



BILL CORNISH
MEMORIAL LECTURE
PROFESSOR JANE GINSBURG

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The Author as Revenue-Sharer: Lecture in Memory of William R. Cornish

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In 2002, Professor Bill Cornish delivered the Horace S. Manges Lecture at Columbia Law School. Titled “The Author as Risk-Sharer,” the lecture examined the perennial problem of authors’ remuneration: authors’ contracts tend to result in revenues disproportionately low relative to the returns to investors and intermediaries. Professor Cornish compared the laissez-faire, or risk-sharing, approach of Anglo-American law to the more author-protective constraints on copyright contracts prevalent in continental jurisdictions. Presciently (albeit not anticipating Brexit), Prof. Cornish forecast:

Within a short period the Franco-German axis in the EU could be committed to limiting what an author can submit to by contract. The British will find themselves drawn, more or less willingly, into abandoning their old “handsoff” policy towards authors’ and performers’ contracts. An EU Directive might require the setting of common remuneration standards (and indeed numerous other conditions) in order to ensure that a level playing field for authors is maintained across the whole common market.

The adoption in 2019 of an EU Directive declaring authors’ and performers’ “entitle[ment] to receive appropriate and proportionate remuneration” bore out Prof. Cornish’ prediction (albeit not for the UK). Moreover, notwithstanding the Anglo-American tradition, Prof. Cornish ultimately endorsed the author-interventionist approach:

So how should common law systems view these authors’ rights laws on guarantees of remuneration? [I] believe that they are fundamentally worthwhile . . . , though of course with a decent common lawyer’s circumspection. They are a form of legal constraint which, based on more than concerns over work-for-hire or intellectual creativity or sacrosanct moral rights, seek to preserve real benefits from copyright laws for the authors in whose name the copyrights are granted. They seek to ensure that copyright laws are not mere pretexts for protecting the investment and entrepreneurial initiative of authors’ exploiting partners. Why after all do we continue to have copyright laws which derive their legal and moral force from the act of creativity?

The last observation seems to me key: a system built solely on investor incentives should differ substantially from the modern copyright regime, as those who think about what, if any, kind of protection should attach to the authorless outputs of AI systems, should recognize.

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The moral high ground of copyright requires the preservation or institution of measures to ensure “real benefits from copyright laws for the authors in whose name the copyrights are granted.” I will consider the various techniques national and, for the EU, regional, copyright laws have employed to provide those “real benefits” to authors. These include targeting the terms of the grant of rights, for example by denominating some rights inalienable, by regulating the scope or duration of a grant, by returning rights to authors if their grantees fail to exploit the work, or by providing for the adjustment of the authors’ compensation if their shares become disproportionately low relative to their grantees’ returns. The 2019 European Union Digital Single Market Directive employs most of these techniques. In Britain historically, and still in the US, authors’ reversion or termination rights attempt to redress the balance between authors and exploiters of the works by giving authors a “second bite of the apple” at licensing her rights. None of these techniques, however, guarantee that authors will in fact receive the “appropriate and proportionate remuneration” to which legal systems (particularly in the EU) might (or should) aspire. Impediments include, first, a cultural predilection (especially in common law countries) for free alienability of property rights, together with ambivalent attitudes about the merits of author protections. Second, the potential for circumvention of substantive author protections by manipulation of private international law rules, particularly as to forum selection and choice of law. And, third, and perhaps most intractably, the rise of online platform Terms of Service requiring creators to surrender effectively all of their rights when posting their works to the platform.

