

A Free Information Ecology in a Digital Environment

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THE GREAT COPYRIGHT ROBBERY

Rights allocation in a digital environment

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1. Introduction

In his monumental work on the origins of copyright¹, professor Grosheide enumerates several distinct rationales of the copyright system. For the sake of simplicity, I will list only the five most important arguments:

- a) The ‘personality’ argument: the work of authorship bears the personal imprint of its maker; copyright (‘author’s right’) is a species of a right of personality.
- b) The ‘natural law’ rationale: copyright reflects notions of natural justice. “Author’s rights are not created by law but always existed in the legal consciousness of man”.²
- c) Economic arguments: copyright protection promotes economic efficiency, by optimizing the allocation of scarce resources through the pricing system.
- d) Social and cultural rationales: copyright acts as an incentive to create and disseminate works that serve a valuable social or cultural purpose.
- e) The freedom of expression rationale: copyright makes creators independent of Maecenas, State or subsidy; copyright is the proverbial ‘engine of free expression’.

¹ F.W. Grosheide, *Auteursrecht op maat*, Deventer: Kluwer 1986, p. 128 ff.

² E.W. Ploman and L. Clark Hamilton, *Copyright. Intellectual Property in the Information Age*, London 1980, p. 13; Grosheide (note 1), p. 130.

Not surprisingly, most of these rationales presuppose that copyright vests in the author (creator) of the work. This 'natural' allocation principle is, indeed, reflected in the general rule that copyright originates with the originator of the work. In fact, in most countries of the world, copyright is 'author's right' by definition - if not by name.

What is surprising, then, is that in practice nothing much of this allocation principle remains. Professional authors only rarely own the copyrights in the works they professionally produce. This is true not only for the millions of intellectual workers producing works under employment contracts, or otherwise 'for hire', but also for those truly independent creators - the unsung heroes of the information age, the freelance authors.

In a pluralist society, the voice of the independent author, free from public or private patronage, cannot be missed. Ideally, freelance authors do not produce their works to order (like their colleagues employed in the information and entertainment industries), but create 'on spec' - often non-conformist, 'non-commercial' and controversial works. For these authors to survive and prosper, and to produce the kind of 'speech' that makes the freedom of expression worth fighting for, the 'structural function' of copyright is essential.³ Absent subsidy or salary, copyright constitutes the only means of living the life of an independent creator. In an information society increasingly dominated by media conglomerates sometimes more powerful than governments, keeping this category of authors alive is vitally important.

But will they survive? In the shadows of the 'copyright grab' that is currently taking place at the national, European and international political level, a massive confiscation of author's rights, possibly much more destructive to society, is taking place. Media concentration, media convergence and the lure of multimedia product development have inspired media companies all over the world to redraft their standard publishing or production contracts in such a way as to effectively strip the authors of their pecuniary rights entirely. Authors have a simple choice: sign away their rights, or starve.

This paper will examine the allocation of rights between independent authors and producers from a mainly historical perspective - from the printing privileges of yesteryear, to the cynical

³ Neil Weinstock Netanel, 'Copyright and a Democratic Civil Society', *Yale Law Journal* 1996, Vol. 106, p. 352.

‘buy-out’ practices of today. As we shall conclude, it is still not too late to take author-protective action, or even legislative measures, as have been enacted in a number of mostly European countries; but time is rapidly running out.

1. A brief history of copyright: from publisher’s right to author’s right

The evolution of European literary property from publisher’s right via copyright into author’s right has been amply described in legal literature.⁴ Thanks to the printing privileges (‘patents’) that were granted by the public authorities of pre-copyright days, the printer-publishers enjoyed strong, but short-lived monopolies in the ‘privileged’ editions they produced. Inspired by emerging notions of natural justice, in the eighteenth and nineteenth century the idea gradually became accepted that it were the creators, rather than the printers, that deserved the protection of the law. At the same time, the emancipation of the bourgeoisie that culminated in the French revolution signaled the end of the privilege system. Thus, printing patent was replaced by copyright, an exclusive right of reproduction that originated with the author of the work.

But the authors were hardly better off. Under the first copyright laws that emerged in continental Europe, transfer of title to a manuscript automatically implied a grant of copyright. As a result, author’s rights remained publisher’s rights in practice, until in the second half of the nineteenth century the exclusive right was, at long last, made independent of the manuscript. With that, the paradigm shift of copyright was complete, at least on paper. Intellectual property was born; the printer-publishers had lost their privileges, apparently for ever. In the future, for protection against pirates, competitors and other unauthorized users, producers⁵ would be largely dependent upon the authors’ economic rights.

