

## COPYRIGHT REVERSION IN THE CREATIVE INDUSTRIES: ECONOMICS AND FAIR REMUNERATION

The European Commission proposal to harmonize fair remuneration in Member States in EC ‘on copyright in the Digital Single Market’ COM(2016) 593 final<sup>1</sup> included the proposal to harmonise a right to contract reversion. Fair remuneration is an ambiguous concept for economists: some EC documents imply the policy is required for efficiency purposes, in others purely for equity reasons. Copyright to an extent attempts to deal with both and also at times confuses the two. This article tries to disentangle these issues.

Research commissioned by the European Union (EU) prior to the proposal concentrated on the legal aspects rather than on the impact on markets. It would have benefitted from recent work in law and economics and in economics on reversionary rights as well as to a well-established body of research in cultural economics on labour markets of authors and performers in the cultural and media industries. That work shows both the variety of influences on motivation, incentives and contracts for creators, as well as exposing the difficulties of empirical research in this area.

The article discusses work that has been done in economics dealing with copyright contracts and with reversion and considers the contribution studies on labour markets in the creative industries could make to the policy proposals on fair remuneration for creators and performers.

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### 1. Introduction

How copyright works for authors as both incentive and reward is an important question in its own terms but there is a step before it, namely that authors are not, in economic terms, the principals in the ‘copyright social contract’ but the agents of the state’s policy to stimulate creativity. Authors (aided or not by publishers) are not being consecrated by copyright for their inherent genius so much as for the benefits of the works they provide for society. The view that authors are agents of the state as producers of copyright works may not accord with that of legal scholars or of the authors themselves but it should underpin the way economists analyse copyright. That approach views copyright in terms of social efficiency: how well copyright law achieves creativity for our society in terms of its aims. Moreover, policy towards copyright is increasingly motivated by the benefits that creators and copyright holders can bring to the economy via growth and employment in the creative industries – another efficiency aim and one that is in the preamble of almost every document concerned with copyright in the EU. As we see from EU documents quoted in the next section, though, having stated stimulating economic benefits as its prime motivation, the focus of copyright policy turns immediately to copyright as a means of protecting authors from unfair treatment, an equity aim. There

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<sup>1</sup> <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-593-EN-F1-1.PD>

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is inevitably a conflict here that one instrument, copyright law, is somehow expected to mediate between efficiency and equity objectives.

Economists like to think in terms of alternatives – which policy is relatively more efficient in achieving a set of objectives. Copyright law is not the only policy that aims to protect authors and performers: state provision and subsidy of the arts and culture are others, which also use financial means to recognise and reward creators. The difference is that the market is the mechanism that delivers the rewards via copyright, while public finance from state taxation delivers the grants and other types of subsidy. The alternative is there and is actively utilised; indeed both systems are complementary since works financed by arts subsidy are usually copyrightable. In addition, there are policy measures that are not specifically aimed authors and performers that may improve their financial position, such as tax breaks, welfare payments policies, minimum wage and labour laws that benefit them as members of the workforce<sup>2</sup> as well as preferential treatment for cultural products (as with EU audiovisual policy, fixed book agreements etc) that are part of cultural policy. Anti-trust (competition) law might also be included in this list, as suggested later on.

Equity as a policy objective has proved difficult in economics even though few economists acknowledge that allocative efficiency in markets results in equitable distribution of the income they generate. Most of applied welfare economics is about the imperfections in both. The eponymous Pareto Optimality rule is a thought experiment about perfect social efficiency (an ordering of resources in which no one member of a society can be made better off without making another worse off) and Pareto complemented it with the empirical analysis of the distribution of wealth, thereby developing the eponymous Pareto distribution in statistics. A few other economists have proposed analogous definitions of equity: Baumol's concept of 'superfairness'<sup>3</sup> is an attempt to apply a rule similar to that of Pareto Optimality, stating that maximum equity is achieved when one person's utility can be improved without another's being reduced such that there is no envy – a situation that is feasible when people have differing preferences. Similarly, the 'Shapley value' is a rule for equity in the division of revenues between contributors to the production process. It has been used by Watt to determine a fair tariff for the use of music in radio broadcasting as well as being used in other (non-copyright) settings and may well be applied, as Watt suggests, to any other setting in which an undertaking relies on access to several different copyrights.<sup>4</sup> The Shapley 'rule' put simply is that rewards be distributed among participants according to the marginal contribution that each plays in a cooperative activity, such that each one does not receive less than that which she would have earned

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<sup>2</sup> See Jeremy De Beer 'Making copyright markets work for creators, consumers and the public interest' in Rebecca Giblin & Kimberlee Weatherall (eds) WHAT IF WE COULD REIMAGINE COPYRIGHT? 148 (2017).

<sup>3</sup> William Baumol SUPERFAIRNESS: APPLICATIONS AND THEORY(1986).

<sup>4</sup> Richard Watt 'Fair Remuneration for Copyright Holders and the Shapley Value' in Richard Watt (ed) HANDBOOK ON THE ECONOMICS OF COPYRIGHT (2014) 120.

by operating alone.<sup>5</sup> These concepts are difficult to put into practice but, as with all models, they suggest ways of looking at real world problems, even if they are not always able to offer a practical solution. They are mentioned here not because they have been applied to regulating copyright contracts but to demonstrate that economists have applied their analytical skills to the question of equity and this could provide a way forward in the debate about fair remuneration. The several cases in which a 50:50 rule is adopted in relation to some aspects of copyright, eg for the division of income between author and publisher in equitable remuneration schemes, might be seen in this light.

Another concern of EU copyright policy is administrative efficiency, especially in relation to copyright management organisations (CMOs), whose administrative costs seem often to be confused with transaction costs in policy documents. Transaction costs are obviously associated with administration of the law but they are not about poor management. Their role in the economic debate lies in the effect that risk and asymmetric information have on negotiating principal agent relations, relevant here due to their role in the theory of contracts and bargaining.

This article is about recent proposals on how to increase the financial<sup>6</sup> rewards to authors and performers by legislating via copyright law to regulate the contracts they make with the publisher who markets their works. As copyright works through the market, rewards to creators are in general commensurate with the financial success of their works in the marketplace; consumers who purchase their work provide the revenue from which the publisher pays a portion to the author, thus providing an indirect link between the end user and the author or performer. The terms of the contract between the author and publisher for that portion, whether a one-off payment ('buy-out) or royalty, and the income it generates for the author are what are being scrutinized by the EU. Contracts in these industries have rarely been seen as 'fair' in the past but the contemporary concern is that in the digital marketplace, the mechanisms for payment to authors for all uses of their work have changed, reducing royalties - or even fail to reach them at all.

The article works backwards from the recent proposals from the EU concerning the achievement of fair remuneration for creators to analysis of existing contract reversion provisions in the US and Germany. It looks at the topic using the tools of economics – theory and evidence. Understanding the economics of the labour markets for authors and performers and the industrial organization of the creative industries is essential in evaluating the proposals for contract reversion but at a deeper level,

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<sup>5</sup> The concept originated in game theory of cooperative games and is essentially designed to inhibit the last 'player' entering a cooperative agreement from 'unfairly' exploiting his hold-up position by paying each according to the average of the total.

<sup>6</sup> 'Economic' is the adjective mostly used in the law literature instead of 'financial' which is what it actually means. Economics recognizes a host of non-financial benefits in economic life; see Ruth Towse *'Partly for the Money: Rewards and Incentives to Artists'*, *KYKLOS*, 54, 2/3 (2001) 473 for a discussion of intrinsic and extrinsic motivation on the part of authors.

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what also needs to be decided are the underlying policy objectives: whether they are to increase growth and productivity, increase access to copyright works or to achieve a fair deal for authors – in economic terms, do they aim for efficiency or equity?

