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By Kate Darling*

I. INTRODUCTION

¶1 Imagine that a production company purchased the rights to a screenplay from a writer in 1965. The film was released and yielded the expected average return at the box office. Twenty years later, the film is re-released for home viewing on videocassette. It becomes a massive financial success, the likes of which were completely unimaginable for films prior to the invention of home viewing media.[1] The creator, who initially received a small buy-out fee for the production rights to the work, is not consulted on the re-release and has no participation in the proceeds.

¶2 Now imagine that in 2003, a newspaper publisher wants to release a compilation of previously published articles on CD-ROM. The publisher is also involved in negotiations with an online service provider who would like to make previous newspaper editions available to subscribers in an online database. These undertakings will involve articles written by thousands of journalists, some of whom are deceased or no longer traceable. Finding the original authors (or subsequent right holders) and getting them all to agree to re-release their works would be prohibitively difficult.

¶3 Today is a world of technological change. The increasingly rapid development of new media continuously leads to new and unanticipated ways of distributing copyrighted works. Distribution methods are frequently modernized—sometimes replacing former methods, sometimes supplementing them—giving old content new value and creating additional sources of wealth. The performing arts and film industries have witnessed a progression over the last few decades from theater to motion pictures, television, videocassettes, DVDs, on-demand movies, streaming video, cell phone formats, and more. The music industry has experienced a similar succession of technological developments, including piano rolls, vinyl records, 8-tracks, reel-to-reel tapes, cassette tapes, CDs, mini discs, MP3 downloads, and streaming audio. Around the turn of the

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[1] This is not an uncommon occurrence in the film industry. One example of a film that was an initial financial failure at the box office and later grossed millions of dollars in home viewing format is Walt Disney's *Fantasia*. *See Fantasia (1940)—Trivia*, IMDB, http://www.imdb.com/title/tt0032455/trivia (last visited Mar. 11, 2012).

century, new distribution methods such as CDs, online databases, and e-books began to revolutionize the print media industry.[2] Now more than ever, the digital age is changing the ways that information can be accessed and distributed by expanding content beyond its initial medium.[3] These developments potentially affect any kind of creative authorship. We are yet unable to imagine what further possibilities the next decade, let alone the next century, will bring.

¶4 Copyright law grants authors[4] certain exclusive rights over their creations. To monetize these rights and distribute the work, authors regularly enter into contracts with publishers[5] and assign to the publisher the exclusive rights granted by copyright law, such as the rights to produce, publish, and distribute the work. Copyright terms can last for longer than a century.[6] During this time, the value of the work and the circumstances surrounding its distribution may be subject to considerable change. Consistent with notions of freedom of contract, United States copyright law allows authors to grant publishers the rights to all known or unknown uses of a work.[7] Despite the ostensible clarity of this norm, courts have struggled considerably with cases where the scope of rights transferred is uncertain.[8] New media developments have generally prompted litigation and the issue of which exclusive rights can and should be implicitly licensed has never been resolved with consistency.[9] Furthermore, perceived bargaining asymmetries and the unpredictability of a creative work's success over time has led to much discussion surrounding the 1976 Copyright Act's termination right for authors, which will begin to take effect within the next few years.[10] Many lawmakers, courts, and scholars are concerned about the case of the writer whose screenplay rights are bought out upfront by the production company. The concern lies in protecting disadvantaged creators from losing out on the later financial success of their work.

¶5 Looking across borders, it is apparent that other countries have been dealing with similar issues within their copyright systems. Many countries, however, have chosen a different approach to the problem. To prevent authors from signing away rights of

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[2] In July 2010, Amazon reported that the number of sold e-books was now consistently higher than that of printed books. *See* Dylan Tweney, *Amazon Sells More E-Books than Hardcovers*, WIRED (July 19, 2010, 5:46 PM), http://www.wired.com/epicenter/2010/07/amazon-more-e-books-than-hardcovers.

[3] *See* Marc Breslow et al., *An Analysis of Computer and Photocopying Issues from the Point of View of the General Public and the Ultimate Consumer*, *in* NAT'L COMM'N ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REPORT OF THE NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS 128 (1979).

[4] For the purposes of this Article, "author" pertains to any original copyright owner.

[5] For the purposes of this Article, "publisher" pertains to any entity that acquires rights from the author for the purpose of disseminating and benefitting from the copyrighted work.

[6] *See* Berne Convention for the Protection of Literary and Artistic Works art. 7, July 24, 1971, 1161 U.N.T.S. 30 (as amended on Sept. 28, 1979) (stipulating that, for most works, the length of the copyright term must be at least fifty years after the author's death). Many countries set even longer terms: the United States stipulates a seventy-year period *post mortem*.

[7] *See* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.10[B] (rev. ed. 2009); Neil R. Nagano, Comment, *Past Copyright Licenses and the New Video Software Medium*, 29 UCLA L. REV. 1160, 1166 (1982).

[8] *See* NIMMER & NIMMER, *supra* note 7, at § 10.10[B], 85.

[9] *Id.* at 85–94; *see also infra* note 44.

[10] *See* Peter S. Menell & David Nimmer, *Judicial Resistance to Copyright Law's Inalienable Right to Terminate Transfers*, 33 COLUM. J.L. & ARTS 227 (2010); Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the "Inalienable" Right to Terminate*, 62 FLA. L. REV. 1329 (2010); *see also infra* Part II.A.

unforeseen future value, some countries simply prohibit granting rights to uses unknown at the time of the contract. The legislative goal of this restrictive measure is primarily distributional: because authors are viewed as entitled to the financial returns of their creations, the law intervenes to ensure that they are not "cheated" out of this wealth by incautiousness, inexperience, or a lack of bargaining power in dealing with publishers.[11] Because this rationale is echoed in current discussions of author termination rights in the United States, it seems useful to take a closer look at this alternative approach and its effectiveness in dealing with the general underlying issue in other countries.

¶6 This Article delves into the reasoning behind European restrictions on granting rights to unknown uses of copyrighted works and evaluates the legislative assumptions from a law and economics perspective. This Article finds it economically plausible that the distribution deemed undesirable by the restrictive legislatures will occur in absence of legal intervention. When individuals, such as the screenplay writer, engage in contract negotiations with publishers, they are often in a poor bargaining position due to economic factors that leave authors with the shorter end of deals.

¶7 This Article also argues, however, that the chosen solution of preventing authors from transferring rights to uses that do not yet exist may have effects that counteract the legislative goals. Restricting the grant of rights to unknown uses essentially means that a new contract negotiation is necessary between author and publisher whenever a new distribution method emerges. As illustrated in the case of the newspaper publisher's difficulty releasing article compilations in digital form, this practice can give rise to transaction costs and other hindrances to market exchange. Importantly, not only does this situation harm the publisher, it also may harm authors by decreasing the total number of rights transfers or leaving them with unfavorable terms. In light of this result, restrictions on granting the rights to new uses should be considered with caution, even by author-protective legislatures, as they might not be suitable instruments for distributing wealth to creators.

¶8 The analysis of this Article is descriptive. It focuses on what the European legislatures are trying to achieve with restrictions on transfers of new use rights and evaluates whether they are likely to reach their goal. While using elements of economic welfare theory, this Article distinguishes between general wealth lost due to economic market failure and the loss of distributable wealth to authors due to bargaining disadvantages. Whether or not the latter is a warranted ground for intervention from an economic welfare perspective, it is largely what the legislatures in question aim to correct. For this and other reasons,[12] this Article refrains from a general welfare analysis and instead examines and evaluates the concrete legislative assumptions and goals. Although this Article's conclusions do not determine the optimal design of new use right laws, they provide helpful insights and indicate a sensible direction for further research and legislative discussion. Market reality and technological change call for continuous reconsideration of copyright laws. For example, in 2008, Germany fundamentally reformed its previously prohibitive approach to the grant of unknown use rights, and

[11] Although the argument could also be made that the distribution of wealth to authors serves to incentivize investment in artistic creation, such economic reasoning is scarce in the legislative discussion on restricting new use right grants. Instead, the distribution rationale is regularly based on natural rights theories or fairness concerns. *See infra* Part III.

[12] *See infra* Part V.

other countries, such as India, are currently engaged in legislative debate over introducing such a restriction.[13] This Article helps to draw a better picture of the costs and benefits involved in the various methods of achieving legislatures' goals.

¶9 Part II establishes the legal approaches to new use right grants in the United States and in the prominent European jurisdictions of Germany and France. Part III looks at the legislative reasoning for restricting new use right grants in France and pre-reform Germany. Part IV evaluates this reasoning in light of applicable economic theory. Part V concludes and discusses possible future implications.

II. LEGAL LANDSCAPE OF NEW USE RIGHTS

¶10 The United States generally allows the free transfer of rights to unknown uses of copyrighted works.[14] Similar situations exist in other countries, such as the United Kingdom[15] and Ireland.[16] Some countries, however, limit copyright grants to those distribution methods known at the time of the contract. This restrictive approach is taken in jurisdictions such as Germany (prior to the reform in 2008),[17] Spain,[18] Belgium,[19] Greece,[20] Poland,[21] Hungary,[22] and the Czech Republic.[23] France has a system that

[13] The latest copyright reform bill in India, currently in parliamentary discussion, introduces a new provision that would prohibit the grant of rights to unknown uses. *See* Copyright (Amendment) Bill, Rajya Sabha 24, § 6 (2010) (India) (as introduced), *available at* http://www.prsindia.org/uploads/media/Copyright%20Act/The%20Copyright%20Bill%202010.pdf. *See also* STANDING COMM. ON HUMAN RES. DEV., REP. NO. 227, REPORT ON THE COPYRIGHT (AMENDMENT) BILL, 2010 (2010) (India), *available at* http://www.prsindia.org/uploads/media/Copyright%20Act/SCR%20Copyright%20Bill%202010.pdf (committee report leading to the amendment).

[14] *See infra* Part II.A.

[15] Copyright, Designs and Patents Act, 1988, c.48, §§ 90, 91 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/1988/48/data.pdf; *see also* MICHAEL CHOI, STELLUNG DES URHEBERS UND SEIN SCHUTZ IM URHEBERVERTRAGSRECHT SOWIE IM COPYRIGHT CONTRACT LAW: EINE RECHTSVERGLEICHENDE STUDIE [POSITION OF THE AUTHOR AND HIS PROTECTIONS IN THE COPYRIGHT CONTRACT ACT VERSUS COPYRIGHT CONTRACT LAW: A COMPARATIVE STUDY] 171 (2007).

[16] Copyright and Related Rights Act 2008 §§ 120, 121 (Act No. 28/2000) (Ir.), *available at* http://www.irishstatutebook.ie/pdf/2000/en.act.2000.0028.pdf.

[17] *See infra* Part II.B.

[18] Intellectual Property Law art. 43(5) (B.O.E. 1996, 97) (Spain), *translated in Spain: Royal Legislative Decree 1/1996 of April 12 Approving the Revised Law on Intellectual Property, Regularizing, Clarifying and Harmonizing the Applicable Statutory Provisions*, WORLD INTELL. PROP. ORG., http://www.wipo.int/wipolex/en/details.jsp?id=1358 (last visited Jan. 27, 2012).

[19] Loi relative au droit d'auteur et aux droits voisins [Law on Copyright and Neighboring Rights] of June 30, 1994, art. 3(1), MONITEUR BELGE [M.B.] [Official Gazette of Belgium], July 27, 1994, 19297 (Belg.), *translated in Belgium: Law on Copyrights and Neighboring Rights*, WORLD INTELL. PROP. ORG, http://wipo.int/clea/en/details.jsp?id=348 (last visited Jan. 27, 2012); *see also* Frank Gotzen, *Das belgische Urhebervertragsrecht* [*Belgian Copyright Contract Law*], *in* URHEBERRECHT IM INFORMATIONSZEITALTER: FESTSCHRIFT FÜR WILHELM NORDEMANN ZUM 70. GEBURTSTAG AM 8. JANUAR 2004 [COPYRIGHT LAW IN THE INFORMATION AGE: COMMEMORATING WILHELM NORDEMANN'S 70TH BIRTHDAY ON JANUARY 8, 2004] 515, 520 (Ulrich Loewenheim ed., 2004) (Ger.) [hereinafter COPYRIGHT LAW IN THE INFORMATION AGE].

[20] Nomos (1993:2121) Pneymatikh idiokthsia, syggenika dikaiwmata kai politistika themata [Law on Copyright, Related Rights and Cultural Matters], EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS [E.K.E.D.] 1993, A:25, art. 13(5) (Greece), *translated in Greece: Law 2121/1993 on Copyright, Related Rights and Cultural Matters*, WORLD INTELL. PROP. ORG., http://www.wipo.int/clea/en/details.jsp?id=1790 (last visited Jan. 27, 2012).

[21] Ustawa o prawie autorskim i prawach pokrewnych [Act on Copyright and Neighboring Rights] of

allows the grant of unknown use rights but is considerably restrictive in effect.[24] There is currently a legislative proposal in India that aims to introduce a prohibition on such grants.[25] This Part describes the legal landscapes of prominent jurisdictions—specifically, the United States, pre-reform Germany, and France. It finds that the two European copyright regimes are more restrictive in their legal treatment of new use rights than is U.S. copyright law.

A. New Use Rights in the United States

¶11 United States copyright law, often portrayed as the counterpart to author-protective systems, such as in France, does not restrict the voluntary transfer of new use rights.[26] The United States generally allows a transfer of copyright in its entirety.[27] In the case of a full transfer, there is no question that all exclusive rights pass on to the transferee, regardless of whether these rights pertain to known or unknown uses of the work.[28] Thus, if an author transfers her entire copyright to another party, that party will obtain the rights to use the work in all media developed after the transfer.

