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Cover Page Footnote

This paper is drawn, in part, from my doctoral dissertation written under the supervision of Prof. Gideon Parchomovsky at Bar-Ilan University, Faculty of Law. I am grateful to Prof. Gideon Parchomovsky for his invaluable advice and guidance and Dr. Miriam Bitton-Marchovitch for her comments and suggestions. I also thank Bar Atrakchi and Dr. Avi Osterman for valuable observations and comments on earlier drafts. Special thanks are also due to the participants of the Ph.D. Colloquium at Bar-Ilan University, Faculty of Law. All errors or omissions are the sole responsibility of the Author.

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ABSTRACT—The contractual relationship between author and intermediary—be it a producer, publisher, or anyone facilitating the commercial exploitation of the author's copyrighted works—is often viewed as an unequal one. Other than a minority of superstars, the vast majority of authors are forced to accept contractual terms dictated by their powerful counterparties. This outcome is perceived by many scholars and policymakers as undesirable. Thus, in an effort to protect the authors' wellbeing in their contractual dealings, legislatures from around the world are increasingly keen to adopt regulatory measures that limit the menu of options the parties can adopt contractually. Specifically, these instruments endeavor to offset author's weak bargaining position either by ensuring a minimum level of remuneration to authors' ex-ante or providing them with an inalienable right to ask for a modification of the com-sensation stipulated in the contract ex-post or by granting them an inalienable right to regain control of their previously transferred rights. Overall, these legislative interventions are seemingly based on the assumption that regulating author-intermediary transactions ex ante and ex post will invariably improve the financial situation of authors as a whole. This assumption is mistaken.

Drawing on insights from neoclassical and behavioral economics, the benefits and drawbacks of these interventions are narrated throughout this paper. It is further demonstrated that while these legislative interventions were adopted with the best possible intentions, they ultimately prove ineffective in meeting their own objective of securing authors a more

[*] Postdoctoral Research Fellow, the Center for Cyber, Law & Policy (CCLP), Haifa University. This paper is drawn, in part, from my doctoral dissertation written under the supervision of Prof. Gideon Parchomovsky at Bar-Ilan University, Faculty of Law. I am grateful to Prof. Gideon Parchomovsky for his invaluable advice and guidance and Dr. Miriam Bitton-Marchovitch for her comments and suggestions. I also thank Bar Atrakchi and Dr. Avi Osterman for valuable observations and comments on earlier drafts. Special thanks are also due to the participants of the Ph.D. Colloquium at Bar-Ilan University, Faculty of Law. All errors or omissions are the sole responsibility of the Author.

favorable distribution of wealth. In fact, they occasionally harm the very group of beneficiaries they were designed to help. Particularly, the different forms of interventions into the author-intermediary contractual relationships create an inter-author redistribution of wealth and redistribution over time, which largely harm the most vulnerable groups of authors. These findings illustrate the limitations of the current legislative interventions that were designed to strengthen the position of authors vis-à-vis their counterparties and emphasize that the structural disparities in bargaining powers cannot be easily remedied by legal intervention alone.

I. INTRODUCTION

The author's financial wellbeing is a central concern of the copyright system. For this reason, copyrights are generally vested initially with the author.[1] Granting the author a bundle of exclusive property rights does not

[1] There is no doubt that categorizing copyrights as property rights is a normative decision. Indeed, one of the most debated questions in the copyright literature is whether copyright is or should be property rights. Nevertheless, for present purposes it is enough to note that the prevailing narrative in almost all jurisdictions refers to copyrights as property rights. For a detailed discussion of the property debate, *see, e.g.,* Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WISC. L. REV. 141 (2011); Richard Epstein, *Liberty versus Property—Cracks in the Foundations of Copyright Law*, 42 SAN DIEGO L. REV. 1 (2005); Stewart Sterk, *Intellectualizing Property: The Tenuous Connections between Land and Copyright*, 83 WASH. U.L. Q. 417 (2005); Sara

guarantee pecuniary rewards, but it does create a legal institution that performs a set of social and economic functions related to the management of creative works, which authors can use to elicit monetary or non-monetary compensation.[2] However, authors are rarely in a position to engage in the commercial exploitation of their work. As a result, these rights are commonly transferred to an entity better positioned to maximize the commercial value of the work—an intermediary.[3]

Problem is, authors are generally in a weaker bargaining position relative to their counterparties, resulting in bargaining outcomes that often heavily favor the intermediary.[4] Therefore, specific measures purporting to protect the authors' wellbeing in their contractual dealings have been implemented through the copyright laws of the United States, Israel, and multiple European countries.[5]

One specific category of these author-protectionist measures are at the heart of this paper, namely those I term "hard interventions".[6] Hard interventions aimed to redress the disparities in bargaining power between authors and intermediaries, by limiting the menu of options parties can adopt contractually.

K. Stadler, *Copyright as Trade Regulation*, 155 U. PA. L. REV. 899 (2007); Neil W. Netanel, *Copyright and Democratic Civil Society*, 106 YALE. L.J. 283 (1996); Aaron Perzanowski & Jason Schultz, *Reconciling Intellectual and Personal Property*, 90 NOTRE DAME L. REV. 1211 (2015).

[2] Martin Kretschmer, *The Relationship Between Copyright and Contract Law: Regulating Creator Contracts: The State of the Art and a Research Agenda*, 18 J. INTELL. PROP. L. 141, 144 (2010). *See also*, Abraham Bell & Gideon Parchomovsky, *The Dual-Grant Theory of Fair Use*, 83 U. CHI. L. REV. 1051, 1060-1061 (2016) (Arguing that the grant of exclusive property rights has a double effect: first, a negative effect, which takes away certain rights form the public; and second, a positive effect of depositing these rights in the control of the author. These two effects together force any third party interested in exploiting a copyright work to: (a) transact with the author; and (b) pay for such use.)

[3] The intermediary can be roughly defined as an institutional or individual mediator between the author and his or her audience. Richard E. Caves, *Contracts between Art and Commerce*, 17 J. ECON. PERSP. 73, 73 (2003). ("The inspiration of talented artists reaches consumers' hands (eyes, ears) only with the aid of other inputs—humdrum inputs—that respond to ordinary economic incentives.") Important to note that not all authors create with the desire or expectation to reap some benefits; however, authors aiming to derive some compensation from their creative works are less likely to commercialize their creative work on their own. *See, e.g.,* Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945 (2006); Diane Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL. INQ. L. 29 (2011). *Contra* Eric E. Johnson, *Intellectual Property and The Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623, 644-46 (2012).

[4] RICHARD WATT, COPYRIGHT AND ECONOMIC THEORY FRIENDS OR FOES? 3 (2000).

[5] Alain Strowel & Bernard Vanbrabant, *Copyright Licensing: A European View*, in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY LICENSING, 31-32 (Jacques de Werra ed.) (2013).

[6] I term these measures "hard" interventions, as they are generally coercive, inalienable and non-waivable.

Researchers have long acknowledged the existence of such author-protectionist measures.[7] However, no scholar to date has offered a complete, orderly, and systematic scrutiny of these measures.[8] Neither has any scholar systematically examined whether these interventions have worked in advancing the interest of the intended beneficiaries, and if so, specifically whom and under what conditions. This paper aims to fill this scholastic gap. Providing a unifying perspective for classifying legislative measures exposes the reader not only to the multiplicity of approaches but also provides a more comprehensive picture of the field, laying the ground for in-depth and critical discussion of their distributional implications.[9]

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[7] *See, e.g.*, Alain Strowel & Bernard Vanbrabant, *Copyright Licensing: A European View*, *in* RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY LICENSING, 31-32 (Jacques de Werra ed.) (2013); Paul Katzenberger, *Protection of the Authors as the Weaker Party to a Contract under International Copyright Contract Law*, 19 INT'L REV. INTELL. PROP. & COMPETITION L., 731 (1988); Kate Darling, *Occupy Copyright: A Law & Economic Analysis of U.S. Author Termination Right,* 63 BUFF. L REV. 147 (2014); Kate Darling, *Contracting About the Future: Copyright and New Media*, 10 NW. J. TECH. & INTELL. PROP. 485 (2012); Bernt Hugenholtz, *The Great Copyright Robbery: Rights Allocation in a Digital Environment* 2, 9-10 Conference at the NYU School of Law (31 March - 2 April, 2000), http://www.ivir.nl/publicaties/download/1073 [https://perma.cc/4W3K-AF8K]; Guy A. Rub, *Stronger than Kryptonite: Inalienable Profit Sharing Schemes in Copyright Law*, 27 HARV. J.L. & TECH. 49 (2013); Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the "Inalienable" Right to Terminate*, 62 FLA. L. REV. 1329, 1349 (2010).

[8] The following catalog does not purport to be a comprehensive survey of each and every legislative intervention that exists in Western traditions, rather documenting the most common soft and hard interventions as found in prominent jurisdictions. Throughout this paper I will rely mainly upon the United States, Canada, Israel, France, and German legislation to represent both copyright and authors' rights traditions. However, discussion is not restricted to those examples or the language of any legislation in particular.

[9] Inevitably, not all potential restrictions on the parties' freedom of contract have been placed into the existing copyright regimes. Several clarifications are, therefore, in order here. First, while an individual author may lack bargaining power, the aggregated power of numerous authors may be helpful in the pursuit of a more equal bargaining position. In fact, collective bargaining plays an important role in many countries. *See* Pedro Letai, *Don't Think Twice, It's All Right: Toward a New Copyright Protection System*, 5 J. BUS. & ECON. 1012, 1022 (2014). Although, neither collective bargaining nor collective rights management necessarily imply a specific or even fair distribution of funds among authors. On average, collective bargaining should yield a more beneficial deal than the author is able to achieve individually. *Id.* at 1012. *See also* Amit Datta, *Collective Bargaining Agreements in the Film Industry: U.S. Guild Agreements for Germany?*, 2 BERKELEY J. ENT. & SPORTS L. 199, 205 (2013); KAMINA PASCAL, FILM COPYRIGHT IN THE EU, 214-20, 242-48 (2002); Daniel Gervais, *Collective Management of Copyright: Theory and Practice in the Digital Age*, *in* COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS (Daniel Gervais ed., 2d ed. 2010); Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1295 (1996). This research, however, focuses on contracts concluded between individual authors and their intermediaries. Therefore, measures governing transfers of rights to collective societies or contracts concluded by a rightholder other than the author are not considered hereafter. Second, compulsory licenses and levies (or limitation-based remuneration right) undeniably have bearing on the remuneration of the author. These measures override the author's right to authorize or forbid exploitation of her work and convert it onto a mere right-to-receive-remuneration (liability rule) for acts that implicate one or more of the exclusive rights. Henceforth, the rights are

A central finding of this paper is the notion that most authors will be unable to derive much value from the regulatory tools intended to provide more bargaining power and higher levels of compensation. Indeed, the aforementioned legislative instruments would affect the distribution of wealth, but not in the way that policymakers expect. They are likely to bring about a redistribution of wealth that would benefit a select group at the expense of a much larger group of authors. Alternatively, as will be demonstrated, wealth would be redistributed from an author's younger self—when he or she is more likely to be under financial constraint—towards the older self, or even the successors. Consequently, these legislative interventions can harm the very same group of beneficiaries they originally intended to help. This article is organized as follows. Part II provides an overview of author-intermediary contractual relationship. Parts III-V of this paper will provide a thorough description of the mandatory result-oriented measures that are used to regulate the author-intermediary contractual relationship. The first category of measures detailed in section II is the *ex ante* restraints on the parties' ability to determine the form and level of compensation for copyright transfer, namely: (a) a right to equitable remuneration, (b) a right to proportional remuneration, and (c) a minimum royalty rate. Part III will describe the second category of hard interventions that aim to protect the economic interests of the author vis-à-vis the intermediary *ex post*, especially in circumstances where a huge

being transferred not because of a voluntary transaction. For this reason, these instruments are not part of the interventions examined in this re-search. For similar reasons, the study of the fair use doctrine and other limitations and exceptions are outside the scope of this paper. *See generally,* Christophe Geiger, *Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law*, 12 VAND. J. ENT. & TECH. L. 515, 529 (2010); JANE C. GINSBURG, THE ROLE OF THE AUTHOR, *in* COPYRIGHT IN COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS, 63 (Ruth L. Okediji ed., 2017); S. J. Liebowitz, *Alternative Copyright Systems: The Problems With a Compulsory License,* (Based upon a talked delivered at a conference sponsored by the Progress and Freedom Foundation on June 10, 2003), http://law.haifa.ac.il/images/Publications/hasdara.pdf [https://perma.cc/DUS4-LRMQ]; Annette Kur & Jens Schovsbo, *Expropriation or Fair Game for All? The Gradual Dismantling of the IP Exclusivity Paradigm*, (Max Planck Inst. for Intell. Prop., Competition & Tax L., Res. Paper No. 09-14, 2009). Third, and finally, even when confining the discussion to issues of copyright contracts, there is no question that copyright contracts might be governed by other bodies of law. For example, requirements imposed by general policy and contract laws may be applicable to aspects of the contractual relationship. Be that as it may, for the sake of this research, I have elected to concentrate on copyright and other author-centric legislation. Requirements imposed by other bodies of law are unspecific, and they may fail to acknowledge the unique characteristics of copyright protection. Legislatures themselves rarely perceive contract law as a satisfactory way to regulate this relationship, as evident by the number of legislative measures adopted around the world. Furthermore, many of the rights and obligations of the parties in the author-intermediary relationship stem not from what the parties themselves have agreed upon, but from the complex and distinct nature of copyright laws. In which case, the application of such general rules may be inconsistent with the desire to protect authors' economic interests in almost all jurisdictions. Therefore, the detailed analysis of such general provisions is also outside the scope of my research.

discrepancy between the compensation of the author and the proceeds from the work exists. This paper identifies two *ex post* remuneration adjustment mechanisms: success clauses and resale royalty rights. Part IV details the third and last category of legislative measures designed to protect authors and their heirs from the results of contracts concluded under unequal bargaining conditions by providing the right of reversion.

While the idea of contractual interventions as a means to balance disparities in bargaining powers seems appealing, in reality, it is oversimplified and flawed. Part VI of this paper explores whether the measures identified in Parts III-V truly improve the lot of the authors, or if they turn out to be counterproductive and harmful to their intended beneficiaries instead. The Last Part summarizes my key findings and emphasize that the structural disparities in bargaining powers cannot be easily remedied by legal interventions alone.

II. COPYRIGHTS CONTRACTS

To understand the possible ramifications of hard interventions it is crucial to understand the basics of copyrights contracts. Essentially, a copyright contract represents an exchange of commitments between the author and the intermediary. On the one hand, the author, transfers some or all of her rights into the hand of the intermediary.[10] In return, the intermediary assists the author in handling the commercialization of her work.[11]

The author and intermediary are conventionally viewed as partners in the task of disseminating the author's work to the largest possible audience

[10] For a discussion of alienability and its role within the copyright system, *see generally* Netanel, *infra* note 221, at, 368-70. (Arguing that "Under the utilitarian model, the widespread dissemination of intellectual works is no less an important goal of copyright than is the creation of those works . . . . For the proponents of the natural rights theory of copyright, alienability follows from recognizing the analogy between copyright and the liberal prototype of property. The products of mental labor are property, just as are the fruits of physical labor. Since alienability (i.e., "saleability") is an essential characteristic of property, products of mental labor must also be fully saleable.")

[11] This is not to argue that authors are unable to exploit their works on their own. *See, e.g.*, Lior Zemer, *What Copyright Is: Time to Remember the Basics*, 4 BUFF. INTELL. PROP. L.J. 54, 68 (2006). The reality is, that production and dissemination of copyrighted work often require a significant financial investment, elaborated infrastructure and expertise. For instance, producing, printing and disseminating a literary work might require a printing press, warehouse, trucks, and working relations with various retailers. Authors rarely hold control over or access to such resources. It is important to note that in the digital age, the phenomena of authors who produce, publish, distribute and market their own works have become more feasible. However, producers, publishers and distributers remain important players in the creative market. *See* Richard Watt, *Economic Theory of Copyright Contracts, in* THE RELATIONSHIP BETWEEN COPYRIGHT AND CONTRACT LAW 24 (STRATEGIC ADVISORY BOARD FOR INTELLECTUAL PROPERTY POLICY 2010), http://eprints.bournemouth.ac.uk/16091/1/_contractlaw-report.pdf [https://perma.cc/489J-V8D9].

and preventing others from infringing the copyright.[12] While their interests are not entirely misaligned, they certainly do not always run parallel.[13] There has therefore been a long-simmering tension between authors and intermediaries, particularly when it comes to the details of the copyright contract.[14] The conflict between authors and their intermediaries reveals itself most acutely in negotiations regarding the author's remuneration.[15]

For instance, a budding author writes an incisive first novel that catches the eye of a major publishing house. Trusting that the publisher will disseminate her work to the largest possible audience, and perhaps excited that her work has been noticed at all, the author grants the rights to the publisher. The publisher will then strike deals with booksellers, provide free copies to book critics, and perhaps even schedule the author's appearance on a talk show. The publisher, of course, could not undertake any of these actions without having first obtained the right to use the novelist's copyrighted work. Thus, the initial agreement between the author and the publisher is where the author retains the most power to ensure her financial remuneration.[16]

A bargain between an artist such as the novelist described above who lives for her art, and a multinational corporation with enormous power a prosperous corporation is what most people envision when considering an author signing away her rights. Indeed, the literature tends to portray the

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[12] Not all authors create with the desire or expectation to reap some benefits; however, authors aiming to derive some compensation from their creative works are less likely to commercialize their creative work on their own. For further discussion of authors' intrinsic and extrinsic motives *see* Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945 (2006); Zimmerman, *supra* note 3. *Contra* Eric E. Johnson, *Intellectual Property and The Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623, 644-46 (2012).

[13] *See* Yifat Nahmias, *The Limitations of Information: Re-thinking Soft Paternalistic Interventions in Copyright Law,* 37 CARDOZO ARTS & ENT. L.J. 373, 376-8 (2019); Michael Brendon Lopez, *Creating The National Wealth: Authorship, Copyright, and Literary Contracts*, 88 N.D. L. REV. 197, 198-9 (2012) (citing Henry C. Mitchell's assertion that the interests of authors and publishers generally run parallel); GUIBAULT & HUGENHOLTZ, *infra* note 121, at 33.

[14] *See* Cornish, *infra* note 35, at 2.

[15] Thomas A. Mitchell, *State of the Art(s): Protecting Publishers or Promoting Progress?,* 12 RICH. J.L. & TECH. 1, 2 (2005).

[16] GIUSEPPINA D'AGOSTINO, COPYRIGHT, CONTRACTS, CREATORS, NEW MEDIA, NEW RULES 22 (2010). While copyright contracts may cover a wide area of activities, this discussion is limited to contracts and contractual relationship entered into between the author and the intermediary (e.g., publisher or producer). To be precise, my dissertation is concerned with contracts in which the author (i.e., the first right holder) transfers her economic rights in a copyrighted work to a producer, publisher or any other intermediary to warrant their exploitation. Subsequent contracts between the first transferee and any third party (including users) may have an enormous effect on the monetary gains derived by the author; however, these secondary agreements are outside the scope of this research, given that the author is not a party to the contract. Contracts falling under the work-made-for-hire doctrine are likewise outside the scope of this research.

author as naïve and inexperienced. Thus, when she must negotiate with a powerful corporation over the terms of the contract, she is thought to be at a distinct disadvantage.[17] There may be some truth to this popular view; many intermediaries have undoubtedly taken advantage of authors. And yet, even when the author in question is business-savvy, the intermediary tends to have the upper hand in negotiations.[18]

Among other reasons, this results largely from an imbalance in the bargaining positions of authors and intermediaries.[19]Although the reasons for this imbalance remain unclear, several reasons have been proposed for the power disparity between the two.[20] One such reason is that many authors, particularly at the start of their career, are not financially well-off. They rely on the revenues stemming from their creative works for their livelihood and cannot simply borrow against their future earnings. The

[17] It is important to note that although the "poor artist" story is very appealing, not everyone subscribes to it. Guy Rub argues that the picture of artists as poor and buyers as rich, as well as the story that the paradigmatic transaction between the two makes the artist poorer and the buyer richer, is based on false assumptions. Rub refers to the view advanced by John Henry Merryman and Monroe Price and claims that it is merely a fable, and therefore should not be grounds for legal policy. *See* Rub, *supra* note 7, at 81-82. (citing Henry Merryman, *The Wrath of Robert Rauschenberg*, 41 AM. J. COMP. L. 103, 107-108 (1993)); Monroe E. Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite*, 77 YALE L.J. 1333, 1334-35 (1968). Others argue that the under-compensated author does not stem from unequal bargaining powers, but it is a result of works of low quality. *See* Maureen A. O'Rourke, *A Brief History of Author-Publisher Relations and the Outlook for the 21th Century*, 50 J. COPYRIGHT SOC'Y U.S.A. 425, 437 (2002). (citing Alan White, *Public Lending Right*, in RAYMOND ASTBURY, THE WRITER IN THE MARKET PLACE 25, 28 (1969); Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 ECONOMICA 167, 182-4 (1934). *Cf.* Katzenberger, *supra* note 7, at 731 (suggesting that even famous authors are nonetheless the weaker party).

[18] Jacques de Werra, *Moving Beyond the Conflict Between Freedom of Contract and Copyright Policies: In Search of a New Global Policy for On-line Information Licensing Transactions, a Comparative Analysis Between U.S. Law and European Law*, 25 COLUM.J.L. & ARTS 239, 246 (2003).

[19] *See* MARTIN KRETSCHMER ET AL., COPYRIGHT CONTRACTS AND EARNINGS OF VISUAL CREATORS: A SURVEY OF 5,800 BRITISH DESIGNERS, FINE ARTISTS, ILLUSTRATORS AND PHOTOGRAPHERS 3 (2011), https://microsites.bournemouth.ac.uk/cippm/files/2011/05/DACS-Report-Final1.pdf [https://perma.cc/7H9A-HX67]; Giuseppina D'Agostino, *Contract lex rex: Towards copyright contract's* lex specialis *in* INTELLECTUAL PROPERTY AND GENERAL LEGAL PRINCIPLES: IS IP A LEX SPECIALIS? 1, 4 (Graeme B. Dinwoodie ed. 2015) 12; *See also infra* note 20 and accompanying text.