## **2. EU copyright policy and proposals for fair remuneration**

Several economic aspects of copyright law feature in EU policy documents: consistency of law and its effects on markets for creative goods and services in the Member States, ie the Single Market: its role in stimulating the creativity that fuels the creative industries; and the adaptation of these industries to the digital era. Accordingly, policy proposals come from several sources – those concerned with internal trade, with cultural production and with the effects of the internet and digitization – and each adopts a different emphasis on the role copyright law.

The 2016 Proposed Directive ‘on copyright in the Digital Single Market’ identifies the need “to reduce the differences between national copyright regimes and allow for wider online access to works by users across the EU”.<sup>7</sup> It follows on from President of the European Commission (EC) Juncker’s Political Guidelines, which “aim to achieve a wide availability of creative content across the EU, to make sure that EU copyright rules continue to provide a high level of protection for right holders, and to maintain a good balance with other public policy goals, like education, research and innovation, or equal access for persons with disabilities, in the digital environment”.<sup>8</sup> The Digital Strategy endorses these objectives, which “play an important part in Europe’s economic and societal progress, international competitiveness and cultural diversity. They all address the needs of right holders and users of copyright-protected content alike”.<sup>9</sup> Accordingly, the ‘Digital Single Market’ proposal aims to address these issues. Moreover, value creation and income and employment growth is increasingly noted as an objective of copyright, as stated in the European Parliament resolution of 9 July 2015, which asks that any change to copyright be accompanied by an assessment of its economic impact.<sup>10</sup>

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<sup>7</sup> *Supra* note 1 at 2.

<sup>8</sup> COM 2015 192 Final *A Digital single market for Europe* at 2

<sup>9</sup> COM 2015 626 Final *Towards a modern, more European copyright framework* at 2.

<sup>10</sup> European Parliament resolution of 9 July 2015 on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ([2014/2256\(INI\)](#)). Item 21 “Points out that copyright-intensive industries employ more than seven million people in the EU; asks the Commission, therefore, to ensure that, in line with the principles of better regulation, any legislative initiative to modernise copyright be preceded by an exhaustive ex-ante assessment of its impact in terms of growth and jobs, as well as its potential costs and benefits”.

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These statements show that there are multiple policy objectives which are concerned both with economic efficiency in production of cultural content and with equity in the distribution of resources and these objectives seem often to be elided in discussions of copyright policy. The shortcoming is that there is one instrument (albeit a complex one) for multiple objectives.

Copyright is perceived by economists as predominantly grounded in efficiency, a trade-off between the incentives it offers authors and access by users. Its objective is to encourage the best possible use of resources to achieve the creation and distribution of creative content ('creativity') in the presence of market failure. Market failure is present in information markets due to the failure of the price mechanism to provide sufficient incentive to achieve the maximum production from resources because of free-riding. Copyright establishes statutory rights to protect authors' and performers' works so that they can obtain the efficient level of remuneration via the marketplace. It regulates economic relations between buyer and seller, thereby redistributing costs and benefits from what might otherwise be a free-for-all market. Setting a high level of protection for rights holders in order to provide the incentive for maximising the growth of the creative industries creates a disincentive for users, however. While the long term objective is the addition to the public domain of a freely available cultural heritage, during its term copyright is a trade-off between incentives and disincentives to producers and consumers with implications for society at large.

To these efficiency objectives is added an equity objective and the two are apparently inextricably intertwined according to the proposers of the Digital Single Market directive. Digital technologies and the use of new business models put at risk "the development of European creativity and production of creative content. It is therefore necessary to guarantee that authors and right-holders receive a fair share of the value that is generated by the use of their works and other subject-matter".<sup>11</sup> The proposal:

"provides for measures aiming at improving the position of rightholders (NB not just authors and performers (RT)) to negotiate and be remunerated for the exploitation of their content by online services giving access to user-uploaded content. ....Finally, authors and performers often have a weak bargaining position in their contractual relationships, when licensing their rights."<sup>12</sup>

As a prelude to this proposal, the European Parliament commissioned a study by Dusollier et al<sup>13</sup> on copyright contracts in a selection of EU member states. Despite the obvious economic role of

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<sup>11</sup> *Supra* note 1 at 3.

<sup>12</sup> *Id.*

<sup>13</sup> Séverine Dusollier, Caroline Ker, Maria Iglesias and Yolanda Smits CONTRACTUAL ARRANGEMENTS APPLICABLE TO CREATORS: LAW AND PRACTICE OF SELECTED MEMBER STATES, Brussels, European Union. Citizens' Rights and Constitutional Affairs, Policy Department (2014).

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contracts, the study was commissioned to consider only legal arrangements and practice.<sup>14</sup> Acknowledging that copyright contracts could secure financial independence for authors and performers by granting them ‘a fair remuneration’, the authors were to be commissioned to provide an assessment of ‘the rules and legal provisions applicable in the EU that purport to protect creators in their contractual dealings’.<sup>15</sup> Like other such endeavours, the study offered no definition of what is meant by a ‘fair share’ or ‘fair remuneration’.<sup>16</sup> It mentions the different doctrines of fairness or good faith present in the laws and rules of member states and also notes the German concept of ‘adequate remuneration’, which is linked to collectively bargained remuneration. The authors conclude that ‘existing contractual protection of authors, as included in copyright law and, indirectly, in general contract law, appears not to be sufficient or effective to secure a fair remuneration to authors or address some unfair contractual provisions’.<sup>17</sup>

To remedy this situation, the Digital Single Market directive proposes obliging Member States to improve the protection of authors as follows: Article 14 requires Member States to include obligations to improve transparency of reporting to authors and performers, with ‘modes of exploitation, revenues generated and remuneration due’ given as examples. Interventions need not be the same in each state and can be adjusted for administrative burden. Article 15 requires Member States to establish a contract adjustment mechanism, in support of the obligation provided for in Article 14: ‘Member States shall ensure that authors and performers are entitled to request additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation of the rights when the remuneration originally agreed *is disproportionately low compared to the subsequent relevant revenues and benefits* (my italics) derived from the exploitation of the works or performances’.<sup>18</sup>

This defines the EU’s conception of ‘unfair’ remuneration applicable to Article 15 (the so-called ‘best seller clause’). Article 16 requires Member States to set up a dispute resolution mechanism for issues

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<sup>14</sup> It is to be regretted that policy-makers do not perceive the value of interdisciplinary research on copyright. An earlier study for the UK’s Intellectual Property Office by Martin Kretschmer, Estelle Derclaye, Marcella Favale and Richard Watt THE RELATIONSHIP BETWEEN COPYRIGHT AND CONTRACT LAW, Intellectual Property Office (2010), available at <http://eprints.bournemouth.ac.uk/16091/1/contractlaw-report.pdf>, had taken into account both legal and economic aspects and empirical evidence but its results were not used. The Dusollier report recommended a new economic study of authors’ remuneration be undertaken, presumably the result was the Europe Economics /IViR REMUNERATION OF AUTHORS AND PERFORMERS FOR THE USE OF THEIR WORKS AND THE FIXATIONS OF THEIR PERFORMANCES, commissioned by the European Commission DG Communications Networks, Content & Technology Brussels, European Union (2015), available on <https://www.ivir.nl/publicaties/download/1593.pdf> It is discussed in detail in the text below.

<sup>15</sup> *Supra* note 9 at 62.

<sup>16</sup> The word ‘fair’ is bandied about in many such legal discussions, yet use of the adjective in English is quite varied: ‘fair weather’, a ‘fair wind’, a ‘fair maid’, even a ‘fair amount’ have nothing to do with distributive justice (though the antonym ‘unfair’ usually does).