In the course of the nineteenth and twentieth century, the producers have managed to overcome this legal catastrophe with remarkable ease. The panacea was ‘freedom of contract’.

⁴ Among many others: E.D. Hirsch Ballin, ‘Auteursrecht in wording’, in: *Auteursrechtelijke opstellen*, Deventer: Kluwer 1970, p. 9 ff.

⁵ In this paper the term ‘producer’ is used in a broad manner, to indicate every natural or legal person who enters into a contractual relationship with the author (creator) of the work, with the object of using the work. This definition includes publishers, film producers, record producers, broadcasting companies and database producers - but not collecting societies. See Jacqueline Seignette, *Challenges to the Creator Doctrine*, Deventer/Boston: Kluwer Law and Taxation 1994, p 4.

If the legislature had bestowed upon the authors certain exclusive rights, nothing prevented the publishers from relieving the authors from their legal rights by contractual means. Indeed, this occurred on a grand scale almost immediately,⁶ a practice made easy by most authors' timid behavior vis-à-vis their publishers. Until well into the nineteenth century, many authors considered it not done to benefit financially from the proceeds of their works. The true author created *gloria et fama*, not for material profit.⁷ Untroubled by earthly matters, such as rights and royalties, the relationship between authors and publishers often took on an almost idyllic nature.⁸ The amount of the *honorarium* that a publisher would award his author, therefore, rarely reflected the commercial success of the published book.⁹ For most writers, authors' rights were merely moral rights; the pecuniary side of the coin began to prevail only much later - with the advent of the 'enterprising' author. But even today, many authors still struggle with the dilemma between mind and matter.¹⁰

The publishers, from their part, quickly discovered that their derivative legal position yielded some unexpected benefits. Because the copyright laws now focused on the person of the author, the term of protection followed the life of the author, plus an 'alimony period' to the benefit of the author's descendants. As a result, by acquiring the copyrights of the authors, the publishers had in fact obtained a legal monopoly that far exceeded the duration of the former printers' privileges, or even the (neighboring) publisher's right that European publishers would lobby for, in vain, in the 1970's and 1980's.¹¹

⁶ Hirsch Ballin, 'Uitgeversrecht in wording', in: *Auteursrechtelijke opstellen* (note 4), p. 54.

⁷ M. Vessillier-Ressi, *Le métier d'auteur*, Parijs: Dunod 1982, p. 9 ff. Similarly, professionalism in sports was considered taboo until well into the 1960's.

⁸ J.W. Goethe, *Aus meinem Leben. Dichtung und Wahrheit*, Berlin/Weimar 1984: Aufbau, Part III, Book 12, p. 514: "Die Produktion von poetischen Schriften [...] wurde als etwas Heiliges angesehen, und man hielt es beinahe für Simonie, ein Honorar zu nehmen oder zu steigern. Autoren und Verleger standen in dem wunderlichsten Wechselverhältnis. Beide erschienen, wie man es nehmen wollte, als Patrone und als Klienten. [...] Wechselseitige Grossmut und Dankbarkeit war nicht selten [...]; Knickerei und Niederträchtigkeit, besonders der Nachdrucker, waren noch nicht im Schwange."

⁹ H. Steiner, *Das Autorenhonorar - seine Entwicklungsgeschichte vom 17. Bis 19. Jahrhundert*, Wiesbaden: Harrasowitz 1998, p. 29-38.

¹⁰ Steiner (note 9), p. 27. Cf. Paul Léautaud: "faire l'amour comme un devoir, écrire comme un métier, des deux côtés, néant", quoted by Vessillier-Ressi (note 7), p. 9.