¶12 The question of unknown uses only arises when specific exclusive rights are transferred or licensed. In this situation, United States copyright law imposes no restrictions on the author regarding the alienation of rights to future uses. These rights can be transferred if it is the explicitly expressed will of the contracting parties.[29] The accumulation of case law on new use right grants in the United States therefore mainly deals with situations where there is no explicitly expressed will of the parties. Here, legal scholars and courts apply the principles of general contract law. The rights to new uses are thereby generally allocated according to the implicit will of the parties.[30] Therefore, even when the contract does not explicitly provide for it, a transferee may be able to appropriate such rights from the author. Many such decisions follow the lead of *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, in which the Second Circuit held that the granted motion

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Feb. 4, 1994, DZIENNIK USTAWA [DZ. U.] 1994 Nr 24, poz. 83, art. 41(4) (Pol.), *translated in Poland: Law of February 4, 1994, on Copyright and Neighboring Rights*, WORLD INTELL. PROP. ORG., http://www.wipo.int/wipolex/en/details.jsp?id=3500 (last visited Jan. 27, 2012).

[22] 1999. évi LXXVI. törvény a szerzői jogról (Act LXXVI of 1999 on Copyright Law), art. 44(2) (Hung.), *translated in Hungary: Act No. LXXVI of 1999 on Copyright*, WORLD INTELL. PROP. ORG., http://www.wipo.int/clea/en/details.jsp?id=2213 (last visited Jan. 27, 2012).

[23] Zákon č. 121/2000 Sb., autorský zákon, art. 46(2) [Copyright Act] (Czech), *translated in Czech Republic: Law No. 121/2000 Coll. of 7 April 2000 on Copyright, Rights Related to Copyright and on the Amendment of Certain Laws (Copyright Act)*, WORLD INTELL. PROP. ORG., http://www.wipo.int/clea/en/details.jsp?id=962 (last visited Jan. 27, 2012).

[24] *See infra* Part II.C.

[25] *See supra* note 13.

[26] *See* Nagano, *supra* note 7, at 1166; JENS WEICHE, US-AMERIKANISCHES URHEBERVERTRAGSRECHT [AMERICAN COPYRIGHT CONTRACT LAW] 108 (2002) (Ger.).

[27] 17 U.S.C. § 201(d)(1) (2006) ("The ownership of a copyright may be transferred in whole or in part . . . ."); *see also* NIMMER & NIMMER, *supra* note 7, at 85; PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT §§ 5.1, 5.1.1.1 (3d ed. 2005; electronic version, updated 2010).

[28] *See* 17 U.S.C. § 106; Nagano, *supra* note 7, at 1166.

[29] *See* Rooney v. Columbia Pictures Indus., 538 F. Supp. 211, 229 (S.D.N.Y. 1982); Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 70 (1994); Nagano, *supra* note 7, at 1166.

[30] *See* NIMMER & NIMMER, *supra* note 7, at § 10.10[B]; Joanne Benoit Nakos, Comment, *An Analysis of the Effect of New Technology on the Rights Conveyed by Copyright License Agreements*, 25 CUMB. L. REV. 433, 438 (1995).

picture rights to a musical included the television rights.[31] The agreement referred to "motion picture rights throughout the world" and allowed MGM to "otherwise reproduce the . . . play . . . visually or audibly by the art of cinematography or any process analogous thereto."[32] The court read the agreement as implying intent on the author's part to grant the broadest rights possible regarding his work, namely the film adaption of his play.[33]

¶13 Problems arise, however, when the parties have no discernible will at all—for instance, when they use overly vague contract clauses or when both parties simply do not anticipate the possibility of a new distribution method at the time of the contract. Such cases have been the subject of much litigation and legal analysis in the United States.[34] Generally, these cases settle or become subject to ambiguous rulings by the court system.[35] Various approaches exist to allocate the rights in these situations. For instance, applying the principle of interpreting unclear clauses in favor of the non-drafting party would have authors retain any rights not expressed by their intent.[36] The leading case applying a restrictive approach to interpret grants is the Ninth Circuit's decision in *Cohen v. Paramount Pictures Corp*.[37] The court held that a license to a musical composition that includes a right to exhibit a film on television does not include the right to expand to videocassettes, explaining: "Although the language of the license permits the *recording and copying* of the movie with the musical composition in it, in any manner, medium, or form, nothing in the express language of the license authorizes *distribution* of the copies to the public by sale or rental."[38] The court thus read the lack of a clause granting videocassette rights to Paramount to mean that they were retained, even adding that "[t]he holder of the license should not now 'reap the entire windfall' associated with the new medium."[39]

¶14 Another view advocates that licensees should have all the rights that are reasonably within the scope of the distribution method and purpose.[40] In *Boosey & Hawkes Music Publishers v. Walt Disney Co.*,[41] the Second Circuit held that the right to record the musical composition "in any manner, medium or form for use in [a] motion picture" included videocassette rights.[42] The court stated that the licensee should be able to

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[31] Bartsch v. Metro-Goldwyn-Mayer, Inc., 391 F.2d 150 (2d Cir. 1968).

[32] *Id.* at 152.

[33] *Id.* at 154.

[34] For an overview of the case law, see NIMMER & NIMMER, *supra* note 7, at § 10.10[B]; *see also* Nakos, *supra* note 30, at 436; Nagano, *supra* note 7, at 1169; Carolina Saez, *Enforcing Copyrights in the Age of Multimedia*, 21 RUTGERS COMPUTER & TECH. L.J. 351, 374–77 (1995); Sidney A. Rosenzweig, Comment, *Don't Put My Article Online!: Extending Copyright's New-Use Doctrine to the Electronic Publishing Media and Beyond*, 143 U. PA. L. REV. 899, 908–20 (1995); Boosey & Hawkes Music Publishers v. Walt Disney Co., 145 F.3d 481, 486 (2d Cir. 1998).

[35] *See* NIMMER & NIMMER, *supra* note 7, at § 10.10[B].

[36] At least when they are dealing with standard form contracts and other publisher-drafted agreements, such is the norm in many publishing industries. *See, e.g.*, Rey v. Lafferty, 990 F.2d 1379 (1st Cir. 1993).

[37] Cohen v. Paramount Pictures Corp., 845 F.2d 851 (9th Cir. 1988).

[38] *Id.* at 853.

[39] *Id.* at 854 (quoting Nagano, *supra* note 7, at 1184).

[40] *See, e.g.*, NIMMER & NIMMER, *supra* note 7, at 86–87; *see also* Platinum Record Co. v. Lucasfilm, Ltd., 566 F. Supp. 226 (D.N.J. 1983); Rooney v. Columbia Pictures Indus., 538 F. Supp. 211, 229 (S.D.N.Y. 1982).

[41] 145 F.3d 481 (2d Cir. 1998).

[42] *Id.* at 486 (internal quotation marks omitted).

"pursue any uses which may reasonably be said to fall within the medium as described in the license."[43]

¶15 None of the approaches appears to have decisively gained the upper hand.[44] Nevertheless, the relevant observation for the purpose of this Part is that the voluntary transfer of new use rights is neither forbidden nor prohibitively restricted in the United States. This is not to say that United States copyright law ignores the problem of unforeseen future value of creative works—author termination rights provide a mechanism for dealing with these issues. The 1976 Copyright Act contains a provision that grants the author (and successors) a general contract termination right after a period of thirty-five years.[45] Congress was concerned that the future value of creative works would be difficult to predict and that authors are often the party less experienced in publishing matters and with less leverage in bargaining for terms.[46] These rights aim to protect the author as a disadvantaged party by allowing a later opportunity to renegotiate and "cash in" on the work's success.[47] Because the law was enacted in 1978 and does not apply retroactively to agreements entered into before that date, rights holders will be able to begin terminating contracts under this rule as of 2013.[48] Depending on how courts interpret this provision,[49] the resulting effects could in many ways be comparable to the situation in post-reform Germany.[50]

¶16 This Article demonstrates that the reasoning for introducing author termination rights in the United States is similar to other countries' reasons for choosing a strict allocation of new use rights.[51] But first, it turns to the basic legal construction for the rights to unknown uses in pre-reform Germany.

B. Germany

¶17 Prior to its reform in 2008, the German Copyright Act explicitly prohibited the licensing of rights to new uses. Section 31(4) established that "[t]he grant of an exploitation right for as yet unknown types of use and any obligations in that respect shall

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[43] *Id.* at 486 (quoting Bartsch v. Metro-Goldwyn-Mayer, 391 F.2d 150, 155 (2d Cir. 1968)).

[44] *See* NIMMER & NIMMER, *supra* note 7, at 85–94; Nagano, *supra* note 7, at 1183–92; Nakos, *supra* note 30, at 455–61; Barbara D. Griff, Note, *A New Use for an Old License: Who Owns the Right?*, 17 CARDOZO L. REV. 53, 82–84 (1995); Saez, *supra* note 34, at 371–73; Rosenzweig, *supra* note 34, at 920–26; Stacey M. Byrnes, *Copyright Licenses, New Technology and Default Rules: Converging Media, Diverging Courts?*, 20 LOY. L.A. ENT. L. REV. 243, 271–74 (2000).

[45] 17 U.S.C. §§ 203, 304 (2006) ("notwithstanding any agreement to the contrary"); *see also* GOLDSTEIN, *supra* note 27, at § 5.4.

[46] *See* REGISTER OF COPYRIGHTS, COPYRIGHT LAW REVISION: REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 92 (Comm. Print 1961); H.R. REP. NO. 94-1476, at 124 (1976).

[47] *But see* Loren, *supra* note 10, at 1345–46 (arguing that the law mainly addresses the issue of high uncertainty surrounding the future success of creative works as a problem faced by both parties).

[48] This also pertains to the rules for contracts entered into before 1978, which grant a termination right after fifty-six years in some cases and seventy-five years in others (for the two times that the duration of the copyright term was extended, authors are allowed a termination right for prior contracts after the original copyright term length). *See* 17 U.S.C. § 304(c), (d).

[49] The U.S. Supreme Court has already confirmed the inalienability of the right in *Stewart v. Abend*, 495 U.S. 207, 230 (1990). *See* Loren, *supra* note 10, at 1331. However, other decisions have been ambivalent regarding the possibility of preempting the right by terminating the initial agreement and entering into a new one before the termination period has been reached. *See* Menell & Nimmer, *supra* note 10, at 227–40.

[50] *See* discussion *infra* Part IV.B.4.

[51] *Infra* Part III.

have no legal effect."[52] This strict protection of new use rights, although not statutorily introduced until the 1960s, was a codification of judicially developed rules that began restricting rights transfers as early as the beginning of the twentieth century.[53] In a prominent case in 1927, the German Federal Court of Justice denied a publisher the film rights to the operetta *Das Musikantenmädel*,[54] even though film technology was known (albeit not widespread) at the time, and the broadly worded contract clause covered the rights to the text and stage directions "for all times and with all current and future derived rights, including all translation and performance rights, as well as the rights of stage operation and performance for all countries."[55]

¶18 Two years later, the German Federal Court of Justice decided that a publisher did not have control over the broadcasting rights to the creations of Wilhelm Busch, despite a contract assigning the company the full copyright to all of his works.[56] In a following case concerning gramophone record rights in 1931,[57] the court validated the grant, reasoning that it pertained to a closely related advancement of previous distribution methods. This argument, in effect, confirmed that not all uses were covered by the blanket clause granting the "irrevocable exclusive authorization to exploit all held rights using currently known or yet to be invented mechanical music instruments of all kinds . . . as well as all cinematographical rights."[58]

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[52] Gesetz über Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz] [UrhG] [Copyright Act], Sept. 9, 1965, BUNDESGESETZBLATT [BGBL.] I at 1273, § 31(4) (as adopted in 1965) (Ger.). "Exploitation right" is a continental European term covering use and distribution of a copyrighted work.

[53] Artur-Axel Wandtke & Eike Wilhelm Grunert, *§ 31 Ein räumung von Nutzungsrechten*, *in* PRAXISKOMMENTAR ZUM URHEBERRECHT [PRACTITIONER'S COMMENTARY ON COPYRIGHT LAW] 422 (Artur-Axel Wandtke & Winifried Bullinger eds., 2d ed. 2006) (Ger.); STEFAN DREWES, NEUE NUTZUNGSARTEN IM URHEBERRECHT [NEW USES IN COPYRIGHT LAW] 28–37 (2002) (Ger.); KERSTIN A. ZSCHERPE, ZWEITVERWERTUNGSRECHTE UND § 31 ABS. 4 URHG: EINE KRITISCHE ANALYSE [COPYRIGHT COLLECTIVES AND § 31 PARA. 4 OF THE COPYRIGHT CODE: A CRITICAL ANALYSIS] 29 (2004) (Ger.); Stefan Lütje, *Die unbekannte Nutzungsart im Bereich der Filmwerke—alles Klimbim?* [*The Unknown Use in the Area of Cinematic Works—Always* Klimbim *(Fuss and Bother)?*], *in* AKTUELLE RECHTSPROBLEME DER FILMPRODUKTION UND FILMLIZENZ: FESTSCHRIFT FÜR WOLF SCHWARZ ZU SEINEM 80. GEBURTSTAG [CURRENT LEGAL PROBLEMS OF FILM PRODUCTION AND FILM LICENSE: COMMEMORATING WOLF SCHWARZ ON HIS 80TH BIRTHDAY] 115, 116 (Jürgen Becker & Mathias Schwarz eds., 1999) (Ger.); *see also infra* Part III.A.

