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## *ARTICLE: The Author as Risk-Sharer*

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### **Reporter**

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\* Herchel Smith Professor of Intellectual Property Law, University of Cambridge, Q.C., L.L. D., F.B.A.. This paper is a version of the 15 Annual Horace S. Manges Lecture given at Columbia Law School on March 26, 2002. I dedicated the Lecture to two exceptional advocates of authors' rights in law, both of them academics with a long commitment to the cause. The first is Professor John Kernochan of Columbia Law School, among other things a composer and more-than-passing music publisher. His advocacy for authors has been exemplary, but I think of one action in particular. Nine years ago he saw to the publication of the English translation of a fascinating study of the legal and economic position of authors in France, Michele Vessilier-Ressi's *The Author's Trade: How Do Authors Make a Living?* (John Hargreaves trans., John M. Kernochan ed., Center for Law and the Arts, Columbia University School of Law 1993) (1982). The second dedicatee is Professor Adolf Dietz of the Max-Planck Institute for Intellectual Property in Munich, who has been a catalyzing figure in the whole complex movement to harmonize the copyright laws of the European Union. His hope is that in that process the author's right will be legally buttressed by a whole set of complementary measures, and that the status of the author will thereby be much enhanced. Professor Dietz is a fine proponent of the Continental European tradition (or traditions) of authors' rights, distinguishing authors in the sense of intellectual creators from those with only ancillary rights to copyright - recording and film producers, broadcasters, cable-casters and even performers. Coming as I do from one of the two common law jurisdictions of the European Union, I have affiliations with both the humane, European-minded Kernochan, just because he is a common-law cousin; and with Dietz, because, reluctant though the British sometimes are, we are in the European Union endeavor and must accept our place in molding institutions like copyright law for a single European market and who knows what beyond. Moreover, Dietz is a person whose stand for individual justice is always tempered by social concern.

### **Text**

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The Lecture contrasts the two-dimensional approach of Anglo-American copyright law, with its concentration upon the exclusive right to prevent users from engaging in infringing activities, and the tripartite linkages implanted in European laws on authors' rights. Focusing initially on those aspects of the author's personality which are accorded moral rights, some European laws have also developed protective measures against unfair exploitation of authors by the investors who collaborate with them in marketing their works. This aspect of the French Authors Rights Law of 1957 is outlined and then contrasted with new provisions introduced into German Law by amendments of March 2002. These need to be assessed

against the background of labor law and collective copyright practices. After taking account of such factors, their potential for transplantation even into common law systems deserves a fair hearing.

## I. AUTHORS AND EXPLOITERS

Most intellectual property is today in the white heat of controversy. Inflamed objectors treat IP as one of the most blatant outworks of greedy capitalistic [\*2] behavior, in which legal monopoly helps to secure returns to investors far in excess of their deserts. In this paper, I am not addressing the rights and wrongs of the prices which users of copyright - professionals like record companies and broadcasters, as well as ultimate consumers - have to pay for copyrighted material. Rather I am concerned with the relationship between the author (in the sense of a literary or artistic creator) and his publisher or producer - the entrepreneur who contracts to bring the work to the public in one or other form.

Authors and their entrepreneurs do market battle shackled one to another as they do battle with users. Their prime aim has to be to drive away pirates and freeloaders and to extract returns from licensees. But the publishing contract, which binds them together, can seem a clanking iron. Authors have long hated their publishers. As Professor Kernochan likes to remind me, Jan Sibelius received a lump sum of \$ 26.00 for his most popular composition, *Valse Triste*, from the German music house, Breitkopf und H<sub>a</sub>rtel - a sorry dance indeed. Richard Strauss so hated all the German music publishers that he composed a mordant song-cycle denouncing them one by one which lasts a whole 27 minutes. (But then for Strauss, longevity was often the soul of wit, rather than brevity.)<sup>1</sup> The leg-tie which chafes peculiarly is that the entrepreneurs have secured copyright in the name of the author but use their contractual deals to reap most of the advantages from the exclusive right. So it was in the beginning, with the clique of London booksellers who secured the Statute of Anne in 1710, and so no doubt it ever shall be; or at least until the Internet and MBA programs convert all the world's creative talent into producers and distributors of their own works.

Of course there have always been authors who would like to venture on to the market taking entrepreneurial risks. Signs of this inclination can be measured by the contracts they secure: notably over the form of their remuneration, but also over such matters as the term of years for which they grant rights to their exploiters. As to remuneration, certain types of solution have recurred through history. The gentlemanly writer, of course, regarded payment as beneath consideration. But the 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. The arrival of copyright made little difference to these practices and [\*3] the attitudes which they encapsulated. Before 1710, John Milton had shown that there were other possibilities: his contracts for each limited edition of *Paradise Lost* were priced at £ 5 and to that degree his returns were dependent on the market for his majestic poem. In the eighteenth century, Alexander Pope moved to the centre of the exploitive stage when he arranged publication of his rendering of *The Iliad* by purchasers paying advance subscriptions; there was then a split of the receipts with the bookseller which was much to Pope's advantage. Writing as a profession was becoming a respectable outlet for talent, and, said Dr. Johnson, "No one but a blockhead writes except for money."