¹¹ A. Dietz, 'Einführung. Das Urhebervertragsrecht in seiner rechtspolitischen Bedeutung', in: F.-K. Beier a.o. (ed.), *Urhebervertragsrecht. Festgabe für Gerhard Schricker zum 60. Geburtstag*, München: Beck 1995, p. 12. Proponents of a publisher's right are found mainly in The Netherlands; see F.W. Grosheide and F.W. Obertop, 'Proeve van een Wet op het Uitgeversrecht. Een pleidooi voor een naburig uitgeversrecht', *Informatierecht/AMI* 1992, p. 163. Grosheide and Obertop

Politically, the publishers and producers also drew substantial benefits from the copyrights of their ‘partners’, the authors. Expansion of author’s rights proved to be a much easier ‘sell’ than the introduction of a purely capitalist publisher’s right. The authors were easily persuaded to act as stalking horses for the producers;¹² a practice that has continued until today.¹³

2. Towards an equilibrium: the socialization and collectivization of copyright

However, the producers have never managed to deprive the authors from the one right that, more than anything else, represents the ethical core of the *droit d’auteur*: the moral right. The *droit moral* offered the authors at least a modicum of protection against abusive producer practices, such as unauthorized first publication, incorrect crediting or mutilation of the work. In some European countries, the moral right also provided the foundation for a number of further reaching author-protective provisions. Both in Austria (1936) and Germany (1965) the moral rights-inspired doctrine of ‘monism’ (economic and moral rights are two sides of the same coin) led to the rule, still existing today, that copyrights cannot be assigned or transferred.¹⁴ In the future, producers in these countries had to settle for licenses (‘Einräumung von Nutzungsrechten’).

Thanks to the socialization of society that started to take effect late in the nineteenth century, the authors’ legal position vis-à-vis the producers further improved. The Dutch Copyright Act

propose the introduction of a (neighboring) publishers’ right for the duration of 50 years after first publication of a new ‘edition’.

¹² Cf. John Tebbel, *A History of Book Publishing in the United States*, New York: Bowker 1978, Vol. III, p. 420: “At the ALA’s 1922 convention in Detroit, the chairman of the Bookbuying Committee attacked American publishers in harsh terms for their attitudes on copyright and price maintenance, including the Authors’ league in this indictment. He charged that publishers were obtaining ‘unjust rights and fattening their purses at the public’s expense’, and in this, he said, the Authors’ League had played the role of stalking horse, although inadvertently.”

¹³ According to an IFPI press release, the ‘Spice Girls’ were thrilled with the European Copyright Directive’s adoption (in first reading) by the European Parliament in February, 1999.

¹⁴ Article 23 of the Austrian Copyright Act; article 29, second sentence, of the German Copyright Act. According to Seignette (note 5), p. 31, the German law is “the ultimate manifestation of the creator doctrine”.

of 1912 ('DCA') introduced the 'purpose-of-transfer-rule' (article 2 DCA).¹⁵ Whenever the terms of a contract are unclear, the author is deemed to have assigned no more rights than are required by the purpose of the contract. The parliamentary history of this provision, that has served as a model for similar provisions in Germany and France, demonstrates that its primary aim is to prevent "young and inexperienced" authors in their dealings with "cunning" publishers from "rashly" giving away their copyrights.¹⁶

An even earlier example of socially inspired copyright contract law is the German *Verlagsgesetz* (Publishing Act) of 1901. The Act, still valid today, contains a large number of author-protective provisions, including an enumeration of rights that are *not* transferred by contract. A weak point of the act is that its rules are not mandatory, and therefore may be overridden by contract. Moreover, many of its provisions are now outdated. In practice, the *Verlagsgesetz* no longer plays an important role.¹⁷

Moral and social considerations inspired the French legislature, on the occasion of the major revision of the copyright law in 1957, to enact a whole range of detailed rules governing all sorts of copyright contracts - mostly mandatory provisions. Some of the French rules are of a general nature, and contain formal or material requirements that any copyright contract must comply with. Thus, a deed of assignment or license must clearly describe the scope of exploitation: media, goal, place and duration. Moreover, every copyright contract must provide for a right to proportional remuneration of the author of the work.¹⁸ In addition, the French law regulates contractual practices in certain specific sectors, such as publishing, public performance, advertising, et cetera. Similar rules exist in many other European countries, including Spain and Belgium.

The German Copyright Act of 1965 contains only a handful of general provisions on copyright contracts - all mandatory. Licenses in respect of uses unknown at the time of

¹⁵ Article 2 (2), second sentence, of the Dutch Copyright Act reads: "The assignment shall comprise only such rights as are recorded in the deed or necessarily derive from the nature or purpose of the title."

¹⁶ K.J. Koelman, 'De overdracht overdacht', *Informatierecht/AMI* 1998, p. 70. W. J. Soetenhorst, *De bescherming van de uitgeefprestatie* (diss. Utrecht), Den Haag: VUGA 1993, p. 51-62.

¹⁷ Soetenhorst (note 16), p. 102.