[20] *See, e.g.* Kate Darling, *Occupy Copyright—A Law & Economic Analysis of U.S. Author Termination Right,* 63 BUFF. L REV. 147 (2014); Rub, *supra* note 7; Martin Kretschmer, *Does Copyright Law Matter? An Empirical Analysis of Creators' Earnings* (Univ. of Glasgow, Working Paper, 2012), http://ssrn.com/abstract=2063735; [https://perma.cc/EK4C-RC99]; Guy Pessach, *Deconstructing Disintermediation—A Skeptical Copyright Perspective*, 31 CARDOZO ARTS & ENT. L.J. 833 (2013); John M. Kernochan, *Ownership and Control of Intellectual Property Rights in Audiovisual Works: Contracts and Practice—Report to the ALAI Congress, Paris, Sept. 20, 1995*, 20 COLUM.-VLA J.L. & ARTS 379 (1996). *See also*, Günther G. Schulze, *Superstars*, *in* A HANDBOOK OF CULTURAL ECONOMICS 431, 431-36 (Ruth Towse ed., 2003); William A. Hamlen, Jr., *Superstardom in Popular Music: Empirical Evidence*, 73 REV. ECON. & STAT. 729 (1991); Sherwin Rosen, *The Economics of Superstars*, 71 AM. ECON. REV. 845 (1981).

intermediary, meanwhile, is typically a larger corporation that does not need revenues from a single work to survive; a wide array of revenue streams maintains their profit line.[21] These contrasting situations result in the author being more willing to accept an offer that might be disadvantageous in the long-term.[22] Another reason for the power disparity is that there are far fewer intermediaries than authors in the industry,[23] often forcing the author to accept questionable contracts because she has nowhere else to go.[24] Finally, and perhaps most obviously, authors do not often negotiate copyright contracts. Their relative inexperience in this matter gives the well-practiced intermediary an enormous leg-up in the negotiation process.[25] Scholar Nancy Kim has identified an additional factor, that is, the "background law" in effect at the time of the negotiation.[26] Indeed, her research indicates that laws governing the particulars of copyright contracts can influence the negotiating position of both parties, perhaps with unpredictable effects.[27] Furthermore, a party's ignorance of the background law could put them at a sharp disadvantage.[28] Kim also pointed to "market power," the capacity to control norms within an industry, as a decisive factor in creating an imbalance in copyright negotiations.[29] These two additional factors are of particular importance for

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[21] *Id.* at 507-8.

[22] Kate Darling, *Contracting About the Future: Copyright and New Media*, 10 NW. J. TECH. & INTELL. PROP. 485, 507 (2012) (Noting that this assumption has been criticized "[a]s not entirely realistic.").

[23] Lack of competition in the market is of a great importance for the terms of the agreement. *See* Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 616 (1982). *See also,* Rub, *supra* note 7, at 101 (discussing non-competitive markets in the context of creative industries); Darling, *supra* note 22, at 509-511 (discussing insufficient competition in different markets for copyrighted works).

[24] Bernt Hugenholtz, *The Great Copyright Robbery: Rights Allocation in a Digital Environment* 2, 9-10 Conference at the NYU School of Law (31 March - 2 April, 2000), http://www.ivir.nl/publicaties/download/1073 [https://perma.cc/8YXU-6D7D].

[25] *See* Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 199-223 (2005).

[26] Nancy S. Kim, *Bargaining Power and Background Law*, 12 VAND. J. ENT. & TECH. L. 93, 94 (2009).

[27] *See id.* at 95.

[28] *Id.* at 97-102 (discussing knowledge imbalance in the context of artist-hiring party and employee-employer relationships and arguing that the work-made-for-hire doctrine creates two exceptions to the typical initial rights allocation under copyright law).

[29] *Id.* at 106 (discussing power market imbalance in the context of software company-consumer relationships as well as creative consumer-corporate website relationships and arguing that companies' ability to dictate business norms undermines the traditional contracting process).

the following discussion of legislative interventions into the author-intermediary contractual relationship as will be illustrated below.[30]

A complicating factor for copyright contracts is the existence of asymmetric information regarding the true value of the author's work.[31] Both the author and the intermediary are negotiating based partially on predictions regarding the work's value, but asymmetric information gives the intermediary an upper hand.[32] For example, the author might negotiate with only the knowledge of how well her previous work has performed. At best, she could hire an agent to assess market demand. The intermediary, meanwhile, has a wealth of information to bolster his bargaining power. He can evaluate precise sales figures for the genre in question, consider whether other intermediaries are about to promote similar works, or even hire a team to study market demand. Not only does the author lack such information, but she would also have to pay a great deal to obtain it.[33] This asymmetric information will impact how well the author can protect her financial interests. It will also allow intermediaries to profit in ways they could not have if the author had access to the same facts.

It is imperative to understand that the remuneration of the author or profit-sharing arrangements between the author and the intermediary, stipulated by a contract for the exploitation of a copyrighted work, can take on many different forms. A short online search for copyright contracts yields hundreds of samples constructed on a case-by-case basis. Nevertheless, many of the contracts display commonalities that reflect industry standards. Therefore, it is possible to make some general statements in this regard.[34] Intermediaries and authors generally agree to one of three models. At the one end of the spectrum are contracts based on the pure buy-out model, where the rights are transferred to the intermediary for a single payment. The terms, including the amount paid to the author, are determined by the respective bargaining power of the parties and the

[30] *See* Watt, *supra* note 11; *see also* Abhinay Muthoo, *Bargaining Theory and Royalty Contract Negotiations*, 3 REV. ECON. RES. ON COPYRIGHT ISSUES 19 (2006) (claiming that several factors influence the end result of the negotiation, namely reservation values, impatience, risk of breakdown during the negotiations, the existence and value of other options and asymmetric information).

[31] Loren, *supra* note 7, at 1331.

[32] *See generally* Darling, *supra* note 22, at 512.

[33] *Id.* at 512-13. The author is more inclined to under-estimate or over-estimate the value of her work. In this regard, it is also important to note that the literature drawing from behavioral economics suggests that the endowment effect may leads authors to over-evaluate their works. For a general discussion of the endowment effect in the contexts of copyright, *see* Christopher Buccafusco & Christopher Sprigman, *Valuing Intellectual Property: An Experiment*, 96 CORNELL L. REV. 1 (2010).

[34] *See* Ruth Towse, *Copyright and Economic Incentives: An Application to Performers' Rights in the Music Industry*, 52 KYKLOS 369 (1999). (discussing some generalizations and the industry standards in the music industry).

dynamics of bargaining process. Upon payment, the intermediary can fully utilize the rights transferred under the terms of the contract. Moreover, the very same intermediary retains the entire future stream of revenues the authorized use generates. Furthermore, as some commentators have pointed out, under the buy-out model the author not only transfers the right to the intermediary, but also any associated risks.[35] This is important because of the high risks and uncertainty associated with the market for most copyrighted works, as well as asymmetric information between parties. Broadly speaking, a transfer contract may serve as a risk-sharing device and help solve the asymmetric information problem. By transferring the uncertain future value of the copyrighted work into the hands of the intermediary, the author receives a certain payment.[36] Consequently, if the work proves to be a bigger success than anticipated, the intermediary will reap the benefit. If it is not as successful as anticipated by the parties, the intermediary will suffer the loss.[37] In fact, it can be said that the author trades the possibility that the work will turn out to be a success against the risk it will not.[38] Although Watt argues that from an economic perspective, the buy-out model is a very good option for the parties only under certain conditions (i.e., in the absence of risk or uncertainty as to the future value of a work).[39] In reality, this model is more common in situations where it is necessary to obtain rights held by numerous entities but can be found in other circumstances as well.[40]

At the other end of the spectrum are long-term and success-contingent contracts. The success contingent contract provides the author with a certain share (percentage) of the proceeds from the work (e.g., royalties). Royalty rates vary by industry as well as among authors. Still, Watt notes there are two types of success-contingent contracts: the first is based on fixed royalties' percentage independent of the amount of revenue received;

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[35] Watt, *supra* note 11, at 24; *see also* William Cornish, *The Author as Risk-Sharer*, 26 COLUM. J.L. & ARTS 1 (2002); Kretschmer, *supra* note 2, at 160-162; Arthur Snow & Richard Watt, *Risk Sharing and the Distribution of Copyright Collective Income*, *in* DEVELOPMENTS IN THE ECONOMICS OF COPYRIGHT 23 (L.N. Takeyama, W.J. Gordon & R. Towse eds., 2005); Watt, *infra* note 42; David Lindsay, *The Law and Economics of Copyright, Contract and Mass Market Licenses* 99-100 (Center for Copyright Studies Ltd., 2002); EYAL ZAMIR & BARAK MEDINA, LAW, ECONOMICS AND MORALITY 258 (2010).

[36] It has been argued that authors do not have the same degree of risk aversion as intermediaries. Further, an intermediary can use revenues from very successful works to cover expenses for less successful works. *See generally* Cornish, *supra* note 35, at 1-2; Watt, *supra* note 4, at 88-89.

[37] *See* Paul M. Horvitz, *The Pricing of Textbooks and the Remuneration of Authors*, 56 AM. ECON. REV. 412, 414 (1966).

[38] *See generally*, Cornish, *supra* note 35.

[39] Watt, *supra* note 11, at 25.

[40] Towse, *supra* note 34, at 374.

the second involves a variable royalties' percentage, namely, a function of the amount of revenue received.[41] So, for example, in the first instance, the contract provides the author with royalties set at 3% of the revenues, irrespectively of the amount of revenues. In the latter instance, the author is entitled to royalties set at 3% when the revenue is lower than a given amount and 5% when the revenue is above that same amount.

Whatever form it may take, the success-contingent model is comprised of future payments calculated based on market revenues. Hence, it requires the author and the intermediary to share in the risks associated with investing in the work and provides an incentive for both parties to invest in the commercialization of the work.[42]

Occupying the "middle" of the spectrum are different variations of contracts based on the combined model. Under the combined model, the author can receive a mixture of royalties and a lump-sum payment in advance. This model has several advantages over the other models. For example, the early payment can help reduce an author's uncertainty associated with the success-contingent model considering the uncertain future value of a copyrighted work.[43] In addition, an early payment can help an intermediary—e.g., a publisher—persuade an author to work with that intermediary.[44] On the other hand, Watt observes that although using the lump-sum payment in conjunction with success-contingent terms can decrease an author's uncertainty, it is often stipulated as "forwarded royalty payments."[45] This means that the advance payment is credited or "recouped" against future royalties. As a result, this approach does not necessarily yield higher rewards for authors.

On the whole, authors often transfer their rights to intermediaries, either in the form of an assignment or a license.[46] For this, they are either

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[41] *See,* e.g., Watt, *supra* note 11 at 25.

[42] Both the licensee and the licensor have a strong incentive to see their work successful in the market. The royalty rate represents a tradeoff between the incentive to the author and the incentive to the intermediary. For a detailed discussion of the optimal royalty that solves the tradeoff between giving incentives to the author and to the publisher, *see* Inés Macho-Stadler & David Pérez-Castrillo, *Copyright Licensing Under Asymmetric Information*, 11 REV. OF ECON. RES. ON COPYRIGHT ISSUES 3 (2014); Richard Watt, *Revenue Sharing as Compensation for Essential Inputs*, 8 REV. OF ECON. RES. ON COPYRIGHT ISSUES 51 (2011).

[43] Towse, *supra* note 34, at 373 (discussing some generalization and the industry standards in the music industry).

[44] *Id.*

[45] Watt, *supra* note, 11, at 26.

[46] *See* Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 10-12 (2010) (discussing the relationship between creators and intermediaries and how authors transfer their rights to intermediaries for distribution under copyright laws). *See also* SEVERINE DUSOLLIER ET AL., CONTRACTUAL ARRANGEMENTS APPLICABLE TO CREATORS: LAW AND PRACTICE OF SELECTED MEMBER STATES (2014), http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493041/IPOL-

compensated by lump-sum payments independent of the proceeds received from the exploitations of their work, or some type of royalty payments. Therefore, the very first decisions an author must make as part of the exploitation of her work are to whom to entrust the right to use her work, in what form to transfer her rights, and for which model of compensation to settle.

Conventional wisdom suggests that the less concentrated the industry is, the stronger the bargaining position of the author.[47] Therefore, one would expect the online environment—which provides the author with greater opportunities for autonomous exploitation— to decrease the power that intermediaries wield over authors.[48] This is not necessarily the case. Take for example the music industry. In 2007, Radiohead decided to release an album through the band's own web site, without engaging a record company.[49] Consequently, the band retained ownership of the rights linked to the album. The album turned out to be a huge success, and some reports suggest the band's profits from it go beyond $6.5 million.[50] It would therefore seem as if Radiohead found a new means to distribute music and cut out the intermediary.

It bears emphasis, though, this disintermediation option has not occurred on a large scale. Just because the Internet has the ability to connect authors and users, it does not necessarily obviate the need for intermediaries.[51] This is especially true when the author lacks the

JURI_ET(2014)493041_EN.pdf [https://perma.cc/TXC9-7FLY]; Pedro Letai, *Don't Think Twice, It's All Right: Toward a New Copyright Protection System*, 5 J. BUS. & ECON. 1012, 1014 (2014) ("Creators may, of course, release their own works to the public, but in practice the copyright system is designed with the expectation that many creators will contract with intermediaries to exploit their works commercially.").

[47] *See* Pessach, *supra* note 20, at 844-45.

[48] This argument has often been constructed based on the idea of disintermediation. *See* Mark Fox, *E-commerce Business Models for the Music Industry*, 27 POPULAR MUSIC AND SOC'Y 201 (2004) (emphasizing the influence of disintermediation on competition and authors' compensation); Jesse C. Bockstedt, Robert J. Kauffman & Frederick J. Riggins, *The Move to Artist-Led On-Line Music Distribution: A Theory-Based Assessment and Prospects for Structural Changes in the Digital Music Market*, 10 INT'L J. OF ELECTRONIC COMM. 7 (2006) (predicting the weakening in positions of record labels and other intermediaries); Amy Gilbert, *The Time Has Come: A Proposed Revision to 17 U.S.C. § 203*, 66 CASE W. RES. L. REV. 807, 841 (2016).

[49] Radiohead then made the album available at www.inrainbows.com, where fans were able to pay as much as they want for the digital downloading.

[50] Sara Karubian, *360° Deals: An Industry Reaction to the Devaluation of Recorded Music*, 18 S. CAL. INTERDIS. L.J. 395 (2009).

[51] *See* Arnold Picot, Christine Bortenlanger &And Heiner Re Hrl, *The Organization of Electronic Markets: Contributions from the New Institutional Economics*, 13 INFO. SOC'Y 107, 115-116 (1997) ("The electronization of markets does not automatically lead to markets without middlemen. A more differentiated intermediation structure is far more realistic than the total with minimal search costs.").

experience, infrastructure and business skills of the intermediary.[52] After all, bands such as Radiohead are well-known and backed by a group of skilled professionals (i.e., public relations experts and managers). They also enjoy a large fan base. Most authors will find it difficult to adopt such independent distribution methods. In fact, even Radiohead eventually contracted with iTunes and a new distributer to sell albums online and in stores.[53] Another group of authors that may take advantage of the online environment to disseminate their works without the help of traditional intermediaries are new and aspiring authors and artists. They upload their content online, sometimes for free, with the hope of gaining popularity and exposure.[54] One of the most frequently cited online success stories is Justin Bieber. His official biography states that Scooter Braun, an entrepreneur eager to start his own record label and management company, discovered him after watching several of his YouTube videos.[55] Nevertheless, Bieber later entered into a contractual agreement with a more traditional intermediary (i.e., Island Def Jam Records). Hence, intermediaries still play a vital role in the copyright industries.

Even if a few superstars can operate without an intermediary, it does not mean that the industry is becoming less concentrated or that intermediaries are becoming obsolete. In fact, the online environment allows intermediaries to reinvent themselves and for new intermediaries to emerge.[56] Guy Pessach argues this is particularly true if one takes into consideration the limited ability an author has to effectively reach an audience.[57]

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[52] Patryk Galuszka, *Music Aggregators and Intermediation of the Digital Music Market*, 9 INT'L. J. COMM. 254, 256 (2015).

[53] *See* Karubian, *supra* note 50.

[54] Singers, entertainers, authors and comedians are among the groups of authors and performers that tends to utilize the online environment to disseminate their works and create opportunities. YouTube and other similar services can serve as a platform for authors and performing artists to create opportunities—it mediates between aspiring authors and traditional intermediaries (e.g., managers, agents and record companies).

[55] Reuven Ashtar, *Licensing as Digital Rights Management, from the Advent of the Web to the iPad*, 13 YALE J. L. & TECH. 141, 181-82 (2011).

[56] *See generally*, Henry H. Perritt, Jr., *Music Markets and Mythologies*, 9 J. MARSHALL REV. INTELL. PROP. L. 831 (2010).

[57] *See* Pessach, *supra* note 20, at 844. ("Seemingly, the Internet and networked communication platforms provide almost an unlimited range of distribution platforms. Nevertheless, if one adds the parameter of effective audience attention and the ability to effectively reach audiences, in realms of information overflow, reality appears different. What we witness is a reduction in the number of effective distribution platforms, as well as concurrent escalation in their market share. At the same time, the popularity of these platforms tends to increase their attractiveness to both users and content providers—a factor which either sustains or increases the centrality and market share of these platforms.").

So long as there exists an imbalance in bargaining power between author and intermediary, the latter will continue to receive a large portion of the profits generated by the copyright system, often at the author's expense.[58] Of course, authors are not only incentivized by profit, and they can distribute their works outside of the typical methods of their industry.[59] But most authors rely on at least some remuneration for their work, and without the expectation of financial return many authors might cease to create new work.

One may argue that this is a byproduct of the market for copyrighted works. However, considering that copyright is often perceived as a right designed to promote the economic wellbeing of authors, this is a fundamental weakness that may undermine the system as a whole.[60] Governments are well aware of this issue, and have developed laws and policies to resolve the issue. Such initiatives are usually aimed at strengthening the author's bargaining position vis-à-vis the intermediary. Author protectionist measures can be roughly divided into two broad categories: soft and hard interventions. *Soft interventions* typically require the parties to abide by certain legislative requirements but leave a wide range of choices in implementing said requirements (e.g., mandatory disclosure rules). The focus of such intervention is to improve the author's position by promoting information exchange and disclosure.[61] They benevolently push the author away from risk or encourage her to make

[58] *See* Lea Shaver, *Copyright and Inequality*, 92 WASH. U. L. REV. 117, 141 (2014) ("The advantages of copyright protection are reaped primarily by those already privileged: affluent consumers, the most successful creators, and major publishing houses and other copyright holders located in industrialized countries.") *See also* Justin Hughes and Robert P. Merges, *Copyright and Distributive Justice*, 92 NOTRE DAME L. REV. 513 (2016); Litman, *supra* note 46, at 27-28.

[59] Plant, *supra* note 17, at 168-169. Martin Senftleben applies Pierre Bourdieu's sociological analysis of the field of literary and artistic production and distinguishes between autonomous and bourgeois authors (e.g., those who create for commercial motives and those who create to gain the recognition of their peers. Martin Senftleben, *Copyright, Creators and Society's Need for Autonomous Art—the Blessing and Curse of Monetary Incentives in* WHAT IF WE COULD REIMAGINE COPYRIGHT? 25-72 (Rebecca Giblin and Kimberlee Weatherall eds., 2017). Furthermore, he claims that "An artist seeking to gain recognition among peers must not align her work with the tastes of the masses and produce mainstream works in the hope of commercial success. This would be perceived as a concession to the predominant profit orientation of society." *Id*. at 27. *See also* Ruth Towse, *Partly for the Money: Rewards and Incentives to Artists*, 54 KYKLOS 473, 475 (2001) ("[C]opyright law plays an important role in the balancing act as it represents both intrinsic and extrinsic incentives . . . .").

[60] Robert M. Hurt & Robert M. Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. 421-32 (1966). *See also* Sean M. O'Connor, *Creators, Innovators, and Appropriation Mechanisms,* 22 GEO. MASON L. REV. 973, 980 (2015) ("[T]hey all need some means of supporting both themselves and the practical instantiation of their ideas.").

[61] For a detailed discussion of soft intervention and their benefits as well as shortcoming, *see* Yifat Nahmias, *The Limitations of Information: Re-thinking Soft Paternalistic Interventions in Copyright Law,* 37 CARDOZO ARTS & ENT. L.J. 373 (2019).

decisions that the legislator perceives to be in her best interests, but stop short of mandating a certain result.[62] By contrast, *hard interventions* are more intrusive and result-oriented. They are also intended to strengthen the author's bargaining position but, unlike soft interventions, require a certain outcome that the parties cannot alter contractually. Concretely, these measures ensure a minimum level of remuneration to authors *ex ante*,[63] either by providing them with an inalienable right to ask for modification of the compensation stipulated in the contract *ex post*,[64] or by granting them an inalienable right to regain control of their previously transferred rights.[65] Put differently, these measures are specifically aimed to redress the disparities in bargaining power between authors and intermediaries by limiting the menu of options parties can adopt contractually.[66]

This paper is focused on hard interventions and will analyze their particulars in the coming sections.

III. EX-ANTE RESTRICTIONS ON THE FREEDOM TO DETERMINE THE FORM AND LEVEL OF COMPENSATION

As indicated earlier, buy-out contracts provide for a single remuneration or a lump-sum payment. These lump-sum payments are set *ex ante* and are mostly reliant on the anticipated success of the work.[67] Whether or not the work eventually turns out to be a success has no bearing on the remuneration of the author. If the work is not as successful as anticipated, the intermediary will sustain losses. However, if the work proves to be a bigger success than anticipated, only the intermediary will reap the benefits. In this case, there is a chance that the author would be deprived of a "fair share" in the economic success of the work.[68] This is

[62] *See id.* (Arguing that because authors are susceptible to various cognitive limitations, many of them are unable to understand the information soft interventions produce, much less incorporate the information into their decision-making. Hence, interventions that incentivize information exchange generally fall short of achieving the legislative goal.).