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<sup>1</sup> Richard Strauss, *Der Kr<sub>a</sub>merspiegel* (Rummagers Revealed) from *Zw<sub>o</sub>lf Ges<sub>a</sub>nge f<sub>u</sub>r ein Singstimme mit Klavierbegleitung*, Opus 66 (Boosey & Co. 1959) (translation by the author). This was Strauss' riposte to the publishers Bote und Bock, when they pressed him to fulfill a longstanding commission for a song cycle. For decades the result was considered too bitter to be performed, let alone published; now, of course, it is an honor to have been given the treatment. B & B themselves got the following:

His Victorian successors took to forms of profit-sharing which became quite common in England. But since the publisher did the production and distribution and so took in the receipts, he had considerable control over the costs to be deducted. As in today's film production, creative accounting for even the most evident successes can turn them financially into break-evens or losses. Among English speaking countries, it was in the US that the notion of a royalty on receipts (i.e., without any deduction of costs) seems first to have taken hold. That great cross-voyager, Henry James, is said to have brought it to Britain, where publishers came under pressure to concede it, for instance from our rather genteel Society of Authors. And so, somehow, it has become accepted that authors of various kinds should have a royalty (i.e., a percentage of gross receipts, not a proportion of profits) from sales of their work.

Perhaps the tradition has been fortified by the arrangements that were blossoming early in the twentieth century for remunerating the performances of songs and other music. The first performing right societies were mostly organizations of composers and their publishers aimed at extracting returns from concert-halls and thes-dansants, and later from cinema owners and broadcasters. These joint collecting societies shared receipts between their two wings after deductions had been made for administration fees by the society, not by the publisher. The scale of their operation meant that associations of composers and lyricists could seek to put pressure on the collecting society over the division of the share-out with the publishers. Collectivization of the labor force (albeit a labor force of independent contractors) began to make a little more headway. <sup>2</sup>

## II. THE IMPULSE TOWARDS RISK-SHARING

Why did creators - those creatures driven to expression by deep psychological forces - people who seemed little interested in how to turn their work to account or in what they might earn as a result - why did they not prefer to take a down payment and run? As Gypsy Rose Lee once remarked "Royalties are nice and all but shaking the beads brings in money quicker."

Many an economist could systematize that feisty observation. Take, for [\*4] instance, Richard Watt in his recent book *Copyright and Economic Theory: Friend or Foe?*:

The curious point to note is that, in general, while the distributors of intellectual products should be better able to bear the implied risk than are the creators, it is not common to see outright sales contracts. The distributors ...can easily hedge all risks of all ventures ...On the other hand, the creators generally only sell a very limited product set. Therefore, it is difficult to see why it is the creators who insist upon limited rights transactions, and therefore retention of risk, when an arrangement of outright sale may well be beneficial to them ...[Yet] the creators actively lobby their governments for formal legal requirements to the rights that may be transferred, in many cases in an attempt to make outright sale contracts illegal ...[This the author regards as peculiarly curious] since exactly the same solutions that the law provides for can be achieved using optimal private contracts, which have the added advantage of allowing more flexibility for each particular case. <sup>3</sup>

So puzzling has this phenomenon seemed to those whose observations turn upon the optimizing behavior of rational economic actors, that a theory of regret has been imported to explain it: the author fears so

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<sup>2</sup> Playwrights, composers and visual artists also show some interest, again rather spasmodically, in the same range of profit-sharing expedients. Likewise in other countries: for France, see Vessilier-Ressi, *supra* note , at chs. 1, 2.

<sup>3</sup> Richard Watt, *Copyright and Economic Theory: Friends or Foes?* 88-89 (2000).

much that he will later be disappointed by not participating in an above-average success that he must protect against that acrid emotion in advance. <sup>4</sup> Maybe so: maybe it is 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. <sup>5</sup> Let us at least remember that creators may go through almost as many ages as Jaques identifies for human kind in *As You Like It*: first the new-born authors fight with the inevitable crowd to make any entry at all into the commerce of their art-form; then, with luck, they pass through a precocious adolescence with a surprise best-seller; in mid-life they may settle into being unshowy regulars of their profession; but at some magic moment they may be considered one of the tiny number of "greats" whose attraction to the public makes them most decidedly rent-worthy; and there they may stay; or, public taste being ever fickle, they may slide back into ordinariness. Even Mozart found only a pauper's grave. <sup>6</sup>

### III. LEGISLATIVE GUARANTEES: COPYRIGHT VS. AUTHORS' RIGHTS

Let me then turn attention to those legislative efforts to shore up the contractual [\*5] earnings of authors, which Richard Watt finds so much at odds with his intuitions. They make an appearance in common law systems only occasionally, as with legal rules on renewal of term or termination rights; and in applications of contract law principles which condemn unreasonable restraints of trade and undue influence. <sup>7</sup> Certainly in England, renewal and termination provisions are likely to run counter to the expectation of the judges that freedom of contract should determine all and the judges have tended to show their disapproval of the constraints which such rules have imposed. <sup>8</sup>

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<sup>4</sup> Stan J. Liebowitz, *Some Puzzling Behaviour by Owners of Intellectual Products: An Analysis*, 5 *Contemporary Policy Issues* 44 (1987).