<sup>17</sup> *Supra* note 9 at 13.

<sup>18</sup> *Supra* note 1 at 10.

arising from the application of Articles 14 and 15. Disputes about the obligations under Art 14 and 15 may be submitted to a ‘voluntary, alternative dispute resolution procedure’, though there is no precision how this mechanism will look, or why authors and performers will be inclined to use it, given the perceived ‘black listing’ threat that prevents most creators and performers from auditing contracts.<sup>19</sup>

In order to inform the proposed Directive on the possible impact of its proposals on the creative industries, the EC’s DG Communications Networks, Content & Technology commissioned a study from Europe Economics and IViR (hereafter EE/IViR)<sup>20</sup> The report, which focused on the audio visual sector, outlined the main analytical economic elements that authors’ and performers’ contracts have to address: risk, asymmetric information and incentives, standard topics which have long been explored in depth in the literature on the economics of copyright, in particular by Watt.<sup>21</sup> The empirical part of EE/IViR study was ambitious in attempting to substitute the effect of the ‘legal framework’ on remuneration (earnings) for the usual variables adopted as determinants of earnings in labour market studies – qualifications, experience, age, etc. The legal framework was defined as: rules on the form of payment; collective bargaining; exclusive/non-exclusive nature of rights; waivable/non-waivable character of non-exclusive rights; and rules on transfers of rights (e.g. specification of modes of exploitation, limit on transfer of rights of future works, future modes of exploitation). These are important considerations but difficult to deal with statistically; dummy variables can be used but with so many qualitative variables, statistical significance can become an issue, especially when covering a number of different Member States with diverse cultural markets in terms of size and institutional arrangements, such as the organisation of and subsidy to the arts, all of which impact on labour markets in the cultural sector.

It is worth considering the significance of these organizational differences as they relate to musicians. Musicians and singers working in orchestras and opera companies in most of the Member States in the EU selected in the EE/IViR study have regular employment contracts with the state or municipal cultural administration that owns and manages these organisations and they are paid on salary scales and with conditions of work similar to those of civil servants. Rates of pay are negotiated collectively within the state administrative apparatus and in some places (eg Germany) collective bargaining is

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<sup>19</sup> Thanks to Martin Kretschmer for this point.

<sup>20</sup> *Supra* note 14.

<sup>21</sup> See Richard Watt COPYRIGHT AND ECONOMICS: FRIENDS OF FOES? (2000) and Richard Watt ‘*Copyright and Contract Law: Economic Theory of Copyright Contracts*’, 18 J. Intell. Property Law 173 (2010) available at: <http://digitalcommons.law.uga.edu/jipl/vol18/iss1/6> for application specifically to copyright contracts between author and publisher and with the CMO. See also Ruth Towse ‘*Copyright, Incentives and Performers’ Earnings*’, *KYKLOS* 52, 3 (1999) 369.

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enshrined in law. Copyright earnings are of little importance in these circumstances. Contrast the UK, in which orchestras and opera companies are private, non-profit organisations in receipt of public subsidy, which fluctuates over relatively short periods. The performers are members of trade unions (Musicians' Union and Equity) which negotiate pay and conditions on a voluntary basis with the organizations that represent the orchestras and opera companies. Performers may be (and often are) freelancers also working on the open commercial market as session players or in diverse ensembles; as such, they negotiate individual contracts, some of which would be buy-outs. Similar arrangements are in place for performers in theatre, TV and film. Copyright has considerably greater significance for them. It is therefore difficult to survey performers working in such different organizational environments.

The EE/IViR study ran into problems of data collection of a more elementary kind, however, as they freely admitted. The survey method it adopted resulted in what they describe as biased and inconsistent data. Even with a rigorous sampling process (which they did not use), there is always the worry that responses are biased as response rates for surveys of authors and performers are typically low. That seems to have been the case here and moreover, with so many variables there were very few replies in some categories. As the report frankly states, only limited inference can be drawn from the results. In fact, lack of good data has been the barrier to nearly all empirical research on the impact of copyright on remuneration and by extension, to the economic importance of copyright to GDP and economic growth.<sup>22</sup>

With that in mind, this article now proceeds by examining economic research on labour markets in the creative industries and on the economics of contracts in order to provide a context for evaluating EU the proposals outlined above.

### **3. Economic studies of artists' labour markets**

Research on artists' labour markets in cultural economics goes back to the path-breaking book on performing arts by Baumol and Bowen<sup>23</sup> which included evidence on performers' earnings. The authors' main hypothesis, now known as Baumol's Cost Disease, identified the cause of increased costs of the performing arts as due to the combination of little (or zero) scope for productivity improvements in the performing arts (theatre, opera, orchestras, TV programme production) – the so-

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<sup>22</sup> See Ruth Towse 'What We Know, What We Don't Know and What Policy-Makers Would Like Us to Know About the Economics of Copyright' R. ECON RESEARCH ON COPYRIGHT ISSUES, 2011, 8, 2 December, 101.

<sup>23</sup> William Baumol and William Bowen PERFORMING ARTS: THE ECONOMIC DILEMMA (1966).

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called 'stagnant' sector - with rising wages due to increases in productivity in the 'dynamic' sectors of the economy. This triggered a host of empirical studies on performers' earnings and employment characteristics, which showed that official data sources were biased or non-existent and that only through surveys could a realistic picture emerge.<sup>24</sup> A number of surveys from Finland to Australia have shown that the 'typical', ie median, authors and performers (known as 'artists' in this literature), have incomes that are lower than the national average for workers with an equivalent level of educational; only a proportion of income is due to 'arts' work, the rest coming from multiple-job-holding in arts-related and non-arts occupations (and often family and spouse support), despite their having higher than average educational attainment and independently of age or experience.<sup>25</sup> Copyright only applies to that part of their income due to arts work.

The overall distribution of artists' earnings in the creative industries is typically skewed, with a very few superstars earning very high incomes while the majority earn below national average incomes. Despite that, there is an excess supply of labour, with numerous artists trained in a huge number of 'vocational' university and specialist college courses entering the labour market, the majority unable to find the type of work they had hoped to do. In other words, this is a labour market that does not function like other labour markets or according to labour economists' models (though nowadays other labour markets are now following suit in the zero- contract, Uber style world). Similar research has been conducted on earnings from copyright for literary authors in the UK and Germany, notably by Kretschmer and Hardwick,<sup>26</sup> which showed the same features - copyright does not affect much of their work and earnings from writing are most likely to be very low. It must be concluded that measures in copyright law to achieve fair remuneration and to improve the bargaining position of creators would likely relate to only part of their work.<sup>27</sup>

Several lessons have been learned from this research: one is that official labour surveys and statistics do not provide an accurate view of authors' and performers' labour markets; they focus on

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<sup>24</sup> One early study was Randall Filer 'The Starving Artist: Myth or Reality? Earnings of an Artist in the United States' J. POLITICAL ECONOMY 94, 1(1986) 56. Filer used US Census data on earnings of persons who were classified as artists (authors, performers etc). The Census asks respondents to identify their occupation in terms of what work they do in Census week: thus an actor working as a waiter in Census week is classified as a waiter. It stimulated a number of irate counter-studies showing the fallacy of using census data.

<sup>25</sup> See Greg Wassall and Neil Alper 'Occupational Characteristics of Artists: A Statistical Analysis'. J. CULT ECON 9 (1985)13. The median is the statistic (the 'halfway mark') is to be preferred to the average for distributions that are skewed, as in these labour markets.

