies decisions interpreting license grants to encompass new, unforeseen media.[210] But

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[209] *See supra* Part I.C.

[210] Random House, Inc. v. Rosetta Books, LLC, 150 F. Supp. 2d 613, 623 (S.D.N.Y. 2001) (citing early decisions expressing "concern that any ap-

publishers do not have to receive *all* of the value created by a new technology to have an incentive to develop it. Authors' incentives coincide with theirs — both would want further distribution of the work. Moreover, authors and others as well as publishers can be sources of innovation.[211]

Thus, refusing to enforce contractual terms transferring rights in future media should provide authors with a better bargaining position as technology develops without impairing publishers' incentives to develop such new systems. Since the technology would be truly unforeseen, it would not give the publisher much reason to offer less on the initial deal because it would be difficult convincingly to quantify the value of future exploitation. Refusing to enforce the term is a minor intrusion on contractual freedom and should lead to results consistent with copyright law's goals.

c. Enhanced Use of the Unconscionability Doctrine[212]

Contract law itself contains doctrines that limit contractual freedom. For example, a contract (or term thereof) may be unconscionable or one party may fail to exercise good faith in the performance or enforcement of the contract. Common law courts could incorporate considerations of copyright policy into the unconscionability and good faith inquiries, and, in so doing, over time provide rough guidance on the contours of reasonable contracting practices. As I have noted elsewhere, however, unconscionability likely will not offer uniform redress even to similarly situated authors, and courts are reluctant to hold contracts unconscionable solely because of inadequacy of price.[213] Furthermore, authors likely would be wary of challenging the contracts of publishers with whom they'd like to establish a relationship, and publishers can usually find a ready supply of writers to work under whatever terms they offer.[214] The new German law tries to avoid these problems by encouraging representative associations of authors and publishers to agree on common remuneration standards. I discuss below the feasibility of the German approach.

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proach to new use problems that 'tilts against licensees . . . gives rise to antiprogressive incentives' insofar as licensees 'would be reluctant to explore and utilize innovative technologies.'").

211 *See generally id.* ("In the 21st century, it cannot be said that licensees such as book publishers and movie producers are ipso facto more likely to make advances in digital technology than start-up companies.").

212 For a detailed analysis of the use of unconscionability to police overreaching terms in copyright licenses, see Smith, *supra* note 63, at 20-41.

213 O'Rourke, *Bargaining in the Shadow of Copyright Law*, *supra* note 78, at 628.

214 *See generally id.*

B. Labor Law Solutions

The American Assembly suggested also the appropriateness of developing "[m]eans by which freelance creators may more effectively negotiate their rights," but left what such means would be unstated.[215] Congress, however, in two recently proposed bills, has effectively tried to give that suggestion some content by granting antitrust exemptions to certain authors to permit them more easily to engage in collective bargaining. While this approach is worth further study, certain characteristics of authors may make it unlikely to succeed, and the costs of its implementation may outweigh its benefits.

The bills — one to enhance the bargaining power of freelance authors;[216] the other to assist playwrights[217] — took somewhat different approaches. The first sought to encourage freelancers to organize collectively by providing them with an antitrust exemption equivalent to that provided by the National Labor Relations Act (NLRA) to employees of a duly recognized bargaining unit.[218] The latter provided playwrights with an antitrust exemption for engaging in certain collective activity (like setting minimum terms and conditions) without referring to the NLRA.[219] Neither bill was enacted.

The playwrights' bill resembles the new German law[220] more explicitly than the freelancers' bill. The Senate version of the proposed legislation describes its purpose as "[t]o modify the application of the antitrust laws to permit collective development and implementation of a standard contract form for playwrights for the licensing of their plays."[221] That standard form contract may contain "minimum terms of artistic protection and levels of compensation," ostensibly akin to the German "common remuneration" standards.[222] Like the German law, the bill would permit representatives of playwrights and producers jointly to set contract standards.[223] Unlike the German legislation, the playwrights' bill does not provide an inalienable right to "reasonable remuneration" that can be enforced in court. The effect, however, might be similar — certainly, minimum compensation standards agreed to by representatives of playwrights

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215 ART, TECHNOLOGY, AND INTELLECTUAL PROPERTY, *supra* note 164, at 38.

216 Freelance Writers and Artists Protection Act of 2002, H.R. 4643, 107th Cong. (2002). The legislation also applied to freelance artists. *See id.*

217 H.R. 3543, 107th Cong. (2001).

218 *See* O'Rourke, *Bargaining in the Shadow of Copyright Law*, *supra* note 78, at 626-29 (describing the legislation).

219 *See id.* at 629 n.100.

220 *See supra* Part I.C.2.

221 S. 2082, 107th Cong. (2002).

222 *Id.* § 2(a).

223 *Id.*

would likely be considered reasonable or at least conscionable in any contract action challenging a license fee.

Should the U.S. adopt the German approach for all authors, or just playwrights, and/or freelancers? Elsewhere, I have argued that the U.S. should not enact legislation providing a right of reasonable remuneration to all authors because the scope of the problem may not justify such a broad solution.[224] What, though, if it were limited to just those areas where we can agree that lack of bargaining power creates a situation at odds with copyright law's goals? For example, the law could provide an antitrust exemption just for freelancers and publishers to set minimum compensation levels. I remain doubtful about such legislation for three reasons: (i) the reluctance of authors to participate in collective bargaining; (ii) the possibility of changing market conditions; and (iii) the precedential effect of providing antitrust exemptions for particular underempowered groups.