Free alienability

It’s no accident that the copyright law of the U.S. and other common law countries favors easy alienability of authors’ rights. Our legal system frowns on “restraints on alienation.” Perhaps ironically, the ability freely to part with property is a hallmark of its ownership, so freedom of contract provides the prevailing norm. That the author’s “freedom” to contract away all her rights works to the benefit of the so-called “content industries” could traditionally be justified as consistent with the overall goals of the copyright scheme. These are not only to promote the care and feeding of authors, but also—some would contend, primarily—to ensure the dissemination of works of authorship. After all, the US constitutional goal “to promote the progress of science” is not met merely by creating works; someone has to get them from the author’s pen (or laptop) into the public’s hands (or screens). To the extent that authors retard that process by endeavoring to withhold some rights, or to make it more expensive by demanding more pay for rights granted, authors can seem like pesky interlopers. Australian writer Miles Franklin (best known for her novel “My Brilliant Career”), captured this annoyance in “Bring the Monkey,” her 1933 parody of the English country house murder mystery. The conversation she imagined among members of Britain’s budding motion picture industry anticipates what US film and TV studios may be fantasizing now that the members of the Writers Guild of motion picture and television screenwriters have gone on strike for a decent share of the income, especially from streaming services and new media “platforms” on the Internet. Miles Franklin wrote:

[T]hey [the “film magnates”] were generally agreed that the total elimination of the author would be a tremendous advance. . . .

“Authors,” said this gentleman, “are the bummiest lot of cranks I have ever been up against. Why the heck they aren’t content to beat it once they get a price for their stuff, gets my goat.” . . .

There was ready agreement that authors were a wanton tax on any industry, whether publishing, drama or pictures. . . .

“I understand your point of view,” [the film producer] said suavely. “That is why I want you to see my film. . . . It has been assembled by experts in the industry, not written by some wayward outsider.” . . .

[And, indeed, in the film] [t]here was no suggestion of an author. [Instead, the suave producer] was listed twice, as continuity expert and producer.”

(Miles Franklin was certainly on to something, as we learn that today’s screenwriters fear that suave producers will replace them with Chat GPT.)

Consistent with the desire to get authors out of the way of the work’s exploitation, the U.S. copyright law contains few mandatory substantive provisions. Most limitations go to form: a transfer of exclusive rights must be in writing and signed by the author. But nothing prevents the author from executing such an instrument to grant nearly all of her economic rights of exploitation. Thus it is possible for a U.S. author, “for good and valuable consideration” (which could be the mere fact of disseminating the work) to assign “all right, title and interest in and to the work, in all media, now known or later developed, for the full term of copyright, including any renewals and extensions thereof, for the full territory, which shall be the Universe.” I’m not making this up. The Roz Chast New Yorker “Ultimate Contract” cartoon was not so far off in further specifying:

and even if one day they find a door in the Universe that leads to a whole new non-Universe place, . . . or everything falls into a black hole so nobody knows which end is up and we’re all dead anyway so who cares, we’ll STILL own all those rights. So stop whining, sign or don’t sign, but face reality for once in your life, because this is the way the world works, pal.

Worse, with one exception, this is a valid contract. The exception is not the extraterrestrial aspect; US authors can, it seems, validly grant rights for Mars (although, under principles of territoriality, Martian law may apply to the substantive copyright matters the extra-planetary grant covers for that territory). The exception concerns the author’s inalienable right to terminate grants of US rights 35 years after the grant was executed. Thus, even if the contract purports to grant rights in perpetuity and for a lump sum, the author can nonetheless retrieve most of her U.S. rights 35 years after the conclusion of the contract. Accordingly, we next turn to the origin and vicissitudes of authors’ reversion rights.

Reversion rights

The challenge of fairly compensating authors is hardly new: the rise in the seventeenth and eighteenth centuries of a professional class of authors stimulated demands for better remuneration from their writings. The increase in authors who sought to live from their work, rather than from patronage or personal fortune, likely provided at least one impulse for the author-protective provisions of the first copyright act, the 1710 British Statute of Anne. Under the regime of printing privileges that preceded the Statute of Anne, authors generally received from publisher-booksellers a one-time payment, made when the authors surrendered their manuscripts for publication. Authors whose works enjoyed particularly high demand might have negotiated additional payments for new editions or for new printings of a work that had done well, or they might extract a higher price per sheet for their next work, but neither law nor custom generally assured authors remuneration which reflected the sales of their work. As a result, few authors benefited from the continued success of their work.