¹⁸ Articles L 131-3 and 131-4 of the Code de la propriété intellectuelle. See A. Lucas and H.J. Lucas, *Traité de la propriété littéraire et artistique*, Paris: Litec 1994, p. 393-550.

contracting are null and void (article 31 § 4). In addition, the German law provides for a purpose-of-transfer rule similar to the Dutch provision (article 31 § 5), a right of contract revision in case of disproportionately low revenue (article 36; the so-called ‘bestseller clause’), restrictive rules regarding the licensing of future works (article 40), and a right to terminate a license in case of non-use (article 41). All these provisions are illustrations of the principle that the author has a right to equitable remuneration for each and every form of exploitation. As Professor Ulmer has stated, copyright in Germany has a tendency “to stay with the author as much as possible”.¹⁹

In view of the wide range of author-protective rules currently existing in many European countries, it comes as no surprise that nearly all cases concerning ownership of ‘electronic rights’ (i.e. the rights to reuse works on CD-ROMs, web sites or databases) that have been brought before European courts in recent years, have ended in convincing victories for the authors. The courts did not accept the argument put forward by the publishers that the authors, by agreeing to publication in printed form, had implicitly or tacitly consented to other, electronic uses.²⁰

Even the United States Copyright Act contains a few author-friendly provisions relating to copyright contracts. The most important thereof is the ‘termination of transfers’ rule of Section 203, which replaced the complex ‘renewal’ provisions of the 1909 Act. Pursuant to this section, authors have the right to terminate a license or transfer after 35 years. The termination right is not subject to waiver or transfer. According to legislative history, the rule is aimed at protecting authors against unprofitable transfers, “because of the unequal bargaining positions of authors, resulting in part from the impossibility of determining a work’s prior value until it has been exploited.”²¹

¹⁹ E. Ulmer, quoted by G. Schricker in G. Schricker (ed.), *Urheberrecht. Kommentar*, München: Beck 1987, § 29(4).

²⁰ See inter alia: *Central Station*, Court of Appeals Brussels, 28 October 1997; *De Volkskrant*, District Court (Arrondissementsrechtbank) Amsterdam, 24 September 1997, 21 Informatierecht/AMI 194 (1997); *Freelens*, Court of Appeal Hamburg, 5 November 1998, Case 3 U 212/97; *Progrès*, Court of Appeal Lyon, 9 December 1999; *Wiener Gruppe*, Austrian Supreme Court, 12 August 1998, *Multimedia und Recht* 1999, p. 275. See also P. Bernt Hugenholtz and Jane C. Ginsburg, ‘Symposium on Electronic Rights in International Perspective’, 22 *Columbia-VLA Journal of Law and the Arts* 151-164.

²¹ House Report No. 94-1476, 94th Con., 2d Sess., p. 124 (1976). See Seignette (note 5), p. 44.

This gradual improvement of the authors' legal position vis-à-vis the producers has not merely resulted from legislative action. Even if less 'naturally' inclined to solidarity than their fellow-oppressed, the workers, the authors, too, discovered that power rests in the numbers. In some sectors, collective bargaining resulted in model contracts that were concluded with organizations of producers.²² Especially in the common law countries (Great-Britain, United States and Australia), where statutory rules on copyright contracts have remained particularly rare, collective bargaining on behalf of authors has flourished.²³ In various sectors of the information industry, the unions or guilds have concluded collective agreements with organizations of producers and exploiters. Interestingly, the American guilds, that are open only to authors of works 'for hire', have succeeded in securing agreements detailing minimum payments for all sorts of secondary uses, so-called 'residuals'.²⁴ Mangan refers to these agreements as "a model of quasi-rights payments [...] which is in many ways derivative of the copyright model."²⁵ In the audiovisual sector, these collective agreements even recognize certain moral rights (still conspicuously absent from U.S. copyright law), e.g. rights of 'rewrite' (of scripts and scenarios) and proper crediting.²⁶

True market power was finally achieved by the ultimate form of union: the establishment of collective rights organizations. By 'pooling' their pecuniary rights in a jointly administered corporation, the authors could now effectively impose their conditions of use upon the producers, even more so after securing the support of the legislature. In many European countries, collecting societies enjoy legal monopolies. Moreover, certain secondary rights,

²² An example is the 'Model Publishing Agreement for Literary Works', adopted by the Dutch Publishers Union (NUV) and the Dutch Writers Union in 1987. The Model Agreement is widely used by publishers of Dutch-language literature.