One author describes the futility of James Cain's attempts shortly after World War II to organize a group that would represent writers in contract negotiations.[225] Cain concluded that:

> writers were impossible to organize: 'Plumbers, yes, or scene shifters, or electric chair operators. In these will be found some sense, some comprehension of the solidarity they owe each other. But writers . . . are idiots and may be expected not only to turn on each other at every conceivable point, but to pursue any whacky idea that catches their fancy, regardless of whether it is in their own interest or not.'[226]

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224 *See* O'Rourke, *Bargaining in the Shadow of Copyright Law*, *supra* note 78, at 637.

225 WEBER, *supra* note 44, at 207 (describing Cain's attempt to organize the American Authors' Authority, and noting that writers objected to his plan requiring assignment of copyrights to the organization for licensing purposes).

226 *Id.* at 207-08. Others agreed, stating "In 1946, and continuing to this date, writers have suffered a crisis of professional identity, and this fact more than any other accounts for their singular lack of success in pressing their claims to a share of the profits from their work commensurate with their contribution. Unable to create a true profession, writers invariably fall back on the cult of the individual and wrap themselves in the quasi-sacred notion that writing is a 'calling.' Unable to organize to protect their own economic interests in a society that values those interests above all else, writers have become diminished players in the literary marketplace, and in American culture as a whole." *Id.* Although this dim view might overstate matters a bit, so many different groups of authors exist that it would be virtually impossible to bring them together in a manageable number of collectives. *See id.* at 252 (listing just some authors' organizations).

More recently, enough freelance photographers wanted "'nothing to do'" with a cooperative intended to provide services, including minimum price lists, to cause the venture to flounder.[227] As with the compulsory licenses that Congress enacted, minimums may wind up becoming ceilings on compensation, and it may prove exceedingly difficult to keep authors accustomed to high rates of pay in the collective. Yet, their participation would be essential because they already have bargaining power in negotiations with publishers. Put simply, forming an effective collective requires a commonality of interests, work product, and rates of pay that simply may not exist among authors.

It seems particularly unwise to enact legislation with such a dubious prospect for success when the market is changing rapidly. Electronic technology may yet open the way to another "golden age" of authorship. Furthermore, more analysis is required before passing legislation that practically invites any group feeling under-empowered to seek an antitrust exemption from Congress. Hard questions need to be answered. For example, does the existence of the social policy embodied in copyright law qualitatively distinguish authors from others who could strike better deals by organizing collectively? If not, then why not antitrust exemptions for other groups?[228] Creating such precedent with legislation that seems doomed to fail is not advisable. Instead, the U.S. should study the hard questions, monitor how the German legislation fares, and then decide whether an antitrust exemption for one or more authorial groups makes sense.

C. Antitrust Law and Self-Help Measures

Certainly, the antitrust authorities should vigorously enforce the law to police unlawful combinations and conspiracies in the copyright industries. Breaking up illegal arrangements should help both authors and users of copyrighted works. A complication arises because, as discussed above, conventional antitrust analysis may not take into account all of the relevant values, some of which are extremely difficult to quantify. As a result, antitrust law may permit combinations to continue that are inadvisable from the perspective of copyright law's goals.

Professor Baker argues that "whether or not in other areas of the economy antitrust law should be largely restricted to economic efficiency concerns and monopolistic power over pricing, it should not be so limited in the media arena."[229] Antitrust authorities should certainly consider

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227 *See* O'Rourke, *Bargaining in the Shadow of Copyright Law*, *supra* note 78, at 628.

228 For example, doctors could likely negotiate more effectively with HMOs if they could collectively fix prices.

229 Baker, *supra* note 136, at 917.

ways to incorporate copyright policy concerns into their analysis, although antitrust law's ability to help copyright law achieve its goals may be limited. The government should therefore also consider directly funding the production of the types of works that analysis reveals suffer from underproduction in the free market.

Professor Baker's insights also indicate that the FCC should re-think its decision permitting more cross-ownership of different media outlets.[230] From the perspective of authors, less cross-ownership would likely enhance their bargaining power.

Authors must also engage in some self-help. They should continue to educate themselves on their rights under the law, taking advantage of the groups that already exist to help them in this effort.[231] They should also seek creative ways of exploiting new distribution technologies to their advantage.

CONCLUSION

If copyright history reveals anything, it shows that "the more things change, the more they stay the same." Certain themes recur with notable frequency throughout history. In particular, tension persists between those who argue that the market works well and those who insist it does not. This debate will doubtless continue into the future, but certain current trends toward consolidation in the copyright industries give some urgency to tackling that debate head-on.

Congress has attempted to intervene in the market over the years to ensure a reasonable level of compensation for authors, but the measures it has adopted have largely been unsuccessful. New technology may work a major paradigm shift, empowering authors to compete directly with their traditional publishers, but it has yet to do so.

Rather than seeking broad changes, it may be preferable to identify areas most likely to threaten copyright law's goals and address them. Certainly, minimally, antitrust enforcers should take copyright law's policies into account when evaluating mergers and acquisitions in the media industries. Such market restructurings affect the bargaining power of authors and the quantity and quality of copyrighted products.

At the end of the day, some will advocate more far-reaching protections for authors than those I have suggested here, and others fewer or

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230 *See generally id.*

231 *See* O'Rourke, *Bargaining in the Shadow of Copyright Law*, *supra* note 78, at 637-38 (discussing efforts to educate creators, including the American Society of Journalists and Authors "Contracts Watch" database that explains which contractual provisions are acceptable and which are not and why, and providing advice and anecdotes).

none at all. Regardless, the conversation is one in which it is worthwhile to engage because, indeed, copyright law does shape much of our common experience.