[63] *See, e.g.,* Law for the Protection of Literature and Authors in Israel, 5773-2013, S.H. 2407. p. 208, http://www.oit.org/dyn/natlex/docs/ELECTRONIC/97289/115377/F-1621783321/ISR97289.pdf [https://perma.cc/NQ99-UUK3] [hereinafter Law for the Protection of Literature].

[64] Wilhelm Nordemann, *A Revolution of Copyright in Germany*, 49 J. COPY. SOC'Y U.S. 1044 (2002).

[65] 17 U.S.C. §§ 203, 304.

[66] I term these measures "hard" interventions, as they are generally coercive, inalienable and non-waivable.

[67] *See* Horvitz, *supra* note 37.

[68] *See* Slobodan M. Markovic, *Copyright Contracts Law—Creativity on the Market, Legal Aspects*, 6 ZBOTNIK HRVATSKOG DRUSTVA ZA AUTORSKO PRAVO 55 (2005) (Croat.) http://hdap-alai.hr/wp-content/uploads/2014/06/Markovic-Copyright-Contracts-Law-Creativity-in-the-Market-Legal-Aspects.pdf [https://perma.cc/HQK7-NJ8U].

especially true of young and unknown authors who, in the hopes of gaining a contract and some recognition, usually agree to a very low compensation. As a result, several jurisdictions have chosen to counterbalance the effects and quantity of lump-sum payments by imposing at least one of the following: (a) a right to equitable remuneration, (b) a right to proportional remuneration, or (c) a minimum royalty rate.[69] While at first glance these measures appear distinct from each other, they are actually similar in their restrictions on the freedom to determine the form and level of compensation.

A. Equitable Remuneration

A legal measure commonly used to address the issue of low bargaining power early in an author's career is the equitable remuneration right. German legislators introduced the author's statutory right to equitable remunerations in 2002 as part of a larger reform of copyright law.[70] It was not intended to "protect authors merely in cases of blatant abuse of negotiating power by the exploiters, but to create legal arrangements for bringing about a general and comprehensive balancing of interests between authors and exploiters with regard to remuneration."[71] Accordingly, the

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[69] GESETZ ZUR STÄRKUNG DER VERTRAGLICHEN STELLUNG VON URHEBERN UND AUSÜBENDEN KÜNSTLERN [Act to Strengthen the Contractual Position of Authors and Performing Artists], Mar. 22, 2002, BGBl I, at 1155-115 (Ger.), http://www.urheberrecht.org/law/normen/urhg/2002-03-22/materialien/bgbl_I_1155.php, *translated in* Act on Copyright and Related Rights, https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html; [https://perma.cc/A3G2-AZYY]; CODE LA PROPRIÉTÉ INTELLECTUELLE [CPI] [Intellectual Property Code] arts. L.122-7 - L. 131-4 (Fr.), *translated in* Intellectual Property Code, www.legifrance.gouv.fr/content/location/1742 [https://perma.cc/H4QC-2BJV]; Law for the Protection of Literature, *supra* note 63.

[70] The amendment is known as the *Act to Strengthen the Contractual Position of Authors and Performing Artists*. GESETZ ZUR STÄRKUNG DER VERTRAGLICHEN STELLUNG VON URHEBERN UND AUSÜBENDEN KÜNSTLERN, Mar. 22, 2002, BGBl I, at 1155-115 (Ger.), http://www.urheberrecht.org/law/normen/urhg/2002-03-22/materialien/bgbl_I_1155.php, *translated in* Act on Copyright and Related Rights, https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html [https://perma.cc/A3G2-AZYY]; For a detailed discussion of the legislative background, *see* Karsten M. Gutsche, *Equitable Remuneration For Authors In Germany—How The German Copyright Act Secures Their Rewards*, 50 J. COPY. SOC'Y U.S. 257 (2002); Nordemann, *supra* note 64, at 1043-44.

[71] Bundesverfassungsgericht [Federal Constitutional Court], Order of the First Senate of 23 October 2013 - 1 BvR 1842/11 - paras. 82, http://www.bverfg.de/e/rs20131023_1bvr184211en.html [https://perma.cc/P66P-7A33] (Ger.). *See also,* Adolf Dietz, *Amendment of German Copyright Law in Order to Strengthen the Contractual Position of Authors and Performers*, 33 NT'L REV. INTELL. PROP. COMPETITION L. 828 (2002); Marjut Salokannel, STUDY ON THE AUDIOVISUAL PERFORMERS' CONTRACTS AND REMUNERATION PRACTICES IN FRANCE AND GERMANY, AVP/IM/03/3B, 31-32 (Ad Hoc Informal Meeting on The Protection of Audiovisual Performances Geneva, November 6 and 7, 2003), http://www.wipo.int/edocs/mdocs/copyright/en/avp_im_03/avp_im_03_3b.pdf. [https://perma.cc/M3C7-HRUM].

right to equitable remuneration cannot be waived or circumvented contractually.[72]

This right to equitable remuneration comes into play in two different situations. Firstly, if the amount of remuneration has not been determined in the contract, the law specifically states that the author has a right to an equitable remuneration for the transfer of her rights.[73] Secondly, if the parties have already stipulated a certain amount of remuneration in the copyright contract, but the court finds that the compensation stipulated in the agreement violates the equitable remuneration requirement,[74] the author may ask the intermediary to modify the contract so as to ensure equitable remuneration to the author.[75]

To that end, the German legislation assigns an important role to collective bargaining and common remuneration schemes.[76] Remunerations that stem from a collective agreement or adhere to joint remuneration schemes ("*Gemeinsame Vergütungsregeln*"), are considered by German law to be fair.[77]

In the absence of a collective agreement or joint remuneration scheme, the remuneration negotiated between the author and the counterparty is considered equitable if it conforms to what is both customary and fair in the industry at the time of contracting.[78] This consideration takes into account

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[72] GESETZ ÜBER URHEBERRECHT UND VERWANDTE SCHUTZRECHTE [Urheberrechtsgesetz] [UrhG] [Copyright Act], Sept. 9, 1965, BGBl I at 1273, §32(3) (Ger.), http://www.gesetze-im-internet.de. [hereinafter GERMAN COPYRIGHT ACT] [https://perma.cc/2WRG-JCES] Important to note however that the author may grant an interested party a non-exclusive right to use her work free of charge.

[73] *Id.* Article 32(3).

[74] As will be further discussed in the next section, German law deals separately with the surprise best-seller or success problem.

[75] GERMAN COPYRIGHT ACT*, supra* note 72, Article 32(1); *see also*, BVerfG, Order of the First Senate of 23 October 2013 - 1 BvR 1842/11 - paras. (1-115), http://www.bverfg.de/e/rs20131023_1bvr184211en.html [https://perma.cc/P4SJ-EYLP].

[76] *See* Drucksache Deutscher Bundestag 14/6433, June 26, 2001, http://www.urheberrecht.org/UrhGE-2000/download/1406426.pdf [https://perma.cc/2XDR-LD86].

[77] The Act encourages third-party groups such as authors, publishers, and other associations to fix appropriate remuneration rates under the so-called joint remuneration schemes. Section 36 supplements Section 32 by creating remuneration standards. These remunerations serve as a benchmark for any discussion of appropriate remuneration, where only collective agreements will take priority over them given that such collective agreements are binding. *See* Nordemann, *supra* note 64, at 1046. *See also*, Hilty & Peukert, *infra* note 79, at 427-28. To that end, Article § 32(4) explicitly states that the author may not ask for a modification of the contract if the remuneration is regulated by either of these schemes and agreements. *See* GERMAN COPYRIGHT ACT*, supra* note 72, Article 32(4).

[78] In this regard, it is important to note that the 2002 Act deems terms set as the result of a negotiation between collective organizations and intermediary to be "fair." *See* GERMAN COPYRIGHT ACT*, supra* note 72, Article 32(2). For a detailed discussion *see* Gerhard Schricker, *Efforts for a Better Law on Copyright Contracts in Germany—A Never-Ending Story?*, 35 INT'L REV. INTELL. PROP. & COMPETITION L. 850, 852 (2004).

the type and scope of rights assigned, duration of use, and other relevant circumstances.[79] However, in a series of cases involving the rights of translators, the court determined that compliance with customary remuneration practices do not necessarily fulfill the fair requirement. Stating that "a given remuneration is only fair when it equally takes account of the interests of the author besides those of the exploiter."[80] What is more, in this cases the court used the Common Remuneration Rules for Writers of German Fiction as a guideline for the development of a fair remuneration standard for translators. Thus, turning a specific common remuneration rule into a general yardstick for the establishment of fair remuneration standards for the entire sector by way of analogy.[81]

Important to mention that, the assessment criteria for the equitability of the compensation stipulated in the contract is based on the amount determined to be equitable by the court specifically at the time the contract was concluded *ex ante*.[82] The author, therefore, can raise a claim to modify the contract only once during the life of the contract.

On the whole, the principle of equitable remuneration neither explicitly prohibits lump-sum contracts nor obliges the parties to a minimum level of remuneration.[83] Nevertheless, the requirement for the compensation made to an author to meet the general fairness criteria may imply a predisposition against contracts stipulating a one-time lump-sum payment. More so, when courts are prone to find buy-out contracts to be

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[79] Hilty and Peukert note that the explanatory memorandum of the 2002 amendment list few relevant criteria, namely, "market conditions, investment, risk-taking accruing costs, number of copies produced and expected proceeds." Reto M. Hilty & Alexander Peukert, *"Equitable Remuneration" In Copyright Law: The Amended German Copyright Act as a Trap For The Entertainment Industry In The U.S.?,* 22 CARDOZO ARTS & ENT. L.J. 401, 431 (2004). *See also*, Alexander Peukert, *Protection of Authors and Performing Artists in International Law—Considering the Example of Claims for Equitable Remuneration Under German and Italian Copyright Law*, 35 IIC 900, 903 (2004).

[80] *See* Martin Senftleben, *More Money for Creators and More Support for Copyright in Society—Fair Remuneration Rights in Germany and the Netherlands*, 41 COLUM. J.L. & ARTS 413, 424 (2018) (quoting Bundesgerichtshof [BGH], [Federal Court of Justice] October 7, 2009, case I ZR 38/07, 11, Gewerblicher Rechtsschutz und Urheberrecht 2009, 1148 (1150) with case comment by R. Jacobs; Bundesgerichtshof [BGH], [Federal Court of Justice] October 7, 2009 I ZR 230/06, 12, *available at* https://perma.cc/ZX4U-9H3T).

[81] *See* Martin Senftleben, *Copyright, Creators and Society's Need for Autonomous Art—the Blessing and Curse of Monetary Incentives*, *in* What If We Could Reimagine Copyright? 25, 52-54 (Rebecca Giblin & Kimberlee Weatherall eds., 2017), https://press.anu.edu.au/publications/what-if-we-could-reimagine-copyright [https://perma.cc/62NV-PKHA]; Senftleben, *supra* note 80, at 425.

[82] *See* Gutsche, *supra* note 70, at 261. However, it is important to note that such corrective claim for the amendment of remuneration cannot be raised in case where the remuneration was stipulated as part of a collective bargaining agreement.

[83] *See* Martin Schippan, *Codification of contract rules for copyright owners—the recent amendment of the German Copyright Act*, 24 E.I.P.R. 171, 171-174 (2002).

inequitable.[84] Further, the legislative pressure on the parties to use collectively negotiated remuneration agreements and courts' inclination to employ them as a yardstick curtails the bottom rung of the remuneration distribution ladder.[85] Taken together, these principles operate as a *de facto* remuneration floor.[86]

B. Proportional Remuneration

Another way in which legislators attempt to guarantee the author an appropriate remuneration *ex ante* is by having an unassignable, unwaivable right to proportional remuneration. Under the principle of proportional remuneration, authors who transfer their rights—whether in part or in whole—are entitled to participate proportionally in the proceeds resulting from the commercial exploitation of their work.[87] The idea behind this

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[84] For instance, in the cases of Talking to Addison and Destructive Emotions, the German Federal Court in Munich ("Oberland-esgericht") examined whether the common scheme of fixed fee per translated page, in addition to the very low profit sharing arrangement was both customary and fair. Taking the nature and scope of the rights granted as well as other circumstances into account, and in light of the general fairness criteria articulated in the Act, the court found that while the remuneration scheme was common in the relevant industry, it was nevertheless inequitable. Consequently, in both cases, the court held that it was necessary to provide the translator with a share of the revenues based on a certain number of copies sold (namely, 0.8% for hardcover books and 0.4% for paperback books). *See Talking to Adison,* Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 7, 2009, I ZR 38/07, Neue Juristische Wochenschrift [NJW] GRUR 2010, 771 (Ger.); *Destructive Emotions,* Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 20, 2011, I ZR 19/90 GRUR 2011, 328 (Ger.), *upheld*, on constitutional challenge by the publisher concerned, BVerfG (Federal Constitutional Court), Oct. 23, 2013, GRUR 2014, 169 (Ger.). *See also* Michael Gruenberger & Adolf Dietz, *Germany, in* 2-GER INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 4 (Paul Edward Geller ed., 2017); Senftleben, *supra* note 59, at 25, 52-4.

[85] *See* in comparison scholarly discussion of union role in creating a *de facto* minimum wage for organized employees, David Metcalf, Kirstine Hansen & Andy Charlwood, *Unions and the Sword of Justice: Unions and Pay Systems, Pay Inequality, Pay Discrimination and Low Pay*, 167 NAT'L INST. ECON. REV. 61 (2001) (arguing that unions negotiate over the minimum wage, truncating the lower end of the pay scale).

[86] Take for example the model contract for translation contracts, which came into force on April 1, 2014. This model contract establishes basic compensation in the amount of 19 euros per page, plus a right to participate in the proceeds from the published work (2.5% of each copy sold above a certain threshold). EUROPE ECONOMICS, LUCIE GUIBAULT AND OLIVIA SALAMANCA, REMUNERATION OF AUTHORS OF BOOKS AND SCIENTIFIC JOURNALS, TRANSLATORS, JOURNALISTS AND VISUAL ARTISTS FOR THE USE OF THEIR WORKS 87-88 (A study prepared for the European Commission DG Communications Networks, Content & Technology, Sep. 2016), https://ec.europa.eu/digital-single-market/en/news/commission-study-remuneration-authors-books-and-scientific-jou=rnals-translators-journalists-and [https://perma.cc/A58Y-2EWZ].

[87] CODE DE LA PROPRIÉTÉ INTELLECTUELLE [CPI] [Intellectual Property Code] arts. L.122-7 - L. 131-4 (Fr.), available in English at www.legifrance.gouv.fr [hereinafter FRENCH INTELLECTUAL PROPERTY CODE]. *See also,* Tristan Azzi, *General report: Mechanisms to ensure adequate remuneration for creators and performers, in* REMUNERATION FOR THE USE OF WORKS: EXCLUSIVITY VS. OTHER APPROACHES, 90-92 (Silke von Lewinski ed., 2017). MARIAN HEBB & WARREN SHEFFER, TOWARDS A FAIR DEAL CONTRACTS AND CANADIAN CREATORS' RIGHTS 28 (Creators' Copyright

policy instrument is that authors should be given a share of the profit and success of their work.[88]

In France, for example, the author's right to proportional remuneration governs all copyright contracts made for consideration, irrespective of the modes of commercial exploitation.[89] The legislator does not fix the percentage due to the author, and it is generally up to the discretion of the parties to determine the exact royalty rate to be paid, *ex ante*, on the condition that it is not paltry.[90] Where no specific rate is specified, the law requires that the intermediary provide the author with a proportional share in the work's success via royalties.[91]

Where the remuneration stipulated in the contract is ruled to be paltry, the contract—or at least its provisions—may be declared void for lack of due consideration.[92] However, what constitutes paltry compensation is left unelaborated. Only in relation to digital publishing does Article L. 132-17-6 of the France Code provide that a publishing contract "guarantees to the author a fair and equitable remuneration right on all of the receipts coming from the marketing and the diffusion of a book published in digital form."[93]

Coalition, And the Creators' Rights Alliance/ Alliance Pour Les Droits Des Créateurs 2006), http://www.Creatorscopyright.Ca/Documents/Contracts-Study.Pdf.

[88] *See* Theodoros Chiou, *On Royalties and Transfers Without (Monetary) Consideration—Looking for the "Magic Formula" for Assessing the Validity of Remuneration Clauses of Copyright Transfers Under French Copyright Law*, 44 ICC 585, 5889 (2013); Andre Lucas, Pascal Kamina & Robert Plaisant, *France in* 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE FRA §4 (Paul Edward Geller ed.) § 4[3][b] (2017) ("The rationale behind this reform was to protect authors who might otherwise be tempted to alienate valuable rights for the illusory bait of lump-sum payment."). *See also*, NICOLAS BOUCHE, INTELLECTUAL PROPERTY LAW IN FRANCE, 75 (Klower Law Int'l 2011).

[89] Article L. 122-7 provides that "[t]he right of performance and the right of reproduction can be transferred, with or without payment." Furthermore, art. L122-7§1 provides that "[t]he author is free to put his work at the disposal of the public, on condition that he respects the rights of possible coauthors and third parties, and that he acts in accordance with the agreements he has entered into." Thus, theoretically the parties may opt for either a free transfer of rights, or, a transfer providing the author non-monetary consideration. Although the implication of these provisions alongside the obligation to provide the author with proportional remuneration is not entirely clear. *See* FRENCH INTELLECTUAL PROPERTY CODE, *supra* note 87; Chiou, *supra* note 88, at 590-92.

[90] PASCAL, *supra* note 9 at 202-04; BOUCHE, *supra* note 88, at 74-5.

[91] The "basis of remuneration" ("assiette de rémunération") must be calculated taking into account: (1) either the price actually paid by the public for access to the work ("the public sale price") or (2) the income derived from its operation, whichever is most favorable to the author. Accordingly, the Court of Cassation has traditionally held that the basis for calculating the royalty is calculated on the basis of the sale price to the public, excluding VAT. *See* Court of Cassation, Civil Chamber 1 – 16th July 1998; Court of Cassation, Civil Chamber 1, 9 October 1984; *see also* Jean-Baptiste Auroux, *infra* note 94 § 15:31-32; *See* EUROPE ECONOMICS*, supra* note 86, at 32-34.

[92] The author also has a right of access to financial information enabling them to know the financial basis of their right to proportional remuneration. *See* Chiou, *supra* note 88, at 589-90.

[93] LIONEL BENTLY ET AL., STRENGTHENING THE POSITION OF PRESS PUBLISHERS AND AUTHORS AND PERFORMERS IN THE COPYRIGHT DIRECTIVE 58 (Citizens' Rights and Constitutional Affairs,

In effect, courts often refer to commercial customs or practices to evaluate the adequacy of remuneration.[94] For instance, a 0.5% royalty may have been held satisfactory in the case of a film, but a 2.5% royalty rate was ruled as inadequate for a publishing contract.[95] Resulting in a *de facto* sector-specific floor. In general, the principle of proportionality has been devised to counter the practice of lump-sum remuneration.[96] Therefore, lump-sum agreements are now void with the exception of certain cases specified in the legislation, such as circumstances where it is impossible to provide the author with a share of the proceeds.[97]

C. Minimum Royalty Rate

On July 31, 2013, the Israeli legislature introduced the Law for the Protection of Literature and Authors in Israel.[98] The legislation intended to "ensure Israeli authors proper remuneration for their creations"[99] by incorporating three key measures. First, it subjected newly published books to price protection for a period of eighteen months, starting from the date of initial publication.[100] Second, its limited bookstores' and publishers' commercial activities.[101] Third, it mandated a certain level of remuneration to authors. [102] While the first two measures were mainly aimed to break up

Policy Department ed., 2017), https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU%282017%29596810_EN.pdf [https://perma.cc/ZUW2-7H9T].

[94] *See* Jean-Baptiste Auroux, *Statutory or other rules regarding remuneration for authors and performing artists in* 2 COPYRIGHT THROUGHOUT THE WORLD § 15:32 (Silke von Lewinski ed.) (2015) (citing CA Paris, Feb. 28, 2003, Comm. com. électr. 2003, No. 68, comment Caron Ch.)

[95] This minimum can vary depending on the industry. *See generally* Lucas, Kamina & Plaisant, *supra* note 88, at §4[3][C].

[96] *Id.,* at § 4[3][b]; BOUCH, *supra* note 88, at 75.

[97] *See* FRENCH INTELLECTUAL PROPERTY CODE, *supra* note 87, Article L. 131-4, 131-6; Lucas, Kamina & Plaisant *supra* note 88, at § 4[3][b]. Although not explicitly mentioned in the law, the Court of Cassation has allowed lump-sum payment in cases of collective works. Finally, the author can ask for the proportional remuneration to be converted into lump-sum annuities for a fixed time period. Generally, when a lump-sum payment is permissible, the amount agreed upon need not to correlate to the success of the work. Nevertheless, as will be further discussed in the next section, in certain circumstances this lump-sum payment will be modified for the benefit of the author.

[98] Law for the Protection of Literature, *supra* note 63. The law was designed to increase competition between publishers and booksellers and to ensure authors are better compensated. Several drafts preceded the final version of the law.

[99] *See id*. at §1; *see also* Ron Ben-Menachem & Karen Elburg, *Israel's New Authors Act*, HERZOG FOX & NEEMAN (Jan. 28, 2014), http://unfolding.co.il/israels-new-authors-act/ [https://perma.cc/5LE8-Z7ZP].

[100] During this eighteen-month period, the book is sold at the retail price set by the publisher. *See* Law for the Protection of Literature, *supra* note 63 at §§2, 4.

[101] *Id.* §8.

[102] *Id.* §3(a).

the duopoly in the Israeli book market,[103] the third and most relevant measure for the purpose of this study affected the core of the contractual relations between the author and the publisher—the amount of remuneration paid to the author.[104]

Specifically, the Law for the Protection of Literature and Authors in Israel determined that during the first eighteen-month period, the author shall receive at least eight percent (8%) of the book's list price (minus the VAT) for the first 6,000 copies sold, and ten percent (10%) of the book's list price for any copies sold thereafter.[105] For the seven years following the initial eighteen-month period, the author would then receive no less than sixteen percent (16%) of the actual payment received by the publisher for the books. [106] Hence, the law set the minimum royalties that would be given to authors.[107]

It should be pointed out that the law differentiated between first-time authors and all others.[108] Namely, the royalty rate for the first book should not be lower than 80% of the rates stated above.[109] This distinction was designed to reduce the risk associated with first-time authors.[110]

Buy-out contracts were not categorically forbidden under the law. Actually, it allowed the author and the publisher to set a lump-sum advance while the author was writing the book. The publisher would then deduct this amount from subsequent royalties.[111]

Additionally, there were several exceptions to the minimum royalty requirements. These included: (1) research books written by Israeli authors

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[103] *See* Miriam Marcowitz-Bitton & Jacob Nussim, *People of the Book and the Law of the Book: The Law for the Protection of Literature and Authors in Israel*, 31 Mehkarey Mishpat 223, 228 (2017) (Isr.).