²³ Mona Mangan, 'The organization, representation and protection of authors in common law countries. General report', in: G. Roussel (ed.), *ALAI Conference 1997 Montebello*, Conference Proceedings, Cowansville (Québec): Éd. Yvon Blais 1998, p. 953; Peter S. Grant, 'L'interprétation, l'intérêt et la mise en oeuvre des ententes collectives ayant trait aux oeuvres audiovisuelles', *ALAI Conference 1997 Montebello*, p. 1051.

²⁴ See Annex, *ALAI Conference 1997 Montebello* (noot 23), p. 959-964; Grant (note 23), p. 1056.

²⁵ Mangan (note 23), p. 955.

²⁶ Mona Mangan, 'U.S. Report', *ALAI Conference 1997 Montebello* (note 23), p. 1094-1099; John M. Kernochan, 'Ownership and Control of Intellectual Property Rights on Audiovisual Works: Contracts and Practice. General Report III', in: *ALAI Congrès du Premier siècle du cinéma*, 17-22 September 1995, Paris: ALAI, p. 282-283. Grant (note 23), p. 1047, speaks of an American "obsession" with credits.

such as the rental right guaranteed by Council Directive 92/100/EEC, have been declared unwaivable.²⁷

But the authors had to pay a price for the spectacular successes of the societies. Efficiency demanded that the authors unconditionally surrender their pecuniary rights, thereby enabling the societies to offer blanket licenses to their clients (broadcasters, cable operators, restaurants, etc.). Thus, the exclusive right degenerated into a right to remuneration. For the same reasons, the societies discouraged the individual exercise of moral rights. For ever striving for higher gross income, and increasingly in competition with foreign societies, the rights organizations gradually began to resemble their traditional foes, the producers. Internally, their mission was being undermined as well. Traditionally, the societies administrated not only the rights of ‘real’ authors, but of other, powerful right holders as well (e.g. music publishers). As a consequence, producers have always had an important say in collecting societies’ administration and politics.

3. The rights war flares up

In recent years, the precarious equilibrium between authors and producers has been disturbed once again, largely due to two interrelated factors: media concentration and media convergence.

Media concentration

Both on the national and the international level, the number of independent media companies of some importance has fallen dramatically in recent years. Acquiring rights to ‘content’ (e.g. a complete film library or music catalogue) is an important impetus behind the tidal wave of take-overs and mergers, that has reshaped the media landscape.²⁸ Invariably, ‘synergy’ is the magic word. Press releases never fail to optimistically predict, that the divisions of the new mega-company will creatively impregnate each other, and that the company’s ‘content’ assets will flourish as never before. In practice however, ‘synergy’ rarely happens. Because of the ‘targets’ that each individual division has to meet, there is no incentive to keep the entire

²⁷ Article 4, Council Directive 92/100/EEC.

²⁸ Janine Jaquet, ‘Cornering creativity’, *The Nation*, 17 March 1997, p. 10.

chain of exploitation “in the corporate family”. According to Janine Jaquet, “selling movie rights or book rights to the highest bidder is how you make money”. Synergy is “dead”.²⁹

The media companies that have survived the wave of mergers and acquisitions are ‘global players’, such as AOL/Time Warner/EMI, News Corp., Bertelsmann and Elsevier - ‘multinationals’ oblivious to national borders and well-established local custom. Gone is the enlightened gentleman-publisher of the good old days, the author’s intellectual partner and trusted friend. Enter the ‘media mogul’, whose ‘stable’ of authors generate the copyrights that feature prominently as capital on the company’s balance-sheet.³⁰

In this process, the norms of the international media companies have gradually eroded to reflect those of the United States, the dominant power in every segment of the information industry. This phenomenon of ‘Americanization’ is painfully visible in the legal field. Media companies grow large legal departments teeming with specialized copyright lawyers.³¹ The producer-oriented copyright paradigm rules; simple copyright contracts balloon to telephone directory-size proportions; and the ‘buy-out’, a relict of the bad-old days of American slavery (according to Professor Nordemann), becomes the norm.³²

Media convergence

“The seismic explosion of digitised information systems appears to drive myriad splinters into copyright contracting”. Professor Cornish’s introductory words to the ALAI Conference in Montebello (1997) have proven to be prophetic.³³ Indeed, the digitalization of the information industry has had, and is still having, far-reaching consequences for the law of copyright contracts. In this process, media convergence plays an important role – a development already begun in analogue times, but progressing at a dazzling pace through the

²⁹ Jaquet (note 28).