<sup>26</sup> Martin Kretschmer and Philip Hardwick AUTHORS' EARNINGS FROM COPYRIGHT AND NON-COPYRIGHT SOURCES: FROM A SURVEY OF 25,000 BRITISH AND GERMAN WRITERS (2007) Available on [www.cippm.org.uk/publications/alcs/ACLS%20Full%20report.pdf](http://www.cippm.org.uk/publications/alcs/ACLS%20Full%20report.pdf)

<sup>27</sup> It could, of course, be argued that if they earned more from copyright, creators and performers could devote more time to their chosen occupation; surveys always find that the limitation to how much time they spend on arts work is reported as being insufficient income from that work.

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employment and on the occupations being undertaken in census or survey week and may fail to take into account self-employment and multiple job-holding that is typical of authors and performers – hence the need for surveys. Those shortcomings are now beginning to be rectified, however, for example, in UK official data. Furthermore, it is not easy to categorize creative work, which may involve several functions - authors such as song-writers and choreographers may also be performers; each part of their work might be subject to different payment and other contractual arrangements. Finally, when asked about motivation to remain in their professions despite relatively low earnings, many authors and performers report non-financial motives (love of their work, need for self-expression, independence) as their objective, subject to being able to earn a basic income. In relation to copyright, the moral right is often reported as having a greater incentive than economic rights for that reason: creators seek recognition and status and they feel that is provided by copyright.<sup>28</sup> Similarly, subsidies to individual artists and grants and prizes awarded by peer groups also confer recognition and status. The amount and generosity of those items vary considerably from country to country and within Europe: a striking example is that in Norway, 30 year state-funded stipends paying the same as a civil servant are granted to selected authors to encourage the development of literature in the Norwegian language, whereas an author in the UK would count herself lucky to get a grant for 1 year (but could obviously reach a far larger potential market). Cultural subsidies are not harmonized in the EU, nor is there any plan to do so, though they have a significant impact on market outcomes in the creative industries.

A particular feature of these labour markets is the prevalence of superstars. Several explanations have been put forward for this phenomenon: the tendency of consumers to follow the crowd, exacerbated in the digital world by social media; reduction of search costs for consumers in the face of excess supply of content; heavy promotion and advertising by publishers; and the use of algorithms to tailor goods offered to the consumer to their observed tastes. The last mentioned produce network effects that are self-reinforcing and perpetuating. The result is that there is very substantial concentration in content goods markets on a very small proportion of the total catalogue of published works (with added competition from older catalogue being cheaply exploited by publishers) and accordingly, concentration on the few superstar authors and performers who create them with extreme skewness in earnings distributions. This concentration is being exacerbated in the digital world.<sup>29</sup>

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<sup>28</sup> See Kristín Attladóttir, Martin Kretschmer and Ruth Towse, R. ‘*Artists, authors’ rights and copyright*’ in Ruth Towse and Christian Handke HANDBOOK ON THE DIGITAL CREATIVE ECONOMY (2013) 274.

<sup>29</sup> ECONOMIST ‘*The Paradox of choice. The modern entertainment industry is a nirvana for consumers*’ February, 11/2017. See <https://www.economist.com/news/leaders/21716611-americas-bloated-pay-tv-providers-not-so-much-modern-entertainment-industry-nirvana> accessed 31/08/17.

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Another feature of the creative industries that undermines earning power is competition: there is a permanent excess supply of wannabe authors and performers on the one hand and increasing oligopolization of markets for creative content on the other. The effect of excess supply of labour simply means that if an author or performer objects to the terms offered by a publisher, there is always someone in the queue behind them who is willing to accept them. In addition to reducing the competition for authors' services, oligopolization strengthens the control that an enterprise has over the terms of use of the creator's work.<sup>30</sup> Once assigned to the publisher, copyrights are tradeable assets that enables industry mergers and take-overs without recourse to the creator. That was the basis of the George Michael case and (at the time of writing) Paul McCartney's claim to his publication rights.<sup>31</sup> Assignment of recording rights is also the reason why record labels are free make deals with online music providers.

Besides these features of the labour market for artists, there are particular economic aspects to authors' and performers' contracts in the creative industries. Caves' appropriately entitled book *Creative Industries: Contracts between Art and Commerce* details features of production specific to the creative industries – radical uncertainty about demand for new works, the combination of different skills in team work in sequences of production – which he utilized to explain authors' and performers' contracts.<sup>32</sup> Caves applied contract theory, an application of principal agent theory, to analyse the chain of production from author/performer to the market, showing why publishers who invest in creative products insist on the transfer of all rights to them. The reason for the control of rights is to protect sunk investment by preventing hold-ups in the subsequent decision processes that take place after the initial work has been acquired and once production proceeds. Most media products, particularly sound recording, film and broadcasting, require a sequence of inputs to produce an output embodying various rights and works. Investment decisions and contracts with diverse suppliers have to be made along the chain of production and, without the power to control rights and hence decision-making, the cost and uncertainty of producing these goods would be that much greater. This analysis of the principles of contracting applies to artists of all kinds working in the creative industries.

Copyright's bundle of rights can be exercised in several ways – by individual contract, by an agent or collectively – according to which rights are involved and the markets in which the final product is sold or licensed and they may be licensed separately (and usually are) as they relate to different markets, to different product formats and activities. In principle, the author may retain some rights but

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<sup>30</sup> In 2009 CIPPM at Bournemouth University organised a symposium with representatives of professional associations and trade unions for authors and performers; all reported this problem. See <http://eprints.bournemouth.ac.uk/16091/1/contractlaw-report.pdf> ..

<sup>31</sup> Panayiotou and others v Sony Music Entertainment (UK) Ltd. ([1994] ChD 142). Rights to part of The Beatles' repertoire was eventually bought by Sony, being contested by Paul McCartney at the time of writing. See Dan Rys, <http://www.billboard.com/articles/columns/rock/7662519/beatles-catalog-paul-mccartney-brief-history-ownership>. Accessed 31/08/17.

<sup>32</sup> Richard Caves CREATIVE INDUSTRIES: CONTRACTS BETWEEN ART AND COMMERCE (2000).

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in practice the publisher requires assignment of them all. Complexity of rights and uses in the digital era, while analogue works are still present, is creating an anti-commons, which few fully understand, making it impossible for the author or performer to make an informed decision *ex ante* about how much she will earn.<sup>33</sup>

What all these features of markets in the creative industries very often add up to is a ‘take-it-or-leave-it’ set of terms, conditions and royalty rates offered by the industry side of the contract to the author or performer.

#### **4. Economics of buy-out versus royalty contracts**

A particular concern of the EU proposals on fair remuneration is buy-outs, which seem nowadays mostly to prevail in the film industry and journalism. Caves’ analysis of the film industry explains the economic logic from the point of view of the film studio – their need to control all rights in order to secure finance for investment in the sequence of production involved in producing a distributable film.<sup>34</sup> Historically, however, buy-outs were the norm in most ‘creative industries’. A frequently quoted example is the price paid to Milton for ‘Paradise Lost’ for £10 in 1667, equivalent worth =£2,203.88 in 2016, according to the Bank of England Inflation Calculator<sup>35</sup> - so not quite as paltry as is often suggested. Music publishing is a typical market in the creative industries and a very old one. Research on the economic history of this industry showed that up to the 1920s, songwriters were routinely paid a lump sum for the ‘copyright’ ie all rights, of which some payments were very high considering the size of the 19<sup>th</sup> C market. Though the performing right existed for non-dramatic works, it was not exercised and the one-off fee was the composers’ sole source of remuneration from publishing. The performing right was not exercised because it was not in the perceived interests of music publishers whose business model relied on profits from sales of sheet music that they advertised by ‘plugging’ live performances in music halls and concerts. As sales of printed music fell around the turn of the 20<sup>th</sup> century and with the formation of the Performing Right Society (PRS) in 1914, publishers and songwriters began to apply the performing right, initially for live performances and later, with the development of radio, for broadcasts, which for quite some time (solely on the BBC) were mostly of live performances. From 1911, the mechanical right also provided a source of royalties to composers and songwriters for the use of their work in sound recordings. The royalties from these rights, the share of which was paid direct to the songwriters, gave them the first sources of

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<sup>33</sup> *Supra* note 14 103.