[104] Authors' ability to capture some of the revenues generated by their works is ordinarily dictated by contractual arrangements between authors and publishers. However, the concentration in the Israeli book market has led to fierce competition and high discount rates in book prices (in comparison to the set price on the book). On one hand, these high discount rates benefit the consumers, as they were able to enjoy a considerable decrease in book prices. On the other hand, because of their considerable market power, the two dominant chains were able force publishers into offering them considerable discounts. This caused a decrease in publishers' ability to remunerate authors, translators, editors, and other service providers. In consideration of the forgoing, the legislature hoped that should a minimum royalty rate become statutory condition, it would help the authors. *See* Law for the Protection of Literature (Explanatory Notes).

[105] Law for the Protection of Literature, *supra* note 63 §3(a).

[106] *Id.* §3(b).

[107] *Id.* §3.

[108] *Id.* §3(c).

[109] *Id.* §3(c).

[110] Given the difficulty to determine the value of a copyrighted work prior to commercialization. *See* Marcowitz-Bitton & Nussim, *supra* note 103, at 231.

[111] *See* Law for the Protection of Literature, *supra* note 63 §3(d).

who undergo scientific scrutiny prior to their publication and are published either on one's own or in cooperation with a nonprofit institution;[112] (2) a book that is a work created by an employee;[113] (3) a book made pursuant to a commission, with respect to which it was agreed in writing between the commissioning party and the author that the first owner of the copyright therein shall be the commissioning party; and (4) a state-owned work.[114]

The law was initially enacted for a three-year trial period starting in February 2014.[115] However, Opponents of the Law refer to it harmful to competition and claimed it increased book prices for the citizens.[116] Indeed an intense public debate eventually led to its revocation on May 22, 2016.[117] Nevertheless, the discussion of minimum royalty rate is not without merit, seeing that it is not inconceivable to think of a scenario in which an intervention specifying a minimum rate to counter the imbalance in bargaining power is once again adopted by policymakers.

Overall, the Law for the Protection of Literature and Authors in Israel established a minimum royalty rate that governed author-publisher contracts. This arrangement has no counterpart in other jurisdictions.

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[112] *Id.* at §3(f)(1).

[113] *Id.* §3(f)(2).

[114] *Id*. §3(f)(3).

[115] *See* Law for the Protection of Literature, *supra* note 63, §43(a2).

[116] Lahav Harkov, *Cancellation of Law Which Increased Book Prices Moves Forward*, THE JERUSALEM POST (March 20, 2016), www.jpost.com/Israel-News/Politics-And-Diplomacy/Cancellation-of-law-which-increased-book-prices-moves-forward-448574 [https://perma.cc/ZCC7-H83E].

[117] The Minister of Culture and Sport nominated a public committee to examine the effect of the proposed legislation. Among the issues addressed by the committee was the effect of the minimum royalties on publishers and authors (first time authors in particular), the number of books published, and the diversity in the market. For example, according to a survey done by the Israel Consumer Council, 38% of respondents said they bought fewer books over the year or none at all, compared to previous years. Of those, 46% stated it was because of high prices or lack of sales. Approximately half of the respondents said that over the past year they had bought fewer books—or none at all—by authors they did not previously know, with 23% of those indicating it was because of high costs or lack of sales. The members of the committee held varying opinions as to the effect of the legislation. Nevertheless, they all recommended waiting until the end of the three-year period before determining whether the law was able to achieve its goals. Moreover, they emphasized more data is necessary. *See* Annual Report on the state of the Book Industry, A report submitted by the Advisory Committee to the Minister of Culture and Sport, the Minister of Economy and the Knesset Education, Culture and Sport Committee 15 (March 2016) (in Hebrew), http://fs.knesset.gov.il/%5C20%5CCommittees%5C20_cs_bg_341671.docx [https://perma.cc/YZ8E-NH5W]. Nevertheless, on May 22, 2016, the Israeli government decided to revoke the law in light of its flaws. Law No. 2553, was passed by the Knesset on May 30, 2016. The draft bill and explanatory notes were published as part of the Law for the Protection of Literature and Authors in Israel (Temporary Provision), (Legislative Amendments), 5776–2016, HH (Knesset) No. 1044 p. 1016 (May 23, 2016), (Isr.). *See also*, Ron Ben-Menachem & Karen Elburg, *Israel's New Authors Act*, LEXOCOLOGY (Jan. 28, 2014), www.lexology.com/library/detail.aspx?g=00148cfe-eae1-455b-96fd-93698702da3e [https://perma.cc/S6W4-WWY6].

However, the right to equitable remuneration and proportional remuneration mentioned earlier create comparable restrictions on the parties' freedom in determining the level and form of remuneration stipulated in the contract. Indeed, although they do not by themselves guarantee that some remuneration will be paid to the author, all three arrangements involve two main features: (1) parties are either banned or discouraged from adopting lump-sum payments; and (2) the legislation restricts the parties' freedom to set the compensation rate too low.

IV. EX-POST ADJUSTMENT MECHANISMS

The previous sections featured a group of interventions designed to protect the economic interests of the author vis-à-vis the intermediary *ex ante.* To do so, they either explicitly ban the use of lump-sum payments or strongly encourage the parties to avoid them. When a transfer of rights in exchange for a lump-sum payment does happen, several jurisdictions consider *ex post* intervention necessary—particularly in situations where a discrepancy between the compensation and the proceeds flowing from the work occurs.

This Part surveys two instances of *ex-post* remuneration adjustment mechanisms. The first provides the author with an opportunity to receive an additional share of the revenues that stem from commercially successful woks via success or best-seller clauses. The other provides visual artists who maintain the copyrights in their works but sold the physical embodiment of such works to receive additional compensation following a subsequent sale of the work.

A. Success Clause

Success clauses, as the title suggests, provide the author with the right to modify the remuneration stipulated in the contract when the intermediary sees disproportional profits.[118] This form of intervention—meant to protect the author who could potentially fail to benefit from the exploitation of her work—is common in European countries.[119] However, the conditions under which an author may invoke her right of modification may differ from country to country.

For instance, as noted previously, in France, the author has a right to receive proportional remuneration under the Code.[120] Nevertheless, if the parties opt for a lump-sum payment where a specific exception applies, the

[118] Thomas Dysart, *Author-Protective Rules and Alternative Licenses: A Review of the Dutch Copyright Contract Act*, 37 E.I.P.R. 601, 605 (2015).

[119] William Cornish, *The Author as Risk-Sharer*, 26 COLUM. J.L. & ARTS 1, 12 (2002).

[120] *See supra* note 91.

legislation provides the author with a non-waivable right to modification or adjustment of the amount of remuneration stipulated in the contract. The author may seek such modification only if: (1) she suffers a loss of more than seven-twelfths the compensation to which she was entitled; and (2) the loss results from either "a burdensome contract or an insufficient advance estimate of the proceeds of the works."[121]

German copyright law likewise prescribes authors with a right to ask for a modification of the contract.[122] In the past, to claim modification the author had to demonstrate that her remuneration is grossly disproportionate.[123] However, as part of the 2002 amendment to the Copyright Act, the legislature introduced the new success rule.[124]

The new "success rule" is based on the former best-seller clause, and likewise, aims to safeguard authors' fair share of the proceeds.[125] Nonetheless, under the new rule the threshold for asking for a modification of the compensation is lower in comparison to the formed best-seller clause in two respects. First, no longer is the author required to demonstrate "gross disproportionality" between her remuneration, and the returns and benefits of the intermediary.[126] Rather, it is enough for the author to show "a conspicuous disproportionality."[127] Another major difference between the previous bestseller rule and the amended Section 32(a) is that the new provision clearly states that the author is entitled to ask for a modification

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[121] FRENCH INTELLECTUAL PROPERTY CODE, *supra* note 87, Article L. 131-5; LUCIE GUIBAULT & BERNT HUGENHOLTZ, STUDY ON THE CONDITIONS APPLICABLE TO CONTRACTS RELATING TO INTELLECTUAL PROPERTY IN THE EUROPEAN UNION, at 32-33, 40, 72 (Information Law Institute, University of Amsterdam, Final Report, Study Contract No. ETD/2000/B5–3001/E/69, 2002). http://dare.uva.nl/document/2/24667 [https://perma.cc/5TEN-E7RS].

[122] *See* GERMAN COPYRIGHT ACT, *supra* note 72, Article 32(a).

[123] The so-called "bestseller clause" was meant to "secure for the author a fair share of the income having regard to the circumstances." *See* GUIBAULT & HUGENHOLTZ, *supra* note 121, at 82.

[124] *See* GERMAN COPYRIGHT ACT, *supra* note 72, Article 32(a)(1). Although, the old bestseller rule remains in force with regard to cases from before March 28, 2002. The main reason for the introduction of this new success clause is that courts were reluctant to find that the remuneration agreed upon between the parties was grossly disproportionate under the old provision. *See* Senftleben, *supra* note 59, at 50-54; GUIBAULT & HUGENHOLTZ, *supra* note 121, at 80-81.

[125] The German legislature found it to be unfair to exclude the author, to whom the current right holder owes her success, from a share of the revenue. *See* Nordemann, *supra* note 64, at 1045.

[126] *See* Gutsche, *supra* note 70, at 264; Senftleben, *supra* note 59 (claiming the requirement if for the remuneration to equals less than half of the income she could have anticipated in view of the work success).

[127] The requirement is to show "auffälligen Missverhältnis" (conspicuous disproportionality) as opposed to showing of "groben Missverhältnis" (gross disproportionality) under the former best-seller clause. *See* GERMAN COPYRIGHT ACT, *supra* note 72, Article 32a(1); Salokannel, *supra* note 71, at 32.

of the contract whether the disproportionality could have been foreseen at the time of contract conclusion, or not.[128]

Given the protection these policies provide authors and their extensive implications, the German legislature anticipated attempts to circumvent them. Therefore, authors' right to modification cannot be waived in advance, nor can any disposition regarding the expected benefit be effective. Moreover, this right applies to all modes of exploitation, and any part in the contract deviating from this right is considered null and void.[129] That said, the contract does remain valid following a request for modification.[130]

Authors' right to modify contract terms is mainly enforceable against authors' direct contracting party.[131] Nevertheless, because it is common for the original transferee to enter into subsequent contracts, the German Copyright Act not only provides the author with the ability to assert her rights against contracting partners, but also to enforce her rights against a third party with whom the author has no direct contractual relationships.[132]

Finally, it is important to distinguish the right to ask for a modification of the contract, pursuant to Section 32(a) of the German Copyright Act, from the right to ask for a modification of the contract pursuant to Section 32 (i.e., violation of the author's right to equitable remuneration).[133] The latter depends on an *ex-ante* assessment of the remuneration, namely

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[128] Senftleben, *supra* note 59; *see also* Salokannel, *supra* note 71, at 32; GUIBAULT & HUGENHOLTZ, *supra* note 121, at 80.

[129] Mainly in order to prevent the stronger party (i.e., the intermediary) from forcing the author to assign or waive their right to modification in a contract. *See* GERMAN COPYRIGHT ACT, *supra* note 72, Article 32a(2); Salokannel, *supra* note 71, at 34-46; Gruenberger & Dietz *supra* note 84, at §4[3][a][i].

[130] *See* Gutsche, *supra* note 70, at 261-62. It is important to note that the author may not ask for a modification of the contract if the remuneration has been determined by a collective agreement or in accordance with joint remuneration scheme and "explicitly provides for further equitable participation." *See* GERMAN COPYRIGHT ACT*, supra* note 72, Article 32a(4); *see also*, GUIBAULT & HUGENHOLTZ, *supra* note 121, at 82.

[131] To assert a possible claim to remuneration, the author needs information about the revenue generated from exploitation of the work. Article 32a grants her such right. *See, e.g., Das Boot* (the Boat) Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 22, 2011, I ZR 127/10, GRUR 2012, 496 (Ger.).

[132] Because the major part of the proceeds may be at the hands of the third party, if the third party is liable, then the direct (original) contracting party is not liable. GERMAN COPYRIGHT ACT*, supra* note 72, Article 32a(2). For such third party liability to arise, the following conditions must be met: (1) the author receives a conspicuously disproportionate monetary compensation; (2) the party to the original contract transferred the exploitation rights to a third party; and (3) the conspicuous disproportion resulted from returns gained by that third party. Salokannel, *supra* note 71, at 32-33.

[133] *See* GERMAN COPYRIGHT ACT, *supra* note 72, and accompanying text.

whether it is equitable. The former is applicable where the agreed remuneration turns out to be *ex-post* disproportional.[134]

In sum, there are a few significant distinctions between the conditions governing the right to modify the contract in France and Germany. However, in both instances, the legislatures oblige the parties to revisit and change the terms of the agreed upon profit-sharing arrangement when the royalty rate is disproportionately low. Consequently, author is prevented from fully transferring the risk associated with the exploitation of the work to the intermediary, namely, the counterparty.

European endeavors in this regard are continuing. In fact, Article 20 of the EU's new Directive on copyright and related rights in the Digital Single Market requires Member States to introduce into their national legislation a contract adjustment mechanism.[135] Accordingly, an author shall be entitled to claim additional, appropriate, and fair remuneration for the exploitation of her rights, when the initially agreed remuneration "turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances."[136] This recent initiative serves to emphasize the importance of adjustment mechanisms in the European Union, both as a policy tool and for purposes of critical discussion.

B. "Droit de Suite"—Artists' Resale Royalties Right

Analogous to the aforementioned contract adjustment instruments, the institution of *droit de suite*—artists' resale royalty rights—entitles creators of a visual artwork[137] to a share option of the future stream of revenues generated by her work.[138]

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[134] It appears as if the legislature had doubts over the ability of an ex ante measure alone to assure adequate remuneration to the authors from an *ex post* perspective. Thus, this two-phase model was thought to be an appropriate solution. *See* Christian Jansen, *Economic Effect of the New German Copyright Contract Law* 5, (University Library of Munich, Germany, Law and Economics, 2003), https://ideas.repec.org/p/wpa/wuwple/0302003.html#cites [https://perma.cc/2MLX-H5QP].

[135] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (L130) 92, 122.

[136] *Id.*

[137] The creators include painters, sculptors, and photographers.

[138] The term "*droit de suite*" (literally translated to the "right of following up") is drawn from French real property law and represents one's continued possession of rights despite changes in ownership. *See* U.S. COPYRIGHT OFFICE, DROIT DE SUITE: THE ARTIST'S RESALE ROYALTY 7 (1992), https://www.copyright.gov/history/droit_de_suite.pdf [https://perma.cc/N5R7-H8YF].

Visual artists' right to participate in or follow the proceeds from the resale of their work was first implemented in France in 1920.[139] It stemmed from legislative concerns for the financial interests of visual artists whose works are initially sold for a low price and then resold by the purchaser for a much higher price.[140] When this happens, artists cannot benefit from the increase in the value of their work.[141] According to this line of thinking, creators are doomed to live a life of poverty, whereas the rapacious intermediaries become even wealthier.[142] The concern for the artists' pecuniary interests is eminent given the particulars of the art market and the peculiar nature of visual works of art. Art markets can be roughly divided into two distinct sectors: primary and secondary. The primary art market is where artists sell their works for the first time. And it is therefore their main source of income. In the secondary market, intermediaries (e.g., dealers, galleries, auction houses, etc.) sell or trade the works again. Although the prices at the secondary market frequently outrun those on the primary market, for the vast majority of artists, the secondary market is immaterial.[143]

To make matters worse, the literature suggests that visual artists are under-protected by current copyright laws simply because of the nature of their works.[144] It has something to do with the fact that an author of a literary work gains most of her monetary proceeds from the reproduction and distribution of copies, while a visual artist derives financial benefits only through the sale of the actual and original artwork. For instance, a

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[139] For a detailed discussion of the history of the *Droit de Suite*, s*ee generally,* Francois Hepp, *Royalties from Works of the Fine Arts: Origin of The Concept of* Droit De Suite *in Copyright Law*, 6 BULL. COPYRIGHT SOC'Y 91 (1959).

[140] Diane B. Schulder, *Art Proceeds Act: A Study of Droit de Suite and a Proposed Enactment for the United States*, 61 NW. U. L. REV. 19, 24-25 (1966-1967); Michael B. Reddy, *The Droit de Suite: Why American Fine Artists Should Have a Right to a Resale Royalty*, 15 LOY. L. A. ENT. L. REV. 509, 515 (1995).

[141] Donald M. Millinger, *Copyright and the Fine Artist*, 48 GEO. WASH. L. REV. 354, 376 (1980).

[142] The names of artists such as Millet, Dégas, and Bollin were invoked to support this pathos. *See, e.g.*, LILLIANE DE PIERREDON-FAWCETT, THE DROIT DE SUITE IN LITERARY AND ARTISTIC PROPERTY: A COMPARATIVE LAW STUDY 1, 4 (Louise-Martin-Valiqueet trans., 1991); Stephanie B. Turner, *The Artist's Resale Royalty Right: Overcoming the Information Problem*, 19 UCLA ENT. L. REV. 329, 335 (2012); Sam Ricketson, *Proposed International Treaty on Droit de Suite/Resale Royalty Right for Visual Artists* 8-9 (2015).

[143] *See* Jeffrey C. Wu, *Art Resale Rights and the Art Resale Market: A Follow-Up Study*, 46 J. COPYRIGHT SOC'Y U.S.A. 531, 543-44 (1999).

[144] Rita E. Hauser, *The French Droit de Suite: The Problem of Protection for the Underprivileged Artist under the Copyright Law*, 6 BULL. COPYRIGHT SOC'Y U.S.A. 94, 94-95 (1959); *see also* Reddy, *supra* note 140, at 513.

copy of a book is usually regarded as having the same value as every other copy. However, in the case of visual artwork, that is simply not the case.[145]

Legislators perceived the right to royalties as a necessary element in the transition from direct state support for visual artists to a free market, designed to maintain some protection for artists.[146] The goal is to benefit artists by overcoming the asymmetric bargaining power and information they face, as well as to eliminate certain distinctions between visual artists and other types of authors.[147] In fact, since the 1920s, several international and multinational treaties have incorporated artists' royalty rights,[148] including in more than 80 jurisdictions such as member states of the European Union,[149] Australia, and the state of California.[150] Although artist royalty rights schemes vary in both nature and scope from country to country, the fundamental elements remain largely the same.[151] Specifically, these efforts grant an artist the right to participate in an increase in the value of her work derived from subsequent sales.

These schemes normally set a minimum resale price to trigger the royalty payment. Thus, the author is entitled to a resale royalty only when the resale price exceeds the floor set by the legislation.[152] The thresholds vary among jurisdictions. For example, Directive 2001/84/EC and its provisions regarding resale royalty rights exclude resales made three years

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[145] Physical embodiment is valuable precisely because there is no other object quite like the original.

[146] David Booton, *A Critical Analysis of the European Commission's Proposal for a Directive Harmonizing the Droit de Suite*, 2 INTELL. PROPERTY Q. 165, 183 (1998).

[147] *Contra* Guy A. Rub, *The Unconvincing Case for Resale Royalties*, 124 YALE L.J. F. 1, 3 (2014) (claiming "visual artists do not seem to typically be in a poor bargaining position").

[148] *See* Berne Convention for the Protection of Literary and Artistic Works art. 14ter, Sept. 9, 1866, S. Treaty Doc. No. 99-27 (as revised at Paris on July 24, 1971 and amended in 1979).

[149] Resale royalty rights became mandatory as of January 1, 2006 for countries of the European Union, which already had implemented them in their national legislation and as of January 1, 2010, for all other member states. *See* Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art, 2001 O.J. (L 272) 32.

[150] For a precise list, *see* Ricketson, *supra* note 142, at 10.

[151] Some commentators suggested the *droit de suite* is more common in countries of the authors' rights tradition because it functions as an adjunct to artists' moral rights. *See, e.g.*, Thomas M. Goetzl & Stuart A. Sutton, *Copyright and the Visual Artist's Display Right: A New Doctrinal Analysis*, 9 COLUM. J. ART & L. 15, 19 (1984); Marina Santillini, *United States' Moral Rights Developments in European Perspective*, 1 MARQ. INTELL. PROP. L. REV. 89, 106-07 (1997). However, the UK adopted these rights as part of the harmonization of laws in the EU. Additionally, the state of California has implemented the "California Resale Royalty Act of 1976." Under the Act, artists have a right to receive a five-percent royalty on any resale of their work, unless they have expressly waived the right. CAL. CIV. CODE § 986 (West 2014). Not only that, but Georgia and South Dakota have enacted laws that include a narrow version of resale royalty right provisions applicable only to artwork financed under state law. *See* GA. CODE ANN. § 8-5-7 (West 2012); S.D. CODIFIED LAWS § 1-22-16(5) to (6) (2012).

[152] Ricketson, *supra* note 142, at 44.

after the initial purchase where the resale price does not exceed 3,000 euros.[153] It represents a compromise between the desire to have as many artists as possible enjoy the benefits of resale royalty rights while taking into consideration transaction costs.[154]

The sums payable to the artist are commonly calculated on a digressive scale. In which case, the higher the price on resale, the lower the percentage of royalties applied. The resale royalty right cannot be licensed, assigned or waived and will remain with the artist even if the copyright in the work is transferred to a third party.[155] On the other hand, the resale royalty system is inherited, and thus, retained by the artist's family after death.[156]

Notably, the difficulty to monitor and administer royalties based on an increase in value has led most countries to adopt specific restrictions on resale royalty rights. For instance, in many jurisdictions resale royalty rights apply only to subsequent sales made by non-private or commercial parties, such as those through auction houses, art galleries and professional dealers.[157]

In sum, both success clauses and royalty resale rights create an opportunity for authors and visual artists to receive continued financial recompense for their work. To this end, these adjustment mechanisms attempt to rectify the disparity in bargaining positions between the authors (and artists) and their counterparties by assuring that the author (or at least the author's family) will profit if the work becomes highly successful long after a contract is concluded.