³⁰ Seignette (note 5), p. 62: “The creditworthiness of production and publishing companies, whether of books, electronic databases, television programs or computer software, rests for a large part on ownership of copyrights.”

³¹ Wilhelm Nordemann, ‘Towards a Basic International Regime of Copyright Contracts’, in: Jan J.C. Kabel and Gerard J.H.M. Mom (ed.), *Intellectual property and Information Law*, Den Haag/Londen/Boston: Kluwer Law International 1998, p. 219

³² Nordemann (note 31). Cf. Jaquet (note 28).

³³ William R. Cornish, ‘General Report. Individual Contracts of Authors and Artists: Practices in the Digital Environment’, in: *ALAI Conference 1997 Montebello* (note 23), p. 382.

digitalization of the production, distribution and consumption of information products and services. The traditional borderlines between print publishing, sound recording, film production, broadcasting and so-called 'new media' are rapidly evaporating. Having seen their 'natural' (media specific) mission gradually disappear, producers are forced to redefine their goals. Publishers, formerly 'traders in printed matter', have become 'information producers' almost by accident. But what kind of information? And how to market it?

The publisher's dilemma becomes a full-blown identity crisis as soon as he realizes that the typography, reproduction and distribution functions that used to be essential to his trade, can be performed by just about anybody - even by the authors themselves.³⁴ The Internet is the publisher's ultimate nightmare: not only 'global copying machine', but also zero-cost, world-wide distribution channel. Suddenly, every author equipped with a modem and a PC can reach out to an audience of hundreds of millions readers, viewers or listeners - without the intervention of a publisher, retailer or other intermediary.

Bereaved of his traditional role, his mission and his identity, the desperate publisher clings to his single remaining asset. He "contracts the work as raw matter for various [information] products". He acquires the rights in all possible media, because "at the time of contracting, the publisher has no idea to what uses the work might eventually be put."³⁵

So, once again, we see the total transfer of rights becoming standard business practice, not out of necessity, not to facilitate enforcement, not for logistic purposes, not for reasons of efficiency or legal security, but as a symptom of existential insecurity, because publishers have no idea what the future has in store for them, and for the works created by 'their' authors. It is this same feeling of insecurity that explains much of the 'copyright grab'³⁶

³⁴ In 1980, W. Gordon Graham issued an early warning. The traditional division of roles in the publishing industry (author-printer-publisher-library-bookseller) does not fit "into a world seeking instant communication which is already beginning to evolve, for this purpose, a two-constituency structure of 'producers' and 'users'. That is one reason why publishers feel intuitively nervous." W. Gordon Graham, 'The future of publishing', in: J. Somerwil a.o., *De uitgever: boekenmaker of merchandiser?*, Deventer: Kluwer 1980, p. 15

³⁵ M.J. Frequin (secretary of the Dutch Publishers Union), 'Uitgeefovereenkomsten', in: M. Haven, P.J. Keuchenius en G.J.H.M. Mom, *Contracten en (multi)media*, Deventer: Kluwer 1999, p. 10-11.

³⁶ Pamela Samuelson, 'The Copyright Grab', *Wired* 4.01, January 1996.

occurring today - the aggressive, almost paranoid lobbying for increased copyright protection in the digital environment.

The multimedia publisher is a myth. Today's publishers only rarely develop and exploit products in all possible media. In practice, most right holders will prefer to grant (sub)licenses for each individual medium to specialized companies. Most 'paper' publishers simply do not possess the know-how they need to survive a 'digital' adventure. The Internet has its very own dynamics; here, strange laws apply, such as 'Dyson's Dictum': "Treat your on-line content *as if it were free*."³⁷ Publishers attempting to simply transpose print-oriented business models to the Internet do not stand a chance against a new breed of providers of innovative information services. True, even in this digital *mer à boire* intermediaries have a role to play. But this role has already been reserved - for the *portals* and *search engines* on the world wide web.

What will be the author's legal position in this world of multimedia? Perhaps, we can learn the answer from the history of music publishing, a sector of the entertainment industry where the separation of mission and media has happened in a much earlier stage - with the introduction of 'musical instruments', such as the player piano and the phonograph, and later: radio, tape recorder and CD. Music publishers traditionally acquire (nearly) all rights from composers and song writers. What do they 'publish' in return? Surprisingly little. What music publishers only rarely produce these days is sheet music, even if the wording of the average music publishing contract suggests otherwise. Music publishers have remained publishers only by name. They no longer publish, but administer and exploit the rights to their 'libraries', by granting licenses to record companies, and receiving monies from the collecting societies.³⁸

The music publisher is not a publishers, but an exploiter of rights - precursor of the new generation of 'multimedia producers' that the digital era will breed.