<sup>34</sup> *Supra* note 32. These days, up to a third of the finance for a film comes from pre-sales, which explains the emphasis on control.

<sup>35</sup> <http://www.bankofengland.co.uk/education/Pages/resources/inflationtools/calculator/default.aspx>

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income independent of the music publisher.<sup>36</sup> With this form of remuneration, there was a huge output of songs throughout the 19<sup>th</sup> and early 20<sup>th</sup>, the hits of which earned publishers high sales revenues (despite widespread, industrial-scale piracy).<sup>37</sup>

In a perfectly competitive market economy with perfect anticipation of future revenues and costs, a single upfront buy-out payment would pay the same as the present value of future royalty earnings. It is easy to see that market imperfections interfere with this economic nirvana; both authors and publishers are risk averse, though not equally so<sup>38</sup>, and information asymmetries about the chance of success of the work, the resources that each will invest in getting the work to market, the possibility that the publisher can free-ride on the intrinsic motivation of the author etc require a contract that trades-off incentives with risk-sharing. Royalty contracts exist because they deal with the sharing of risk, though if the parties could agree on the eventual pay-off and each were risk-neutral, a fixed fee payment would be more efficient.<sup>39</sup>

Given uncertainty and asymmetric information, some contractual deals will overstate the value of future earnings and others under-state them. Best seller clauses concentrate on the latter and ignore the former (as is also the case with the artists' resale right – artists are not required to compensate buyers for any loss due to a price paid in the initial sale that turned out on resale to have been 'too high'). A royalty contract implicitly allocates risk between the parties while offering each the incentive to maximise revenues;<sup>40</sup> a contract also has to encourage contract fealty and be enforceable. Analytically-speaking, there are several types of contracts - implicit, relational, option contracts; Caves' book expounds the economic explanation for their adoption in the very differing circumstances of the various creative industries, in terms of the complexity of the chain of production and sequence of sunk investment. In practice, contracts split up rights, have variable royalty rates, may offer an advance,<sup>41</sup> offer different timing of payments, reversion clauses and so on within those categories.<sup>42</sup>

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<sup>36</sup> For songs; grand rights of dramatic works were mostly contracted direct with the theatre.

<sup>37</sup> On all these points, see Ruth Towse 'Economics of music publishing: Copyright and the market' J. CULT. ECON. 41, 4 (2016) 403.

<sup>38</sup> Moreover, once an author knows the success of her work, perception of risk could well change as she is less pressed for cash.

<sup>39</sup> See Iñez Macho-Stadler and David Pérez-Castrillo 'Copyright Licensing Under Asymmetric Information', R. ECON RESEARCH ON COPYRIGHT ISSUES (2014) 11,2,1. Available on [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2576669](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2576669); also Richard Watt 'Copyright and Contract Law: Economic Theory of Copyright Contracts' 18 J. Intell. Prop. L. 173 (2010). Available at: <http://digitalcommons.law.uga.edu/jipl/vol18/iss1/6>.

<sup>40</sup> Macho-Stadler and Pérez-Castrillo *supra* note 39 point out that the presence of risk-aversion requires a higher than efficient payment.

<sup>41</sup> An advance is usually recoupable from the author's future royalties but in the event of the work being a flop, it would be a loss for the publisher (more evidence of asymmetry). Watt points out that an advance is the

As emphasised by Caves, uncertainty prevails in the creative industries but unlike risk, for which a probability may be assigned, uncertainty cannot be estimated. One source of asymmetry in bargaining is that the publisher is likely to have better (though still imperfect) information about the future success of a work than does the author and in addition, the publisher is better able to pool risk by holding many copyrights of other authors, thereby reducing uncertainty. It is interesting to reflect on the influence that self-publishing has had on these industries in this respect. Self-publishing provides a track record of success via internet that is utilized by publishers and authors: risk has been reduced and this may improve the terms of publisher contracts as a result. It is said that for that reason, today A&R departments of music publishers and record labels spend their time scanning the internet for successful songwriters rather than trawling the club scene. Work on music publishing contracts by Barr and Towse found that in a few cases there had been a shift over the last few years from the standard 50:50 share to 70:30 in favour of the composer, which we attribute to reduced risk for the publisher due to this foreknowledge.<sup>43</sup>

If an author has the choice, would she opt for a buy-out or royalties? There is no financial risk with the certainty of the lump sum buy-out and it apparently suits some creators: Naxos Records (based in Hong Kong) at one time always (and maybe still?) paid performers upfront and bought out their rights; a glance at their catalogue suggests many did not object. However, in some industries conventions prevail that do not allow for choice, the situation that the EU proposals are intended to deal with. It would be an interesting piece of research to look at the underlying economic rationale of those conventions. A further point that may affect the bargain is that the reward to some rights, for example, mechanical rights of composers, is set by legal decree and therefore not subject to contract; the publisher, however, knows they will be paid and would make a lower offer as a result. Similarly, royalties from rights to equitable remuneration that are mandated for collection and distribution via a CMO, such as the rental right, could well be anticipated in the contract and reduce the offer the publisher (or employer) is prepared to make.<sup>44</sup>

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equivalent of a deductible in an insurance contract, ie a deterrent to moral hazard, while Macho-Stadler and Pérez-Castrillo point out the double moral hazard situation of the matching of author and publisher.

<sup>42</sup> *Supra* note 32.

<sup>43</sup> See Kenneth Barr and Ruth Towse “‘All you’ll have left is the songs’”. *Writer contracts in the contemporary UK music publishing industry: theory and practice*. Available from [ruth.towse@gmail.com](mailto:ruth.towse@gmail.com).

<sup>44</sup> See Millie Taylor and Ruth Towse ‘*The Value of Performers’ Rights: An Economic Analysis*’ *MEDIA, CULTURE AND SOCIETY*, 20, 4 (1998) 631.

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Another aspect of the choice of contract type (buy-out vs royalty) is the differing transaction costs of adopting one or the other to each party.<sup>45</sup> For some purposes, especially for one-off jobs, such as a recording session (for non-contracted players) or a walk-on part in a film, a detailed individual contract would be too costly to negotiate and enforce. There are many administrative solutions that reduce these transaction costs, such as collective agreements and easy to use online forms for contracts that identify which rights are included in the deal.<sup>46</sup> As discussed in section 2 above, some EU states have well-established collective agreements that are transparent and properly enforced.<sup>47</sup>

In both music publishing and sound recording, option (royalty) contracts are common. Option contracts give the publisher time to test the market with one song or recording before committing to subsequent investment in the publication of later works. For the song-writer or performer, the advantage is that they do not have to search for a publisher for every work. However, in practice option contracts can be one-sided favouring publishers, who may own rights to a work they do not intend to invest in or publish - the target of the 50 year 'use it or lose it' condition introduced for recording artists in the EC Directive 2011 on the term of copyright and related rights.<sup>48</sup>

The great variation in contracts, industry practice and the complexity of production in the individual creative industries themselves (and amply evidenced by Caves for the pre-digital era) raises questions about how appropriate copyright law is for the task of correcting unfair remuneration to creators and performers, for which contract reversion is perceived as a remedy. As Watt (2010) has pointed out, there has been no economic analysis of the effect of copyright law on the terms of contracts, for instance, the influence of stronger enforcement.<sup>49</sup>

The next section outlines legal provisions that have been used to try to rectify the perceived unfairness in creator contracts.