<sup>5</sup> Some authors of course want to await the day when they bank the royalty check and rather fear an immediate dollop of cash that may unsettle the quiet twilight of their ways: progressive taxation or death duties may loom; they may wish to get by on something like a steady income, or they may want the determination to keep large sums from their emotionally ravaged, spendthrift partners or children.

<sup>6</sup> Let us not forget how risk-averse the entrepreneur may be, compared with the self-belief of the creator. At least those who do take risks, particularly with untried talent, will argue strenuously that they deserve their returns from occasional winners.

<sup>7</sup> In Britain there has been a tendency to give this protection to anyone who lacks "equality of bargaining power," as when he or she is obliged to take or leave a standard-form contract. We know that, even in the hard-hearted common law world, the movement to curb the self-protective legal excesses of tough capitalists has in modern times drawn both legislatures and judges in many countries to intervene on behalf of the hopelessly uncommercial and transparently jejeune. In 1974 the House of Lords sided with a young composer, relieving him of outstanding obligations under a music publishing contract which bound him, but not the publisher, for 10 years, and obliged him to submit all his songs to the publisher; the latter, however, was not obliged to publish any of them: *A Schroeder Music v. Macaulay*, 3 All E.R. 616 (1974). A spate of cases followed, some relying primarily on the unreasonable restraint of trade which was considered to exist in such circumstances (e.g., *Clifford Davis Management v. WEA Records*, 1 All E.R. 237 (1975)); but more on undue influence of which the evidence could be considerable (e.g., *O'Sullivan v. Mgmt. Agency & Music Ltd.*, Q.B. 428 (C.A. 1985); *Elton John v. James*, [18 F.S.R. 397 \(1985\)](#)). The supposed exertion of market power which underlies the first line of decisions was rightly criticized by Michael Trebilcock in *The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords*, 26 *U. Toronto L.J.* 359 (1976); and eventually the singer George Michael brought such a case but left court empty-handed, given the particular facts: *Panayiotou v. Sony* 1 All E.R. 755 (1993).

<sup>8</sup> It is not for me to evoke the complex history of the renewal right under your 1909 Act, and your much stronger termination rights of 1976. The British began the notion in the Statute of Anne itself, since section 11 provided the author with an additional term of 14 years if still living when the first 14 years expired. This was eventually held to create a right which the author was free to assign to the publisher in advance of the moment of revivification; the publisher had only to see that the advance assignment was in clear enough terms. The case law, such as it is, is reviewed by Judge Wilberforce in *Campbell & Connolly Co. v. Noble* 1 All E.R. 237 (1962) (a decision which turns partly on New York law). In the Imperial Copyright of 1911, section 5(2) there was a reversion for the last 25 years of the period of 50 years from the author's death: see *Chappell v. Redwood* 2 All E.R. 817 (1980). In the 1956 Copyright Act, however, it was abolished for the future and the

How very different, then, within the temple of authors' rights are the laws of Continental Europe. There one is likely to find a whole splay of rules, either presumptive or mandatory, which constrict the market-frame of negotiations, particularly at those points in a creator's career when he or she is not running with special fame and fortune.

Some of these rules are largely rhetorical, aiming to win the world's favor for David, the author, against Goliath, the entrepreneur. Hence the distaste for work for hire and similar rules which deprive employees, or even outside contractors, of any copyright at all; or a rule, as in German law, that prevents the author from transferring his copyright completely during his life, thereby leaving him at most with the power to license.<sup>9</sup> There is a dislike of loose systems which extend [\*6] copyright to mundane fact-collecting, thus obscuring the special beauty of cultural creativity as an object of veneration in law; and of course the insistence upon inalienable moral rights.<sup>10</sup>

In authors' rights laws there may be a set of presumptions about the contractual terms, which act at least as a model of basic fairness.<sup>11</sup> There may be a positive requirement that each aspect of copyright be specifically assigned or licensed - otherwise it will remain with the author; general assignments of future works may be disallowed;<sup>12</sup> equally, there will probably be severe limitations on the assignment of any work so far as concerns exploitation by technology unknown at the contract date - think of all your case law which was needed to decide whether or not copyright contributions to old films were licensed for videocassette versions. For the most part, the decisions turned on the niceties of phraseology in the contract; but beneath that of course lay a good slice of attitude since the contract had been drafted without foreseeing the particular development in question.<sup>13</sup>

#### IV. THE FRENCH EXPERIENCE

Turning next to provisions directly relating to the author's writings, I refer first to developments in French law. Modern copyright legislation came to France in 1957, a year after the British, eight before the German, nineteen before the American. In France this was not before time, since the new law replaced those venerable enactments of the Revolution which Continental Europeans like to treat as the fons et

U.K. has kept the matter that way. For details, which are complex, see Hugh Laddie, et al., *The Modern Law of Copyright and Designs* Headings 23.28-31 (3d ed. 2000).

<sup>9</sup> In 1965, West Germany provided that the creator-author was not capable of assigning his or her right, but only of granting a right to use over it, a legal strategy which aimed to buttress the basic hierarchy of this type of copyright thinking. As Immanuel Kant argued so categorically, the right is the author's since it arises from his or her intellectual activity of creation. Any exploiter must therefore supplicate permission to turn the work to his advantage.