³⁷ Carl Shapiro and Hal R. Varian, *Information Rules*, Boston: Harvard Business School Press 1999, p. 65.

³⁸ M. Karnstedt, 'The Future of Music Publishing in a Wired World', WIPO International Conference on Electronic Commerce and Intellectual Property, Geneva, 14-16 September 1999. J. Tatt, 'Music Publishing and Recording Contracts in Perspective', *EIPR* 1987, 132.

6. Authors as publishers

The rise of the Internet inevitably raises the question whether authors really need these intermediaries. This question, too, has been asked before. More than two centuries ago, in 1772, a handful of prominent German authors (led by popular poet Friedrich Gottlieb Klopstock³⁹) shocked the literary society by proclaiming the *Deutsche Gelehrtenrepublik*. This ‘Republic of Learned Men’ aimed at liberating the authors from the publishers’ chains through a scheme of direct marketing; the authors’ works were sold directly to the readers on a subscriber basis.⁴⁰ Not surprisingly, the plan, that was largely inspired by frustration over the publishers’ author-unfriendly copyright policies, failed. The authors could not duplicate the distribution network that the publishers had rolled out. But politically, Klopstock’s republic was a success; the urgent call for authors’ rights was soon answered by the German lawmakers.⁴¹

The 20th Century has seen various attempts at author self-control. In 1919, Hollywood stars Charles Chaplin, Mary Pickford and Douglas Fairbanks, together with director D.W. Griffith, established the *United Artists* film studio. But even author-run enterprises such as these never succeeded in making intermediaries entirely redundant.

For the successors of Klopstock and Chaplin, the Internet appears to be a dream come true. Scientific authors, early adapters of the Internet, are particularly optimistic. Is ‘publishing without publishers’ a realistic scenario? At the Institute for Information Law’s 1997 conference on ‘Copyright and Universities’, Professor Mackaay put the theory to the test.⁴² Mackaay predicts two publishing models to develop side-by-side: a market-based model for marketable information products and services (e.g. commercial databases, periodicals, treatises and monographs), and a non-commercial model for the rapid exchange of scientific information. Indeed, the Internet has rapidly become the dominant medium of communication

³⁹ Friedrich Gottlieb Klopstock (1724-1803), best known for his religious epic ‘Der Messias’.

⁴⁰ Goethe (note 8), p. 514-516.

⁴¹ Martha Woodmansea, *The Author, Art, and the Market*, New York: Columbia University Press 1994, p. 47-48.

⁴² E. Mackaay, ‘Scientific publishing without publishers’, in: P.B. Hugenholtz a.o. (ed.), *Universiteit en auteursrecht. Wetenschappelijke informatievoorziening in een digitale omgeving*, Amsterdam: Otto Cramwinckel 1998, p. 21.

among scientists. Papers and drafts are being distributed through discussion lists, posted on private or university-owned web sites, or distributed through *e-print servers*. In contrast, ‘refereed’ versions are formally published in print only many months later, to be directly archived in libraries and other depositories.

For scientific authors and their employers (universities and research institutions), this parallel universe of non-commercial publishing is an important reason to be very cautious in granting rights of publication to commercial publishers. Scientific publishers, including some of the learned societies, are notoriously greedy in acquiring as many rights as possible.⁴³ It is essential for freedom of scientific communication to survive and prosper that authors reserve, at the very least, the right to publish their articles in electronic form – before or after formal publication. University copyright policies that are currently being developed at many institutions, should focus on preserving that freedom, and not be merely guided by pecuniary considerations. To this end, universities might co-operate with publishers in developing model publishing contracts that provide for only minimal grants of rights.