## 5. Contract reversion/termination

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<sup>45</sup> See Ruth Towse 'Copyright, Incentives and Performers' Earnings' *KYKLOS* 52,3 (1999) 369.

<sup>46</sup> See, for example, the rates set out for freelance journalists' work with the BBC:

<http://www.londonfreelance.org/feesguide/index.php?section=Broadcasting&subsect=BBC+and+national+TV>

<sup>47</sup> In the UK, Mrs Thatcher made 'closed shop' trade union agreements illegal in the 1980s; however, they have effectively survived in several creative industries where uncertainty about workers' quality is an issue, such as acting, dance and musical performance, and 'members only' continue to be accepted by employers who agree to minimum rates and conditions of work.

<sup>48</sup> [http://ec.europa.eu/internal\\_market/copyright/term-protection/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/term-protection/index_en.htm) on the term of

copyright and related rights. See also Martin Kretschmer, *Copyright Term Reversion and the "Use it or Lose it" Principle*, INT'L J. MUSIC BUS. RES. (2012).

<sup>49</sup> Richard Watt *supra* note 21.

In order to enable creators to maximise royalties, copyright law in a number of countries includes the right to terminate contracts or for them to revert to the creator by enabling them to break or renegotiate contracts.<sup>50</sup> These rights have been much written about in the law literature but to my knowledge, only recently by economists - Karas and Kirstein - in two papers discussed in the next section, one relating to the US and the other to Germany.<sup>51</sup>

The rights relate to two aspects of a contract that may in some circumstances improve or promote 'fairness': one is the type of reward, that is, whether it is a single lump sum payment or a royalty (possibly with a non-recoupable advance) and the other is its duration. For a royalty contract, the main aspect of the financial bargain ('the deal') is over the royalty rate, that is, the agreed percentage of the revenues from the sale or licence of the work. The second aspect is the term of the contract: many royalty contracts are for the life of copyright of the work (which could be well over 100 years).<sup>52</sup> Most economists regard the copyright term as excessively long on the grounds that as the present value of a sum of money diminishes relatively quickly under reasonable assumptions of time preference and accordingly, its incentive value is considerably less than the statutory term: the copyright term is inefficient and reducing it would be welfare-enhancing.<sup>53</sup> Given the long term of the contract, the reversion or termination right benefits authors' legatees (who may exercise it) rather than the authors themselves, unless they have a remarkably strong behest motive. Publishers argue, however, that as they increasingly rely on back catalogue for revenues, a lengthy term is necessary for exploitation, a point that has been made against these rights.

It is not the intention here to go into details of how the reversion/termination right works in the various countries in which it exists but to provide sufficient background to the economic analysis of the right as presented in section 7. In the US, Section 203 of the Copyright Act of 1976, which took effect in 1978, provides for the termination after thirty-five years of transfers and licenses assigned by

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<sup>50</sup> For full details in *see* Dusollier et al. *supra* note 14; *see* also Paul Heald 'Copyright reversion to authors (and the rosetta effect): an empirical study of reappearing books' (2017) available on [http://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=227781](http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=227781).

<sup>51</sup> Michael Karas and Roland Kirstein 'Efficient Contracting Under The U.S. Copyright Termination Law' (2017a) and 'More Rights, Less Income? An Economic Analysis of the New Copyright Law in Germany' (2017b) both available from [michael.karas@ovgu.de](mailto:michael.karas@ovgu.de), Otto-von-Guericke-University, Magdeburg, Germany.

<sup>52</sup> If a work were created by an author aged 30 who dies at 80, the work would be in copyright for 120 years in jurisdictions in which the copyright term is life + 70years.

<sup>53</sup> *See* the Amicus Brief in *Eldred v. Ashcroft* by a group of leading economists available on <http://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/economists.pdf>. *See* also the criticism of the brief by Stanley Liebowitz and Stephen Margolis 'Seventeen famous economists weigh in on copyright: the role of theory, empirics, and network effects' *HARVARD JOURNAL OF LAW AND TECHNOLOGY* 18 2 (2005). Available at SSRN: <https://ssrn.com/abstract=488085> and <http://dx.doi.org/10.2139/ssrn.488085>

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authors for works created after 1978; advance notice has to be given and the right does not apply to works made for hire or for derivative works.<sup>54</sup> The termination right is an inalienable right and cannot be contracted around or waived in advance. Termination notice must be served not less than two or no more than ten years before the effective date of termination and if the author fails to exercise her termination right, the original contract stands and the author loses the right to terminate.<sup>55</sup>

It was argued in a US House of Representatives Report that “Section 203 was 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”.<sup>56</sup> This suggests a mixture of efficiency and equity motives: that the first contract was not ‘efficient’ and that it was unfair because creators are in a relatively weak bargaining position *ex ante*. That would, however, improve *ex post* over the specified period for those authors whose works were successful. Presumably 35 years was chosen as giving the intermediary/publisher sufficient time to recoup his investment and sufficient time for the success or otherwise of the work to be established. The first contract terminations began to take place from 2013, welcomed by authors and their representatives.<sup>57</sup>

In Germany, Section 40(a) of the German Copyright Act, which came into force 1 March 2017, automatically converts exclusive licences to non-exclusive licences after 10 years for contracts in which the assignment was initially made in return for a lump sum payment (a buy-out).<sup>58</sup> The new system gives authors the inalienable right to transfer the reverted rights to another publisher after the ten year period. The termination of an exclusive contract enables the author to contract with another publisher on a non-exclusive basis. A publisher who initially obtained the exclusive rights of usage may continue producing the work (book, song, photograph etc) on a non-exclusive basis. Accordingly, a second publisher may then produce concurrently (and compete) with the initial publisher, enabling the author potentially to acquire payment from two (or more?) publishers.<sup>59</sup> In

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<sup>54</sup> See Heald *supra* note 50. In the US case, there is ambiguity in some industries, such as sound recording, as to whether creators /performers have a work made for hire contract or not - see Kate Darling ‘*Occupy Copyright: A Law & Economic Analysis of US Author Termination Rights*’, *BUFFALO LAW REVIEW* 63 1 (2015) 147.

<sup>55</sup> See Darling *supra* note 53; also Amy Gilbert ‘*The Time Has Come A Proposed Revision to 17U.S.C. § 203*’ *CASE WESTERN RESERVE LAW REVIEW* 66 3 (2016) 807. Available at: <http://scholarlycommons.law.case.edu/caselrev/vol66/iss3/6>. The Sonny Bono Copyright Term Extension Act of 1997 article 304 (c,d) that extended the copyright term from 50 to 70 years pma granted the authors a chance to terminate pre 1978 contract so as to exploit copyright in the ‘extra’ years: see Guy Rub ‘*Inalienable Profit-Sharing Schemes in Copyright Law*’ *HARVARD JOURNAL OF LAW & TECHNOLOGY*, 27 1(2013), 49.

<sup>56</sup> Gilbert *supra* note 55 at 818.

<sup>57</sup> See Heald *supra* note 50.

<sup>58</sup> The right existed in a previous form: see Dusollier *supra* note 13 for details.

<sup>59</sup> Karas and Kirstein *supra* note 51.

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economic terms, this creates a very similar situation to that of pirated works coexisting in the ‘legal’ market.

The German and US laws obviously differ in their formulation but their motivation is couched in the same equity terms: increasing fairness to authors by enabling them to increase remuneration. However, increasing remuneration to authors has to be paid for somewhere down the chain of production or consumption with allocation and therefore efficiency implications. The motive for these legal provisions appears not to involve the incentive to authors to increase their effort and time to produce more or better works of art or to encourage more authors and performers to enter arts occupations, ie there seems to be no efficiency motive for increased output due to contract reversion. Reversion may, however, increase access to copyright works, the subject of Heald’s research reported below.