[54] Reichsgericht [RG] [Federal Court of Justice] Oct. 29, 1927, 118 ENTSCHEIDUNGEN DES REICHSGERICHTS IN ZIVILSACHEN [RGZ] 282 (Ger.).

[55] *Id.* at 285 ("[F]ür alle Zeiten und mit allen gegenwärtig und künftig fliessenden Rechten, auch den sämtlichen Übersetzungs- und Aufführungsrechten, sowie dem Rechte des Bühnenbetriebs und der Aufführung für alle Länder."). All translations are my own, unless otherwise noted.

[56] RG Feb. 16, 1929, 123 RGZ 312 (Ger.).

[57] RG Nov. 14, 1931, 134 RGZ 198 (Ger.).

[58] *Id.* at 199 ("[U]nwiderrufliche ausschliessliche Vollmacht zur Ausnutzung aller ihrer Rechte bei jetzt bekannten oder noch zu erfindenden mechanischen Musikinstrumenten aller Art . . . und aller ihrer kinematographischen Rechte."). Two other prominent cases in the 1960s concerned Curt Goetz's filmography works. The first involved a similar dispute on whether the television rights had been granted along with the general film rights (finding they had not), and the second did not deal directly with the issue of unknown distribution methods, but confirmed the restrictive interpretation of copyright agreements in general. Curt-Goetz-Filme II, BGH Oct. 2, 1968, GRUR 143, 1969 (Ger.); Curt-Goetz-Filme III, BGH Oct. 2, 1968, GRUR 364, 1969 (Ger.). Other noteworthy cases include the German Federal Court of Justice decision *Keine Ferien für den lieben Gott*, Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 16, 1959, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 197, 1960 (Ger.), in which the court decided that a clause granting the "exclusive substandard film exploitation rights in their entirety" did not include the television rights to the movie. Furthermore, although a later German Federal Court of Justice decision allowed for expansion to television based on a contract clause that granted the rights to "[A]ll

¶19 After the explicit establishment of § 31(4) in the Copyright Act, German courts continued to confirm the prohibition in subsequent cases. Prominent examples include *Videozweitauswertung*,[59] in which the German Federal Court of Justice concluded that the copyright to the new VHS technology was not transferred in a 1968 license granting the rights to all known and future uses and *Spiegel-CD-ROM*,[60] finding that, based on § 31(4) of the 1965 Copyright Act, the publication rights to newspaper articles did not extend to CD-ROM technology. In the years prior to the reform, cases favored less restrictions on expansion into other media, as courts increasingly declared technological advancements not to be "unforeseen" or "new" uses in a legal sense.[61] In the mid-1990s, the German Federal Court of Justice began to establish the practice of allowing "risk agreements" (*Risikogeschäfte*) that covered technically known but, at the time, economically unimportant distribution methods.[62] This stood in contrast to its previous practice of requiring that "known" technology be economically meaningful.[63] Although these tendencies lessened the restriction on new use right grants, the prohibition continued to be upheld for significant technology advancements that were not invented at the time of the contract.[64]

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ways, systems, and methods known at the time of the contract, and all ways, systems, and methods not yet found and invented at the time of the contract, in particular film broadcast and color film," the court justified this decision solely through a wide interpretation of the term "film broadcast," confirming that the blanket clause covering uninvented methods was invalid. Alverträge, BGH May 13, 1982, GRUR 727, 1982 (Ger.).

[59] BGH Oct. 11, 1990, GRUR 133 (135–36), 1991 (Ger.).

[60] Oberlandesgericht [OLG] [Higher Regional Court] Nov. 5, 1998, MULTIMEDIA UND RECHT [MMR] 225, 1999 (Ger.), *aff'd by* BGH July 5, 2001, 148 ENTSCHEIDUNGEN DES BUNDESGERICHTS IN ZIVILSACHEN [BGHZ] 221 (Ger.) (the court focused on the "purpose of grant" rule (Zweckübertragungsregel) in the original version of the Copyright Act, UrhG Sept. 9, 1965, BGBL. I at 1273, § 31(5) (as adopted in 1965) (Ger.)); *see also, e.g.*, OLG Oct. 10, 1995, NEUE JURISTISCHE WOCHENSCHRIFT-RECHTSPRECHUNGS-REPORT, ZIVIRECHT [NJW-RR] 420, 1996 (Ger.) (finding a CD to be a new use compared to records and cassette tapes); *see also* Kassettenfilm, BGH Apr. 26, 1974, GRUR 786, 1974 (Ger.) (leaving the question of new use open, but invoking the purpose of grant rule to find that a 1966 license granting all broadcast and film rights does not include distribution of super-8 cassettes).

[61] *See* Lütje, *supra* note 53, at 115.

[62] Videozweitauswertung III, BGH Jan. 26, 1995, 128 BGHZ 336 (Ger.); EROC III, BGH Oct. 10, 2002, GRUR 234, 2003 (Ger.); Klimbim, BGH July 4, 1996, 133 BGHZ 281 (Ger.); Der Zauberberg, BGH May 19, 2005, 163 BGHZ 109 (Ger.); *see also* GERHARD SCHRICKER, URHEBERRECHT: KOMMENTAR [COPYRIGHT LAW: COMMENTARY] 657 (3d ed. 2006) (Ger.); MANFRED REHBINDER, URHEBERRECHT: EIN STUDIENBUCH [COPYRIGHT LAW: A STUDY GUIDE] 214 (15th rev. ed. 2008) (Ger.); Gernot Schulze, *§ 31a Verträge über unbekannte Nutzungsarten*, *in* THOMAS DREIER & GERNOT SCHULZE, URHEBERRECHTSGESETZ: URHEBERRECHTSWAHRNEHMUNGSGESETZ KUNSTURHEBERGESETZ: KOMMENTAR 545, 557–59 (3d ed. 2008) (Ger.); ULRICH LOEWENHEIM, HANDBUCH DES URHEBERRECHTS [COPYRIGHT LAW HANDBOOK] 1263–64 (2d ed. 2010) (Ger.); *infra* Part IV.B.6.

[63] *See, e.g.*, GEMA Vermutung I, BGH June 5, 1985, 95 BGHZ 274 (275) (Ger.); GEMA-Vermutung IV, BGH Oct. 15, 1987, GRUR 296 (298), 1988 (Ger.); Videozweitauswertung I, BGH Oct. 11, 1990, GRUR 133 (136), 1991 (Ger.); *see also* PHILIPP MÖHRING & KÄTE NICOLINI, URHEBERRECHTSGESETZ [COPYRIGHT ACT] 231 (1970) (Ger.).

[64] *See, e.g.*, Spiegel-CD-ROM, OLG Nov. 5, 1998, MMR 225, 1999 (Ger.); Video-on-demand, OLG Mar. 19, 1998, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT [ZUM] 413 (416), 1998 (Ger.); Elektronische Zeitung im Internet, OLG May 11, 2000, ZUM 870, 2000 (Ger.); Fernsehproduktion im Internet, Landgericht [LG] [Regional Court] Mar. 10, 1999, MMR 291, 2000 (Ger.); EROC III, BGH Oct. 10, 2002, GRUR 234 (235), 2003 (Ger.) (not denying that CD could be a new use, despite much controversy in lower courts and commentary); *see also* OLE JANI, DER BUY-OUT-VERTRAG IM URHEBERRECHT [THE BUY-OUT CONTRACT IN COPYRIGHT LAW] 107 (2003) (Ger.); Jan Bernd Nordemann, *Die erlaubte Einräumung von Rechten für unbekannte Nutzungsarten* [*The Permissible Appropriation of Rights for Unknown Uses*], *in* COPYRIGHT LAW IN THE INFORMATION AGE, *supra* note 19, at 193, 206

¶20 In 2008, a reform introduced a new regime for new use right grants. It abolished Section 31(4) and officially allowed the transfer of rights to unknown uses of copyrighted works. The reform, however, also introduced an inalienable revocation right, whereby authors are able to revoke the grant within three months after the publisher notifies them of a new distribution method.[65] Because Germany restricted new use right grants for nearly a century before deciding to overturn this rule, it is a particularly interesting example to examine in this context. The long history of restricting new use right grants in Germany is different from the approach of other legal systems, such as that of the United States.

C. France

¶21 The French Intellectual Property Code contains no explicit prohibition of transferring rights to unknown uses of a copyrighted work. Interestingly, despite strict regulations governing the content and scope of copyright agreements,[66] the Code contains a provision that explicitly allows for a grant of rights to unforeseen uses. Article L. 131-6 states: "Any assignment clause affording the right to exploit a work in a form that is unforeseeable and not foreseen on the date of the contract shall be explicit and shall stipulate participation correlated to the profits from exploitation."[67] At first glance, this provision is seemingly the opposite of the clear prohibition found in other European countries. Although the provision requires an explicit contract clause and a profit participation agreement, it does not prevent the author from signing away the rights to unforeseen uses. However, French commentary and case law indicates that the applicability of this provision is somewhat restricted. As implied by the wording of the clause, Article L. 131-6 intends to cover two types of unforeseeability: (1) unforeseeability in the sense that it was impossible for anyone to know of the future use at the time of the contract (*non prévisible*) and (2) unforeseeability in the sense that the use already existed at the time, but was unforeseen by the contracting parties (*non prévue*).[68] However, the French Intellectual Property Code also has a specification requirement in Article L. 131-3 which states: "Transfer of authors' rights shall be subject to each of the assigned rights being separately mentioned in the instrument of assignment

(Ger.).

[65] The specifics of the reform and the developments that led to this change are discussed in more detail *infra* Part IV.B.6.

[66] *See* ANDRÉ LUCAS, PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE [LITERARY AND ARTISTIC PROPERTY] 95, 97 (4th ed. 2010) (Fr.); PIERRE-YVES GAUTIER, PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE [LITERARY AND ARTISTIC PROPERTY] 534 (6th ed. 2007) (Fr.); FRÉDÉRIC POLLAUD-DULIAN, LE DROIT D'AUTEUR [COPYRIGHT LAW] 582–84 (2005) (Fr.).

[67] Loi 92-597 du 1 julliet 1992 relative au code de la proprété intellectuelle [Law 92-597 of July 1, 1992 on the Intellectual Property Code], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 3, 1992, p. 8801, art. L. 131-6, *translated in Intellectual Property Code: Legislative Part*, LEGIFRANCE, http://195.83.177.9/upl/pdf/code_35.pdf (last updated Sept. 15, 2003). The continental European term "exploitation" covers use and distribution of copyrighted works. *See supra* note 52.

[68] *See* HENRI DESBOIS, LE DROIT D'AUTEUR EN FRANCE [COPYRIGHT LAW IN FRANCE] 641 (3d ed. 1978) (Fr.); CLAUDE COLOMBET, PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE ET DROITS VOISINS [COPYRIGHT AND NEIGHBORING RIGHTS] 235 (8th ed. 1997) (Fr.).

and the field of exploitation of the assigned rights being defined as to its scope and purpose, as to place and as to duration."[69]

¶22 The specification requirement clearly stipulates that a transfer of rights must explicitly list each individual distribution method in the contract.[70] As a result, Article L. 131-6 cannot pertain to uses that were merely unforeseen by the parties but only pertains to uses that were entirely unanticipated because they did not exist at the time.[71] But herein lays another problem: distribution methods that are entirely unforeseen will generally be unable to meet the explicit description requirement because the circumstances and scope of unforeseen distribution methods are, in most cases, impossible to define.[72] Additionally, the requirement of agreeing on a correlated share of the profits may render the grant ineffective as well, since the practical feasibility of such a share is not at all clear at the time of the contract.[73] As a result, much of the literature regards the applicable scope of Article L. 131-6 as either insignificantly small[74] or even entirely nonexistent.[75]

¶23 A considerably limited application of Article L. 131-6 also seems in line with the contract-regulating rules found in the French Intellectual Property Code. For example, copyright agreements are subject to the principle of restrictive interpretation set forth in Article L. 122-7, which requires agreements purporting a full transfer of rights to remain strictly limited to the distribution methods determined by the contract.[76]. It seems contradictory to Article L. 122-7 and with Article L. 131-3 (requiring the author's explicit permission)[77] to allow a liberal application of Article L. 131-6, especially considering the legislative reasoning behind these restrictive principles.[78]

¶24 There are few court cases concerning Article L. 131-6 (or its predecessor).[79] The most prominent decision, *Plurimédia*, involved journalists that contested the online

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[69] Law 92-597 of of July 1, 1992, art. L. 131-3 (Fr.).

[70] *See* POLLAUD-DULIAN, *supra* note 66, at 583; HERBERT SCHADEL, DAS FRANZÖSISCHE URHEBERVERTRAGSRECHT [THE FRENCH COPYRIGHT CONTRACT LAW] 29 (1966) (Ger.).

[71] *See* DESBOIS, *supra* note 68, at 641; POLLAUD-DULIAN, *supra* note 66, at 589; SCHADEL, *supra* note 70, at 29.

[72] *See* Roger Fernay, *La cession et le contrat d'édition* [*The Assignment and Publishing Contract*], 19 REVUE INTERNATIONALE DU DROIT D'AUTEUR [RIDA] 257, 295 (1958) (Fr.); COLOMBET, *supra* note 68, at 235.