Contemporary British authors lamented their exclusion from their works' subsequent profits. An item in the February 11, 1710 issue of the journal *The Observer* recounted the argument of an advocate of a suggested amendment of the Bill that would become the Statute of Anne (then in the Commons), "which is design'd as a Kindness to us Authors":

That the Bookseller shall have a Property in the Copy only for a limited Time, after which it shall revert to the Author or his Assignees. This they say will be an Encouragement to Learning, and a Security to Authors against being ill-treated or impos'd upon by Booksellers, who run away with the Profits of their Labours ...; so that Authors not being able to foresee this, because Copies are like Ships put to Sea, whose prosperous or unfortunate Voyage is not to be foreseen, they have nothing more than their first Copy-Money, let the Book sell ever so well.

Parliament adopted the proposed author's reversion right in the last clause of the Statute:

Provided always, [t]hat after the expiration of the said term of fourteen years, the sole right of printing or disposing of copies shall return to the Authors thereof, if they are then living, for another [T]erm of fourteen years.

Although the U.K. abandoned the authors' reversion right in the 1956 revision of its copyright law, and UK caselaw before then had substantially undermined the reversion right by making it freely alienable, a version of the right has remained in U.S. law to the present, in the author's inalienable right to terminate a grant of rights thirty-five years after its conclusion. In its current form, the U.S. termination right can provide significant benefits to those authors who successfully effect termination, or whose prospects of termination prompt the grantee to propose a better deal before the termination period vests. But the right presents several shortcomings. First, it is of no avail to employees and to creators of certain commissioned works because the statute excludes terminations of grants in "works made for hire." Second, the effective date of termination occurs 35–40 years from the execution of the grant; the terms of the contract, no matter how leonine,

will continue in effect for a long time, indeed, potentially well past many works' commercial viability, and potentially well after the author has died.

Third, the statute excludes from the scope of termination derivative works created by the grantee during the period of the grant. This is an immense carve-out, because it means that any adaptations, such as sequels, motion picture versions, musical arrangements or sound recordings made before termination and in accordance with the grant's terms can continue to be exploited under the terms of the now-rescinded grant. Thus, for example, the author of a novel will not see a penny more for the post-termination exploitation of a television series based on the novel and created before termination. (Happily, this carve-out does not extend to yet-to-be-created adaptations. For new, post-termination, seasons of that TV series, the producers will have to obtain new licenses from the author.)

Finally, termination is not automatic: the author must serve notice on each grantee within a minimum of two years before the effective date of termination of each grant. If she does not comply with the deadlines and other formalities of notice, all rights will remain with the grantee(s).

Termination is better than nothing, but better still might be substantive limitations not only on the duration of the grant, but also on the scope of the rights the author grants, for example, by reserving new media rights to the authors, as some national laws in the EU have done, including the German law analyzed in Prof. Cornish's 2002 Manges Lecture. Another pro-author adjustment would require revision of the remuneration paid to authors should that prove highly disproportionate to the exploiter's return on the work. That is what the EU has required in its 2019 Digital Single Market Directive, to which we now turn.

Authors' remuneration rights under the 2019 DSM Directive

Article 18 of the DSM Directive sets out the principle of appropriate and proportionate remuneration. It states that: "Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration." While the Directive excludes authors of computer programs from the application of the principle, all other authors, including employee authors, appear to be covered.

If authors are entitled to appropriate and proportionate remuneration, how will they know whether their contracts are producing disproportionate benefits for the grantees? Implementation of the principle of appropriate and proportionate remuneration requires "transparency": DSM Directive Article 19(1) imposes a transparency obligation from which grantees may not contractually derogate. If the accountings reveal a sufficient disparity, Article 20 then entitles the author to an adjustment of the contractual remuneration. Moreover, the parties may not contract out of this right to readjustment. Article 21 establishes an unwaivable right to alternative dispute resolution (ADR), which may be a practical necessity for authors who cannot afford lawsuits to enforce their rights to contract review and revision. The DSM Directive does not limit the maximum term of an author's

grant, but it does provide relief if the grantee fails to exploit the work. Under Article 22(1)'s Right of Revocation, Member States may impose time limits on the exercise of the revocation, and may allow the grantee time to begin or resume exploitation before the revocation takes effect. Member States may provide that the parties may not contract out of the revocation right unless they are covered by a collective bargaining agreement that already provides for similar rights. Articles 18-22's obligations are complex and too often ambiguous in their details, but they directly endeavor to lengthen the short end of the stick that too many contracts allocate to authors.