## **6. Economic analysis of contract termination/reversion**

As mentioned earlier, many countries have provision in their copyright law for contract termination or reversion and terms and conditions differ in each. There are, however, underlying economic principles that can be applied in general and make testable predictions. The studies by Karas and Kirstein<sup>60</sup> use bargaining models to analyse both the US termination rules and the German reversion clause. For the US case, in which 2013 was the first year in which termination could take place, there has been some legal analysis of cases, for example, by Gilbert<sup>61</sup> and empirical evidence of its effects by Heald.<sup>62</sup>

Karas and Kirstein consider the influence of the unilateral termination option for authors under the US copyright system on contracting between authors and publishers for contracts that include a mixture of royalties and fixed payments. Their model predicts that overall remuneration is lower for terminating authors because publishers would offer a lower lump sum or royalty to protect their profits: unsurprisingly, publishers anticipate the possibility of termination and react accordingly.<sup>63</sup> ‘Moreover’ (the authors conclude) ‘different contracts are necessary for terminating authors as compared to their non-terminating colleagues, or authors who are not entitled to the termination right.’<sup>64</sup> In particular, contracts for terminating authors should include a lower proportion of royalties

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<sup>60</sup> *Sopra* note 50

<sup>61</sup> *Sopra* note 54.

<sup>62</sup> *Sopra* note 49.

<sup>63</sup> Also predicted by Maria Montagnani and Maurizio Borghi ‘*Positive copyright and open source licences: how to make a marriage work by empowering authors to disseminate their CREATIONS*’ INTERNATIONAL JOURNAL OF COMMUNICATIONS LAW AND POLICY 12 (2008) 246.

<sup>64</sup> That is, those whose contracts are works made for hire and the owners of rights to derivative works.

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and a higher proportion of fixed payments'.<sup>65</sup> Gilbert furthermore points out that publishers would behave opportunistically by anticipating the risk that the author may terminate the contract prematurely and take matters into their own hands rather than wait for the author to terminate; in the case of a successful work that would damage the author. In addition, termination reduces the incentive to publishers to invest. Authors cannot pre-commit to not terminating because the right is inalienable in the US.<sup>66</sup> Thus introducing the right to terminate a contract is likely to result in lower earnings for the author, lower output of works and increasing uncertainty, affecting not only authors who have the right to terminate but also the market as a whole.

With regard to the German reversion right, Karas and Kirstein note the different provisions in the 2016 German law which enable authors to contract with a second publisher after 10 years, while the first retains a non-exclusive right to continue to use the work. They compare a one publisher regime with a new 'one-plus' system in which the author brings another publisher into the market. Again, there is likely to be strategic behaviour that reduces royalties; for instance, publisher 1 could drop the price to discourage or put publisher 2 out of business. Karas and Kirstein's analysis shows that reversion may undermine a publisher's incentive to invest in an author's long term career when the publisher faces competition in the market for products using the work - the same finding as for the US termination right. The authors conclude: 'We often observe that authors mourn their financial situation, but also place a high moral value on individual rights. On average, German authors possibly value individual rights higher than reductions in earnings, and thus enthusiastically welcome the new legislation from a different point of view'.<sup>67</sup> To which one may add: 'not only German authors...'. Indeed, economists should worry that the apparent absence of 'rationality' on the part of authors ruins their predictions! That aside, these articles make clear predictions, in particular that authors will be worse off financially. That requires empirical testing and empirical studies of the effect on authors' remuneration are needed before economists (and others) can be confident their predictions are borne out by evidence.<sup>68</sup> The effect on markets of the copyright term has proved very hard to research,

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<sup>65</sup> *Sopra* note 50 2016a at 22.

<sup>66</sup> See Rub *sopra* note 54 for a discussion on the matter of inalienability, pointing out that it is usually avoided by US law-makers – and, one should add, by economists (eg Millie Taylor and Ruth Towse on the EU Rental right in 'The Value of Performers' Rights: An Economic Analysis' MEDIA, CULTURE AND SOCIETY 20:4 (1998) 631.

<sup>67</sup> *Sopra* note 50 (2016b) at 21.

<sup>68</sup> For many years, cultural economists have argued that the artists' resale right, which has a similar aim to reversion in increasing remuneration to successful artists, would have a negative effect on the prices paid to new works of art, especially those by unknown young artists. An empirical study for the UK government, however, showed it was not so: see Katherine Graddy, Noah Horowitz and Stefan Szymanski A STUDY INTO THE EFFECT ON THE UK ART MARKET OF THE INTRODUCTION OF THE ARTIST'S RESALE RIGHT (2008) available on [http://people.brandeis.edu/~kgraddy/government/ARR\\_Finalnc.pdf](http://people.brandeis.edu/~kgraddy/government/ARR_Finalnc.pdf)

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however.<sup>69</sup> The Karas and Kirstein articles also predict an adverse effect on the author-publisher relationship in furthering the career of the authors. As noted above, long term cooperation is mostly achieved through option contracts but the Karas and Kirstein model does not deal with option contracts, which admittedly are difficult to handle in a formal framework.<sup>70</sup>

Turning to the few empirical studies on the effect of contract reversion that have been done, some suggestive research is that by Kretschmer and Hardwick (2007) on writing income of professional literary authors in the UK and Germany.<sup>71</sup> In a questionnaire survey they asked respondents if they had succeeded in changing the terms of their contracts in 2005: the result for both countries was very similar – in each 43 per cent had done so and they earned roughly twice the amount of those who had not. The authors point out the ‘chicken and egg’ problem – do better earning authors have greater power to change contracts or does changing a contract lead to higher income? However one interprets it, their result points to the role of questionnaire studies as a source of empirical evidence on contract reversion and renewal.

Heald’s research used data on book publication to test the impact on market supply of what he calls ‘reappeared books’, that is, out of print titles that have reappeared on the market either as ebooks or reprints due to the provisions in US copyright law for contract reversion. The research deals with two sets of provision: 17 USC § 203, which permits reversion to authors in year 35 after publication, and 17 USC § 304, which permits reversion 56 years after publication and Heald found that they significantly affect the reintroduction of books on the market. The research is detailed and complex, reflecting the multi-faceted aspects of the way these clauses operate and makes a notable contribution to empirical testing of the efficacy of law, in this case on the effect reversion might have on greater access to copyright works by increasing distribution. His evidence supports the conclusion that contract reversion is a means to counteract the impact on access to copyright works that the long copyright term reduces, particularly when it inhibits new entrants from exploiting dormant titles.

The number of works available and possibly authors’ earnings and could be increased by reducing the copyright term but as Heald and Kretschmer among many others writing on copyright have observed, that is not an option within the Berne Convention and effectively reducing the term by

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<sup>69</sup> *Supra* note 22.

<sup>70</sup> As are other dynamic effects of copyright - see Richard Watt and Ruth Towse ‘*Copyright Protection Standards and Authors’ Time Allocation*’ *INDUSTRIAL AND CORPORATE CHANGE*, 15 6 (2006) 995.

<sup>71</sup> *Supra* note 26.