<sup>10</sup> An authors' rights system is likely to encompass one or another form of inalienable moral rights. The law positively prevents the exploiter from degrading the author in relation to the work, by guaranteeing a right to be named as author and a right to prevent any revamping of the work. What is less well known to common lawyers is that in these systems there are also likely to be limitations in the economic sphere on the full run of free contracting. And while moral rights issues arise occasionally, the economic terms for exploitation are at issue in every copyright deal.

<sup>11</sup> Since 1901, in the field of book publishing, the Germans have had an enactment, the Law on Publishing Contracts, which fills in gaps in authors' contracts with their publishers - a presumptive guarantee of the author's position but no more. See *An Act Concerning the Law of Publication* 1901, art. 12, 1901 (RGBl. S.217). Translated in UNESCO, *2 Copyright Laws and Treaties of the World* (1987).

<sup>12</sup> If this is provided, as under the French Law (Law No. 92-597 of July 1, 1992, J.O., July 3, 1992, p. 5, JCP 1995, 131-1, 131-3 [hereinafter "French IP Code"]), there will need be an exception relating to membership of collecting societies (French IP Code, supra, 132-18).

<sup>13</sup> For a critical review of that case-law by one trained in authors' rights thinking, see Nikolaus Reber, *Film Copyright, Contracts and Profit Participation* 38-56 (IIC Studies No. 19, 2000).

origo of authors' rights. <sup>14</sup> By the 1950's, *auteurisme* among the masters of the subject had moved far and fast. In the vision of M. le professeur Henri Desbois and his apostles, the right as a whole was not merely a property right [\*7] (however ultimate that may seem to the pedestrian common lawyer); it was also a right of personality enshrining the act of individual creative expression. <sup>15</sup>

In consequence, the Law of 1957 provided that, upon an author transferring copyright in a work to an exploiter, whether partially or in toto, the author is entitled to proportional remuneration out of receipts from sale or other exploitation. <sup>16</sup> This is an entitlement which cannot be surrendered by contract. <sup>17</sup> The way in which the law then builds upon this base shows the complications which inevitably follow from such a strategic intervention. The assumption behind the law is that, without a guaranteed royalty, the author will miss out on earnings. The entrepreneur who buys up young talent ahead of public acclaim, as with Jan Sibelius and Valse Triste, is cited as the worst case in need of correction. <sup>18</sup> How often will this be corrected by outlawing lump sum payments (forfaits)? What remuneration does the law require to be guaranteed? What sum must be treated as being in the collection plate for division? So far as the sale of copies on material supports (printed matter, tapes, discs, etc), the French courts have insisted that the retail price of the copies should be brought into account without any deduction of production, marketing and distribution costs other than taxes. <sup>19</sup> They have, in other words, stood out against the transmutation of royalty sharing into profit sharing with all its attending difficulties over accounting.

What then should the proportion be? In the French provision of 1957, proportion does not imply equity, but simply the avoidance of a lump-sum pay-off. Only in cases of severe meagerness, in comparison with usual conditions in an industry, have the courts intervened: in film writers' contracts they have allowed a rate of 0.5 percent to stand; whereas in publishing a rate of 2.5 percent was dismissed as "unserious" and overridden. If the law is not respected, the author can seek revision of the contract, if necessary from a court; but that may be easier said than done from perspectives both legal and practical." <sup>20</sup> What help does the law [\*8] supply? There is a right to inspect accounts and that is essential. In some cases, there is also a right to insist that the entrepreneur positively try to exploit the work, but both the law and proof of

<sup>14</sup> The Law of 1791 gave a performing right for the author's life and five years thereafter, the Law of 1793 a reproduction right for life plus ten years. There is no denying their immense influence; they reversed the original decree of the Constituent Assembly which declared works upon publication to be public property.

<sup>15</sup> See Pascal Kamina, *Author's Right as Property: Old and New Theories*, 48 J. Copyright Soc'y U.S.A. 383 (2001).

<sup>16</sup> French IP Code, *supra* note 12, 131-4(1). A general exception exists for gratuitous transfer, which may today accommodate the contracts for open source software and other subject matter.

<sup>17</sup> Andre Lucas & Henri-Jacques Lucas, *Traite de la propriete litteraire et artistique* PP 518-43 (2d ed. 2001); Pascal Kamina, *Film Copyright in the European Union* PP 173, 174 (Cambridge University Press 2002). The principle is restated elsewhere in the Code, e.g., in relation to publishing contracts - French IP Code, *supra* note 12, 132-5 (See Lucas, P 592, with P 597 for exceptions). In this respect it was more protective than West Germany in 1965, which only gave courts power to rewrite the contractual terms covering surprise best sellers.

<sup>18</sup> Treated as a Faustian bargain with the Devil by Bainville. (See Lucas, *supra* note 18, P 518 at n. 284.) French law in any case deals separately with the surprise best-seller problem by allowing adjustment of a lump-sum whenever it is less than five-twelfths of a proportional royalty: French IP Code, *supra* note 12, 131-5; Lucas, *supra* note 18, P 540. The indignation surrounding such cases has been a mainspring for the *droit de suite* attaching to the resale price of a visual artist's original work.