[73] *See* POLLAUD-DULIAN, *supra* note 66, at 590; SCHADEL, *supra* note 70, at 29; *see also* DREWES, *supra* note 53, at 95; Frédérique Genton, *Multimedia im französischen Urheberrecht: der zweite Sirinelli-Bericht* [*Multimedia in French Copyright Law: The Second Sirinelli Report*], 6 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT INTERNATIONALER TEIL [GRUR INT.] 693, 696 (1996) (Ger.) (discussing the problems of the financial evaluation of multimedia works under French law).

[74] *See* DESBOIS, *supra* note 68, at 641; SCHADEL, *supra* note 70, at 28–29.

[75] *See* COLOMBET, *supra* note 68, at 235; DREWES, *supra* note 53, at 95–96; Fernay, *supra* note 72, at 295.

[76] *See* Law 92-597 of July 1, 1992 on the Intellectual Property Code, J.O., July 3, 1992, p. 8801, art. L. 122-7 (Fr.), *translated in Intellectual Property Code: Legislative Part*, LEGIFRANCE, http://195.83.177.9/upl/pdf/code_35.pdf (last updated Sept. 15, 2003) ("Where a contract contains the complete transfer of either of the rights referred to in this Article, its effect shall be limited to the exploitation modes specified in the contract."); LUCAS, *supra* note 66, at 97; *see also* POLLAUD-DULIAN, *supra* note 66, at 583.

[77] GAUTIER, *supra* note 66, at 534–35; LUCAS, *supra* note 66, at 97; POLLAUD-DULIAN, *supra* note 66, at 583–84.

[78] *See* discussion *infra* Part III.B.

[79] The predecessor to Article L. 131-6 is Loi 57-298 du 11 mars 1957 sur la propriété littéraire et artistique [Law 57-298 of March 11, 1957 on Literary and Artistic Property], J.O., Mar. 14, 1957, p. 2723,

publication of articles that were originally published in a printed newspaper.[80] The court ruled that the online use of the articles was an unforeseen distribution method and that the rights to this method were not transferred because there was neither an explicit contractual clause covering new uses nor any stipulated profit participation thereof.[81] Although this decision confirms the basic restrictions found in the wording of Article L. 131-6, it does little to reveal how much further these restrictions may reach in practice. The court makes no further comment on the scope or applicability of the norm.[82] In a similar case, *Le Figaro*,[83] journalists again complained that they had not granted permission for the online publication of their articles. Again, the court found no explicit agreement to the contrary and decided in favor of the journalists.[84]

¶25 It is unclear why the legislature introduced Article L. 131-6 at all. The legislative history does not provide a completely satisfying explanation. The provision first appeared as Article 38 of the Law of 1957, with no change in wording when it was incorporated into the current act as Article L. 131-6. The preparatory documentation of the 1957 Law sheds little light on the provision's reasoning. An extra-parliamentary commission introduced the provision relatively late in the process, without explaining the rationale or precise meaning. It generated no recorded debate.[85] According to some speculation, the provision's originated as a requirement that authors explicitly approve every new use, as set forth by a draft law from 1936.[86] The provision in the draft law was apparently intended to legislatively counteract a decision by the French Supreme Court for Judicial Matters in 1930,[87] which found a contract made prior to the invention of the gramophone record to include the right to distribute the work using this new method. However, earlier case law established that the use of new distribution methods requires an explicit agreement.[88] Because the decision was not in accordance with prior case law, the legislature may have felt the need to implement a unifying provision. The court may have simply overlooked the basic underlying concern, which had already been comprehensively addressed by other provisions in the course of the reform.[89]

¶26 Despite the lack of illuminating case law on Article L. 131-6 or its predecessor, French courts have indeed confirmed the strict treatment of contract clauses with regard

art. 38 (Fr.), *translated in Intellectual Property Code: Legislative Part*, LEGIFRANCE, http://195.83.177.9/upl/pdf/code_35.pdf (last updated Sept. 15, 2003).

[80] *See id.*

[81] Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Strasbourg, Feb. 3, 1998, JCP 1998, II, 10044 (Fr.), *translated in Symposium on Electronic Rights in International Perspective*, 22 COLUM.-VLA J.L. & ARTS app. at 199 (1998).

[82] In fact, it bases much of its decision on provisions found in employment law and the collective labor agreement between the parties.

[83] TGI Paris, Apr. 14, 1999, Légipresse 162, I, 69 & 162, III, 81 (Fr.).

[84] *Id.*; *see also* Betrand Delcros, *France: Journalists' Copyright and the Internet*, IRIS, May 1999, at 3, *available at* http://www.obs.coe.int/iris_online/iris_1999/5.pdf.

[85] *See* DESBOIS, *supra* note 68, at 641.

[86] *See* DREWES, *supra* note 53, at 94; *see also* Draft Law, *in* JEAN ESCARRA, JEAN RAULT & FRANÇOIS HEPP, LA DOCTRINE FRANÇAISE DU DROIT D'AUTEUR: ETUDE CRITIQUE A PROPOS DE PROJETS RECENTS SUR LE DROIT D'AUTEUR ET LE CONTRAT D'EDITION app. [THE FRENCH DOCTRINE OF COPYRIGHT: CRITICAL REVIEW ABOUT THE RECENT DRAFTS TO THE LAW ON COPYRIGHT AND PUBLISHING CONTRACTS] (2d ed. 1937) (Fr.).

[87] Cour de cassation [Cass.] [supreme court for judicial matters], May 10, 1930, D.P. 1932, I, 29 (Fr.).

[88] *See* DREWES, *supra* note 53, at 96.

[89] *See id.* at 95.

to the restrictive interpretation principle set forth in Article L. 122-7 and the specification requirement set forth in Article L. 131-3. Overly broad clauses that purport to grant all rights generally violate these provisions and would likely be rendered void.[90] The French Supreme Court for Judicial Matters has held that distribution methods without explicitly defined scope and purpose are not part of the contract and constitute infringement[91] and that clauses such as "all rights included" (*tous droits compris*) are invalid.[92] Furthermore, the principle of strict interpretation has led French courts to favor journalists in the many controversial cases of online publication rights.[93]

¶27 Thus, France, like pre-reform Germany, employs a generally restrictive approach toward new use right grants. Right transfers in copyright agreements are subject to strict rules of interpretation—courts tend to invalidate clauses that are worded broadly, as grants of unknown use rights generally must be.

D. Summary

¶28 This Part shows that France and pre-reform Germany have a restrictive approach to new use right grants. Broadly worded contract clauses that assign the rights to all future and unknown uses of a work are invalidated, generally preventing publishers from using unforeseen distribution methods without regaining explicit permission. While such copyright license restrictions are common in Europe, there are other legal systems with less regulation regarding new uses. The United States permits the voluntary transfer of unknown use rights, but such transfers are subject to author termination rights. The next Part explores the reasoning behind restraining the grant of rights to new uses in France and pre-reform Germany in order to understand the legislatures' desired goals.

III. LEGISLATIVE REASONING

¶29 The official legislative reasoning behind limiting the contractual freedom of the parties to known uses of a work is commonly distributive: according to lawmakers in countries that prohibit the grant of new use rights, the main goal is to allocate to authors the financial returns of their artistic works. This aim is regularly based on societal preferences, such as notions of fairness.[94] Although creators initially have control over their copyright,[95] some fear that creators might transfer their rights to new uses to publishers because creators face a variety of bargaining disadvantages when negotiating

[90] *See* Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Feb. 20, 1981 (Fr.); *see also* POLLAUD-DULIAN, *supra* note 66, at 584; Netanel, *supra* note 29, at 68.

[91] Cass., 1e civ., Nov. 28, 2000, Bull. civ. I, No. 308 (Fr.).

[92] Cass., 1e civ., Bull. civ. I, No. 2536 (Fr.).

[93] *See, e.g.*, CA Paris, 22e ch., June 9, 2009, 51 Revue Lamy droit de l'immatériel 2009, 1671 (Fr.); Le Progrès, TGI Lyon, July 21, 1999, Légipresse 166, I, 132 & 166, III, 156 (Fr.); *see also* Plurimédia, TGI Strasbourg, Feb. 3, 1998, Légipresse 149, I, 19 & 149, III, 22 (Fr.), *translated in* 22 COLUM.-VLA J.L. & ARTS 199 (1998); Le Figaro, TGI Paris, Apr. 14, 1999, Légipresse 162, I, 69 & 162, III, 81 (Fr.); LUCAS, *supra* note 66, at 98.

[94] The non-distributive economic argument of giving artists the returns from their works in order to incentivize artistic creation does not seem prevalent. Instead, legislative reasoning commonly follows natural rights theories. *See infra* Parts III.A-B.

[95] Legal systems that prohibit new use right grants generally do not employ a "work made for hire" doctrine as is known to U.S. copyright law.

with publishers. Therefore, they deem legal intervention necessary to ensure that authors are not "cheated" out of the intended wealth distribution. This Part traces the historical development of restrictions on transfers of new use rights in Germany and France and brings to light the intent and reasoning of the legislatures and courts behind implementing and upholding this contractual restriction.

¶30 To better understand the distributional reasoning for legal rules pertaining to the transfer of copyrights, it is helpful to summarize how and why these rights were allocated to authors in the first place.[96] Tracing these underlying principles helps to explain why many European countries have a strong focus on protecting authors and allocating wealth in their copyright laws.[97] This Part, therefore, briefly delves into the history of how copyrights initially emerged in Germany and France before it addresses the developments that led to the restrictions on transferring new use rights.

A. Germany

¶31 The first copyright protection in Germany came in the form of the privilege system. Local sovereigns granted letterpress printers (and later publishers) a temporary exclusive monopoly to prevent competitors from eroding the gains from their investments.[98] This system was abolished at the end of the nineteenth century, and philosophers began to propagate the concept of an author's moral rights, arguing that the author's intellectual property should comprise the right to control all reproduction and dissemination of the work.[99] As a result of this movement, new laws towards the end of the nineteenth century vested certain (restricted) rights in authors to prevent unauthorized reproduction of their works.[100]

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[96] What may seem logical today, in a legal world that automatically grants authors intellectual property, is based on entitlement choices which legal systems have made over the last two centuries. These are allocations that could just as well have been made differently. Indeed, looking at the history of copyright law, one finds that although the legal result—allocating distribution rights to the creators of artistic works—is quite similar across borders, the reasoning on which different countries have based their choices varies considerably.

[97] In other countries, such as the United States, the law has a slightly different history and purpose. U.S. copyright scholars may therefore find the premise of European copyright law of interest.

[98] This form of copyright protection was employed in the fifteenth and sixteenth century in Italy, Germany, France, England, and other European countries. *See* ELIZABETH ARMSTRONG, BEFORE COPYRIGHT: THE FRENCH BOOK-PRIVILEGE SYSTEM, 1498–1526, at 1–10 (1990); EUGEN ULMER, URHEBER- UND VERLAGSRECHT [COPYRIGHT LAW AND PUBLISHING] 51 (3d ed. 1980) (Ger.).

[99] In reference to propositions made by Immanuel Kant, see JOHANN CASPAR BLUNTSCHLI & FELIX DAHN, DEUTSCHES PRIVATRECHT [GERMAN PRIVATE LAW] 113 (3d ed. 1864) (Ger.); 1 OTTO GIERKE, DEUTSCHES PRIVATRECHT [GERMAN PRIVATE LAW] 762–66 (1895) (Ger.); ULMER, *supra* note 98, at 109–10.

[100] Gesetz betreffend das Urheberrecht an Schriftwerken, Abbildungen, musikalischen Kompositionen und dramatischen Werken [Law on the Copyright of Written Works, Pictures, Musical Compositions, and Dramatic Works], June 11, 1870, BGBL. I at 339 (Ger.); Kunstschutzgesetz [Art Conservation Act], Jan. 9, 1876, REICHSGESETZBLATT [RGBL.] I at 4 (Ger.); Photographieschutzgesetz [Photography Protection Act], Jan. 10, 1876, RGBL. I at 8 (Ger.); Gesetz betreffend das Urheberrecht an Werken der Literatur und der Tonkunst [LUG] [Law Relating to Copyright in Works of Literature and Music], June 19, 1901, RGBL. I at 227 (Ger.); Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie [KUG] [Law Relating to Copyright in Works of Fine Art and Photography], Jan. 9, 1907, RGBL. I at 27 (Ger.). Although another reason that this was politically possible was that the printers and publishers were also strongly in favor of a conception of authors' rights. For one, the territorial fragmentation of the country meant obtaining printing rights from many different local lordships, most of which charged high monopoly fees. Furthermore, the sovereigns were using the privilege system as a means of censorship by

¶32 Proponents of authors' moral rights regarded the protection of fiscal interests as a logical emanation of the basic right.[101] The German Federal Court of Justice officially recognized the author's right to compensation for the use of his work in a 1926 decision,[102] holding that the purpose of copyright was to allocate to the creator the monetary proceeds derived from a copyrighted work. The concept of granting authors the financial returns to their creations was confirmed by further case law[103] and finally established statutorily by new copyright laws in 1965, which granted all distribution rights to the author,[104] including the rights to future unknown uses of the work.[105] Thus, next to ideological interests, the main function of German copyright law, since the beginning of the nineteenth century, has been to secure for creators the financial returns generated by their work.[106]

¶33 When authors became legally entitled to the economic benefits derived from the use and distribution of their works at the end of the nineteenth century, their rights were initially fully transferable by contract ("translative").[107] However, the natural rights movement soon introduced the concept of a moral connection between author and creation. According to the monistic theory developed by German legal scholars, the material and immaterial interests protected by copyright were inextricably intertwined.[108] The resulting theory of constitutive transfer,[109] which holds that copyright is never fully transferable,[110] leaves the author with some moral and monetary authority despite granting licensing rights to others.[111]

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supervising and controlling printed media. Vesting reproduction rights in the authors would allow the printers and publishers to exclusively obtain these rights through contract, thereby granting them protection from competitors without leaving them at the mercy of the regional lords.