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contract reversion seems an effective solution. The problem with this view is that reversion and reducing the term are not equivalent from the economic point of view: an individual's choice to exercise a reversion right, as theoretical studies suggest and some casual empirical evidence bears out, could well have repercussions for authors' earnings as publishers adjust their offers, whereas a change in the statutory term would not have that effect.<sup>72</sup>

As outlined in the Introduction to the present paper, greater output and access to it is copyright's long term objective in which authors are the agents; if those agents are motivated by a reversion clause to retake control of their works and republish them, that objective is achieved. That does not tell us about the effect on authors' earnings, however: there could be an indirect effect if getting dormant works back into the market were to increase royalties but one would also have to assume that the predicted deleterious effect of reversion on the deal in the contract with the first publisher was not present. Moreover, research on artists' labour markets, as well as observation of vanity publishing on social media etc, has shown the strong intrinsic motivation of authors and many would no doubt wish to see their work in print without any financial reward. There is accordingly scope for further empirical work on the impact of reversion on authors' earnings.

## **7. Concluding remarks**

This article has shown that research on the effects of copyright on authors' contracts and on labour markets in the creative industries has been pursued by a range of scholars from law, law and economics and economists from various specializations – contract/bargaining theory, economics of copyright, cultural economics. There had in fact been a number of such studies prior to the EU proposals on contract reversion and it is a pity that that body of work was not taken into account. Copyright law works through market incentives and changing it has both intended and unintended effects.

The question of fair remuneration (however it is defined) and how to achieve it is difficult for economists, who mostly consider efficiency effects of copyright. There is little theoretical work on equity aspects, though studies in cultural economics on copyright earnings have been motivated by the concern that, as they are typically low, copyright cannot be relied upon to support many of the authors and performers who work or would like to work in the creative industries. Even here, though, there is a mixture of equity and efficiency - the effect that low rates of reward have on supply.

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<sup>72</sup> That suggests that, like a minimum wage, an across the board change is needed in order to prevent opportunistic behaviour.

In a competitive market economy, a contract between a willing buyer and a willing seller is accepted as binding and, in a sense, is 'fair'. But many contracts in the creative industries are of the 'take-it-or-leave-it' variety. If markets in the creative industries were competitive, the rates that publishers offer authors would be the highest needed to encourage them to contract with them – even if they were very low. However, few would see those industries as competitive; they are mostly viewed by economists as oligopolistic. Policy-makers have been loath to address this with competition law,<sup>73</sup> usually on the grounds that they do not want to inhibit growth in the digital economy and wait to see how markets develop. The over-riding concern of policy-makers with growth of the creative industries, as witnessed in the policy statements cited in the introduction to this article, has implications for copyright policy; efficiency and productivity trump equity and reasonable distribution of the gains. Where there is strong competition, however, is on the supply side of the labour market for creators, in which is a huge excess supply, encouraged by the provision of higher education courses in the arts and media as well as by the opportunities offered for self-expression by social media and internet. With excess supply of both creators and more works on offer than the market can bear, there is downward pressure on prices, fees and royalty rates and on the conditions laid down in contracts. Thus the degree of competition on both sides of markets in these industries is part, at least, of the story about a fair reward for creative effort.

Furthermore, the effect of digitization on these markets through new usage and new business models has been to break the link between producer and consumer/user so that price signals do not work directly. Royalty rates no longer depend on the retail sales price but on subscription models or 'for free' ad-based finance in two-sided markets. Royalties have to be set in different ways and rates for some uses are not negotiated with authors or a collecting society acting on their behalf. Digital goods are now licensed instead of being sold and they are bundled with the works of others, eg in song catalogues, so that the value of the individual work is not known; where access is available 'for free', services are financed by advertising and the platform makes the profit. 'Amateur' competition with incumbent creators has increased the number of works available and the loss of the gate-keeping role of publishers has led to increased uncertainty about quality on the part of consumers, while ratings and the like are done by algorithm. Networks of social media and ranking systems make for dynamic loopbacks in consumer choice which cause increased instability in markets. These developments increase uncertainty about a work's prospects and exacerbate the superstar effects in markets for

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<sup>73</sup> An interesting paper in this context is that by Darlene Chisholm 'Asset-specificity and Long-term Contracts: the Case of the Motion Pictures Industry' EASTERN ECONOMIC JOURNAL 19 2 (1993) 143, which traces the effect on Hollywood contracts due to the 1948 Paramount decree that forced disintegration between film production and distribution.

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creative goods. There is little evidence for the long tail enabling the middle-ranking creator to serve niche markets. Fewer and bigger winners take all in the digital creative economy.

Contracts clearly play *the* major role in delivering the benefits of copyright to authors and performers. Contracts deal with both rates of remuneration and the term. Research on the economics of contracts shows that there is always a trade-off between incentive and risk and that life of copyright contracts are common. So far, copyright policy has served only to increase the term (so-called ‘strengthening’ copyright) benefitting intermediaries who have lobbied for it, thereby increasing economic rent as they acquire more durable assets. It is also the case that this has been done with the support (one might say ‘complicity’) of authors and performers’ organizations who also have a vested interest in the long term. Policy-makers have to rid themselves of the idea that longer is stronger; it does not serve efficiency aims while deferring payment to living authors and reducing access for the public. But equally, authors have to do so too. Economists as well as legal scholars regard any policy measure that effectively reduces the term as an overall welfare improvement.

Reversion after a specified time enables successful authors and performers to renegotiate a deal with better information. But reducing uncertainty and redistributing risk ex post may well increase it ex ante and reduce remuneration from the first publisher. As Rub has pointed out, inalienable termination rights result in the misallocation of risk towards those least able to bear it.<sup>74</sup>

There is undoubtedly ‘unfairness’ in the creative industries that takes various forms – exploitation of authors’ and performers’ intrinsic motivation and their unwillingness to engage with the business side of her profession in addition to publishers and other such persons having the upper hand in contract deals. The complexity of copyright in the digital world has become an anti-commons which most individual creators do not understand. Many accept that they cannot avoid assigning all rights when they could probably make a better deal by licensing only some.<sup>75</sup> Some of the worst excesses of unfair contracts have been dealt with in court cases and there is ample advice issued by trades unions and professional associations about getting legal and a manager or agent’s advice. In the music industry, few deals in the UK are made with reputable publishers without legal advisors being present. Making that a requirement would be an effective way of encouraging greater fairness in contracts.

On the other hand, it has to be said that the perceived unfairness apparently does not affect willingness to enter these artistic professions and to produce copyrightable works: excess supply tells

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<sup>74</sup> *Supra* note 54.

<sup>75</sup> But who am I to talk! Economics journals almost all require full assignment of all rights in an article and that for no financial gain! I doubt many people try to avoid it and if one does try (as I have) it is not easy to find a way.

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us that.<sup>76</sup> Nor is there any shortage of creative works being produced: indeed, as Waldfogel has argued, the case for the copyright incentive (on efficiency grounds) has been weakened as far more are now available than ever before.<sup>77</sup> The purpose of copyright law may be to enable authors to obtain a financial reward for their work but it does not to ‘ensure’ (as many policy documents state) that every author or performer makes a living from their activities. That depends on the market’s response to works and on conditions in the marketplace. Other policy measures, such as grants to authors and to arts organizations, exist to support work that the market does not.

It is clear that the measures proposed by the EU to ensure fair remuneration to authors have both efficiency and equity aims: making contracts fairer by altering incentives. But can that be achieved by copyright law alone? Can one instrument serve multiple objectives with only intended effects? The history of copyright is replete with unintended consequences.

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<sup>76</sup> Adam Smith famously stated: ‘the contempt of risk and the presumptuous hope of success are in no period of life more active than at the age at which young people chuse their professions’ (WEALTH OF NATIONS, Book 10), further pointing out that the ‘chance of gain is naturally over-valued while the chance of loss is frequently under-valued’. This is not only confined to the young.

<sup>77</sup> Joel Waldfogel ‘*Copyright Protection, Technological Change, and the Quality of New Products: Evidence from Recorded Music since Napster*,’ J. LAW & ECON 55 4(2012) 715.

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