<sup>19</sup> When it comes to earnings from performances the French IP Code, *supra* note 12, 132-25 is not so uncompromising (e.g., in relation to payments by film distributors for cinema showings). See Lucas, *supra* note 18, PP 523-5. Mixed lump-sum and royalty arrangements are permitted, provided that they are not merely colorable - for Vesillier-Ressi a common, but objectionable, practice in film-writing.

<sup>20</sup> See Lucas, *supra* note 18, P 525, for the decisions.

its breach can become complicated. <sup>21</sup> Perhaps inevitably, given the varied range of copyright contracting, numerous exceptions are admitted: lump-sum payments are allowed in cases where calculation of a royalty would be unduly laborious or costly; for collective works; and for computer software. <sup>22</sup>

Expert legal practitioners must be at hand to guide both sides through the legal maze which the French law establishes. Out of it standards develop, just as they do in an unregulated common law approach. The issue is whether the legal structure provided by the basic ban on lump-sum consideration leads to those standards giving greater security to authors, particularly for those at the workaday level of their trade. Madame Vessilier-Ressi is one eloquent proponent who is sure of their value. Staunchly modernist in her stance, she believes that a culture stays alive through the vitality of its avant-garde. To her the major new creators in each generation will include those who cannot focus on the need to secure their economic position in a free-enterprise world or who are ideologically opposed to capitalistic behavior. She urges that nonetheless these leaders, and equally the lesser talents at their side, need a protected position in the market-place vis-a-vis their exploiters; from this they will have a chance to some reasonable share in the returns which flow from exploitation protected by copyright. Then they are not obliged to live by a constant search for grants or prizes or else the need for employment which may or may not make use of their talent. Amid the unremitting hubbub surrounding arts policy and indeed the very value of creativity, it is an attractive position to take.

#### V. THE NEW GERMAN LAW - A VARIANT FOR 21<sup>st</sup> CENTURY AUTHORS AND PERFORMERS

In Germany, homeland of Professor Adolf Dietz, literary authors have had some presumptive help from the Publishing Contracts Law of 1901; <sup>23</sup> but their advocates have long pined for minimum conditions which cannot be subverted by express contractual terms and which would cover all fields of authorship. The introduction in France of the right to proportional remuneration looked like an attractive model, but West Germany's prevailing post-war ethos was deeply hostile to the cost-cutting constraints of socialist planning which divided their country and stained red the countries to the East. The French guarantee of royalties to authors found no equivalent in the German legislation of 1965, apart from a "surprise best-seller" clause (Art. 36) which allowed for an increase in remuneration in that lucky [\*9] situation. <sup>24</sup>

The hankering for some general protection of remuneration by law has remained and last year four professors (one of them Adolf Dietz) and a former Ministry officer in the field proposed major legal changes. <sup>25</sup> They attracted the enthusiastic support of a good social democrat, Prof. Dr. Herta D

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<sup>21</sup> See Lucas, *supra* note 18, PP 524, 520. Desbois sought to construct a best endeavors obligation in all cases, but the legal basis for this is hard to discover.

<sup>22</sup> The question of exceptions is particularly complex. For publishing contracts, see French IP Code, *supra* note 12, 132-6.

<sup>23</sup> An Act Concerning the Law of Publication 1901, art. 12, 1901 (RGBl. S.217). Translated in UNESCO, 2 Copyright Laws and Treaties of the World (1987).

<sup>24</sup> Compare also the campaign for a public fund from copyright royalties for the benefit of untried authors (a *domaine public payant*). Contributions to the fund would have run for 20 years after "life-plus-50" had expired. This was rejected in favor of simply making the copyright last for life-plus-70, thus exceeding the Berne Convention minimum by 20 years. From this diversionary tactic stemmed the eventual drive across the whole EU for the "life-plus-70" term, which succeeded in 1992 and has now refracted to the United States.

<sup>25</sup> In addition to Professor Dietz, they include Professors Ulrich Loewenheim, Wilhelm Nordemann and Gerhard Schrickler, as well as Judge Martin Vogel, now of the European Patent Office and formerly the administrator in the German Patent Office of the law governing copyright collecting societies.



author-Gmelin, who happened to be the Federal Minister of Justice. Some of the "Professors' Draft" found its way into the legislature's dustbin, for there were publishers and producers who were outraged by the threat of such invasive regulation and they made an immense brouhaha.<sup>26</sup> What remained was reshaped into more acceptable structures. The legislative result, finally accepted only on March 1, 2002, is regarded by the professor-perpetrators as still a signal achievement. It is moreover an achievement which applies not only to authors but also to performing artists.<sup>27</sup>

The crucial provision now reads:

Art. 32(1) For the grant of exploitation rights and permission to use a work the author is entitled to the remuneration contractually agreed. If the rate of remuneration is not settled, the remuneration shall be at an equitable level. If the agreed remuneration is not equitable, the author may require from his contracting partner assent to alter the contract so that the author is assured an equitable remuneration.

To interpret: behind a thin veneer of contractualist language, an individual author is empowered to bring court proceedings to secure "equitable remuneration." A countervailing contractual term is of no effect.<sup>28</sup> What is "reasonable"? A court may be helped by the following convolution:

Art. 32(2) Remuneration is equitable if it is determined by a common remuneration standard (Art. 36). Otherwise, remuneration is equitable if it conforms at the time of contracting to what is regarded as customary and fair in business having regard to the type and scope of the permitted uses, and in particular their length and timing, as well as to all other circumstances.