Circumventing author protections through private international law

Even in countries covered by the DSM Directive (or in States that choose to adopt similar remuneration rectifications), there remains an important potential impediment to authors' ability to reap the benefits of those laws. Many author contracts, especially in the digital environment, grant rights for multiple territories: the international dimension of these agreements may affect author-protective contract laws' practical impact, even with respect to exploitations occurring within the enacting countries' borders. Because general principles of private international law leave the parties to determine the law applicable to their contract, can the parties simply avoid domestic protections of authors' economic interests by choosing (or the stronger party imposing) the law of a less author-interventionist jurisdiction to govern the full territorial extent of the transfer?

The extent to which the stronger party may, in fact, elude national author protections depends on whether those measures are characterized as substantive copyright norms, or as contract rules. If the copyright characterization prevails, the scope of the transfers will be governed by the laws of countries for which rights are granted (*lex loci protectionis*), and at least some of these will include mandatory author protections. If, by contrast, the matter is considered one of contract law, then the scope of the grant will be governed by the *lex contractus*, the national law "chosen" by the parties (or imposed by the stronger party). Thus, given the predicate issue of characterization, it does not suffice for the grantee to choose the contract law of a State lacking the EU's author protections; to achieve the objective of "contracting out" of those protections, the grantee will also want to include a forum selection clause designating a national court whose rules of characterization will consider the scope of a grant to be a matter of contract rather than of substantive copyright law. For example, suppose the contract selects country A as the forum because that country's characterization rules would deem as matters of contract law requirements that the contract provide for an accounting of revenues (DSM Directive art. 19) and an opportunity to terminate the grant in the event the grantee fails to exploit the work (DSM Directive art. 22). Suppose further that country A's contract law imposes no limits on contracting out of those requirements (even though the Directive provides for inalienability of those author prerogatives). The exploiter will have succeeded in avoiding those obligations in all the territories covered by the contract. Unless . . .

Unless those territories fight back by posing special mandatory rules, as France has, to neutralize this kind of circumvention. In general, one country's courts need not apply another country's mandatory rules; even in the EU, the Rome Convention and the Rome I Regulation permit, but do not require, applying foreign mandatory rules in a contract covering multiple territories. But

France has taken a different, more aggressively author-protective, approach in the following circumstances:

The contract by which the author of a musical composition with or without words in an audiovisual work transfers all or part of his exploitation rights to the producer of the audiovisual work may not have the effect, notwithstanding the law chosen by the parties, of depriving the author, for the exploitation of his work on French territory, of the protective provisions [implementing arts. 18-22 of the DSM Directive] set out in the present code.

The author may bring before the French courts any litigation concerning the application of the foregoing section, whatever may be the location in which his grantee or himself are established and notwithstanding any forum selection clause to the contrary.

Note that France seeks to ensure the benefits, on French territory, of its author-protective laws whatever the nationalities of the author or the grantee. France is not alone in what I'll call its territorial universalism: as interpreted by US courts, the US termination right allows all authors whose works are protected under US law to recover their rights, with respect to exploitations in the US, whatever the law chosen to govern the contract, and whatever the forum selected to hear disputes arising out of the contract.

Admittedly, this approach curtails party autonomy when autonomy would undermine author protections. The observation may be true, but it also misses the point: the purpose of author-protective laws is to override party "autonomy." Content-neutral choice of law rules create the problem in the first place: the rule of "party autonomy," which directs courts to look to the law the parties choose for their contract, and the forum they select for their disputes, enables the stronger party to avoid weaker party protections simply by submitting the contract to a less-constraining national law or forum. In other words, when there is an imbalance in the power of the co-contractants, the rule of party autonomy is "neutral" only in appearance. In fact, it favors the stronger party.