V. RIGHT REVERSION

Long-term copyright contracts offer several benefits to the parties. Indeed, it is quite common for authors to transfer their rights for long

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[153] Directive 2001/84/EC, *supra* note 149, at art. 4. However, beyond that, the minimum price is left to the discretion of the member states.

[154] The very same notion of transaction costs has led several jurisdictions to require artists to transfer their rights to a collecting agency or society to collect royalties. *See* Olav Velthuis, *Art Markets*, *in* A HANDBOOK OF CULTURAL ECONOMICS 33, 35-36 (Ruth Towse ed., 2d ed. 2011).

[155] Ricketson, *supra* note 142 at 39-40; U.S. COPYRIGHT OFFICE, RESALE ROYALTIES: AN UPDATED ANALYSIS 17 (Dec. 2013), http://copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf [https://perma.cc/693H-PB5].

[156] Allison Schten, *No More Starving Artists: Why the Art Market Needs a Universal Artist Resale Royalty Right*, 7 NOTRE DAME J. INT'L COMP. L. 115, 118 (2017) (the resale royalty rights system allows the artist or heirs to reap the financial benefits that are attached to the work).

[157] *Id.*

periods, often even for the entire term of the copyright.[158] Yet, as time passes, transferees may no longer be interested in exploiting a work or certain rights. They may even be unable to do so. Consequently, many works remain underexploited and unavailable for use.[159] Even when the work remains commercially available, the legislature may deem it necessary to protect authors (and their heirs) from the results of early contracts concluded under unequal bargaining settings. This is where the idea of right reversion becomes useful.

Right reversion, or early termination, provisions are as old as the Statute of Anne from 1710.[160] This English statute created a two-term system of copyright protection. Even when the author transferred the first term, the second term re-vested with her or her heirs, so long as the author lived through the first term, giving her an opportunity to strike a better agreement with the publisher and benefit from the success of the work.[161] Since then, copyright law has changed considerably in the U.K., replacing the bifurcated term of protection with a single one. Consequently, reversionary provisions have been repealed.[162] Nevertheless, some form of reversionary rights persist in other jurisdictions, namely in the U.S. and Canada.[163] These provisions may differ from one another in several respects, including duration, formalities and the identity of the beneficiary. But some essential elements are comparable. Chief among them is the underlying aspiration to protect the author—who frequently transfers her rights to an intermediary before the value of the work can be known—from an inauspicious bargain by providing an opportunity for the author and/or

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[158] *See* DUSOLLIER ET AL., *supra* note 46, at 28 (Citizens' Rights and Constitutional Affairs, Policy Department ed., 2014), www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493041/IPOL-JURI_ET(2014)493041_EN.pdf [https://perma.cc/L9C3-TYSF].

[159] Martin Kretschmer, *Short Paper: Copyright Term Reversion and the "Use It or Lose It" Principle,* 1 INT'L J. MUSIC BUS. RES. 44, 46, 49-50 (2012); Deirdre K. Mulligan & Jason M. Schultz, *Neglecting the National Memory: How Copyright Term Extensions Compromise the Development of Digital Archives*, 4 J. APP. PRAC. & PROCESS 451, 462 (2002) (showing that out of 10,027 books published in the United States in 1930, all but 174 were out of print in 2001).

[160] Act for the Encouragement of Learning (Statute of Anne), 8 Ann., c. 19, § 11 (1710) (Gr. Brit.); *see also*, Lionel Bently & Jane C. Ginsburg, *The Sole Right . . . Shall Return to the Authors: Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright*, 25 BERKELEY TECH. L.J. 1475, 1478-80 (2010).

[161] Bently & Ginsburg, *supra* note 160, at 1485-1486; *Cf.* Frank R. Curtis, *Protecting Authors in Copyright Transfers: Revision Bill §203 and the Alternatives*, 72 COLUM. L. REV. 799, 802 (1972); MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 42-48 (1993).

[162] An Act to Amend Several Acts for the Encouragement of Learning, 54 Geo 3, c. 156, § 4 (Gr. Brit. and British Empire). *See also*, Lionel Bently, *R v. The Author from the Death Penalty to Community Service*, 32 COLUM. J.L. ARTS. 1, 66-71 (2008).

[163] 17 U.S.C. §§ 203(a), 304(c)-(d) (2012); Copyright Act, R.S.C. 1985, c. C-42 §14 (1985) [hereinafter Canadian Copyright Act].

her heirs to recapture copyrights and to attract a larger share of the profits.[164]

A. Termination Rights

Congress passed a comprehensive revision of the 1909 Copyright Act in 1976.[165] Among other things, the 1976 Copyright Act abandoned the two-term scheme of copyright protection, adopting instead the international one-term protection standard.[166] Under this single-term copyright protection system, the old reversion of rights scheme could no longer exist.[167] However, "[i]n abandoning the renewal copyright, Congress did not intend to deprive authors of the right they had always had to recapture their rights years after their works were originally exploited."[168] Recognizing the need both to provide authors with a safeguard against unfair undervaluation and to avoid the difficulties encountered under the 1909 Copyright Act, Congress implemented a new reversionary system and introduced two termination provisions in the 1976 Copyright Act, codified at 17 U.S.C. Sections 203 and 304.[169]

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[164] ARTHUR FISHER & THE COPYRIGHT SOCIETY OF THE U.S.A., STUDIES ON COPYRIGHT, 188 (Arthur Fisher memorial ed. 1963) (noting that this feature has been criticized as paternalistic and in conflict with the freedom of contracts); Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the "Inalienable" Right to Terminate*, 62 FLA. L. REV. 1329, 1330 (2010).

[165] Melville B. Nimmer, *Termination of Transfers Under the Copyright Act of 1976*, 125 U. PA. L. REV. 947, 950-51 (1977).

[166] *See* Copyright Term Extension Act, Pub. L. No. 105-298, tit. I, 112 Stat. 2827 (1998). At that time, the term of protection was life of the author plus fifty years. In 1998, Congress extended the term of protection to life of the author plus seventy years.

[167] That is, for works created after January 1, 1978. *See* Nimmer, *supra* note 165, at 951; STUDY NO. 31, COPYRIGHT LAW REVISION, STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE, 86TH CONG., 125-26 (2D SESS. Comm. Print 1961), http://copyright.gov/history/studies/study31.pdf [https://perma.cc/DRQ8-JUXZ]. It is important to note that later revisions of the Copyright Act abolished the renewal right for works created both before and after January 1, 1978. *See* Robert A. Kreiss, *Abandoning Copyrights to Try to Cut Off Termination Rights*, 58 MO. L. REV 85, 101 (1993).

[168] SOUND RECORDINGS AS WORKS MADE FOR HIRE: HEARING BEFORE THE SUBCOMM. ON COURTS AND INTELLECTUAL PROPERTY OF THE H. COMM. ON THE JUDICIARY, 106th Cong. (2000), http://www.copyright.gov/docs/regstat52500.html [https://perma.cc/SNH@-UMQB] (statement of Marybeth Peters, Register of Copyright, U.S. Copyright Office) (expressing the importance of termination rights).

[169] H.R. REP. NO. 94-1476, at 124, 140 (1976) ("The provisions of section 203 are based on the premise that the reversionary provisions of the present section on copyright renewal (17 U.S.C. sec. 24) should be eliminated, and that the proposed law should substitute for them a provision safeguarding authors against unremunerative transfer. . . . An issue underlying the 19-year extension of renewal terms under both subsections (a) and (b) of section 304 is whether, in a case where their rights have already been transferred, the author or the dependents of the author should be given a chance to benefit from the extended term. The arguments for granting rights of termination are even more persuasive under section 304 than they are under section 203; the extended term represents a completely new property right, and

Sections 203 and 304 equally redress the author's lack of bargaining power and the difficulty of foreseeing the future value of her work.[170] Both Sections grants an author or her statutory successors the right to terminate valid copyright transfers under certain circumstances and subsequently recapture her rights, effectively providing the author a second chance to recapture some of the value from her work by placing her in a better position to renegotiate a better deal.[171]

Section 203 provides authors the right to terminate transfers made by the author in works created on or after January 1, 1978[172] thirty-five to forty years after the execution of the grant.[173] Section 304, on the other hand, provides an author with the right to terminate grants executed by the author or her statutory successors before January 1, 1978.[174]

For termination to take effect under both Section 203 and Section 304, the author or her statutory successors[175] must file a notice of termination

there are strong reasons for giving the author, who is the fundamental beneficiary of copyright under the Constitution, an opportunity to share in it.").

[170] Guy A. Rub acknowledges that, historically, the two main justifications for inalienable termination rights are rooted in (1) the romantic view of the author as the weak, unsophisticated party; and (2) Congress's concern with the uncertain future value of work of authorship. However, Rub questions why these concerns should justify an inalienable termination mechanism. *See* Rub, *supra* note 7, at 78-88.

[171] 17 U.S.C. §§ 203(a), 304(c)-(d) (2012). Amy Gilbert, *The Time Has Come: A Proposed Revision to 17 U.S.C. § 203*, 66 CASE W. RES. L. REV. 807, 828 (2016). Many of the features of the current termination right are the result of Section 23 of the 1909 Copyright Act. The 1909 Act bifurcated the copyright term of protection into two distinct periods, each spanning twenty-eight years in length. For a work to remain protected after the first term, the copyright had to be "renewed" at its end. This aspect of the law functioned not only to enlarge the public domain, but also, "to protect the author and his family against his unprofitable or improvident disposition of the copyright." STAFF OF H. COMM. ON THE JUDICIARY, 87TH CONG., REP. OF THE REG. OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 92 (Comm. Print 1961), http://www.copyright.gov/history/1961_registers_report.pdf [perma.cc/33KP-89A6]. Unfortunately, this reversionary aspect of renewal failed to accomplish its primary purpose. *See* Anthony R. Reese, Note, *Reflections on the Intellectual Commons: Two Perspectives on Copyright Duration and Reversion*, 47 STAN. L. REV. 707 (1995); Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643 (1943); Sidney J. Brown, *Renewal Rights in Copyright*, 28 CORNELL L.Q. 460 (1942). *See* H.R. REP. NO. 94-1476, at 124, 140 (1976).

[172] 17 U.S.C. § 203.

[173] The exception to this rule is when the grant covers the right of publication. In this case, the author or her statutory successors may terminate thirty-five to forty years from the date of publication or forty to forty-five years from the date of the execution of the grant, whichever term ends earlier. *See* 17 U.S.C. § 203(a)(3).

[174] *See* 17 U.S.C. § 304. *See also* Loren, *supra* note 164, at 1333.

[175] It is important to note that The Copyright Act lists the statutory successors regardless of the author's wishes. *See* Broad. Music, Inc. v. Roger Miller Music, Inc., 396 F.3d 762, 771 (6th Cir. 2005); Music Sales Corp. v. Morris, 73 F. Supp. 2d 364, 374 (S.D.N.Y. 1999) (quoting Miller Music Corp. v. Charles N. Daniels, Inc., 362 U.S. 373 (1960) and Stewart v. Abend, 495 U.S. 207 (1990)). *Cf.* Lee-ford Tritt, *Liberating Estates Law from the Constraints of Copyright*, 38 RUTGERS L.J. 109 (2006)

within a certain timeframe.[176] If no action is taken to terminate the transfer within the statutory timeframe, the original assignee or his or her successors may continue to exploit the work under the terms of the original agreement for the remainder of the term.[177]

To prevent the intermediary from using his superior bargaining position to frustrate the purpose of termination rights, Congress explicitly decided to make the right to terminate inalienable.[178] In addition, the Copyright Act invalidated any "grant, or agreement to make a further grant" of reversionary rights made prior to the effective date of termination.[179] There is one important exception to this rule. The original transferee and the author or her statutory successors are able to enter into a new agreement to transfer the copyrights, after notice of termination has been served but before the effective date of termination, only.[180] Hence, the Copyright Act creates an exclusive window of opportunity for the original transferee.[181]

In sum, the 1976 Act incorporates a powerful reversionary mechanism, which takes effect thirty-five to forty years from the date of

(discussing and critiquing the way copyright law determines who ultimately has the right to profit from the author's works).

[176] *See* 37 C.F.R. § 201.10; *see also* Nance v. Equinox Music, No. 09-cv-7808, 2010 WL 4340469, at *3 (N.D. Ill. Oct. 22, 2010); Burroughs v. Metro-Goldwyn-Mayer, Inc., 491 F. Supp. 1320, 1325-26 (S.D.N.Y. 1980).

[177] 17 U.S.C. § 203(b)(6) (establishing that unless the agreement provides otherwise, the agreement between the parties continues for the term of copyright).

[178] 17 U.S.C. §§ 203(a)(5), 304(c)(5), 304(d)(1). The Supreme Court has inferred from statutory language that the right to terminate is inalienable. *See* Stewart v. Abend, 495 U.S. 207 (1990). Despite the statute's explicit language, it soon became evident that the exact meaning of the phrase "any agreement to the contrary" is highly controversial. In *Milne v. Stephen Slesinger*, 430 F.3d 1036 (9th Cir. 2005), the Ninth Circuit held that an agreement executed in 1930 was not subject to termination under section 304(d) because the parties revoked it and substituted it with a new agreement in 1983. *Id.* Similarly, in *Penguin Group (USA) Inc. v. Steinbeck*, 537 F.3d 193 (2d Cir. 2008), the Second Circuit held that a 1994 agreement rescinded a 1938 agreement. *See* Peter S. Menell and David Nimmer, *Pooh-Poohing Copyright Law's "Inalienable" Termination Rights*, 57 J. COPYRIGHT. SOC'Y U.S.A. 799 (2010) for detailed analyses of the difficulties arising out of the inalienability of the right.

[179] 17 U.S.C. §§ 203(b)(4), 304(c)(6)(D) (2018).

[180] *Id*.

[181] The right to terminate is subject to several exceptions. First, grants executed by a will. *See* 17 U.S.C. §§ 203(a), 304(c-d) (2018); *see also,* Larry Spier, Inc. v. Bourne Co., 750 Supp. 648, 651 (S.D.N.Y. 1990), *rev'd on other grounds*, 953 F.2d 774 (2d Cir. 1992). Second, existing derivative works. 17 U.S.C. § 203(b) allows the continuing exploitation of existing derivative works under the terms of the grant even after termination. *See generally* HOWARD B. ABRAMS, THE LAW OF COPYRIGHT § 12:39 (2013); Howard B. Abrams, *Who's Sorry Now? Termination Rights and the Derivative Works Exception*, 62 U. DET. L. REV. 181, 204-23 (1985). *See also Stewart*, 495 U.S. 207 (1990). Last but not least, works made for hire. 17 U.S.C. §§ 203(a), 304(c) (2018). Many questions regarding the relationship between the work-made-for-hire doctrine and termination rights are bound to arise in the coming years. *See, e.g.*, Patrick Murray, *Heroes-For-Hire: The Kryptonite to Termination Rights under the Copyright Act of 1976*, 23 SETON HALL J. SPORTS & ENT. L. 411 (2013).

conclusion of a grant of rights.[182] Section 203(a) only recently became effective, and subsequently generated a string of high-profile cases.[183] Perhaps the most famous case involved Victor Willis, the original lead singer of the Village People, who successfully exercised his right to terminate his grants of thirty-three musical compositions, including "Y.M.C.A."[184] But, it is too early to assess the full distributional consequences of this mechanism.

Although, U.S. termination rights constitute a unique legal arrangement in the copyright landscape, it is interesting to note that on December 23, 2016, the German parliament adopted a series of amendments to its Copyright Act.[185] The parliament designed these amendments to further support the 2002 reform. They provided, *inter alia*, a right to terminate an exclusive license ten years after either the granting of the right or delivery, whichever occurs later, creating a ten-year exclusivity period.[186] Consequently, the license will be deemed non-exclusive and the author will be able to exploit the work either through a different intermediary or on her own.

This provision, Article 40a, is specifically targeted at so-called "buy-out" agreements, whereby the author transfers an exclusive "use right" for the effective duration of copyright in consideration for one lump-sum payment before the true commercial value of the work is known.[187] Therefore, the Act provides that after a period of five years—during which the author could learn more about the value of her work—the parties may renegotiate the terms of the agreement and extend the exclusivity beyond

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[182] Bently & Ginsburg, *supra* note 160, at 1564.

[183] Only in 2013 can termination of grants concluded in 1978 under section 203(a) occur (the 35th anniversary of the grant).

[184] Scorpio Music S.A. v. Willis, No. 11cv1557 BTM(RBB), 2012 WL 1598043, at *1 (S.D. Cal. 2012). *See also* Jorge L. Contreras & Andrew T. Hernacki, *Copyright Termination and Technical Standards*, 43 U. BALT. L. REV. 221, 254 (2014); Stella Brown, *It Takes a Village to Make a Difference: Continuing the Spirit of Copyright,* 12 NW. J. TECH. & INTELL. PROP. 129 (2014).

[185] GESETZ ZUR VERBESSERTEN DURCHSETZUNG DES ANSPRUCHS DER URHEBER UND AUSÜBENDEN KÜNSTLER AUF ANGEMESSENE VERGÜTUNG UND ZUR REGELUNG VON FRAGEN DER VERLEGERBETEILIGUNG [Act to improve the enforcement of the right of the author and performing artist to equitable remuneration and for dealing with matters of publisher participation], Dec. 20, 2016, BGBI I at 3037 (Ger.), http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl116s3037.pdf. The amendment took effect on March 1, 2017.

[186] *See* GERMAN COPYRIGHT ACT*, supra* note 72, at Article 40a(3). Nevertheless, this Article provides for several exceptions to the 10 years rules.

[187] Germany prohibits assignment. *See* Andreas Rahmatian, *Non-Assignability of Authors' Rights In Austria And Germany And Its Relation To The Concept Of Creativity In Civil Law Jurisdictions Generally: A Comparison With U.K. Copyright Law*, 5 ENT. L. REV. 95 (2000); Christopher M. Newman, *An Exclusive License Is Not an Assignment: Disentangling Divisibility and Transferability of Ownership in Copyright*, 74 LA. L. REV. 58, 95 (2013).

the ten-year period. That said, the parties may agree to extend the exclusivity period, or contract around it, when another form of remuneration is employed. Article 40a could potentially add to the arsenal of rights already available to authors for rescinding their rights.[188]

B. Reversionary Interests

Canada, like other countries that were part of the British Commonwealth nations and territories, inherited the Imperial Copyright Act of 1911.[189] The Imperial Copyright Act bestowed the author and her heirs with a reversionary right known as the "Dickens Provision," which was intended to complement the extension of copyright protection to fifty years *post mortem auctoris*.[190]

In principle, the provision stipulated that where the author was the first owner of the copyright and the rights were assigned, licensed or otherwise transferred, the transfer did not vest with the transferee any rights beyond twenty-five years after the death of the author.[191] Hence, irrespective of the terms of the contract, twenty-five years after the death of the author, copyrights automatically revert to one's heirs.[192] Although reversionary rights have been repealed in England and many of the former commonwealth nations and territories, they remain in force in Canada and have gone virtually unchanged since 1924.[193]

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[188] Gruenberger & Dietz, *supra* note 84, at § 2.

[189] *See* Copyright Act 1911, 1 & 2 Geo. 5 c. 46, art. 5(2) (U.K.).

[190] Common wisdom suggests that the "Dickens Provision" was introduced into the copyright acts of the UK and other British Commonwealth territories following a public outrage initiated by the fact that the works of Charles Dickens were generating huge profits for publishing companies while his family was left penniless. *See* Alan J. Hartnick, *Stanley Rothenberg: Final Thoughts on The Dickens Provision*, 54 J. COPYRIGHT SOC'Y U.S.A. 565 (2006). S*ee also,* Anne of Green Gables Licensing Auth. Inc. v. Avonlea Traditions Inc., [2000] 4 CPR (4th) 289 (Ont SCJ); Ken Cavalier, *Potential Problems with Commonwealth Copyright for Posthumous Poets and other Dead Authors*, 52 J. COPYRIGHT SOC'Y U.S.A. 225, 231-32 (2005).

[191] *See* Cavalier, *supra* note 190, at 231; Hartnick, *supra* note 190, at 566.

[192] *See, e.g.,* Provision 5(2) of the United Kingdom Copyright Act, 1911.

[193] Canadian Copyright Act, *supra* note 163; *see also* Madam Justice Wilson in paragraph 83 of Anne of Green Gables Licensing Authority v. Avonlea Traditions Inc. (2000) 4 CPR (4th) 289 (Ont SCJ). Pursuant to the United Kingdom Copyright Act of 1956 and effective June 1, 1957, Section 5(2) was repealed. *See generally* Daniel J. Gervais, *A Canadian Copyright Narrative*, 21 INT'L PROP. J. (Can.) 269, 274 (2009); Ziad J. Katul, *Once (Twice) in A Lifetime: Section 14(1) of the Copyright Act Judicially Considered*, 17 INTELL. PROP. J. 91, 96 (2003). For detailed discussion of why commonwealth reversionary rights were repealed in the UK, Australia and New Zealand *see* Joshua Yuvaraj and Rebecca Giblin, *Why Were Commonwealth Reversionary Rights Abolished (And What Can We Learn Where They Remain?*, 41 EUROPEAN INTELLECTUAL PROPERTY REVIEW 232 (2019).