[101] ULMER, *supra* note 98, at 110; GIERKE, *supra* note 99, at 766.

[102] Der Tor und der Tod, RG May 12, 1926, 113 RGZ 413 (418) (Ger.).

[103] Grundig-Reporter, BGH May 18, 1955, 17 BGHZ 266 (Ger.).

[104] UrhG, Sept. 9, 1965, BGBL. I at 1273, § 15 (as adopted in 1965) (Ger.); *see also* Begründung zum Entwurf eines Gesetzes über Urheberrechte und verwandte Schutzrechte, Mar. 23, 1962, DEUTSCHER BUNDESTAG: DRUCKSACHE [BT] IV/270 (Ger.).

[105] BT IV/270, at 45.

[106] *See* Schulbuch, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 7, 1971, 31 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 229 (240) (Ger.); *see also* Schulze, *supra* note 62, at 556.

[107] Gesetz betreffend das Urheberrecht an Schriftwerken, Abbildungen, musikalischen Kompositionen und dramatischen Werken, BUNDES-GESETZBLATT DES NORDDEUTSCHEN BUNDES 339 § 3 (1870) (Ger.) ("Das Recht des Urhebers geht auf dessen Erben über. Dieses Recht kann beschränkt oder unbeschränkt durch Vertrag oder durch Verfügung von Todes wegen auf andere übertragen werden."). Similar paragraphs can be found in the Art Conservation Act (Ger.); Photography Protection Act (Ger.); LUG § 8(3) (Ger.); KUG § 10(3) (Ger.); *see also* MÖHRING & NICOLINI, *supra* note 63, at 223; ZSCHERPE, *supra* note 53, at 22.

[108] *See* ULMER, *supra* note 98, at 116; HAIMO SCHACK, URHEBER- UND URHEBERVERTRAGSRECHT [COPYRIGHT AND COPYRIGHT CONTRACT LAW] 62 (5th rev. ed. 2010) (Ger.).

[109] ULMER, *supra* note 98, at 359; GIERKE, *supra* note 99, at 762–66; SCHACK, *supra* note 108, at 170–72. For case law, see Wilhelm Busch, RG Feb. 16, 1929, 123 RGZ 312 (320) (Ger.).

[110] ZSCHERPE, *supra* note 53, at 22; Philipp Möhring, *Urheberrechtsverwertungsverträge in der Sicht der Urheberrechtsreform* [*Copyright Contracts in View of Copyright Law Reform*], *in* DAS RECHT AM GEISTESGUT: STUDIEN ZUM URHEBER-, VERLAGS- UND PRESSERECHT: EIN FESTSCHRIFT FÜR WALTER BAPPERT [THE LAW ON INTELLECTUAL GOODS: STUDIES OF COPYRIGHT, PUBLISHING AND MEDIA LAW: A COMMEMORATIVE PUBLICATION FOR WALTER BAPPERT] 129, 130–31 (Fritz Hodeige ed., 1964) (Ger.).

[111] MÖHRING & NICOLINI, *supra* note 63, at 224; STEFAN SCHWEYER, DIE ZWECKÜBERTRAGUNGSTHEORIE IM URHEBERRECHT [THE PURPOSE OF TRANSFER THEORY IN COPYRIGHT LAW] 16 (1982) (Ger.).

¶34 The issue of which rights authors could assign soon became a question of legislative importance. Publishers quickly adopted contract clauses that assigned publishers all economic rights over the author's work,[112] including rights to uses unknown at the time of the contract.[113] Discussing the 1900 legislation, some legislators expressed concern that inexperienced authors might sign away all their rights without understanding the magnitude and consequences of their legal actions.[114] Much of the literature over the next decades advocated a very restrictive interpretation of licensing contracts.[115] The publisher was to have only the rights that were explicitly granted in the contract or were necessary to fulfill the joint purpose of the contract.[116] These principles aimed to protect authors from relinquishing their rights unwittingly or due to economic hardship.[117]

¶35 Over the first half of the twentieth century, German courts extensively adopted these restrictive interpretation principles in the above-mentioned new use decisions, favoring authors and declaring sweeping, generalized clauses in copyright agreements to be void.[118] Because blanket clauses covering all distribution methods were no longer allowed, granting another person the rights to unknown uses of a work became *de facto* impossible. The copyright reform of 1965 finally codified the judicially developed principles of restrictive contract interpretation[119] by explicitly forbidding the grant of rights to unknown distribution methods. The courts had based their practice of restricting new use right grants on the above-described fundamental principle of German copyright

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[112] ULMER, *supra* note 98, at 386; Eugen Ulmer, *Das neue deutsche Urheberrechtsgesetz* [*The New German Copyright Act*], 45 ARCHIV FÜR URHEBER-, FILM-, FUNK-, UND THEATERRECHT [UFITA] 184, 288, 291, 294 (1965) (Ger.); *see also* MÖHRING & NICOLINI, *supra* note 63, at 224.

[113] DREWES, *supra* note 53, at 26, 46.

[114] *See* Bericht der elften Kommission über den Entwurf eines Gesetzes, betreffend das Urheberrecht an Werken der Literatur und der Tonkunst, BT 97/214, at 1281 (Ger.). Part of the commission even wanted to introduce a written specification obligation for all uses transferred in the contract. This was rejected due to its incompatibility with the principles of interpreting contracts in good faith. *See, e.g.*, BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Jan. 2, 2002, BGBL. I at 2909, § 157 (Ger.).

[115] *See* PHILIPP ALLFELD, KOMMENTAR ZU DEM GESETZE BETREFFEND DAS URHEBERRECHT AN WERKEN DER BILDENDEN KÜNSTE UND DER PHOTOGRAPHIE VOM 9. JANUAR 1907 [COMMENTARY ON THE LAW CONCERNING THE COPYRIGHT OF WORKS OF FINE ARTS AND PHOTOGRAPHY OF JANUARY 9, 1907], at 71 (1908) (Ger.); ALBERT OSTERRIETH, DAS URHEBERRECHT AN WERKEN DER BILDENDEN KÜNSTE UND DER PHOTOGRAPHIE: GESETZ VOM 9. JANUAR § 10.C.IV (1907) (Ger.); Wenzel Goldbaum, *Neues aus Theorie und Praxis des Urheberrechts* [*New Issues in the Theory and Practice of Copyright Law*], 1923 GRUR 182, 187 (Ger.).

[116] These positions led to the development of the specification requirement (Spezifizierungspflicht) and purpose of transfer theory (Zweckübertragungstheorie), respectively. They were developed mainly by Goldbaum. *See* SCHWEYER, *supra* note 111, at 1–2; ULMER, *supra* note 98, at 364; SCHACK, *supra* note 108, at 296; ZSCHERPE, *supra* note 53, at 30–31.

[117] SCHACK, *supra* note 108, at 296.

[118] *See supra* Part II.B; *see also* SCHWEYER, *supra* note 111, at 18–32. In one prominent decision that validated the grant, the court argued that the blanket clause covered the new use because—and only because—the contract included an explicit remuneration agreement. *See* Der Hampelmann, RG Apr. 5, 1933, 140 RGZ 255 (257–58) (Ger.). Had the author's financial interests not been sufficiently protected with regard to the new use, then the decision would have likely fallen into line with the others and rendered the clause invalid. *See* ZSCHERPE, *supra* note 53, at 32. The court thereby confirmed that the purpose of restricting contractual right grants was to secure authors' participation in the financial benefits.

[119] Such as the specification and the purpose of transfer rules. *See* UrhG, Sept. 9, 1965, BGBL. I at 1273, § 31(5) (as adopted in 1965) (Ger.). Section 29 stipulates that copyright is not transferable except in the case of succession upon death. *See id.* § 29; Begründung zum Entwurf eines Gesetzes über Urheberrechte und verwandte Schutzrechte, Mar. 23, 1962, BT IV/270, at 30, 55, 56 (Ger.).

law: that authors are to be secured participation in the financial profits of their work.[120] Although some commented that the interdependence of distribution methods might make coordination for publishers difficult,[121] there was generally little argument at the time regarding the adoption of § 31(4), because the new clause essentially codified what literature and case law had developed in practice over the previous decades.[122] The official explanatory statement on preventing new use right grants was that authors should be able to decide whether they are willing to permit distribution over a newly developed medium, and at what price.[123]

¶36 According to subsequent commentary and case law, the purpose of § 31(4) is to prevent authors from signing away rights of unknown economic value[124] and to assure them an opportunity to participate in the proceeds from distribution methods that arise after they sign the contract.[125] Although this prohibition constituted a rather severe restriction on the principle of freedom of contract,[126] its introduction was justified on the ground that authors are at a general disadvantage in dealing with publishers and are therefore unable to protect their own financial interests.[127] The literature argues that historically, authors have generally been the weaker contracting party and publishers generally stronger. This results in considerable disparity in bargaining power between the two parties.[128] In the first half of the twentieth century, publishers purchased the exclusive rights to artistic works at little cost and some of those works later enjoyed huge international success.[129] In general, the form and terms of publishing contracts are considered to be one-sided, in that they are constructed solely by the publisher without regard for the author's interests.[130] Without legal intervention, many believe this practice

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[120] CATHARINA MARACKE, DIE ENTSTEHUNG DES URHEBERRECHTSGESETZES VON 1965 [THE FORMATION OF THE COPYRIGHT ACT OF 1965] 729 (2003) (Ger.).

[121] *See* MÖHRING & NICOLINI, *supra* note 63, at 225.

[122] DREWES, *supra* note 53, at 40.

[123] *See* BT IV/270, at 56.

[124] SCHACK, *supra* note 108, at 298; WANDTKE ET AL., *supra* note 53, at 422; SCHRICKER, *supra* note 62, at 656–57; PHILIPP MÖHRING, KÄTE NICOLINI & HARTWIG AHLBERG, URHEBERRECHTSGESETZ: KOMMENTAR [COPYRIGHT ACT: COMMENTARY] 395 (Käte Nicolini & Hartwig Ahlberg eds., 2d ed. 2000) (Ger.); ZSCHERPE, *supra* note 53, at 34; Kabelfernsehen, OLG May 11, 1989, GRUR 590 (590), 1989 (Ger.).

[125] Gunda Dreyer, *§ 31 Ein räumung von Nutzungsrechten*, *in* GUNDA DREYER ET AL., URHEBERRECHT: URHEBERRECHTSGESETZ, URHEBERRECHTSWAHRNEHMUNGSGESETZ, KUNSTURHEBERGESETZ 420, 434 (Hans-Joachim Zeisberg ed., 2d ed. 2009) (Ger.); Schulze, *supra* note 62, at 556; ANNEKE SCHUCHARDT, VERTRÄGE ÜBER NEUE NUTZUNGSARTEN NACH DEM "ZWEITEN KORB" [CONTRACTS FOR NEW USES AFTER THE "SECOND BASKET"] 28 (2008) (Ger.); ZSCHERPE, *supra* note 53, at 35; Klimbim, BGH July 4, 1996, 133 BGHZ 281 (283) (Ger.); Der Zauberberg, OLG Oct. 31, 2002, GRUR 50 (53), 2003 (Ger.).

[126] *See, e.g.*, INITIATIVE URHEBERRECHT, STELLUNGNAHME: ENTWURF EINES ZWEITEN GESETZES ZUR REGELUNG DES URHEBERRECHTS IN DER INFORMATIONSGESELLSCHAFT [OPINION: SECOND DRAFT LAW GOVERNING COPYRIGHT LAW IN AN INFORMATION SOCIETY] 5 (2006) (Ger.), *available at* http://www.urheberrecht.org/topic/Korb-2/st/ra-2006-nov/teil-3/Schimmel.pdf (explaining that the principle of freedom of contract has been continuously confirmed through case law to be a fundamental German legal doctrine and is seen as an extension of the general principle of "freedom of action" in Article 2(1) of the German Constitution).

[127] DREWES, *supra* note 53, at 47–50; CHOI, *supra* note 15, at 181.

[128] ULMER, *supra* note 98, at 386; SCHWEYER, *supra* note 111, at 17.

[129] ULMER, *supra* note 98, at 386.

[130] SCHWEYER, *supra* note 111, at 17, 118.

leads to clauses that grant all-encompassing rights to the publisher, including the rights to uses unknown at the time of the contract.[131]

¶37 There are various assumptions put forth as to why authors are at a bargaining disadvantage and fail to sufficiently represent their own interests in contractual agreements. First, authors are subject to financial constraints that urge them to accept whatever contractual terms will offer them immediate payment.[132] Second, the author is presumably more dependent on the contractual agreement than the publisher due to insufficient competition in the publishing industry and the practice of take-it-or-leave-it offers.[133] Authors, as the economically weaker party, are thus forced to accept the contractual terms because they find themselves faced with the choice of granting all of their rights for a small—but better than nothing—fee, or not getting their work distributed at all.[134] The third assumption is that authors are less experienced and less knowledgeable than publishers when it comes to copyright agreements.[135] Therefore, publishers are generally considered to have a more powerful contracting position,[136] allowing them to reap most of the financial benefits that arise from distribution of authors' works.