[\*10] We should note particularly the reference to current business standards. That may make it difficult for individual objectors to wring an improvement in remuneration from their entrepreneurs when the objection is that a whole class of authors is persistently underpaid. Translators, photographers and illustrators are often cited as examples of groups who, in the hard world of German publishing, are treated as serfs, if not slaves. Nonetheless, Article 32 goes beyond a mere legal requirement of royalty rather than lump sum *a la française*. It sets some minimum standard of fairness, and it ought to increase the proportion of authors on royalty contracts.<sup>29</sup> More generally it may improve the remuneration of some authors close to the margin of viability. On the other hand, inevitably, some who previously found low-paid work will simply not get it. On a separate tack, the case of the surprise success continues to be dealt with by a separate provision which is now found in Article 32A. This is the one provision that allows the contract to be readjusted in light of later developments, rather than by referring only to circumstances at the contract date.

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<sup>26</sup> Thus disappeared a proposal that all licensing of authors' and performers' rights should be open to renegotiation after 30 years if the terms were not then reasonable. And an attempt to restate the regulation of moral rights, so as to confine their scope by a number of reasonable limitations, was taken to be an attempt to extend their scope against entrepreneurs - a practitioner's attitude far removed from the calm world of theory.

<sup>27</sup> See Gesetz *über Urheberrecht und verwandte Schutzrechte*, v. 7.23.2002 (BGB1. I S. 2850), art. 75(1) (hereinafter "German Copyright Act").

<sup>28</sup> *Id.* at art. 32(3). The exception to this, permitting non-exclusive free licenses, is intended to accommodate the practices of the Free Software/Open Source movement.

<sup>29</sup> Unlike the French law, the new German provisions do not explicitly require a royalty unless an exception applies. At an early stage, the Explanatory Memorandum referred to the continuing possibility of lump sum arrangements in appropriate cases, but that was later removed.

Few authors who are not headline news will be prepared to take their publishers or record companies or whoever to court for fear that there will be no work for them in future. That, after all, is one general truth about capitalist production, distribution and service. Long ago (and often with a good dose of agony) it led to the acceptance of collective labor activity as a counterbalance to the dominance of employers. With authors we are in a world of labor relations which marks itself out mainly by the frequency with which authors (and performers) are not employed but operate independently for themselves. In essence the new German legislation is about creating the same framework for these independent authors to act as a group as they would enjoy if they were employees.

Collective bargaining by trade unions, in Germany as elsewhere, is subject to its own legal constraints, particularly regarding strike action and the like. But it is treated as a necessary procedure for stable industrial life and so is not regarded (at least in law) as an unlawful combination which would attract the application of anti-trust laws directed at cartel-like activities of "undertakings." One objective of the new insertions in the German Copyright Act is to provide the equivalent ability not only where there is a collective labor agreement concerning author-employees but also where dealings are with independent author-contractors. This is particularly needed because German Competition Law is otherwise likely to treat the latter group as an anti-competitive cartel. The Monopoly Commission there has in the past issued warnings against collective settlement of Minimum Term Agreements governing authors' contracts.

The new law therefore provides, first, that where a collective labor agreement (i.e. one for employees) determines the remuneration of a group of authors, none of them can claim improved terms individually under Article 32(2).<sup>30</sup> Alongside this [\*11] stands the new Article 36 which creates the concept of "common remuneration standards." These standards are to be agreed, if possible, by representative associations of authors and entrepreneurs in an industry; but if not, then through an award made by a mediation panel. Either side can demand that the matter go to the institution of a mediation. The panel will be composed of panelists from each side of the industry (in equal number) and will have an independent chairperson, who can, if necessary, be appointed by a court.<sup>31</sup> Ultimately, an award setting forth the common remuneration standards is not binding on a side which finds it unacceptable, since each side has three months in which to reject it. But the new provisions blend compulsory legal process and a moral persuasion which is often enough the key in modern labor relations.

## VI. SOME REFLECTIONS

Is all this Continental protectionism of more than passing interest? To anyone enmeshed in the doings of the European Union it has to be. What Paris did yesterday and Berlin is doing today may be what Brussels obliges us all to do tomorrow. The French Law of 1957 with its guarantees for authors was couched in individualistic terms; the new German law, properly understood, emphasizes the need for collective action. In their turn the French are now examining the issues afresh.<sup>32</sup> Within a short period the Franco-German axis in the EU could be committed to limiting what an author can submit to by contract. The British will find themselves drawn, more or less willingly, into abandoning their old "hands-off" policy towards authors' and performers' contracts. An EU Directive might require the setting of common

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<sup>30</sup> German Copyright Act, *supra* note 27, art. 32(4).

<sup>31</sup> The power will lie with the President of a Superior Court (Oberlandesgericht). German Copyright Act art. 36A(3).

<sup>32</sup> See, e.g., P. Gaudrat and G. Masse, *La titularite des droits sur les oeuvres realisees dans les liens d'un engagement de creation*, Report to the Minister of Culture (2000).

remuneration standards (and indeed numerous other conditions) in order to ensure that a level playing field for authors is maintained across the whole common market.