Platform Terms of Service

So far, we have seen that implementation of the principle of "appropriate and proportionate remuneration" for authors would require not only substantive legislation to counterbalance most authors' weaker bargaining positions, but also PIL rules to counteract work-arounds. But even if national laws adopted an interventionist approach, it probably would make little difference to the large class of creators who (yet) lack professional publishers, and who rely on generally unremunerated Internet dissemination to achieve the "exposure" that one day may lead to a contract that will provide payment (even if that payment proves disproportionately low).

For "exposure" (or the hope of it), creators often turn to internet platforms, signing up for a Faustian exchange: the prospect of finding an audience in return for the loss of control over the dissemination of their works. Moreover, the author-protective mandatory remuneration rules of the DSM Directive do not seem to apply to platform licenses. Recital 82 states: "Nothing in this

Directive should be interpreted as preventing holders of exclusive rights under Union copyright law from authorising the use of their works or other subject matter for free, including through non-exclusive free licences for the benefit of any users.”

US courts, meanwhile, have upheld “clickwrap” and “browsewrap” agreements, even where the platform reserves and then exercises the right to make unilateral changes to the TOS. Here’s one example:

WE MAY REVISE THESE TERMS FROM TIME TO TIME BY POSTING A REVISED VERSION. YOUR CONTINUED USE OF ANY OF THESE SITES AND APPS AFTER WE POST SUCH CHANGES WILL CONSTITUTE YOUR ACCEPTANCE OF SUCH CHANGES.

This means that authors may be giving up even more than they initially thought. (It’s also a far cry from the quaint “meeting of the minds” traditional concept of contract law, since it seems that the stronger “mind” may impose continual redefinition of the meeting place.)

Platform licenses are generally broad, and, despite significant variations in phrasing, may have little practical difference in terms of rights ceded by the author. To illustrate and compare the scope of rights surrendered, let’s look at the Terms of Service of some of the principal platforms on which authors post their works: Instagram, YouTube and Twitter.

INSTAGRAM Terms of Service

We do not claim ownership of your content, but you grant us a license to use it. Nothing is changing about your rights in your content. We do not claim ownership of your content that you post on or through the Service and you are free to share your content with anyone else, wherever you want. However, we need certain legal permissions from you (known as a “license”) to provide the Service. *When you share, post, or upload content that is covered by intellectual property rights (like photos or videos) on or in connection with our Service, you hereby grant to us a non-exclusive, royalty-free, transferable, sub-licensable, worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content* (consistent with your privacy and application settings). This license will end when your content is deleted from our systems. You can delete content individually or all at once by deleting your account.

This language means that the posting author grants to the platform an uncompensated, non exclusive, worldwide license to exercise all the rights under copyright, and to allow third parties to do whatever the license permits the platform to do. Whether the platform in fact licenses third parties is another matter, as pending litigation has emphasized. The license terminates with the author’s removal of her content from the platform, or when she deletes her account. But, as a practical matter, the licenses will produce effects long after that, if third parties copy and disseminate the previously licensed content.

You Tube TOS

Rights you Grant

You retain ownership rights in your Content. However, we do require you to grant certain rights to YouTube and other users of the Service, as described below.