¶38 Given this disparity between the contracting parties, freedom of contract will predictively lead to "undesired results."[137] Because the ensuing wealth distribution is not consistent with the legislature's preferences,[138] the state deems it necessary to intervene and restrict the grant of new use rights.[139] The prohibition in § 31(4) was therefore viewed as an important instrument to protect authors from the superior bargaining position of the publishing industry.[140] Section 31(4) accounted for the financial interests of creators and aimed to reallocate wealth from publishers to authors by improving their bargaining position. The next Part discusses whether these legislative fears of

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[131] JANI, *supra* note 64, at 104; ULMER, *supra* note 98, at 386; ZSCHERPE, *supra* note 53, at 33–34; DREYER ET AL., *supra* note 125, at 434; Schulze, *supra* note 62, at 547; SCHWEYER, *supra* note 111, at 118; Lütje, *supra* note 53, at 133.

[132] Christian C.W. Pleister, *Buchverlagesverträge in den Vereinigten Staaten—ein Vergleich zu Recht und Praxis Deutschlands* [*Book Publication Contracts in the United States—A Comparison to the Law and Practice in Germany*], 2000 GRUR INT. 673, 673 (Ger.); Gernot Schulze, *§ 32a Weitere Beteiligung des Urhebers*, *in* DREIER & SCHULZE, *supra* note 62, at 609 (Ger.); Begründung zum Entwurf eines Gesetzes über Urheberrechte und verwandte Schutzrechte, Mar. 23, 1962, BT IV/270, at 57 (Ger.).

[133] *See* P. Bernt Hugenholtz, The Great Copyright Robbery: Rights Allocation in a Digital Environment, Paper Presented at N.Y.U. School of Law Conference: A Free Information Ecology in a Digital Environment 2, 9–10 (Mar. 31–Apr. 2, 2000), http://www.ivir.nl/publications/hugenholtz/thegreatcopyrightrobbery.pdf; DREWES, *supra* note 53, at 47–48.

[134] DREWES, *supra* note 53, at 49.

[135] Schulze, *supra* note 132, at 609; BT IV/270, at 57; DREWES, *supra* note 53, at 48.

[136] Pleister, *supra* note 132, at 673.

[137] ULMER, *supra* note 98, at 386.

[138] *See id.* The purpose of German copyright law is to protect the author's right to the financial profits of her creations. *See supra* note 106.

[139] ZSCHERPE, *supra* note 53, at 33–34; DREYER ET AL., *supra* note 125, at 434; *see also* MARACKE, *supra* note 120, at 720.

[140] Schulze, *supra* note 62, at 547, 561; Gernot Schulze, *Vergütungssystem und Schrankenregelungen: Neue Herausforderungen an den Gesetzgeber* [*Compensation System and Fair Use: New Challenges for Lawmakers*], 2005 GRUR 828, 831 (Ger.); Oliver Castendyk & Jenny Kirchherr, *Das Verbot der Übertragung von Rechten an nicht bekannten Nutzungsarten—Erste Überlegungen für eine Reform des § 31 Abs. 4 UrhG* [*The Ban on the Transfer of Rights to Unknown Uses—Initial Considerations for a Reform of § 31 Para. 4 or the Copyright Act*], 47 ZUM 751, 755 (2003) (Ger.).

unfavorable wealth distribution are justified and whether the chosen method is an appropriate means of rectifying the situation from an economic point of view.

B. France

¶39 France, like Germany, also employed a system of privileges for printers and publishers beginning in the sixteenth century and becoming common in the seventeenth century. Its abolishment, however, came about far sooner and more abruptly than in fragmented Germany.[141] On the eve of the French Revolution, the privilege system was disestablished in 1789 by the August decrees[142] and replaced by legislation in 1791[143] and 1793.[144] One of the main goals of these revolutionary laws was to grant authors literary and artistic property, which was deemed "the most sacred, the most legitimate, the most unassailable, [and] . . . the most personal of all properties,"[145] because it stems from the fruits of authors' thoughts and intellectual creativity.[146] The laws of 1791 and 1793 therefore explicitly assigned copyright rights to authors.[147]

¶40 Initially, this intellectual "property" was freely transferable, either in part or completely.[148] The French Supreme Court for Judicial Matters confirmed this in 1842 and 1880, stating that, with certain exceptions unrelated to transferability, literary and artistic property was viewed under the law like any other form of property.[149] However,

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[141] *See* ULMER, *supra* note 98, at 58.

[142] Original documents in French printed in 1 J.M. ROBERTS, FRENCH REVOLUTION DOCUMENTS 151–53 (1966).

[143] Décret du 13–19 janvier 1791 relatif aux spectacles [Decree of January 13–19, 1791 Relating to Performances], COLLECTION COMPLÈTE DES LOIS, DÉCRETS, ORDONNANCES, RÉGLEMENS ET AVIS DU CONSEIL-D'ÉTAT [DUV. & BOC.] [COMPLETE COLLECTION OF LAWS, DECREES, ORDINANCES, REGULATIONS, AND NOTICES OF COUNCIL OF STATE] II, p. 174 (Fr.) (concerning the works of living playwrights).

[144] Décret du 19–24 juillet 1793 relatif aux droits de propriété des auteurs, compositeurs de musique, peintres et dessinateurs [Decree of July 19–24, 1793 on the Property Rights of Authors, Musicians, Painters, and Illustrators], DUV. & BOC. VI, p. 35, art. 1 (Fr.).

[145] LE CHAPELIER, RAPPORT FAIT: AU NOM DU COMITÉ DE CONSTITUTION, SUR LA PÉTITION DES AUTEURS, DRAMATIQUES, DANS LA SÉANCE DU JEUDI 13 JANVIER 1791, AVEC LE DÉCRET RENDU DANS CETTE SÉANCE [A REPORT OF FACTS: CONSTITUTIONAL COMMITTEE MEETING ON THE PETITION OF AUTHORS, THURSDAY JANUARY 13, 1791 WITH THE RENDERED DECREE] 16 (1971) (Fr.) (citing a 1777 parol by the famous French lawyer Cochu), *available at* http://www.juriscom.net/documents/RapportLeChapelier.pdf ("La plus sacrée, la plus légitime, la plus inattaquable, [et] . . . la plus personnelle de toutes les propriétés.").

[146] *See id.* It must be noted that this sentence, although widely cited as the origin of the author-oriented copyright system, is somewhat taken out of context, for Le Chapelier also strongly advocated the public interest in his report. *See* Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 1007–08 (1990). Indeed, the French laws of 1791 and 1793 set forth both the principle of authors' rights and the principle of limiting these rights due to a public interest in the dissemination of artistic works. *See* COLOMBET, *supra* note 68, at 5. It is also interesting to note that the first draft law which proposed to give authors legal recognition of their rights over their texts in 1790 was motivated not only by ideological theory, but also by an attempt to stem the tide of licentious ideas from the press by making authors responsible for their publications. *See* Anne Latournerie, *Petite histoire des batailles du droit d'auteur* [*Short History of Copyright Battles*], 5 REVUE MULTITUDES 37, 42 (2001) (Fr.).

[147] *See* COLOMBET, *supra* note 68, at 4–5 (assigning the right of representation); SCHADEL, *supra* note 70, at 22–24 (assigning the right of production).

[148] *See* Decree of July 19–24, 1793, art. 1 (Fr.) ("Authors . . . enjoy the exclusive right to . . . transfer that property in full or in part.").

[149] *See* PIERRE RECHT, LE DROIT D'AUTEUR, UNE NOUVELLE FORME DE PROPRIÉTÉ: HISTOIRE ET THÉORIE

around the end of the nineteenth century, many scholars began to oppose the free transferability of copyright on moral grounds, as part of the same natural rights movement that hit Germany.[150]

¶41 As in Germany, French legal scholars and policymakers were concerned about bargaining disadvantages between authors and publishers. They alleged that publishers were becoming increasingly cunning in their contracting, taking advantage of badly informed or incautious creators who were dependent on transferring their rights in order to distribute their works. According to the official statement of grounds for the 1954 draft law, it was deemed necessary to protect the proprietary interests of authors through state intervention, lest they be left at the mercy of the other party and come away nearly empty-handed.[151]

¶42 This legislative preference for wealth redistribution, arising from belief in authors' moral rights and the closely related goal of protecting authors' financial interests, led to a number of restrictions on copyright agreements in the Copyright Law of 1957, such as the specification requirement.[152] The explanatory statement accompanying the draft law expresses the paternalistic aim of providing authors some form of protection against themselves:

> The Articles 34, 35, 36, 37, 38 and 39 express to various degrees the same concern, namely the concern for protecting the author from his own incautiousness or diffidence which he sometimes displays in everyday life. The prohibition of granting the rights to future works, the reconsideration of the contract in cases of damage, the requirement of an explicit clause for the grant of a right to an unforeseeable and unforeseen use of a work—be it for the same reason or for a different reason than that of the right to revoke the contract—all protect the author from the dangers vested in uncertainty over the true value, the possible effects, and the deficiencies of his work that can inevitably arise in the moment of publication. Following this reasoning, it is regarded necessary that the author approve every performance, reproduction, translation, adaptation or rearrangement of his work.[153]

These provisions were carried over into the current law and French legal scholars continue to interpret the provisions as author-protective. According to French legal commentary, the paternalistic purpose of these rules is all the more important today in

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[THE COPYRIGHT, A NEW FORM OF PROPERTY: HISTORY AND THEORY] 50 (1969) (Fr.); *see also* COLOMBET, *supra* note 68, at 12.

[150] For a detailed overview, see RECHT, *supra* note 149, at 61–89; *see also* COLOMBET, *supra* note 68, at 13–14. According to the French legal scholars at the time, the author and his creation are united by an intimate moral bond which should not be fully severable. *See* RECHT, *supra* note 149, at 56–57; DESBOIS, *supra* note 68, at 538; *see also* Netanel, *supra* note 29, at 16. The French Copyright Act of 1957 codified this principle in Article 1(2) of the 1957 Law on Literary and Artistic Property. *See generally* Loi 57-298 du 11 mars 1957 sur la propriété littéraire et artistique [Law 57-298 of March 11, 1957 on Literary and Artistic Property], J.O., Mar. 14, 1957, p. 2723, art. 1(2); RECHT, *supra* note 149, at 61–89.

[151] *See* Draft Law on Literary and Artistic Property of June 9, 1954, Decree of the National Convention, official parliament document 8618, printed in 20 UFITA 75, 80–81 (1955).

[152] *See supra* Part II.C.

[153] *See* Draft Law on Literary and Artistic Property of June 9, 1954, Decree of the National Convention, official parliament document 8618, printed in 20 UFITA 75, 81 (1955).

light of the increasing use of contracts of adhesion in the publishing industry:[154] "Creators must be protected, their consent carefully weighed, and their rights scrupulously respected."[155] The specification requirement in Article L. 131-3[156] serves not only to facilitate contract interpretation, but also to prevent the author from carelessly assigning rights without being fully aware of their scope.[157]

¶43 The principle of strict interpretation in Article L. 122-7 also protects authors from signing away unlimited rights or misjudging the scope of the assignment.[158] The general protective measure resulting from these legislative fears is that an author must explicitly approve every method for distributing a work. Based on this provision, many commentators note that grants of rights to unknown uses are generally invalid.[159] If the parties list a few known distribution methods and also include a provision to cover known but unmentioned distribution methods, the protection intended by the specification requirement and other articles would be rendered completely ineffective.[160]

C. Summary

¶44 Copyright law in European countries such as Germany and France places a strong emphasis on securing for creators the financial returns from the distribution and sale of their work. Authors are often in a weaker bargaining position than publishers and thereby considered unable to adequately protect their financial interests in agreements containing new use right clauses. Allowing the free grant of rights to unknown uses of copyrighted works therefore presumes to create legislatively undesirable wealth distribution. Restricting the grant of new use rights aims to correct this imbalance and reallocate wealth to authors by restoring some of their bargaining power. A similar concern is evident in the ongoing discussions over author termination rights in the United States. Importantly, however, something is largely missing in most, if not all, of the legislative reasoning described in this Part: consideration of the market effects of this legislation. For this reason, the next Part turns to economic theory to ask whether it supports the distributional assumptions of the lawmakers.

IV. LAW AND ECONOMICS

¶45 The main reason legislatures give for intervening in the parties' freedom of contract is the intuitive assumption that authors lack the means to sufficiently protect their financial interests when entering into copyright agreements. Their bargaining disadvantage presumably results in an unequal wealth distribution that is more favorable to publishers. Restrictions on grants of new use rights thus aim to redistribute some of this wealth to authors. This Part looks at the legislative reasoning for this restriction from

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[154] GAUTIER, *supra* note 66, at 515.

[155] *Id.* ("[L]es créateurs doivent être protégés, leur consentement soigneusement soupesé, et leurs droits scrupuleusement respectés.").

[156] *See* discussion *supra* Part II.C.

[157] *See* POLLAUD-DULIAN, *supra* note 66, at 579; Fernay, *supra* note 72, at 261; COLOMBET, *supra* note 68, at 257.

[158] *See* POLLAUD-DULIAN, *supra* note 66, at 584.

[159] *See supra* Part II.C.

[160] *See* DESBOIS, *supra* note 68, at 641.

an economic perspective. Part IV-A examines, and finds plausible, the assumption that publishers enjoy a relative greater share of distributable wealth than authors in a system without intervention. Then, Parts IV-B and IV-C call into question whether the chosen solution is likely to achieve the intended goal of redistribution. Part IV-D concludes that a variety of costs prevent authors from reaping the intended financial benefits of their work, and that the distributional goal of the legislature may in effect be thwarted.