There is little legislative support as to why Canada kept these reversionary rights.[194] Much like its predecessors, the Canadian right of reversion provides the author's heirs an opportunity to redress contractual imbalances and a "relief against hardship suffered."[195] As stated by the court in *Chappell Music Co., Ltd. and Others v. Redwood Music, Ltd.*, the legislative aim was "to safeguard authors and their heirs from the consequences of any imprudent disposition which authors might make of the fruits of their talent and originality."[196]

Pursuant to Section 14 of the Canadian Copyright Act, a transfer of copyrights made after June 4, 1921 in an agreement entered into by the author, revert to the author's estate twenty-five years after the death of the author for the remaining period of copyright protection, notwithstanding any agreement to the contrary made during the life of the author.[197] That is, any transfer of rights made by the author after June 4, 1921 will be terminated twenty-five years after the author's death. These rights will then revert to the author's estate and consequently, her heirs will receive an opportunity to enjoy the benefits of such rights for the remaining twenty-five years of copyright protection.[198]

In the interest of the estate, the Canadian legislation explicitly stipulated that the author cannot assign or license the reversionary interest in an attempt to avoid the operation of the reversionary rights.[199] Yet the author's heirs are able to exploit or negotiate the transfer of these rights and may do so immediately upon the death of the author, that is, decades before the reversion interest has vested.[200] It was thought that an intermediary who

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[194] Bob Tarantino, *Long Time Coming: Copyright Reversionary Interests in Canada,* 375 DÉVELOPPEMENTS RÉCENTS EN DROIT DE LA PROPRIÉTÉ INTELLECTUELLE (Barreau du Québec; Éditions Yvon Blais), 2 (August 16, 2013).

[195] *See* Anne of Green Gables Licensing Authority v. Avonlea Traditions Inc., *supra* note 193.

[196] Reference Lord Salmon's words in Chappell Music Co., Ltd. and Others v. Redwood Music, Ltd. and Another, 98 R.P.C 337, 344 (1981) [1980] 2 All E.R. 817 at 823 per Lord Salmon (H.L.). A similar statement was made in Coleridge-Taylor v. Novello & Co. Ltd., [1983] 3 All E.R. 506, 514. *See also*, COPINGER AND SKONE JAMES ON COPYRIGHT, 308 (Kevin Garnett, Gillian Davis & Gwilym Harbottle eds., 16th ed. 2011) [hereinafter COPINGER AND SKONE]; Bently & Ginsburg, *supra* note 160, at 1485-86.

[197] *See supra* note 193 and accompanying text.

[198] The term of copyright protection in Canada is currently the life of the author plus fifty years. The reversionary rights last for a period that is a bit longer than twenty-five years but shorter than twenty-six years. Reason being that, the reversionary period begins twenty-five years from the death of the author, as opposed to the copyright term of protection, which is measured from the end of the calendar year in which the author dies. *See* Canadian Copyright Act*, supra* note 163, at § 6.

[199] DAVID VAVER, COPYRIGHT LAW, 110 (2000).

[200] *See* COPINGER AND SKONE, *supra* note 196, at 130 ("This reversionary interest, then, unassignable during the author's lifetime, becomes an asset of the author's estate and assignable immediately upon his death."). An alternative proposition will be to argue that, the reversionary interest vest in the estate only twenty-five years after the death of the author. *See* J.C. Sonnekus, *Reversionary*

collaborated with the author and her heirs and made efforts to effectively exploit the work, "would have little to fear from reversion,"[201] because the estate would aspire to maintain the relationship with such intermediary even after the reversion would take effect.[202]

For the reversionary interest to take effect, the author must be the first or initial owner of the rights.[203] In the absence of an agreement to the contrary, the author is not the initial owner where: (1) the author was an employee and the work was made in the course of employment;[204] (2) the author created an engraving, photograph or portrait and another person ordered the original before November 7, 2012;[205] or (3) Her Majesty or any government department directed the preparation or publication of the work, subject to an agreement with the author.[206] Moreover, reversionary rights do not apply to: (1) works for which the copyright protection is calculated by references to some characteristic other than the life of the author;[207] (2) jointly authored works in which at least one of the authors is still alive;[208] (3) transfers made by will; and (4) "assignment of the copyright in a collective work or a license to publish a work or a part of the work as part of a collective work."[209] Even if the work remains beyond the scope of the abovementioned scenarios, when the heirs make no claim to the reversionary rights, the transferee may continue to assert copyrights for the twenty-five-year reversionary period.[210] Additionally, although the language of Section 14 does not explicitly require any form of notification for the reversion of rights to take effect, commentators have suggested that unauthorized uses by the transferee occurring after the date of reversion,

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Interest in Musical Composition and the Administration of the Estate of a Deceased Composer, 122 S. AFRICAN L.J. 464, 467-470 (2005); Tarantino, *supra* note 194, at 15.

[201] *See* VAVER, *supra* note 199, at 110.

[202] *Id.*

[203] Although the Copyright Act points to the author as the first owner of copyright, it does not define who the author is. In most cases, it will be the person creating the work; however, this is not always the case. *See generally* JOHN S. MCKEOWN, FOX ON CANADIAN LAW OF COPYRIGHT AND INDUSTRIAL DESIGNS 382-83 (3rd. ed. 2000) (hereinafter, MCKEOWN, FOX ON COPYRIGHT).

[204] *See* Canadian Copyright Act*, supra* note 163, at § 13(3).

[205] Commissioned engravings, photographs or portraits were subject to subsection 13(2) of the Canadian Copyright Act prior to the Copyright Modernization Act in November 2012. *Id.*

[206] *See* Canadian Copyright Act*, supra* note 163, at § 12.

[207] Tarantino, *supra* note 194, at 4-5 ("posthumous works which are protected for fifty years from the date of publication or public performance; sound recordings created prior to January 1, 1997, which were protected for a period of fifty years from creation; or cinematographic works which possess no "dramatic character" and which are protected for a period of fifty years from the later of the end of the year of their creation or first publication.").

[208] *Id*. at 5.

[209] *See* Canadian Copyright Act*, supra* note 163, at § 14(2).

[210] *See supra* note 193 and accompanying text.

but before the author's heirs asserted their rights, "may be treated as non-infringing and impliedly licensed by the estate."[211]

Section 60(2) of the Canadian Copyright Act establishes an additional reversionary right. This right is applicable to works created prior to January 1, 1924, and which were still protected by previous copyright statutes.[212] Though, for works created prior to January 1, 1924, right reversion takes place seven years after the death of the author.[213] Section 60(2) provides the transferee who already may have invested considerable resources in the work[214] with the option to either preserve the exact rights enjoyed in the work.[215] Another possibility is to obtain non-exclusive reproduction rights, subject to remuneration. When the transferee chooses to preserve the exact rights she previously held but for the reversion, she must notify the author. The Act requires the transferee to notify the heirs at least one year and no less than six months prior to the date of reversion.[216] When the notice is provided in a timely manner, the transferee maintains the rights but must remunerate the author's heirs. The amount of the remuneration may be agreed upon by the parties or determined by arbitration.[217]

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[211] Tarantino, *supra* note 194, at 14 (citing DAVID VAVER, COPYRIGHT LAW 113 (2000)).

[212] Up until 1924, the copyright term of protection in Canada was the life of the author plus seven years. However, the 1921 Act prolonged the term of protection to the life of the author plus fifty years. Because many authors had already assigned most of their works before the amendment took effect, the parliament therefore had to decide which party would gain the benefits of the extended term of protection. To avoid creating an extension that is not particularly advantageous for authors, the legislation provided that in the absence of express agreement, rights revert to the author's heirs on the date on which the pre-1924 rights would have expired, subject to specific rights reserved for the transferee. Notably, Section 60(2) applies only to transfers made by the author before January 1, 1924 for the whole term of copyright, even when the rights were subsequently re-assigned by the transferee. It does not apply, however, to transfers for a limited time. *See* MCKEOWN, FOX ON COPYRIGHT, *supra* note 203, at § 33:5; HUGUES G. RICHARD & LAURENT CARRIÈRE, ROBIC COPY ANN. 60§5.0 (Westlaw).

[213] For illustration, imagine a literary work created in 1900, the author of which died in 1940. Under the pre-1924 copyright statutes, the copyright in the work would have expired in 1947. However, in accordance with Section 60(2) of the 1921 Act, copyright in the work would revert to the authors' heirs in 1947 (i.e., seven years after the death of the author) for the remaining term of protection (or until 1990, the life of the author plus fifty years).

[214] *See* MCKEOWN, FOX ON COPYRIGHT, *supra* note 203, at § 33:5.

[215] *See* Canadian Copyright Act*, supra* note 163, at § 60(2)(a).

[216] *Id*. at § 60(2).

[217] The amount of the remuneration may be agreed upon by the parties or determined by arbitration. Where the transferee fails to provide such notice, she may continue to reproduce or perform the work in the same manner she was entitled to before the occurrence of the re-version. However, she must remunerate the heirs of the author if the author demands such payment within three years prior to the expiration of the rights under the previous law. The amount of remuneration again may be set by agreement of the parties or through arbitration. The form of arbitration or calculation of the remuneration mechanisms are not, however, set forth by the Copyright Act. *See* RICHARD & CARRIÈRE, *supra* note 212, at 60§5.01.

C. Revocation for non-exercise

As previously noted, there may be scenarios in which the intermediary is unable or unwilling to exploit the rights. This might be because it is no longer commercially profitable to do so, or because there has been a deliberate decision to render the protected work obsolete—perhaps in favor of a newer version. In any case, the result is that the work is no longer available, although it is not necessarily without a demand. Consequently, the dissemination of the work and the author's stream of pecuniary benefits are in jeopardy.[218] This is where the idea of revocation of rights becomes auspicious.[219]

Indeed, several European countries including Austria, Belgium, the Netherlands, Germany, Luxemburg, the Nordic Countries, Portugal, and Spain impose an obligation on transferees to genuinely exploit the rights transferred.[220] Where the transferee fails to carry out the aforesaid obligation, the author may rescind the transfer (non usus or 'use it or lose it' provisions).[221]

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[218] Maria Lillà Montagnani & Maurizio Borghi, *Positive Copyright and Open Content Licenses: How to Make a Marriage Work by Empowering Authors to Disseminate Their Creations*, 12 INT'L J. COMM. L. & POL'Y 244, 252-54 (2008).

[219] This needs to be distinguished from the moral right to revoke a grant of right or to withdraw a work from commercial exploitation (right of reconsideration). Lior Zemer, *The Dual Message of Moral Rights,* 90 TEX. L. REV. 125 (2012).

[220] Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 389 (1993) (discussing such obligations to exploit in the context of restrictions on the alienability of copyrights). It is interesting to note that like in other principal-agent relationships, this raises the question of imposing a "performance obligation" on the agent. *See* Ronald I. Coffey, *Firm Opportunities: Property Right Assignments, Firm Detriment, and the Agent's Performance Obligation*, 13 CAN.-U.S. L.J. 155 (1988).

[221] *See* GERMAN COPYRIGHT ACT*, supra* note 72, Article 41; FRENCH INTELLECTUAL PROPERTY CODE, *supra* note 87, Article L. 131-17. Wet auteurscontractenrecht van 30 juni 2015 [Copyright Contract Act of June 30, 2015], Stb. 2015, 257, art. 25e translated in New Copyright Contract Law in the Netherlands, VISSER SCHAAP & KREIJGER, http://www.ipmc.nl/en/topics/new-copyright-contract-law-netherlands [https://perma.cc/XB4N-RH24] (amending the Dutch Copyright Act of 1912); *See also* Edouard Fortunet, *The Author's Moral Right to Withdraw a Work (droit de repentir): A French Perspective*, 6 J. INTELL. PROP. L. & PRAC. 535, 535-541 (2011). *See also*, SEVERINE DUSOLLIER ET AL., *supra* note 46, at 78; Rita Matulionyte, Empowering Authors via Fairer Copyright Contract Law, 42 University of New South Wales Law Journal 681, 700-1 (2019). Likewise, non-exercise rules have been recently introduced into the European Union Directive regarding the term of protection for copyright and other related rights. Although there is a slight difference between the "use-it-or-lose-it rule" introduced into the European Union Directive and the one previously discussed, all in all, the exercise of such provisions enables the author or her successors to revoke a grant, and therefore, could be deemed a de facto right reversion. The Directive aims to strengthen the position of performers by extending the term of protection, consequently granting them remuneration for longer periods. For that reason, some changes and new provisions pertaining to the contractual relationship between performers and recording producers have been introduced. Among those provisions, one can find Article 2(a), also known as the new "use-it-or-lose-it rule." *See* Council Directive 2011/77, 2011 O.J. (L 265) 2 (EU); Estelle Derclaye, Ben Smulders, & Herman Cohen Jehoram, *EU The European Union and Copyright,*

Unlike the U.S. and Canadian reversionary rights, these reversion mechanisms are contingent on the transferee's failure to exploit the work. [222] Nevertheless, they also enable the author to enter a new agreement or exploit the work on her own following a reversion of the rights.[223]

An example of this form of right reversion can be found in the German legislation. The German Copyright Act incorporates a specific provision pertaining to an author's right of revocation (the right to recall, or "*Rückrufsrecht*") for non-exercise relating to all categories except contracts for film production.[224] Article 41 states that the author may revoke a grant of rights if the holder of an exclusive exploitation right fails to exercise the right in a timely manner[225] or does so insufficiently, thereby causing damage to the legitimate interests of the author.[226] The criteria for insufficient or lack of exercise are not outlined in the statute; this is to be determined on a case-by-case basis.[227] It appears, however, that the purpose of the contract and the practice in the relevant industry primarily determines the sufficient degree of exercise.[228] In any case, the right holder must actively work to exploit the rights, and non-exercise is generally

in 1-EU INTERNATIONAL COPYRIGHT LAW AND PRACTICE EU §4 (Paul Edward Geller ed., 2017). Article 2(a) establishes a right of revocation under certain circumstances. That is, during the extension term of protection, the artist may terminate the agreement—by which she transferred her rights in the fixation of her performance to a phonogram producer—if the producer has failed to release the recording physically (in sufficient quantities) or digitally. *See Commission staff working document accompanying the proposal for a Council directive amending Council Directive 2006/116/EC as regards the term of protection of copyright and related rights—impact assessment on the legal and economic situation of performers and record producers in the European Union,* COM (2008) 464 (final) 26 (Jul. 7, 2008) http://eurlex.europa.eu/legalcontent/SV/ALL/?uri=CELEX:52008SC2287 [https://perma.cc/ED7U-VNMM]. *See also,* Christina Angelopoulos, *Amended Directive Extends the term of Protection for Performers and Sound Recordings*, 11 GRUR INT'L 987 (2011).

[222] Some scholars have argued that the U.S. termination rights are likewise "contingent reversionary rights." Robert A. Kreiss, *Abandoning Copyrights to Try to Cut Off Termination Rights*, 58 MO. L. REV 85 (1993).

[223] SEVERINE DUSOLLIER ET AL., *supra* note 46, at 77; Kretschmer, *supra* note 159.

[224] *See* Montagnani & Borghi, *supra* note 218, at 256.

[225] For instance, the statue stipulates that a timely manner is two years after the grant or transfer of the exploitation right, or, if the work is delivered later, two years after its delivery. *See* GERMAN COPYRIGHT ACT, *supra* note 72, Article 41; ARTUR-AXEL WANDTKE & WINFRIED BULLINGER, PRAXISKOMMENTAR ZUM URHEBERRRECHT, (Practitioner's Commentary on Copyright Law), 20 (3d ed., 2009) (Gr.).

[226] *See* GERMAN COPYRIGHT ACT*, supra* note 72, Article 41(2).

[227] CHRISTIAN VRANCKX, DER RÜCKRUF URHEBERRECHTLICHER NUTZUNGSRECHTE NACH §§41, 42 URHG UND SEIN EINFLUSS AUF DEN BESTAND VON LIZENZKETTEN [The Recall of Copyrights According to §§41, 42 GERMAN COPYRIGHT ACT and its Influence on the Existence of License Chains] 70 (Verlag Dr. Kovač 2013) (Ger.).

[228] Landgericht München I [LG München I] [Regional Court of Munich] Dec. 13, 2006, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT, RECHTSPRECHUNGS-REPORT [GRUR-RR] 195 (197) 2007 (Ger.) (discussing sufficient use); WANDTKE & BULLINGER, *supra* note 225, at 13.

presumed when the rightholder deploys less funds than objectively necessary to realize the purpose of the contract.[229] It is important to note that the non-exercise must cause damage to the legitimate interests of the author for the author to exercise a revocation pursuant to the Article 41.[230] Still, the underlying aim is to protect the author from the consequences of an unwise contract.[231] In general, the legitimate interests of the author may be legal or monetary in nature. However, most scholars have found them to encompass either direct or indirect monetary rewards.[232]

The author's right of revocation can be exercised only after she has served the transferee notice of the intended revocation and gave her additional time to sufficiently exercise this right of exploitation.[233] The time provided for the intermediary is likewise determined on a case-by-case basis and influenced by industry practices.[234] Despite that, the author is not required to provide additional time when the transferee is unable or unwilling to exercise the right, or if doing so would threaten her interests.[235] More importantly, the author's right of revocation for non-exercise is not waivable in advance.[236] Any contractual limitations on the exercise of the author's right of revocation are possible if the limitations cover only a short period, up to five years.[237] In other words, the author cannot contractually waive her rights in advance, however, she may decide to renounce it, however, after the right is vested. On the other hand, and unlike the mechanisms previously discussed, the Act requires the author to indemnify the person affected by the revocation "if and to the extent required by equity."[238]

The right of revocation does not apply if "the non-exercise or the insufficient exercise of the right of use is predominantly due to

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[229] *See* GERMAN COPYRIGHT ACT, *supra* note 72, art. 41; WANDTKE & BULLINGER, *supra* note 225, at 12; Gruenberger & Dietz, *supra* note 84, at § 4[3][c][iii].

[230] *See* GERMAN COPYRIGHT ACT, *supra* note 72, art. 41(1).

[231] *See* Senftleben, *supra* note 80, at 422-32.

[232] HARTWIG AHLBERG & HORST-PETER GÖTTING, BECK'SCHER ONLINE-KOMMENTAR URHEBERRECHT [Beck's Online Comment Copyright] Rn. 7 (14th ed. 2016) (Ger.).

[233] *See* GERMAN COPYRIGHT ACT, *supra* note 72, art. 41(3).

[234] Gruenberger & Dietz, *supra* note 84, at § 4.

[235] The circumstances under which the author is not required to provide additional time are not clear. *See* VRANCKX, *supra* note 227, at 86.

[236] *See* GERMAN COPYRIGHT ACT, *supra* note 72, art. 34(5).

[237] *See* GERMAN COPYRIGHT ACT, *supra* note 72, art. 90(1); *see also* Montagnani & Borghi, *supra* note 218, at 256-57. The German Copyright Act also enables early termination for exploitation that is contrary to the artist's wishes. However, such termination is linked to the author's moral rights rather than to her economic interests. DUSOLLIER ET AL., *supra* note 46, at 77-78.

[238] *See* GERMAN COPYRIGHT ACT, *supra* note 72, art. 41(6).

circumstances which the author can be reasonably expected to remedy."[239] For instance, this is the case if there is a need to update or revise the work due to new developments in the field, as in the case of scientific works. However, this does not include alteration due to changes in public taste.[240]

In addition to the above-mentioned principles which are applicable to most copyright contracts comprised in the Copyright Act, the German Publishing Act prescribes specific arrangements that are implied in publishing contracts. *Inter alia*, it empowers the author to rescind the contract when the publisher fails to publish a new edition after an appropriate term, or when the work is not exploited in the agreed upon manner.[241] The right to revoke publishing contracts for non-use is associated with the legislative presumptions that: (1) authors usually transfer their rights exclusively in publishing contracts; and (2) publishing contracts are commonly constructed to the advantage of publishers.[242] Hence, providing the author with a right to terminate the contract in the event the publisher fails to carry out their obligations was intended to counterbalance the power disposition towards publishers.[243]

In general, "[a]ll of the renewal, reversion, and termination provisions of copyright stem from a desire to redistribute the capital asset of copyright to the originator as a protective device against improvident assignments or transfers."[244] In fact, such reversionary mechanisms make all transfers of copyrights revocable by the author or her successors, and therefore, limit the duration of rights enjoyed by the transferee. Hence, the initial ownership of the author cannot be permanently and unconditionally transferred.

In sum, the copyright schema demands that the author be a primary beneficiary of the system. However, it is increasingly recognized that simply providing the author with property rights is insufficient.

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[239] *Id.*, art. 41(1).

[240] *See* Gruenberger and Dietz, *supra* note 84, at § 4.

[241] *See* Verlagsgesetz (VerlG) (Publishing Act), 1901, Sec. 17. *See also,* Gruenberger and Dietz, *supra* note 84, at § 4[3][b][i]; DOROTHEE THUM, STATUTORY OR OTHER RULES REGARDING REMUNERATION FOR AUTHORS AND PERFORMING ARTISTS, 1 COPYRIGHT THROUGHOUT THE WORLD § 16:32 (Silke von Lewinski ed., 2015).

[242] *See* Montagnani & Borghi, *supra* note 218, at 255-56.

[243] *Id.* Another noteworthy example with respect to publishing contracts is the French Intellectual Property Code. Article L 132-17(2) of the French Intellectual Property Code explicitly provides that "[t]he contract shall terminate automatically, if, upon formal notice by the author fixing a reasonable period of time, the publisher has not affected publication of the work or, should the work be out of print, its republication." *See* FRENCH INTELLECTUAL PROPERTY CODE, *supra* note 87, art. L132-17; *See also* DUSOLLIER ET AL., *supra* note 46, at 41.

[244] William Krasilovsky & Robert S. Meloni, *Copyright Law as a Protection Against Improvidence: Renewals, Reversions, and Terminations*, 5 COMM. & L. 3, 5 (1983).

Consequently, a wide variety of approaches to improve the bargaining position of the author have emerged (i.e., ensuring a minimum level of remuneration to authors ex ante, providing them with a right to ask for modification of the compensation stipulated in the contract ex post, or granting authors an inalienable right to regain control of their previously transferred rights)

The table below provides a comprehensive overview of the various "hard" legislative interventions:

Subcategory	Specific Measure	Jurisdiction	Intended Beneficiary
Ex ante Remuneration's determination	**Equitable remuneration**	**Germany**	**Author**
	Proportional remuneration	**France**	**Author**
	Minimum royalty Rate	**Israel**	**Author**
Ex post adjustment mechanisms	**Success clause**	**Germany, France and other European jurisdictions**	**Author**
	Resale royalty rights	**Germany, France and other jurisdictions (including California)**	**Visual artist**
Reversionary Interests	**Reversion**	**Canada**	**Author's heirs**
	Termination	**U.S.**	**Authors (or their statutory successors)**
	Revocation for non-exercise	**Germany**	**Author**

The above categorization is by no means exhaustive. Yet, providing a unifying perspective for classifying "hard intervention" into the author-intermediary contractual relationship draws attention to certain aspects of the regulation that might have been overlooked. More importantly, this categorization provides the framework for subsequent in-depth examination

of the resulting distributional implications. These challenges and distributional ramification will be further discussed in the next Part.