Where will that lead? Will it be to a world divided by the Atlantic - true faith in contractual freedom persisting here and elsewhere in the "New World", but scrupulous regulation in the assumed interests of authors in the "Old World"? The cultural embodiments of learning and entertainment are already spinning inexorably across an Internet which knows no national boundaries. It could prove increasingly complicated if the contracts of authors and performing artists belong to two quite separate camps. The problems will not be major so long as author and producer continue mainly to belong to the same geographical situs. But that is breaking down already and sanity will be preserved only if the law stated to govern the contract is regarded as setting all the rules, at least concerning its economic aspects. That, circumspectly, is the approach in the French law of 1957 as the courts there have interpreted it - so proportional remuneration can be required where the contract is governed by French law.<sup>33</sup> The proselytizing Germans, [\*12] however, have added the complication that common remuneration standards and equitable remuneration will be imposed on foreign contracts so far as the exploitation of the work is in Germany; for this see the new Article 32B. If that ever has practical impact on, say, TV writers' contracts governed by some foreign law, it could lead to some intense forum shopping.

So how should common law systems view these authors' rights laws on guarantees of remuneration? Both my dedicatees, and many others, such as Michele Vessillier-Ressi, believe that they are fundamentally worthwhile. So do I, though of course with a decent common lawyer's circumspection. They are a form of legal constraint which, based on more than concerns over work-for-hire or intellectual creativity or sacrosanct moral rights, seek to preserve real benefits from copyright laws for the authors in whose name the copyrights are granted. They seek to ensure that copyright laws are not mere pretexts for protecting the investment and entrepreneurial initiative of authors' exploiting partners. Why after all do we continue to have copyright laws which derive their legal and moral force from the act of creativity? Why do we not simply have producers' investment laws? All industrial countries, faced with the encroachments of modern copying technology, have been giving producers their own rights. For the most part, in Europe they are separately defined as related rights. It is the entrepreneurs who after all will do most of the fighting to stop the rape of their property, whether it is by hard-copy pirates or by Internet providers and connectors. If we are not prepared to provide legal buttresses for the interest of the author, why are authors there at all?

Whether 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 for its survival, the absurd earnings of the chart-toppers of the pop scene, the fat cat image of some professional promoters of the authors' cause. The acid rain which post-modern interpreters of our seething cultures have poured upon the cult of the romantic author has a tart freshness, for all that it is sourced from the comfortable reservoir of academic employment. 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.

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<sup>33</sup> See Lucas, *supra* note 18, P 994; CA Paris, 1<sup>e</sup> ch., 1 February 1989, 142 *Revue internationale du droit d'auteur* [R.I.D.A.] 301 (1989) (contract governed by New York law under which French ghost-writer was to receive a lump sum from a New York celebrity was held not to be overridden by French law requiring royalty. The result can also be related to the French IP Code, *supra* note 12, 132-6, second sentence, which pertains to publishing contracts).

I also hope that you are increasingly concerned by the consequences of that dubious commodity, the globalization of culture. Globalization seems to mean dominance by international media and entertainment conglomerates on a scale that is racing away from any real hope of legal or political regulation. The author's place at the center of copyright law should be something other than the seventh and last veil over Salome's fleshpot. Legal constraints cannot do a great deal to alter [\*13] hard economic realities, but it is important to spot the pressure points where they can have some real effect. For me, at least, one point is where the law meets collective action. I do not, myself, hold out much hope for protectionist jurisdictions that fail to be used by individuals. There will be occasional cases calling for adjustments over surprise best-sellers and for the liberation of rising stars who suffer under one-sided and unfairly long contracts. Perhaps common-law jurisdictions should do something more about them, but at least we do have some legal means already at hand. But as a means of ensuring that when authors and artists do join forces they will be enabled to exert such pressure as they can jointly manage on their side of their contracts, there is a strong case for a non-threatening statutory framework.

This is the attraction of the new German Law over its French predecessor. There will be difficulties in ensuring its smooth adoption. They will lie partly in the interstices of the legislation, which determines, for instance, how a mediation panel will be made up and who will be its independent chair. It is highly important that the matter should be adjudged by those who have some understanding of the arts and education industries and who are considered by each side to be acceptable. Unless there are cases which go seriously wrong in the early years of the new legislation, the result should be to benefit those near the bottom of various authorial markets. The result will be Minimum Terms Agreements that provide a floor, not just in relation to remuneration but also across a range of economic factors. As to earnings, it will be possible to adopt whatever pattern the two sides can agree, rather than force a given solution, such as a right to a royalty rather than a lump sum. As a way forward, it will probably avoid the kind of polarization between America and the EU which I hazarded a moment ago. For that we may in time be profoundly thankful.

#### APPENDIX. GERMAN COPYRIGHT ACT: AMENDMENTS OF MARCH 1, 2002, RELATING TO EQUITABLE REMUNERATION <sup>34</sup>

##### Sec. 32 Equitable remuneration

(1) For the grant of exploitation rights and permission to use a work the author is entitled to the remuneration contractually agreed. If the rate of remuneration is not settled, the remuneration shall be at an equitable level. If the agreed remuneration is not equitable, the author may require from his contracting partner assent to alter the contract so that the author is assured an equitable remuneration.