A. Distribution Effects Without Intervention

¶46 When picturing the freelance author at the contracting mercy of the powerful media conglomerate, intuition may suggest that authors are getting the short end of the stick. To best evaluate whether this is the case and why or why not, this Part draws upon economic concepts and considers the situation from a general market perspective.

¶47 Despite the use of economic welfare theory elements, it is important for the purpose of this Part to distinguish between loss of wealth due to economic market failure and the loss of distributable wealth to authors due to bargaining disadvantages that are irrelevant from a classic pareto-efficiency perspective.[161] The former case involves not only the author's loss, but also deadweight loss to society, which is the main concern of economic welfare theory and the basis of the justification for state intervention in contractual freedom.[162] The distribution effects that the legislators enacting restrictions on new-use-right grants are most concerned with, however, can also occur in a pareto-optimal situation. If the parties agree to terms that are optimal in this sense, this only means that they have maximized general available wealth in accordance with the first theorem of welfare economics;[163] it says nothing about to whom this wealth is allocated. The agreement over distribution of the surplus is contingent on the "bargaining ability of the parties."[164] Even without a classic market failure, authors may therefore still lack leverage and get the short end of the stick.[165] Whether this is a warranted ground for intervention from an economic welfare perspective, it is this issue of distribution that legislators are concerned with and aim to correct. Accordingly, this Part refrains from general welfare evaluations and instead examines whether authors are likely to receive a lesser share of the distributable wealth than publishers under full freedom of contract.

¶48 A somewhat simplifying, but realistic[166] assumption is that publishers in the media industry are commonly large firms, whereas authors are individuals. This Part therefore

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[161] Pareto efficiency is an economic welfare criterion that focuses on the joint surplus of the market participants. A situation is deemed pareto-optimal when joint surplus has been maximized so that it is impossible to improve one party's situation without making someone else worse off. However, how this surplus is distributed among the parties is not relevant at this stage, only that it is maximized. *See* GLOBAL ENCYCLOPAEDIA OF WELFARE ECONOMICS 217–19 (Sunil Chaudhary ed., 2009).

[162] Although even here government intervention is not necessarily supported; especially where the "inevitable drawbacks" of intervention are argued to outweigh the costs of the market failure. *See* HENRY SIDGWICK, THE PRINCIPLES OF POLITICAL ECONOMY 419 (1883); *see also* BERNARD SALANIÉ, THE MICROECONOMICS OF MARKET FAILURES 8 (MIT Press 2000) (1998) (Fr.).

[163] *See* SALANIÉ, *supra* note 162, at 1–4.

[164] Ariel Rubinstein, *Perfect Equilibrium in a Bargaining Model*, 50 ECONOMETRICA 97, 97 (1982) (internal quotation marks omitted).

[165] RICHARD A. POSNER, ECONOMIC ANALYSIS AND THE LAW 118 (7th ed. 2007).

[166] *See, e.g.*, INST. FOR INFO. LAW, STUDY ON THE CONDITIONS APPLICABLE TO CONTRACTS RELATING TO INTELLECTUAL PROPERTY IN THE EUROPEAN UNION: FINAL REPORT 1 (2002), *available at* http://ec.europa.eu/internal_market/copyright/studies/studies_en.htm; P.B. HUGENHOLTZ & L. GUIBAULT,

examines the postulation that, in comparison to publishers, authors are likely to be subject to more budget constraints, fewer outside options, less complete (asymmetric) information, and increased risk aversion. First, this Part discusses these concepts and their implications on the distributional outcomes of the bargaining process.

1. Relative Budget Constraints and Standardized Contracts

¶49 In classic economic models, individuals are often assumed to be subject to budget constraints, whereas firms are not.[167] Although this assumption can be (and has been) criticized as not entirely realistic,[168] it finds support in the fact that firms generally have much more capital at their disposal than individuals. One reason for this is the relative difference in credit constraints. In theory, market participants have the option to borrow against future capital, making budget constraints irrelevant. However, there are three reasons why individuals are at a disadvantage in the credit market.

¶50 First, individuals cannot easily borrow against earnings generated by human capital, because human capital is intangible and therefore unsuitable as collateral in credit markets.[169] Second, credit markets are subject to imperfections such as incomplete information. Missing knowledge about individuals and their projects can lead to moral hazard or adverse selection problems.[170] This causes credit rationing by lenders, who may make loans contingent on the size of the borrower's credit supply.[171] Because firms regularly have larger supplies, and are therefore more likely to get loans when credit is rationed, this also leads to a difference between the budget constraints of firms and those of individuals. Third, firms are less able to evade debt payments by moving,[172] whereas individuals who move are likely to create costly locating problems for creditors. These monitoring and tracking difficulties also lead to credit rationing,[173] and higher interest rates for individuals have been attributed to these costs.[174]

¶51 In sum, individuals are regularly limited by how much they can borrow, whereas firms are less financially constrained. Comparing the creators of copyrighted works to those who profit from the works, publishing firms are typically large businesses with far

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INST. FOR INFO. LAW, AUTEURSCONTRACTENRECHT: NAAR EEN WETTELIJKE REGELING? [COPYRIGHT CONTRACT LAW: TOWARDS A STATUTORY REGULATION?] iii–iv (2004) (Neth.), *available at* http://www.ivir.nl/publicaties/overig/auteurscontractenrecht.pdf, *translation available at* http://www.ivir.nl/publications/hugenholtz/Summary%2005.08.2004.pdf; ALBERT N. GRECO ET AL., THE CULTURE AND COMMERCE OF PUBLISHING IN THE 21ST CENTURY 10–15 (2007).

[167] *See* Kenneth J. Arrow, *The Firm in General Equilibrium Theory*, *in* THE CORPORATE ECONOMY: GROWTH, COMPETITION AND INNOVATIVE POTENTIAL 68 (Robin Marris & Adrian Wood eds., 1971); *see also* Kiyoshi Kuga, *Budget Constraint of a Firm and Economic Theory*, 8 ECON. THEORY 137 (1996).

[168] MICHIO MORISHIMA, CAPITAL AND CREDIT: A NEW FORMULATION OF GENERAL EQUILIBRIUM THEORY (1992); *see also* Kuga, *supra* note 167, at 138.

[169] *See* GARY S. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION 93 (3d ed. 1993); George J. Stigler, *Imperfections in the Capital Market*, 75 J. POL. ECON. 287, 288 (1967).

[170] Joseph E. Stiglitz & Andrew Weiss, *Credit Rationing in Markets with Imperfect Information*, 71 AM. ECON. REV. 393, 393 (1981).

[171] *Id.* at 395.

[172] Because they are comparatively immobile, but also for reasons of reputation.

[173] *See generally* Stephen D. Williamson, *Costly Monitoring, Financial Intermediation, and Equilibrium Credit Rationing*, 18 J. MONETARY ECON. 159 (1986).

[174] Oded Galor & Joseph Zeira, *Income Distribution and Macroeconomics*, 60 REV. ECON. STUD. 35, 38 (1993).

more access to credit than individual creators. Except for a few disproportionately successful (or otherwise endowed) artists, the majority of authors are unlikely to have financial means comparable to that of most publishing firms.[175] Unlike entities that have access to large reserves of capital, authors are commonly individuals engaged in high-risk projects and have only human capital to offer as collateral. Authors are therefore limited in how much they can borrow against future earnings compared to publishers.

¶52 That many authors are dependent on immediate income to provide for living expenses is often perceived as potential leverage against authors.[176] Some might even argue that such asymmetric bargaining positions could give rise to economic duress, if an individual's financial situation gives them no choice but to agree to the terms offered by the other party.[177] Because publishing firms often use standard form contracts, authors could face take-it-or-leave-it offers that they are ultimately financially dependent on accepting.[178] However, the mere fact that relative poverty and standard form contracts are common in an industry does not necessarily mean that there is asymmetrical bargaining power among the market participants. In a competitive market, operating with standardized contracts can have benefits for everyone[179]—for instance, when the costs of negotiating are high.[180] An important factor, therefore, is not whether one side has less capital or whether contracts can be bargained over, but rather whether there is sufficient competition among publishers to ensure favorable terms for authors.[181] Under the assumption of perfect competition (and general perfect market conditions)[182], budget constraints and contracts of adhesion alone should not affect the parties' bargaining power. However, they deserve mention, because they can weigh in quite heavily if certain prerequisites are missing. Budget constraints may also influence the parties' decision-making under risk, which will be discussed below.[183] The assumption of perfect competition is examined in the following.

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[175] For empirical data on artist incomes, see RICHARD E. CAVES, CREATIVE INDUSTRIES: CONTRACTS BETWEEN ART AND COMMERCE 79–81 (2000).

[176] *See supra* Part III; *see also* Schulze, *supra* note 132, at 609; Pleister, *supra* note 132, at 673.

[177] MARACKE, *supra* note 120, at 612; POSNER, *supra* note 165, at 115.

[178] Wilhelm Nordemann, *Vorschlag für ein Urhebervertragsgesetz* [*Proposal for a Copyright Contract Law*], 1991 GRUR 1, 2 (Ger.); *see also* ULMER, *supra* note 98, at 386.

[179] Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1220–25 (1983).

[180] 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 568 (3d ed. 2004); 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); M.J. Trebilcock, *The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords*, 26 U. TORONTO L.J. 359, 364–65 (1976).

[181] FARNSWORTH, *supra* note 180, at 572; Maureen A. O'Rourke, Column, *Copyright Liability of Bulletin Board Operators for Infringement by Subscribers*, 1 B.U. J. SCI. & TECH. L. 71, para. 12 (1995) ("In a competitive market, form contract terms may simply reflect the terms the parties would have agreed to had they expressly negotiated a contract."); POSNER, *supra* note 165, at 116.

[182] *See infra* Part IV.A.3 (discussing complete information as an assumption of general perfect market conditions). *See generally* ANDREU MAS-COLELL ET AL., MICROECONOMIC THEORY 307–507 (1995); ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 612–13 (7th ed. 2008); ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 224–31 (5th ed. 2008); NICHOLAS MERCURO & STEVEN G. MEDEMA, ECONOMICS AND THE LAW: FROM POSNER TO POSTMODERNISM AND BEYOND 60–67 (2d ed. 2006).

[183] *See infra* Part IV.A.4.

2. Monopsony Power

¶53 As discussed above, financial differences and standardized contracts are often cited to support the argument that authors are the weaker party in negotiating copyright licenses. Although sometimes viewed as an indication of bargaining power asymmetry,[184] contracts of adhesion do not immediately imply that the drafting party is offering unfavorable terms.[185] The same goes for budget restrictions. In theory, if there are competitors in the market, all publishers will seek to acquire authors' rights by providing more attractive terms than their rivals, successively improving the standard offer.[186] Therefore, so long as authors have sufficient outside options,[187] they will not suffer a bargaining disadvantage solely because of the wealth disparity between bargaining parties or because the contract terms are offered on a take-it-or-leave-it basis.

¶54 Insufficient outside options render one party better able to refuse cooperation, which can cause considerable bargaining power asymmetry.[188] According to monopsony theory,[189] a lack of outside options for the seller of a good (in this case, the author) will lead to a lower price than would occur if the market for the seller's services was competitive.[190] This causes both a direct loss of bargaining surplus for the author and a general deadweight loss to society.[191] Although no single publisher dominates the publishing industry, concentration of an industry to a handful of buyer entities may suffice to give them an advantage similar to that of a monopsony.

¶55 This situation also occurs in comparable markets, such as labor markets.[192] A low number of buyers in a market (also known as oligopsony) is likely to drive down the price and amount sold.[193] This means that a low number of publishers would secure copyrights from fewer authors for lower compensation than would be offered under perfect competition. The monopsony power in an oligopsony depends on the number of buyers and also on how they interact.[194] If the publishers in the market engage in lively

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[184] Kessler, *supra* note 179, at 632; W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971); Lewis A. Kornhauser, Comment, *Unconscionability in Standard Forms*, 64 CALIF. L. REV. 1151, 1162 (1976).

[185] Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 828–29 (2006); Kennedy, *supra* note 180, at 616.

[186] POSNER, *supra* note 165, at 116.

[187] "Outside options" refers to the alternatives that a party has to coming to an agreement with another party.

[188] *See, e.g.*, John C. Harsanyi, *Measurement of Social Power, Opportunity Costs, and the Theory of Two-Person Bargaining Games*, 7 BEHAV. SCI. 67, 74 (1962); COOTER & ULEN, *supra* note 182, at 230. For a description of this problem in labor markets, see ALAN MANNING, MONOPSONY IN MOTION: IMPERFECT COMPETITION IN LABOR MARKETS 5–6 (2003).

[189] Monopsony theory corresponds to monopoly theory, but refers to concentrated market power on the side of the buyer. *See* JACK HIRSHLEIFER ET AL., PRICE THEORY AND APPLICATIONS: DECISIONS, MARKETS, AND INFORMATION 364–65 (7th ed. 2005); JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 65 (1988) (Fr.); DAVID M. KREPS, A COURSE IN MICROECONOMIC THEORY 551 (1990).

[190] HAL R. VARIAN, INTERMEDIATE MICROECONOMICS: A MODERN APPROACH 473 (7th ed. 2006).

[191] *Deadweight loss*—meaning that even if one were to somehow redistribute the wealth after the fact, the system would be producing less in general. This matters to the distribution-oriented legislator insofar as there is less wealth to go around.