VI. RAMIFICATIONS OF "HARD" INTERVENTIONS?

The previous sections describe three categories of hard interventions into author-intermediary contractual relationship. Although governments adopt these legislative interventions with the best intentions in mind, we must ask whether these interventions operated to advance the interest of intended beneficiaries (i.e., authors), and if so, which group benefits from those interventions, and under what conditions. Specially, whether authors as a group benefit from those measures at the expense of the intermediaries, or if there are differences among different groups of authors.

Recall our budding author from Part II. In our example the author's first novel that catches the eye of a major publishing house (i.e., an intermediary). Now suppose that during the negotiation process, the author agrees to transfer her rights into the hands of the publishing house for certain periodic payments, or royalties, but the parties have not yet concluded the contract. The legislature then passes copyright legislation incorporating a minimum royalty rate provision. Of course, the minimum royalty rate provision does not guarantee the author any compensation, since the payments depend upon the actual success of the work in the market. Nevertheless, let us assume the floor rate is higher than the rate on which the parties would have agreed under free market conditions. Inevitably, the introduction of the provision would increase the intermediary's costs. Now, the publishing house has to decide whether to enter a contract with the author. If it chooses to contract with the author, all else being equal, the intermediary will have to spend more money to acquire the same rights. This means that the value of the contract decreases. If it chooses not to contract, we have an otherwise viable transaction that failed to materialize.

Now imagine that the legislature did not introduce the *ex-ante* minimum royalty rate. Rather, shortly before the parties sign the contract, the legislature implements a new *ex-post* author's protectionist measure in the form of an adjustment mechanism or reversionary rights. In this scenario, too, the publishing house can choose either to contract or not to contract. If the intermediary decides to contract, the adjustment mechanism and the reversionary right will affect the desirability of the transaction, because these measures deny the intermediary a share of the future profits. If the publishing house decides not to contract, an otherwise viable transaction fails to happen.

As noted previously, contract adjustment mechanisms provide the author with the right to retroactively demand an additional payment. The goal is to reflect the proven value of the work regardless of the initial compensation agreed upon between the parties. Thus, it could be very rewarding for the author who happens to succeed only later in life. However, for the intermediary, it makes the investment less attractive. Reversionary mechanisms make all transfers of copyrights revocable by the author or her successors, and therefore, limit the rights enjoyed by the intermediary. When the term of the contract is shorter, the overall expected value of the rights transferred to the intermediary decreases.[245] In this case too, the expected value of the transfer diminishes.[246]

One might be tempted to argue that reversionary rights are unlikely to abate the intermediary's expected returns since, at the point of reversion or re-negotiation the vast majority of works is of little economic value.[247] However, we must take into consideration that very few successful works remain in demand and generate revenues for very long periods of time. Even if the majority of works are indeed only in demand for a short period, some successful works enjoy a much longer lifespan.[248] The reversion of these "bestselling" works will undoubtedly affect the intermediary's average expected returns. More than that, year after year, more authors will

[245] Darling, *supra* note 22, at 165-67 (2014) (arguing that termination makes that initial assignment of copyright less valuable to publishers, "decreasing the price they are willing to pay to authors upfront"). *Accord,* Guy A. Rub, *Stronger than Kryptonite: Inalienable Profit-Sharing Schemes in Copyright Law*, 27 HARV. J.L. & TECH. 49, 97-8 (2013).

[246] Even more complicated is the situation in Canada, where the intermediary has no real way of knowing how long he will be able to enjoy the rights transferred before the author passes away. Reducing the term of transfer from life of the author plus fifty years to life of the author plus twenty-five years reduces the expectancy of future income. It is true that any transfer of copyright suffers from similar uncertainty. The lifespan of copyrights in all jurisdictions is calculated based on the life of the author. However, not knowing how long the contract will last before reversion rights will vest adds another layer of uncertainty. *See, e.g.,* Tarantino, *supra* note 194, at 12.

[247] Rappaport argues that most copyrighted works enjoy very little value as they arrive at the end of the copyright protection. *See* EDWARD RAPPAPORT, CONG. RESEARCH SERV., 98-144 E, COPYRIGHT TERM EXTENSION: ESTIMATING THE ECONOMIC VALUES (1998), http://www.policyarchive.org/handle/10207/bitstreams/510.pdf [https://perma.cc/QN6A-38W8] (discussing the issue of the long-tail hypothesis). Landes and Posner offer similar argument, claiming that most copyright protection holds little to no value for the right holders at the end of the term of protection (initial term). *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 37 (2003).

[248] Take for example the rights for the comic book character, Superman. The character originated in the 1930s, but continues to generate significant profits today. *See, e.g.*, Siegel v. Warner Bros. Entm't Inc., 542 F. Supp. 2d 1098, 1102 (C.D. Cal. 2008); DC Comics v. Pac. Pictures Corp., No. CV 10-3633 ODW (RZx), 2012 WL 4936588, at *1 (C.D. Cal. Oct. 17, 2012).

exercise their rights and ask to regain control over their works; the cumulative effect on the intermediary could become significant.[249]

Furthermore, it is reasonable to presume that by the time of renegotiation, the intermediary will have already invested in the production, promotion and dissemination of the work. This investment is specific to a particular work and has little to no value once the author invokes her reversionary rights. The only way the intermediary can hope to recoup it is to continue the relationship with the author. [250] As a result, the author has leverage that she can use to obtain more favorable terms and a larger share of the surplus.[251] In other words, the intermediary could expect not only higher costs, but also lower long-term revenue.[252]

Having demonstrated how different modes of intervention are expected to affect the value of the transaction for the intermediary, it is important to consider how the intermediary will adjust its behavior in response.[253] If the intermediary is aware of the existence of hard interventions, it is reasonable to assume it will result in adverse effects on: (1) the intermediary's initial willingness to pay; (2) the number of contracts executed, and (3) the investment in each work.[254] A large and growing body of literature emphasizes how these effects are likely to cause inefficiencies in the market to the extent that legislators want to foster more favorable

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[249] Ariel Bogle, *A Law That Lets Authors Break Contract After 35 Years to Take Effect in January*, MERVILLE HOUSE (December 3, 2012), https://www.mhpbooks.com/a-law-that-lets-authors-break-contract-after-35-years-to-take-effect-in-january/ [https://perma.cc/2HNZ-CU64].

[250] Darling, *supra* note 22, at 165-166 (discussing the hold-up problem); Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 132-36 (2004).

[251] *Moral Rights, Termination Rights, Resale Royalty, and Copyright Term: Hearing Before the Subcomm. on Courts, Intellectual Property and the Internet of the H. Comm. on the Judiciary*, 113th Cong., 2d. Sess. (Jul. 15, 2014) (Testimony of Casey Rae, Vice President for Policy and Education, Future of Music Coalition). Even when the author and the intermediary are unable to agree on the terms of the new contract, the author is given a second chance for the work to be exploited (commercially or non-commercially) either through a different intermediary or on her own. In fact, it is possible that the author or a different intermediary will see a different avenue for the work. *See* Netanel, *supra* note 1, at 409-410. This can lead to a better use of resources since it is not hard to imagine a situation where the author decides to dedicate the work to the public domain or distribute it for free after the intermediary fails exploit it. *See also*, Kretschmer, *supra* note 159, at 50-51; H.R. REP. No. 2222, 60th Cong., 2d Sess. 14 (1909).

[252] Alternatively, the intermediary may reduce the investment or otherwise harm the success of the work just before the time of reversion is up. This problem is particularly problematic when looking at royalty contracts. *See* Darling, *supra* note 22, at 167; Rub, *supra* note 245, at 44.

[253] Samuel W. Buell, *Good Faith and Law Evasion*, 58 UCLA L. REV. 611, 612 (2011).

[254] Darling, *supra* note 22, at, at 162-168 (discussing US Termination rights); Kretschmer, *supra* note 2, at 163; Henry Hansmann & Marina Santilli, *Royalties for Artists versus Royalties for Authors and Composers,* 25 J. CULTURAL ECON. 258, 265 (2001) (discussing resale royalty rights); Stella Brown, *It Takes a Village to Make a Difference: Continuing the Spirit of Copyright*, 12 NW. J. TECH. & INTELL. PROP. 129, 147 (2014); Tarantino, *supra* note 194, at 1, 17-18.

terms for authors. The distributional implications of those measures ought to be explicitly considered.

A. Hard Interventions lead to Inter-Author Redistribution

The intermediary's attempts to offset the effect of the introduction of legislative interventions by reducing average compensation *ex ante* inevitably leads to inter-author redistribution.[255] It is easier to see this if one proceeds from the reasonable assumption that authors are a largely homogenous group with only few superstars whose works generate high profits.[256]

In principle, the intermediary's decreased willingness to pay should adversely affect all authors. In reality, it is likely that this effect will be less pronounced in the case of the small subsection of superstar authors. There are several reasons for this. First, a superstar author who sells millions of copies represents a more lucrative bargain for the intermediary relative to unheard-of or less known authors.[257] Mainly due to her proven record of success. Practically, then, the successful author enjoys a relatively stronger bargaining position that could help her fight off any attempt to lower her remuneration. Moreover, if there are enough intermediaries vying for the works of well-known authors, they will compete among themselves by offering authors more attractive terms.[258] This, in turn, ought to counterbalance, at least to a certain degree, the decrease in intermediaries' willingness to pay *ex-ante*.[259] In contrast, new authors and those working within a particular niche of the industry typically enjoy lower demand,

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[255] The term denotes redistribution of wealth among members of the group.

[256] *See* Nicolas Suzor, *Access, Progress, and Fairness: Rethinking Exclusivity in Copyright*, 15 VAND. J. ENT. & TECH. L. 297, 324 (2013) (claiming that the copyright system "provides extremely high rewards to an extremely small proportion of creators who are able to win a lottery for attention"). ROBERT H. FRANK & PHILIP J. COOK, THE WINNER-TAKE-ALL SOCIETY, 9 (1995) ("[B]ook publishing is a lottery of the purest sort, with a handful of best-selling authors receiving more than $10 million per book while armies of equally talented writers earn next to nothing."); Darling, *supra* note 22, at 160.

[257] *See* MARTIN KRETCHMER & PHILIP HARDWICK, AUTHORS' EARNING FROM COPYRIGHT AND NON-COPYRIGHT SOURCES: A SURVEY OF 25,000 BRITISH AND GERMAN WRITERS (Center for Intellectual Property Policy & Management, 2007) (studying authors' earning in the UK and Germany). *See also* Zimmerman, *supra* note 3, at 38-42. *But see* Rub, *supra* note 245, at 81-82; Randall K. Filer, *The "Starving Artist"—Myth or Reality? Earnings of Artists in the United States*, 94 J. POL. ECON. 56, 59 (1986).

[258] In contrast, in all likelihood, there is insufficient competition among intermediaries over the works of new and unestablished authors. See for example studies indicating a high degree of concentration in different markets. Michael Rushton, *The Law and Economics of Artists' Inalienable Rights*, 25 J. CULTURAL ECON. 243, 250 (2001); Michael Szenberg & Eric Youngkoo Lee, *The Structure of the American Book Publishing Industry*, 18 J. CULTURAL ECON. 313, 314 (1994); Allen J. Scott, *A New Map of Hollywood: The Production and Distribution of American Motion Pictures*, 36 REGIONAL STUD. 957. 959-60 (2002).

[259] RICHARD A. POSNER, ECONOMIC ANALYSIS AND THE LAW, 116 (7th ed. 2007).

giving them little choice but to submit to the intermediary's lower price. Hence, they will be more willing to accept lower payments in comparison to well-known and established authors.

Second, although the threat of higher costs and lower revenues initially reduces the compensation received by the author, in jurisdictions with adjustment mechanisms and reversionary rights, the author or her successors can potentially benefit from an additional share of the surplus *ex post*.[260] These *ex post* reassessments of the terms of compensation can potentially correct the results of the initial lower compensation. Yet, this would be useful only for a handful of authors.

For instance, adjustment mechanisms described earlier, provide the author with a right to demand modification of the contract in case the original agreement concerning remuneration does not reflect the actual benefits derived from the exploitation of the work. Technically, this should trigger further compensation whenever there is an imbalance between the agreed remuneration and the actual revenues. But, in fact, this right to demand adjustment is subject to thresholds requirements in the form of: (1) minimum resale amount in the case of resale royalty rights; or, (2) a conspicuous disparities requirement in the case of best-seller clauses. In other words, the legislation requires that a certain level of success be achieved as a precondition for effectuating the author's rights. Studies suggest that the threshold requirements will be satisfied only for a very small fraction of authors.[261]

No such requirement exists for reversionary rights. Nevertheless, given the long period between the initial contract and the time at which reversion comes into play, the distributional effect of reversionary rights is dependent to a great deal on the work remaining in-demand for several decades. This is typically the case with only a small portion of all works.[262]

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[260] *See supra* Part III.b.

[261] *See* EUROPE ECONOMICS, *supra* note 86, at 174-178. ARTIST'S RESALE RIGHT—SUMMARY OF SURVEY FINDINGS, INTELLECTUAL PROPERTY OFFICE, 1, (2015); Kathryn Graddy, Noah Horowitz, & Stefan Szymanski, *A Study Into The Effect On The UK Art Market Of The Introduction Of The Artist's Resale Right*, 22-23 (2008), ("Auction house data indicate that during the period since its introduction, 80% of all ARR payments should have gone to the top 100 artists") (UK artist's resale right does not apply to sales below 1,000 euros); U.K. INTELLECTUAL PROPERTY OFFICE, COMMENTS SUBMITTED IN RESPONSE TO THE EUROPEAN COMMISSION'S CONSULTATION ON THE IMPLEMENTATION AND EFFECT OF THE RESALE RIGHT DIRECTIVE 2001/84/EC (2011), (under "Contributions authorised for publication"). *See also*, Ricketson, *supra* note 142, at 20. *But see* Anny Shaw, Will Artist Royalty Rights Go Global?, ART NEWSPAPER (Aug. 28, 2015).

[262] Indeed, several studies demonstrate that only a small percentage of all works remain in demand and available long after creation. *See* Mulligan & Schultz, *supra* note 159, at 460-62 (concluding that only 2.3% of in-copyright books and 6.8% of in-copyright films released pre-1946 remained commercially available in 2002.); LANDES & POSNER, *supra* note 247, at 212 (claiming that of 10,027 books published in the USA in 1930, only 174 (1.7%) were still in print in 2001). Stan J. Liebowitz &

To see how *ex-post* legislative interventions generate inter-author redistribution of wealth, let's first look at the right of revocation for non-exercise. [263] The statutory duties to exploit, taken together with the author's right to terminate the contract under the use-it-or-lose it provision, can force the intermediary to draft the contract more narrowly, encompassing only those rights that one genuinely expects or intends to exploit.[264] This may work for the benefit of the author, as it reduces the number and scope of the rights transferred.[265]But, the threat of revocation can potentially impose additional costs on the intermediary, which will be rolled over to the authors either in the form of lower compensation to all authors or fewer transactions. In other words, the intermediary will adjust her behavior to reflect the risks associated the obligation to exploit the work.

As an illustration, imagine a publisher holding the rights to a book written a few years ago. Theoretically, in the absence of an obligation to use the rights to the book within a set time period, the publisher can hold the rights for a very long time while waiting to publish until some event occurs. The book may be out of print, sitting in a back-catalogue, or alternatively, it might remain unexploited. However, in the presence of "use-it-or-lose-it" rule, the intermediary will need to use the rights within the statutory set period or lose them altogether.[266] The publisher can no longer wait. Rather, he must disseminate the work within the period stated in the legislation, or risk losing the rights. The choice to forgo the rights will not entail additional costs, but may affect future income.[267] The choice to publish the work on the other hand will entail additional costs, and therefore, will reduce the expected value on average. Furthermore, in the

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Stephen Margolis, *Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, and Network Effects*, 18 HARV. J. L. & TECH. 435, 455 (2005) (showing that 41% of all books remained in print fifty-eight years after their initial publication)*;* Peter DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives*,55 ARIZ. L. REV. 301 (2013).

[263] Though unlike the U.S.'s termination rights and Canadian reversionary rights, European rights of revocation for non-exercise rules are contingent on the intermediary failure to exploit the work sufficiently in a timely manner. *See* Kreiss, *supra* note 222; *See* DUSOLLIER ET AL., *supra* note 46, at 77; *See* Kretschmer, *supra* note 160. All these rules give rise to similar undesirable distributive effects.

[264] *Cf. Daphna Lewinsohn-Zamir*, *More is not Always Better than Less: An Exploration in Property Law*, 92 MINN. L. REV. 634 (2008). (arguing that "extreme measures are less subject to inefficiencies and more likely to be a product of careful thought, and that moderate measures can be indicative of distributive errors that require correction").

[265] If the scope of transfer is too broad and the intermediary does not make use of the right, it can deprive the author of income and of the opportunity to contract with a different intermediary who can make better use of it. DUSOLLIER ET AL., *supra* note 46, at 72; GUIBAULT & HUGENHOLTZ, *supra* note 121, at 31.

[266] *Id.,* at 49-50.

[267] This is true whether it is a buy-out or a royalty-based contract because by the time of revocation, the publisher has some sunk costs.

case of revocation for non-exploitation, the works are, presumably, of lesser value to the intermediary. At the same time, it is questionable whether the reversion will provide any real financial advantages for the majority of authors. Authors without a proven track record will have a difficult time finding an intermediary willing to take on the risk and expenses necessary to distribute a work in low demand.

An *ex-post* intervention, in other words, is like a lottery ticket, that provides ***all*** authors a small chance to obtain a huge reward in the future. However, unlike the lottery, all authors are forced to participate. The winners are those authors lucky enough to create a successful work, which means they will be generously compensated in the future. The losers, on the other hand, are those authors who were forced to suffer decline in the initial payment and were destined to remain under-compensated.[268] In such a market dynamic, the majority of authors finances the *ex post* additional compensation derived by the fortunate few.

Simply said, hard interventions create inter-author subsidization.[269] Cross-subsidies are widely exercised in the market, and they are not *per se* "undesirable".[270] In actuality, in the copyright realm, most intermediaries adopt a cross-subsidy policy. They use revenues derived from successful and profitable works to recoup the costs from other unsuccessful authors.[271] That said, as Ben-Shahar points out, cross or internal subsidies "should be particularly troubling when they are regressive—when weaker and poorer consumers subsidize the sophisticated and wealthier ones."[272]

Moreover, only a small fraction of all works become successful and generate long-term demand.[273] This being the case, hard interventions also

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[268] In spite of that, authors tend to be overly optimistic and overestimate the likelihood that their work will be successful. This so-called "lottery effect" leads authors to gamble for the chance to win the jackpot. This may incentivize creation in the first place. Zimmerman, *supra* note 3, at 30.

[269] Oren Bar Gill & Omri Ben-Shahar, *Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law*, 50 COMMON MKT. L. REV. 109, 119 (2013) (discussing cross-subsidies in the context of consumer law protection measures); Guy Pessach, *Copyright Law as a Silencing Restriction on Noninfringing Materials: Unveiling the Scope of Copyright's Diversity Externalities*, 76 S. CAL. L. REV. 1067, 1097-98 (2003) (discussing the cross-subsidy argument in the context of corporate media and calls for broad copyright protection).

[270] *See generally* Jacob Nussim, *To Confuse and Protect: Taxes and Consumer Protection,* 1 COLUM. J. TAX L. 218, 245 (2010) (arguing that "Numerous cross-subsidies among individuals exist in the market, and most are not necessarily considered socially undesirable to an extent that requires regulatory intervention.")

[271] Paul Goldstein, *Copyright*, 55 L. & CONTEMP. PROBS. 79, 83 (1992).

[272] Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. 883, 901 (2014).

[273] In fact, a study conducted in 2007 found that royalties' contracts are extremely uncertain sources of income. KRETSCHMER & HARDWICK, *supra* note 257, at 3 (arguing that "The rewards to best-selling writers are indeed high but as a profession, writing has remained resolutely

appear undesirable in terms of reallocation of risk. Authors and intermediaries typically have different disposition to risk. As noted in the previous chapters, it is common for the author to transfer the risk of failure or success to the party in a better position to assume the risk (i.e., the intermediary).[274] Hard interventions preclude the author from transferring the whole risk. This pays off only for successful authors.

Notwithstanding this, it is essential to recognize that in countries in which the legislature implements an *ex-ante* intervention in the form of minimum royalty rate (i.e., *de jure* or *de facto*), the measure operates somewhat like a safety net. Assuming the rate adopted in the legislation is higher than what the parties would have bargained for under the terms of the free market, authors other than superstars could possibly be better off under the new rule than under the terms of the free market. No doubt, this effect will differ across jurisdictions with diverse minimum rate requirements. Nevertheless, ideally the introduction of remuneration floor would redistribute wealth and buttress the bottom ranks.[275]

However, the positive impact of minimum royalty is limited, since legislative interventions also induce the intermediary to reduce its investment in "riskier" transactions, which will lead to a decline in the number transactions.[276] Fewer transactions mean that fewer authors will be able to benefit from the services of intermediaries.[277] This means that new and aspiring authors, as well as those working in less popular fields, will be harmed.

The reason is straightforward: in markets where transactions are characterized by a high degree of uncertainty, contracting parties often use contracts to shift risk. In fact, it is common for the author to transfer the risk of failure or success to the hands of the party that is in a better position to assume the risk (i.e., the intermediary). The intermediary is likely to be risk-neutral, because it can spread his risk over a large portfolio of works.[278]

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unprosperous."). *See also* KRETSCHMER ET AL., *supra* note 19; Glenton Davis, *When Copyright is Not Enough: Deconstructing Why, as the Modern Music Industry Takes, Musicians Continue to Make*, 16 CHI. -KENT J. INTELL. PROP. 373 (2017); Watt, *supra* note 11, at 12.

[274] *See also* Kretschmer, *supra* note 2, at 160-162.

[275] For a general discussion of the labor demand-induced impact of minimum wages *see, e.g.*, Pierre Cahuc & Philippe Michel, *Minimum Wage Unemployment and Growth,* 40 EUR. ECON. REV. 1463 (1996).