(2) Remuneration is equitable if it is determined by a common remuneration standard (Sec. 36). Otherwise, remuneration is equitable if it conforms at the time of contracting to what is regarded as customary and fair in business having regard to the type and scope of the permitted uses, and in particular their length and timing, as well [\*14] as to all other circumstances.

(3) Where an agreement fails to meet the conditions of Subsections (1) and (2) to the disadvantage of the author, the other party may not rely upon it. The provisions designated in the first sentence also apply

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<sup>34</sup> Translation by the author, with considerable help from the originators. No rights in it are asserted, but equally no warranty of accuracy is given.

even where they would be circumvented by countervailing clauses. The author may, however, grant a non-exclusive exploitation right without consideration to the world at large.

(4) The author has no claim under Subsection (1), sentence 3 where the remuneration for use of his work is settled by collective (labor) agreement.

#### Sec. 32A Additional participation of the author

(1) If the author has granted an exploitation right to another party on conditions which cause the agreed consideration to be conspicuously disproportionate to the returns and advantages from use of the work, having regard to the whole of the relationship between the author and the other party, the latter shall be required, at the demand of the author, to assent to a change in the agreement such as will secure for the author some further equitable participation having regard to the circumstances. It is not relevant whether the contracting parties foresaw or could have foreseen the level of such returns or advantages.

(2) Where the other party has transferred the exploitation right or granted further exploitation rights and the conspicuous disproportion results from returns or advantages to a third party, the latter is directly liable to the author under Subsection (1), having regard to the contractual relations in the license chain. The liability of the other contracting party then ceases.

(3) The claims under Subsections (1) and (2) may not be waived in advance. The entitlement to which they may give rise is not subject to execution of judgment; a disposal of the entitlement is ineffective.

(4) The author has no claim under Subsection (1) where the remuneration is determined by a common remuneration standard or a collective (labor) agreement and further equitable participation is expressly provided therein for the case within Subsection (1).

#### Sec. 32B Mandatory Application

Secs. 32 and 32A have mandatory application

1. if, but for a choice of law, the use agreement would be governed by German law; or
2. in so far as the contract concerns substantial use in the territory governed by this Law.

[\*15]

#### Sec. 36 Common Remuneration Standards

(1) In order to settle the equity of remunerations under Sec. 32, associations of authors may establish common remuneration standards with associations of users of works or individual users of works. The common remuneration standards should take account of the circumstances in the current field to be regulated, in particular the structure and size of the user organization. Collective (labor) agreements shall prevail over common remuneration standards.

(2) To fall within Sub section (1), associations must be representative, independent and authorized to settle common remuneration standards.

(3) A procedure to settle common remuneration standards before a mediation panel (Sec. 36a) takes place when the parties agree. The procedure must also take place upon the written request of one party if

1. the other party has not commenced negotiations over common remuneration standards within three months after the first party has requested the negotiations in writing,
  2. the negotiations over common remuneration standards remain without result one year after their commencement has been requested in writing, or
  3. a party declares that the negotiations have wholly failed.
- (4) The mediation panel must make a reasoned settlement proposal to the parties containing common remuneration standards. The proposal will be taken to be accepted if within three months of its receipt it is not rejected in writing.

#### Sec. 36A Mediation Panel

- (1) For the determination of common remuneration standards, associations of authors and associations of users of works or individual users of works may establish mediation panels, when the parties agree or one party requires the conduct of a mediation procedure.
- (2) The mediation panel will consist of an equal number of panelists chosen by each party and an independent chairperson, who should be agreed by both parties.
- (3) When the chairperson cannot be agreed, the appointment will be made by the competent Oberlandesgericht (Court of Appeal) under the Civil Procedure Ordinance, Sec. 1062. Equally, if there is a disagreement over the number of panelists, the Oberlandesgericht will determine the matter. The procedure before the Oberlandesgericht is governed by the Civil Procedure Ordinance, Secs. 1063, 1065.
- (4) The request for institution of a mediation procedure under Sec. 36(3) Sentence 2, must contain a proposal for the establishment of common remuneration standards.

#### [\*16]

- (5) The mediation panel will reach its conclusion by a majority after oral discussions. In the first instance the conclusions will be reached by the panelists; if no majority agreement can be reached, the chairperson will participate, after further discussion, in reaching the conclusions. If one party nominates no panelists or if the members nominated by one party failed to attend despite formal invitation, the chairperson and the members attending will decide the matter alone in accordance with the measures in Sentences 1 and 2. The conclusions of the mediation panel must be recorded in writing, signed by the chairperson and sent to both parties.
- (6) In the absence of other agreement between the parties, the costs of the mediation procedure will be borne by the instituting party.
- (7) The parties may settle the details of procedure before the mediation panel by agreement.
- (8) The Federal Minister of Justice has power to make orders without the agreement of the Bundesrat concerning further details of the procedure before the mediation panel and rules for the costs of the procedure and the indemnification of the members of the mediation panel.

#### Sec. 75 Rights of performing artists

- (4) Secs. 31(5), 32, 32a, 36, 36a and 39 are applicable mutatis mutandis.

(5) Where several performers give a performance together, and their respective contributions cannot be separately exploited, they may decide before the performance to authorize one person to pursue their claims under Secs. 32 and 32a. Sec. 80 remains unaffected.

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