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By providing Content to the Service, you grant to YouTube a worldwide, non-exclusive, royalty-free, sublicensable and transferable license to use that Content (including to reproduce, distribute, prepare derivative works, display and perform it) in connection with the Service and YouTube's (and its successors' and Affiliates') business, **including for the purpose of promoting and redistributing part or all of the Service.**

License to Other Users

You also grant each other user of the Service a worldwide, non-exclusive, royalty-free license to access your Content through the Service, and to use that Content, including to reproduce, distribute, prepare derivative works, display, and perform it, **only as enabled by a feature of the Service** (such as video playback or embeds). For clarity, this license **does not grant any rights or permissions for a user to make use of your Content independent of the Service.**

The YouTube license adds to the Instagram TOS an explicit authorization to use the author's work to promote the YouTube service. The Instagram license does not directly authorize third party usage, though it allows Instagram to act as the intermediary between the author and Instagram's users, with Instagram empowered to decide the extent of any sublicenses on a case-by-case basis. YouTube, by contrast, grants itself the same power while *ex ante* providing for third party licenses for in-platform uses. If the author has no idea who the third-party user is, or when or what the use will be, any "meeting of the minds" must be a legal fiction.

Twitter

By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods now known or later developed (for clarity, these rights include, for example, curating, transforming, and translating). This license *authorizes us to make your Content available to the rest of the world and to let others do the same.* You agree that this license includes the right for Twitter to provide, promote, and improve the Services and to *make Content submitted to or through the Services available to other companies, organizations or individuals for the syndication, broadcast, distribution, Retweet, promotion or publication of such Content on other media and services,* subject to our terms and conditions for such Content use. Such additional uses by Twitter, or other companies, organizations or individuals, is made with *no compensation paid to you* with respect to the Content that you submit, post, transmit or otherwise make available through

the Services as the *use of the Services by you is hereby agreed as being sufficient compensation for the Content and grant of rights herein.*

The Twitter license is the most far-reaching of those considered here, since it covers all rights under copyright, including future uses, and authorizes third party use, whether on or off the platform, all without compensation to the author (apart from the delights of using the service).

The breadth and ambiguity of these licenses mean that authors may not receive the benefits of the Faustian bargain they thought they had concluded. When a creator authorizes the platform to “use” her content, she is ceding control over unanticipated exploitations. Worse, she may in effect be permitting the platform to usurp what limited opportunities for remuneration exist on the Internet. That is because platforms, with their vast repositories of royalty-free (from the authors) sub licensable works, may be the most efficient entity from which to acquire nonexclusive exploitation rights. The incorporation of works of authorship into Artificial Intelligence “training data” furnishes a timely example. This is a contentious topic, especially among photographers and graphic artists who fear that AI systems will “learn” from the training data how to generate images that will compete with those authors’ present or future work. Some advocates have proposed that the data compilers enable artists and photographers to opt out of inclusion in training data. But if those authors have already made their work available on the Internet (which they necessarily will have if the AI programs are obtaining the images through Internet “scraping”), then, based on our reading of the above licenses, many of those whose post their works to Internet platforms will already have authorized the works’ inclusion and recycling through training data and into user-requested outputs.

Conclusion

To return to the challenge Prof. Cornish posed: how do we achieve “real benefits from copyright laws for the authors in whose name the copyrights are granted”? While Prof. Cornish addressed substantive copyright law limitations on authors’ contracts, must we now also look outside of copyright law to basic matters of contract formation? Should we question whether shrinkwrap and browsewrap agreements should be binding in the first instance, or whether they should continue to bind if the platform (the stronger party) unilaterally changes the terms and conditions of the services it provides to authors? But even if we retreated from the extreme *laissez faire*-ism that validates the current Terms of Service regimes, in order to require real knowledge and assent, would authors in fact be any better off? Perhaps the hope of “exposure” makes surrendering copyright worth the candle, but that may be a short term calculation that authors may come to regret. For those sought-after “real benefits,” we may need to combat the bargaining imbalance in ways the EU DSM Directive has not ventured for “free” distribution models. Prof. Cornish spoke of authors sharing with publishers the risks and – with proper adjustment – the rewards of a work’s dissemination. Platforms, unlike traditional publishers, do not invest in the creation of works of authorship, but they reap the fruits of others’ risk-taking. One solution may be to allow and encourage creators to form collectives to bargain, free of antitrust constraints, with the platforms over the terms of service, and to introduce methods of remuneration. That way, authors would remain “risk-sharers,” but they might also have a better shot at becoming revenue-sharers, too.



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