[276] Marcowitz-Bitton and Nussim analyze the Israeli minimum royalty rate and argue that although setting a higher price than what would have been set by the market creates an excessive supply, the demand is lower than what we would see under free market conditions (i.e., lower price). Marcowitz-Bitton & Nussim, *supra* note 103, at 278-79.

[277] Darling, *supra* note 20.

[278] This assumption of risk-neutrality can be challenged. Nevertheless, I believe it is tenable as a general framework for this discussion.

Where the legislative intervention creates a decline in the expected value, the intermediary may strive to reduce his investment in "riskier" works.

It is almost impossible to predict in advance which work will turn out to be a success. As a result, intermediaries must rely on market signals such as the demand for certain genres of works and the author's reputation. In this respect, more well-established and known authors are likely to represent lower levels of uncertainty and risk of failure.[279] Conversely, unestablished authors with works appealing to a very specific segment of the population represent a much higher risk. Hence, it is to be expected that the intermediaries will tend to invest in what they perceive as the "likely winner," while shying away from upstart authors and those who produce works with lower appeal to the masses.[280]

A potential drawback of minimum royalty rate, as well as of all other forms of hard interventions derives from the fact that the intermediary's incentives for cost reduction may lead it to cut back on the number of transactions.[281] For instance, consider what happened in the Israeli book market following introduction of a mandatory minimum royalty rate.[282] The annual report on the state of the book industry, submitted by the advisory committee to the Minister of Culture and Sport, the Minister of Economy and the Knesset Education, Culture and Sport Committee, indicated that data from selected publishers reveal that during the year following the enactment of the law, there has been an average 21% decline in the number of debut books.[283] One should note that the Israeli legislature attempted to reduce the risk undertaken by the intermediary and incentivize it to enter into contractual relationships with first time authors by allowing intermediaries to reduce the royalties' rate payable to first time authors by no more than 20% relative to all other authors.[284] Nevertheless, the above-mentioned data reveal that, for the most part, this was a futile attempt.

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[279] See *supra* Part II.

[280] Marcowitz-Bitton & Nussim, *supra* note 103, at 284-86. This fits well into copyright's winner-take-all dynamic. *See, e.g.*, Davis, *supra* note 273, at 384-85; FRANK & COOK, *supra* note 256; *see also* Ruth Towse, *Copyright and Artists: A View from Cultural Economics*, 20 J. ECON. SURVS. 567, 578 (2006) (describing the "winner-takes-all" aspects of the art labor market).

[281] *See, e.g.*, Rub, *supra* note 245, at 82-84 (discussing termination rights); Darling *supra* note 20 (discussing termination rights); John L. Solow, *An Economic Analysis of the Droit De Suite*, 22 J. CULTURAL ECON. 209 (1998) (discussing resale royalty rights); Marcowitz-Bitton & Nussim, *supra* note 103, at 286-87 (discussing Israeli minimum royalty rate arrangements).

[282] *See* Law for the Protection of Literature, *supra* note 63.

[283] The report also indicated an increase in the number of self-published books, making it seem that writers rejected by the large publishing houses are not desperate and find alternative ways to finance the publication of their books. *See* Annual Report on the State of the Book Industry, *supra* note 117, at 16.

[284] Law for the Protection of Literature, *supra* note 63, §3(c).

What happened in the Israeli book market corresponds, at least to some degree, to the standard law and economics analysis of minimum wage legislation, which predicts that mandatory minimum wages lead to lower earnings in underground sectors, fewer jobs, and higher unemployment rates, for low-skilled workers.

Though, in recent years, some scholars have called into question these predictions, indicating that although minimum wage legislation is one of the most studied topics, empirical results as to its impact on employment remain inconclusive.[285] It bears emphasis that minimum wage policy and mandatory minimum royalty's rate regulation discussed throughout this paper[286] are categorically different. Hence, it would be a mistake to treat them as interchangeable. There are numerous institutions, norms, and other features of the labor market that do not apply to the market for copyrighted works. For example, the minimum royalty rate is determined on a percentage basis and, more importantly, it does not guarantee authors any minimum compensation (unlike minimum wage arrangements).[287] Nevertheless, even if one accepts the conclusion derived from scholarly studies that indicates minimum wage does not bring about unemployment, it does not undermine the conclusion that hard interventions will lead to inter-author redistribution. At best, a disproportionately large segment of authors will be subsidizing authors at the top and bottom tiers. At worst, minimum royalty rates will strengthen the most successful authors and prevent many of the lower tier from transacting with intermediaries.

In sum, inter-author redistribution generates a disproportionate skewing to the detriment of new, less-known, inexperienced and most-vulnerable authors.

B. Hard Interventions Induce Re-distribution of Wealth Over-Time

Hard interventions not only affect inter-author distribution, but they also change the distribution of wealth over time for each individual author they effect. That is, they impact the redistribution of wealth from the author at present to her future self.

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[285] Some studies found small negative employment effects of minimum wage legislation. Others found no effect on employment while the last group found small positive effects. *See* David Card & Alan B. Krueger, *Minimum Wages and Employments: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania*, 84 AM. ECON. REV. 772 (1994); David Card, *Do Minimum Wages Reduce Employment: A Case Study of California,* 46 INDUS. & AND LAB. REL. REV. 38 (1992). *See also*, Marcowitz-Bitton & Nussim, *supra* note 103, at 279-84.

[286] See *supra* Part III.a.

[287] Marcowitz-Bitton and Nussim acknowledge these differences and argue that they do not change the economic analysis. Therefore, we should expect a minimum royalty rate to harm some first-time or riskier authors. Marcowitz-Bitton & Nussim, *supra* note 103, at 284.

Ex post interventions in the form of adjustment mechanisms and reversionary rights bring about an initial payment decrease with a promise of additional compensation in the future. Consequently, for a select few, immediate losses are to be corrected by deferred future gains. For example, as previously stated, under the U.S. Copyright Act the author could regain control of rights previously transferred.[288] However, she must wait at least thirty-five years before terminating the transfer and getting back the rights.[289] Hence, even when a work remains in demand many years after the initial transfer when the reversion can be triggered, the fact remains that the author is substituting a payment in the present for the prospect of a payment in the future. In this scenario, gains may be realized after a decades-long delay amid considerable uncertainty.

Less robust is the distributional effect over time of measures controlling the form of remuneration *ex-ante*. For instance, all things being equal, both France and Israel explicitly prohibit buy-out contracts.[290] The German legislation takes a slightly less intrusive approach, allowing for buy-out contracts, but firmly encouraging the parties to avoid them.[291] The idea is that royalties-based transactions are more favorable to the author for the following reasons: (1) the author is compensated throughout the exploitation of the work; (2) she is associated with the success of her work; and, (3) it safeguards the author from giving up all her rights for a relatively small payment.[292] In this respect, a royalties-based contract could potentially improve the financial position of the author in comparison to a lump-sum,[293] but it would come at the cost of a delayed payment.

The problem of a delayed payment is that the present value of any future income streams is minuscule, due to inflation and the economic principle of time value of money.[294] This is of course, assuming that the

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[288] 17 U.S.C. §§ 203(a), 304(c)-(d) (2002).

[289] *Id.*

[290] *See supra* Part III describing the notion of the right to proportionate remuneration and mandatory minimum royalty rate.

[291] *See supra* notes 76-86 and accompanying text.

[292] Although in practice, this can be less favorable to the author. The amount due to the author in case of a royalties-based contract is contingent on the success of the work.

[293] This taps into the vast literature discussing individual preferences and paternalism, because the legislature assumes her preferences at the time the contract is concluded do not consist with her long-term best interests. *See generally,* Paul Burrows, *Patronising Paternalism*, 45 OXFORD ECON. PAPERS 542, 563-64 (1993); Zamir & Medina emphasize that legal norms can change people's preferences; EYAL ZAMIR & BARAK MEDINA, LAW, ECONOMICS AND MORALITY 323 (2010).

[294] In essence, the time value of money means that a dollar today is worth more than a dollar sometime in the future. In this regard, important to note that the higher the interest rate and the further out into the future one goes, the less the dollar is worth. Richard Posner, ECONOMIC ANALYSIS OF THE LAW 46-47 (5th ed. 1998) ("As a result of discounting to present value, the knowledge that you may be

future income is certain. When the future income is uncertain, this is another reason to prefer payment here and now.

Additionally, the delay in payment created by hard interventions seem undesirable, since most professional authors begin their careers when they are young and often struggle to make a living.[295] At that point in time, an author is likely to be particularly risk averse and more dependent on immediate income to survive.[296] In theory, a risk-neutral person will be indifferent between future and immediate payments if the two have an equal expected value. In contrast, a risk-averse person will prefer a certain immediate payoff over uncertain higher payments later.[297] And so, forcing the risk-averse author to give up an immediate payment for a potential future payment will adversely affect her wellbeing.

A different distributional issue raised by the delay in earning is the fact that in many situations, future payments will flow to the hands of the author's successors. For instance, in the case of reversionary rights, the author's successors are not only entitled to claim the reversionary rights, but in many cases, the right will vest with them from the start.[298] This is the case in Canada, where reversion is possible only after the death of the author.[299] In the United States, although the reversion or rights is not contingent on the death of the author, but often will vest only after the author has passed away.[300] Under both schemes, therefore, the reversionary rights not only redistribute the wealth across time, but also from the author to her successors.

The case is further complicated, as the U.S. Copyright Act that clearly states that if the author dies before the vesting of termination rights, the rights pass to her family members (i.e., the surviving spouse, children or

entitled to a royalty on your book 50 to 100 years after you publish it is unlikely to affect your behavior today."); Robert C. Denicola, *Freedom to Copy*, 108 YALE L.J. 1661, 1679 (1999).

[295] Rub, *supra* note 7, at 104-105.

[296] *Id.* at 83-84. Not all individuals are of course equally loss averse, However, I assume that authors are, in general, loss averse.

[297] A risk-averse individual values money less as he or she accumulate more. *See, e.g.*, Charles A. Holt & Susan K. Laury, *Risk Aversion and Incentive Effects*, 92 AM. ECON. REV. 1644, 1662-63 (2002).

[298] The legislative history indicates that the legislators wanted to ensure the author's family and dependents would be able to benefit from such reversionary rights. *See* Katie Joseph, *Copyright's Unconsidered Assumption: Statutory Successors to the Termination Interest (and the Unintended Consequences for Estate Planners),* 94 NEB. L. REV. 441, 455 (2015).

[299] Copyright Act, R.S.C. 1985, c. C-42 §14 (1985). *See generally*, *supra* notes 190-198 and accompanying text.

[300] In numerous cases, grants made by the author while still alive will be subject to termination after her death. *See* 17 U.S.C. §§ 203(a)(2).

grandchildren).[301] The surviving spouse is entitled to one-half of the interest, and the surviving children then can take equal shares.[302] The grandchildren are entitled to the shares of their deceased parents. If there are no surviving children or grandchildren, the surviving spouse will receive the entire interest.[303] This means that the termination interest may vest in the successors delineated in the Copyright Act, rather than the author's intended beneficiary who may or may not be a member of the group of successors, despite any contrary assignment, and even if the will of the author denies them these rights.[304] Hence, the reversionary rights not only redistribute the wealth from the author to her heirs, but in the case of the U.S., they can even redistribute it from the authors' heirs by will to the statutory successors. As Crawford and Gans put it, this makes it "difficult, if not impossible, for authors to engage in effective estate planning."[305] Less obvious but plausible is the redistribution over time and in favor of successors in the case of adjustment mechanisms. Given that the commercial lifespan of the majority of copyrighted works is very short, it is likely that the author will be the one to demand an adjustment of compensation if the work generates disproportionate proceeds. Nevertheless, in certain scenarios, the value of the work is revealed long after its creation. This is the case for many works of visual arts, which spike in value once the artist passes away and can no longer create.[306] In those scenarios, the advantage of an adjustment mechanism is negligible since future payments will flow to the hands of the artist's successors "[307] A study prepared for the British Art Market Federation by Arts Economics

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[301] *See* 17 U.S.C. §§ 203(a)(2), 304(c)(2) (2006). *See also,* Bobby Rosenbloum, *A Very Welcome Return: Copyright Reversion and Termination of Copyright Assignments in the Music Industry*, 17 ENT. & SPORTS L. 3, 7 (1989).

[302] *See* 17 U.S.C. §§ 203(a)(2), 304(c)(2) (2006).

[303] *See Id.*

[304] Joseph, *supra* note 298, at 444. *Cf.,* Tarantino, *supra* note 194, at 18.

[305] Bridget J. Crawford & Mitchell M. Gans, *Sticky Copyrights: Discriminatory Tax Restraints on the Transfer of Intellectual Property*, 67 WASH. & LEE L. REV. 25, 73 (2010).

[306] *See* Ricketson, *supra* note 142, at 12; Maryam Dilmaghani & Jim Engle-Warnick, *The Efficiency of Droit de Suite: An Experimental Assessment*, 9 REV. OF ECON. RES. ON COPYRIGHT ISSUES 93, 116-118 (2012).

[307] Incidentally, the European Coalition of Art Market Organization, in its submission to the European Commission's consultation on the implementation and effects of the EU Artist Resale Right (ARR) Directive, indicates that, "[f]ewer than 3 out of every 100 living artists benefit from the right in the EU and the bulk of the payments go to the heirs of a few famous deceased artists." The European Coalition of Art Market Organisations, Submission to the European Commission's Consultation on the Implementation and Effects of the EU Artist Resale Right (ARR) Directive (2001/84/EC) (March 2011),
https://www.copyright.gov/docs/resaleroyalty/comments/77fr58175/European_Coalition_of_Art_Market_Organisations.pdf [https://perma.cc/R7JU-NTVR].

found that resale royalty rights benefited only 1% of living British artists in 2013.[308] Clearly, these efforts are failing to create the intended outcome for the majority of artists.

C. Further Considerations

One important factor that is not considered in the hitherto discussion is that the intermediary could attempt to counterbalance the effect of hard interventions by raising the price. This would shift additional costs into the hands of consumers in the form of higher prices. But unless consumers are not price sensitive at all, a price increase will affect consumer demand. Intuitively, it appears as if the demand for most copyrighted works is price elastic. If this is in fact the case, it is critical for the effects of hard interventions. Simply put, price sensitive demand will make it hard for the intermediary to pass on costs. To date, only a limited number of studies have attempted to estimate how an increase in price will affect the consumer's willingness to pay for copyrighted works. For example, in one study, Rihgstad and Loyland examined the demand for books in Norway. [309] Based on survey data for more than 18,000 households from the period 1986-1999, Rihgstad and Loyland conclude that books are price sensitive and that they are close substitutes to other cultural goods.[310] Other scholars report similar effects in the Danish and German book markets.[311]

No doubt, price elasticity certainly varies across industries and among authors. Generally, however, where the demand is elastic, the intermediary will be unable to transfer the full increase in costs to consumers, and therefore, will have to either bear some of it or pass it to authors (i.e., decrease the initial remuneration and number of transactions). Here, too, most of the burden falls, not on "superstar" authors, but on all the others, for all the reasons stipulated above, as well as because the demand for

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[308] CLARE MCANDREW, THE EU DIRECTIVE ON ARR AND THE BRITISH ART MARKET, STUDY PREPARED FOR THE BRITISH ART MARKET FEDERATION BY ARTS ECONOMICS, (Sep. 2014), http://tbamf.org.uk/wp-content/uploads/2014/09/ARR-Sector-Report-UK-2014.pdf. [https://perma.cc/L5JF-BFNV].

[309] Vidar Ringstad and Knut Løyland, *The Demand for Books Estimated by Means of Consumer Survey Data*, 10 J. CULTURAL ECON 141 (2006).

[310] *Id.*

[311] *See* Chr. Hjorth-Anderson, *A Model of the Danish Book Market*, 24 J. CULTURAL ECON 27 (2000) (concluding that the demand for books is price sensitive.); George Bittlingmayer, *The Elasticity of Demand for Books, Resale Price Maintenance and the Lerner Index*, 48 J. INST. & THEORETICAL ECON. 588 (1992) (finding that increasing the price of a particular title reduced the demand for that very same title).

works of established and well-known authors are not as likely to be sensitive to price changes as the works of less known author.[312]

Other elements might prevent the realization of the legislative aim of wealth redistributing from intermediaries to authors. First, many of the hard interventions require the author to invest time, effort, and resources to enjoy them. For instance, gathering information necessary to support a claim for inequitable remuneration or asking for a modification of the contract. However, the author may lack the necessary financial means and wherewithal to do so. Hard interventions are therefore of limited use to certain authors.[313]

Second, the author and her successors may simply be unaware of their rights, or not understand the legal procedure necessary to realize them. For instance, for the author to terminate her rights, Section 203 and 304 of the U.S. Copyright Act require the author to file a notice within a certain timeframe, or else she might lose her right.[314]

Third, authors may be hesitant to initiate legal proceedings. They might want to avoid being labeled as troublemakers and damage their reputations, let alone, their relationship with their intermediaries.[315] After all, there are only so many relevant publishers in niche industries. Thus, authors will be unlikely to seek adjustment or other judicial interventions.

In sum, regardless of the specific legislative language or approach taken, hard interventions will be largely ineffective in improving the financial situation of ***all*** authors. When legislatures coerce different parties into entering into a royalty-based contract where a certain minimum royalty rate exists, aside from the select group of well-known authors, two other

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[312] Although, works of creativity are unique, they do have similar characteristics and are therefore interchangeable to a certain degree. The extent to which this interchangeability will affect the consumer willingness to pay for a particular work will vary. *See* Rub, *supra* note 7, at 89.

[313] EUROPEAN COPYRIGHT SOCIETY, GENERAL OPINION ON THE EU COPYRIGHT REFORM PACKAGE (Jan. 24, 2017),
https://europeancopyrightsocietydotorg.files.wordpress.com/2015/12/ecs-opinion-on-eu-copyright-reform-def.pdf [https://perma.cc/LEQ5-K979].

[314] *Siegel v. Warner Bros. Entm't Inc.,* 690 F. Supp. 2d 1048, 1057-58 (C.D. Cal. 2009) (stating that "by not making termination automatic and requiring authors to jump through hoops even more formidable than those renewal presented" under the 1909 Act, the consequence is that, "in practice, the termination right has" been "barely used," with "approximately 0.72% of [termination] transfers hav[ing] been recorded, as required, with the Copyright Office" (citing William F. Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 922 (1997)); Emily Burrows, *Termination of Sound Recording Copyrights & The Potential Unconscionability of Work for Hire Clauses*, 30 REV. LITIG. 101, 107 (2010); Joshua Beldner, *Charlie Daniels And "The Devil" In The Details: What The Copyright Office's Response To The Termination Gap Foreshadows About The Upcoming Statutory Termination Period*, 18 B.U. J. SCI. & TECH. L. 199, 204 (2012) (discussing this information gap in the context of the termination gap).

[315] *See* SEVERINE DUSOLLIER ET AL., *supra* note 46, at 40.

distinct groups of authors potentially stand to benefit financially. The first are authors who would have bargained for a lower remuneration than that set by the legislation. Admittedly though, there will be fewer transactions. Nevertheless, the authors on the lower end who are fortunate enough to get a contract will enjoy a higher remuneration rate. The second group are novice authors, especially those who later turn out to be successful. For these authors, a royalty-based contract could plausibly yield higher payments since these *ex-post* mechanisms enable them to receive additional compensation proportional to the works' revenues once the real value becomes known. Reversionary rights operate in a similar manner. Regardless, these instruments are likely to benefit fewer authors on account of the long time it takes for the rights to vest.

The exception to this observation is the "use-it-or-lose-it" rules that could help certain authors secure alternative means of distribution for their works and therefore additional revenues. However, any positive effect on the author's financial status is limited as authors may exercise their rights only once the intermediary fails to fulfil its obligations.

As aforementioned, the ones who potentially gain from these interventions are the group of well-known, best-selling authors. These authors enjoy a strong bargaining position and are therefore less likely to suffer from lower initial compensation in the first place. Nevertheless, they would benefit from the *ex-post* measures (i.e., adjustments and reversions), once again reiterating that while not all authors benefit from the introduction of the host of legislative interventions discussed in this research, a select few do.

VII. CONCLUSIONS

In an effort to protect the authors' wellbeing in their contractual dealings, legislatures from around the world are increasingly keen to adopt regulatory measures that limit the menu of options the parties can adopt contractually. Specifically, these instruments endeavor to offset author's weak bargaining position either by ensuring a minimum level of remuneration to authors' ex-ante or providing them with an inalienable right to ask for a modification of the compensation stipulated in the contract ex-post or by granting them an inalienable right to regain control of their previously transferred rights.

This host of legislative interventions is seemingly based on the assumption that regulating author-intermediary transactions ex ante and ex

post will invariably improve the financial situation of authors as a whole. This assumption has been proven to be false.[316]

The *ex ante* and *ex post* measures yield a redistribution of wealth among the author groups, but not in the way the legislature originally envisioned. Specifically, hard interventions are expected to result in a redistribution of wealth that favors a select group at the expense of a much larger group of authors (i.e., inter-author redistribution), and a redistribution of wealth from the author's younger self, when she is more likely to be under financial constraint, towards her older self (or her successors). Finally, in most instances, the author will not even be the one to receive the additional compensation; the compensation will instead be passed on to the author's statutory successors. In many cases, it is nothing more than "too little, too late."[317]

Overall then, hard interventions are ineffective in promoting the interests of authors as a whole. These insights are significant not only for academic purposes, but also for practical ones. After all, copyright contracts are the building blocks of many creative industries. They also form the framework by which the author, a symbol and an intended beneficiary of the copyright system, secures remuneration.[318]

This paper does not claim that the findings by themselves justify an objection to intervention, nor does it categorically oppose all government initiatives designed to benefit authors. Further empirical research is needed before any strong conclusions may be drawn. Nevertheless, the results outlined in this paper should make policymakers doubtful as to the efficacy and desirability of legislative interventions.

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[316] This is assuming a zero-sum game where one party must lose for the other party to win.

[317] HUGH LADDIE, PETER PRESCOTT AND MARY VITORIA, THE MODERN LAW OF COPYRIGHT AND DESIGNS, 882-884 (Butterworths, 3rd ed., 2000).

[318] *But see* GINSBURG, *supra* note 9, at 62-63.