4. In Search of a New Equilibrium

It is one of the ironies of the Internet, that now ‘publishing without publishers’ is finally becoming a reality, authors are forced to assign their rights to publishers and other producers on an unprecedented scale. In the digital era, author’s rights have become the authors’ only by name. The producers have run away with the rights, as in the early days of copyright. High

⁴³ For example, Wiley uses the following language in its standard publishing agreement: “Upon acceptance of the manuscript for publication [...] the Publisher shall acquire the following rights: the right of publication, the right of reproduction, and distribution of the journal, the right to prepare electronic editions of such journals on data carriers of any kind, in particular on CD-ROM, the right to store the work in on-line databanks of any kind, the right to distribute such databanks and to recover the work from such databanks as a hard copy or by incorporeal transmission for the purpose of displaying the work on a screen and for downloading by the databank user, in the form of single transmission or subscription services provided by databank providers, in whole or in part, in particular in the form of profile interest services. The grant of rights shall not be limited territorially (worldwide rights) and shall be exclusive for a period of three years; subsequently the Publisher shall acquire a non-exclusive right that is not limited in time. The Publisher shall be entitled to re-assign the right it has acquired to third parties, in particular to databank providers. [...]”

time to change the course of history once again, and return the rights where they belong: with the authors of works of literature, science and art.

Doesn't the existing repertoire of remedies under private law provide sufficient protection? Indeed, depending on the law applicable to the contract, several instruments available under general contract law may protect authors against unfair provisions in copyright contracts:

- the principle of 'fairness' or equity, that may supplement, or even override, unfair contractual terms in certain jurisdictions;
- rules prohibiting unfair terms in standard agreements, or unconscionable contracts; and
- provisions allowing the revision or rescinding of a contract if unforeseen circumstances would make unaltered execution of the contract unjust.

However, even if authors might benefit from these rules in a given situation, general private law suffers from a fundamental flaw: its normative content is minimal. Contract law does not inform authors or publishers of the (un)reasonable nature of a specific contractual provision. Authors with a grievance may take a publishers to court after the fact, but in practice will be very hesitant to do so.

As we have seen, collective bargaining (on behalf of employed authors, or even 'organized' free lance creators) may restore the lack of balance in copyright contracting, and lead to a more equitable allocation of rights among authors and producers. However, in some countries, including the United States and Germany, freelance authors are barred from collective bargaining for reasons of anti-trust law.⁴⁴ Moreover, even absent such restrictions, freelance authors are often hesitant to organize themselves in guilds or unions. Many authors have elected to live the life of an independent creator not out of social or economic necessity, but as a matter of principle. The independent author is an *Einzelgänger*, preferring total freedom over the social straightjacket of employment, office hours and union. To protect these, truly free creators against the unfair contractual practices of the producers, only one

⁴⁴ Th. Bodewig, in: *Urhebervertragsrecht* (note 11), p. 877-878.

remedy suffices: legislative measures, that impose certain limits on the freedom of copyright contracting.⁴⁵

What measures would be appropriate? A lot can be learned from the rules on copyright contracts presently codified in a number of European countries. Depending on local legal tradition, legislatures might opt for a scheme of detailed, sector-specific provisions (e.g. regarding publishing, broadcasting, advertising, etc.), such as those existing in France, Spain or Belgium. Alternatively, legislatures more comfortable with ‘open’ rules might prefer introducing a set of general rules, phrased in media-neutral terms. Either way, the statutory rules on copyright contracting should be imperative, and preferably immune to choices of (foreign) law.

Rules to be considered might include:

- an ‘automatic’ termination of transfer or grant of rights in case of non-use within a given period of, say, three years;
- a ‘bestseller’ provision, requiring contract renegotiating if the work becomes an unexpected success;
- a purpose-of-transfer rule; and possibly
- a prohibition on the transfer or grant of rights in respect of uses unknown at the time of contracting.

So far, the international copyright conventions do not provide for any such author-protective measures. Obviously, in view of the globalization of the information and entertainment industries, there is much to be said for international solutions. An internationally harmonized regime of copyright contract law would benefit both authors and producers. It would prevent choice of law clauses from undermining author-protective provisions, and create a ‘level playing field’ for producers all over the world.

The central theme of this conference is the belief that abolishing copyright would enhance the free flow of information. This author does not share this belief. In contrast, this author

⁴⁵ Grosheide, *ALAI Conference 1997 Montebello* (note 23), p . 262. Cf. Explanatory memorandum with Council Directive 92/100/EEC (Rental rights Directive) [recognizing need to protect authors as weaker parties, and terming total freedom of contract “unacceptable”].

believes that copyright's structural function, as the "engine of free expression", has in the past been effective in fostering a plurality of voices in the media – a rich and diversified information 'ecology' if you will. Whether copyright can maintain this function in the years to come, and thereby justify its prolonged existence for future generations, will depend largely on the proper allocation of rights between authors and producers.

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