[192] *See* MANNING, *supra* note 188. A large number of workers with different job preferences are competing for labor contracts with a comparatively small number of possible employers.

[193] *See* PINDYCK & RUBINFELD, *supra* note 182, at 373–74.

[194] *See* VARIAN, *supra* note 190, at 480–502 (pertaining to oligopoly, but with the same effect). Monopsony power also depends on the elasticity of market supply. Theoretically, in a market, the supply

price competition, their monopsony power and the negative effects on the amount offered for new use rights will be small.[195] However, if they engage in quantity competition, are less competitive, or even collaborate with each other, then it is realistic to assume that authors will be left with fewer options and suffer price cuts.[196]

¶56 As mentioned, in this regard, artistic markets can be compared to labor markets, to which oligopsonistic qualities are attributed.[197] Furthermore, looking at publishing industries across the globe, the buyer market is often substantially concentrated.[198] A number of studies using a variety of different methods have found that the concentration in most media industries has grown over the last century.[199] This indicates that many sectors of the artistic and entertainment publishing industry are dominated by an increasingly small number of international conglomerates.

¶57 For example, today's music recording industry is commonly known to comprise four major labels (the "big four"): Universal Music Group, Sony Music Entertainment, Warner Music Group, and EMI, which many assert to be oligopsonistic or even a "cartel."[200] While the latter claim is unconfirmed, studies do reflect the substantial market power of these conglomerates, finding that the industry is indeed controlled by a mere handful of firms.[201] Many assert a similar situation for book publishers. Studies find that the industry has become concentrated on an increasingly global scale over the last few decades, and a few large publishing corporations now own what used to be a

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of a good will increase when a higher price is offered, and vice versa. Elasticity refers to how quickly the supply side can react to price changes. If the amount of supply can adapt very quickly, this can serve to undermine monopsony power. *See* PINDYCK & RUBINFELD, *supra* note 182, at 377–78. Although the number of artistic creations may increase or decrease in the long run given the average amount offered to artists for their rights, it is unlikely that price changes would be able to cause short-term reactions in the supply of works of authorship, which are not cranked out on an assembly line and require much personal input. Since supply in this particular market is therefore highly inelastic, it cannot serve to weaken the monopsony power of publishers.

[195] For the corresponding case of oligopoly, see MAS-COLELL ET AL., *supra* note 182, at 389 (noting that Bertrand competition is unrealistic in many settings); *see also* VARIAN, *supra* note 190, at 495.

[196] *See* VARIAN, *supra* note 190, at 501.

[197] *See* MANNING, *supra* note 188.

[198] *See, e.g.*, *Ultra Concentrated Media: Selling Brands*, NEW INTERNATIONALIST, Apr. 2001, at 18, *available at* http://www.newint.org/features/2001/04/01/facts/; BERND-PETER LANGE, MEDIENWETTBEWERB, KONZENTRATION UND GESELLSCHAFT: INTERDISZIPLINÄRE ANALYSE VON MEDIENPLURALITÄT IN REGIONALER UND INTERNATIONALER PERSPEKTIVE [MEDIA COMPETITION, CONCENTRATION AND SOCIETY: INTERDISCIPLINARY ANALYSIS OF MEDIA PLURALISM WITH A REGIONAL AND INTERNATIONAL PERSPECTIVE] 101–15 (2008) (Ger.); Pleister, *supra* note 132, at 673–74 (describing a stronger concentration in the United States than in Germany, but finding concentration tendencies in both countries); Michael Szenberg & Eric Youngkoo Lee, *The Structure of the American Book Publishing Industry*, 18 J. CULTURAL ECON. 313, 314 (1994); GRECO ET AL., *supra* note 166; *see also* Nordemann, *supra* note 178, at 1–2; Hugenholtz, *supra* note 133, at 9–10.

[199] THE SAGE HANDBOOK OF MEDIA STUDIES 296 (John D.H. Downing et al. eds., 2004).

[200] *See, e.g.*, Patrick Burkart, *Loose Integration in the Popular Music Industry*, RED ORBIT (Oct. 3, 2005), http://www.redorbit.com/news/technology/258795/loose_integration_in_the_popular_music_industry/.

[201] Peter J. Alexander, *Entropy and Popular Culture: Product Diversity in the Popular Music Recording Industry*, 61 AM. SOC. REV. 171, 174 (1996) (comment on Richard A. Peterson & David G. Berger, *Cycles in Symbol Production: The Case of Popular Music*, 40 AM. SOC. REV. 158 (1975)) (noting "six large international firms account for nearly 98 percent of the output" of the music recording industry); Mike Jones, *Market Research*, *in* CONTINUUM ENCYCLOPEDIA OF POPULAR MUSIC OF THE WORLD: MEDIA, INDUSTRY AND SOCIETY 554, 555 (John Shepherd et al. eds., 2003) ("[R]ecord-making is dominated by five major, globally active firms . . . with the effect that certain techniques and practices . . . have come to be standardized among and between these companies.").

large number of independent entities.[202] Another prominent example is the film production industry, which since its inception has been oligopsonistic.[203] Since the 1920s, seven major production companies dominated the motion picture sector, provoking a large antitrust case in 1948.[204] Although over time, this structure has somewhat altered and the number of independent film studios has increased, studies find that the "majors" continue to exert large economic power, thus maintaining the oligopsonistic qualities of the industry.[205] Similar developments and structures are reported for sectors of the entertainment and news media industry, where publishers are increasingly large and international and there are fewer firms in the publishing industry.[206]

¶58 A related parallel development is media convergence. The borders between different publishing sectors are disappearing as traditional distribution methods become multimedia-based or digital, and firms begin to expand their areas of expertise to encompass more than one form of distribution.[207] Many publishers no longer focus on just one type of work, such as news media, books, music, or films; rather, they are involved in publishing works of multiple, or even all, types.[208] This development could cause the degree of power concentration in the publishing industry to be underestimated in many of the above-mentioned studies, which measure within specific markets and not across segments.[209]

¶59 Furthermore, there is anecdotal evidence of insufficient competition between publishers in practice.[210] Even though some claim that these developments do not prove the prevalence of monopsony power in all creative markets,[211] the concentration of the

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[202] *See, e.g.*, JOHN THOMPSON, CONCENTRATION AND INNOVATION IN THE BOOK PUBLISHING INDUSTRY: FULL RESEARCH REPORT (2008), *available at* http://www.esrc.ac.uk/my-esrc/grants/RES-000-22-1292/outputs/read/08a1471c-cb6a-433f-999e-eb322e9c00d0; Szenberg & Lee, *supra* note 198, at 314; Pleister, *supra* note 132, at 673–74.

[203] THE AMERICAN FILM INDUSTRY 253 (Tino Balio ed., rev. ed. 1985).

[204] Michael Storper & Susan Christopherson, *Flexible Specialization and Regional Industrial Agglomerations: The Case of the U.S. Motion Picture Industry*, 77 ANNALS ASS'N AM. GEOGRAPHERS 104, 106 (1987).

[205] Asu Aksoy & Kevin Robins, *Hollywood for the 21st Century: Global Competition for Critical Mass in Image Markets*, 16 CAMB. J. ECON. 1 (1992); Murray Smith, *Theses on the Philosophy of Hollywood History*, *in* CONTEMPORARY HOLLYWOOD CINEMA 3, 8 (Steve Neale & Murray Smith eds., photo. reprint 2003) (1998); *see also* Allen J. Scott, *A New Map of Hollywood: The Production and Distribution of American Motion Pictures*, 36 REGIONAL STUD. 957, 959 (2002).

[206] *See* BEN H. BAGDIKIAN, THE NEW MEDIA MONOPOLY (2004); Alan B. Albarran & John Dimmick, *Concentration and Economics of Multiformity in the Communication Industries*, 9 J. MEDIA ECON. 41, 48–49 (1996); Henry Jenkins, *The Cultural Logic of Media Convergence*, 7 INT'L J. CULTURAL STUD. 33, 33 (2004) (pointing out the "alarming concentration of the ownership of mainstream commercial media, with a small handful of multinational media conglomerates dominating all sectors of the entertainment industry").

[207] Hugenholtz, *supra* note 133, at 9–11.

[208] CAVES, *supra* note 175, at 314; Nordemann, *supra* note 178, at 1.

[209] *See* Alan B. Albarran, *Media Economics Research: Methodological Perspectives and Areas for Future Development*, 8 PALABRA CLAVE 115 (2005), *available at* http://palabraclave.unisabana.edu.co/index.php/palabraclave/article/viewFile/1463/1631.

[210] Statement of the Authors Guild on "The Continuing Trend To Concentration of Power in the Book Publishing Industry," paper presented at the Federal Trade Commission Symposium on Media Concentration, Washington, D.C., Dec. 14–15, 1978; Scott, *supra* note 205, at 961; Michael Black & Douglas Greer, *Concentration and Non-price Competition in the Recording Industry*, 3 REV. INDUS. ORG. 13 (1986); STEPHEN G. HANNAFORD, MARKET DOMINATION!: THE IMPACT OF INDUSTRY CONSOLIDATION ON COMPETITION, INNOVATION, AND CONSUMER CHOICE 26–27 (2007).

[211] Michael Rushton, *The Law and Economics of Artists' Inalienable Rights*, 25 J. CULTURAL ECON.

industry to fewer publishing entities can fully suffice to weaken the bargaining position of authors. As mentioned above, the deadweight loss associated with market failure due to monopsony power is not primarily what the legislators are concerned with in this context. The current examination is restricted to the question of whether the distributional outcome they claim is economically plausible. As shown above, if there is indeed monopsony power, authors may suffer considerable losses due to both general market failure and their individual lack of distributive bargaining power. However, even a weaker form of concentration or low-level competition among publishers, oligopsony or not, is likely to lead to authors receiving less of the distributable wealth. As the number of buyers in a market decreases, an author's outside options decrease relative to those of the publisher with whom he is bargaining.

¶60 This Part, so far, confirms that the legislative fears of author bargaining disadvantages are, at the very least, plausible. The next Part examines an additional factor that may contribute to market failure, in the worst case, and may cause bargaining disadvantages (and as a result, distributive effects) in any case: the presence of asymmetric information.

3. Incomplete and Asymmetric Information

¶61 Another argument encountered in the legislative discussion is that authors are at a bargaining disadvantage due to the difficulty of determining the future value of their work.[212] Economic theory assumes that uncertainty of future values is factored into the negotiation as probabilities. So long as both parties know the expected value,[213] there is no reason to assume that one of them is at a bargaining disadvantage simply because the true monetary worth is unknown at the time of the contract. However, if there is reason to believe that one party has more accurate information about the expected value than the other, problems may arise.

¶62 In many markets, the seller often has better information about the true worth of the good than the buyer.[214] In the case of exclusive rights, it is likely to be the other way around. Publishing firms, which employ teams of experts and have years of experience and know-how in distributing and marketing artistic works, will generally have far better knowledge of the probabilities that a certain work will be successful enough to achieve distribution over future media, and of the expected revenues. Indeed, it has been argued that one of the reasons that publishing firms exist is that they offer the asset of superior knowledge of the industry and thus can function as gatekeepers.[215] The author selling the rights, on the other hand, is generally (and plausibly) believed to be less experienced in

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243, 250 (2001) (questioning the existence of monopsony power among art dealers); *see also* GRECO ET AL., *supra* note 166, at 15; Szenberg & Lee, *supra* note 198, at 321 (both questioning economically relevant monopsony power in book publishing).

[212] *See supra* Part III; *see also* DREWES, *supra* note 53, at 48–49; H.R. REP. NO. 94-1476, at 124 (1976); Mills Music, Inc. v. Snyder, 469 U.S. 153, 172–73 (1985).

[213] For purposes of this Article, expected value equals the weighted average of all possible payoffs multiplied by their respective probabilities.

[214] *See* VARIAN, *supra* note 190, at 694–95; MICHAEL FRITSCH ET AL., MARKTVERSAGEN UND WIRTSCHAFTSPOLITIK: MIKROÖKONOMISCHE GRUNDLAGEN STAATLICHEN HANDELNS [MARKET FAILURE AND ECONOMIC POLICY: MICROECONOMIC FOUNDATIONS OF NATIONAL GOVERNANCE] 284 (7th ed. 2007) (Ger.).

[215] CAVES, *supra* note 175, at 52–56.

such business matters.[216] Because authors are aware that publishers have better information and that they suffer disadvantages due to this asymmetry, a theoretical question is why they do not simply acquire the missing information. That they tend to remain "ignorant" is not necessarily attributed to irrational behavior such as laziness or lack of mathematical ability, but can be sufficiently explained by the fact that the costs of acquiring the necessary information are too high.[217] It would be impossibly difficult for most authors to gather enough experience and knowledge to successfully compete with a publishing firm. Essentially, the author is burdened with much greater costs of missing information than the publisher.

¶63 Given that authors are generally uninformed regarding the true value of their rights, the prices that authors are willing to sell for are not optimal.[218] This could mean that a number of authors may be selling their rights for too little, but also, theoretically, that some may be overestimating the expected value of their work.[219] However, since publishers are better informed, they will have a lower reservation price, leaving authors who value their rights too highly with the choice of selling for less, or not having their work distributed at all.[220] Additionally, authors having fewer outside options and being subject to financial constraints can serve to further drive down the price, even for those authors who value their rights highly. Those who underestimate the value of their exclusive rights because of the information asymmetry will suffer a loss in any case.

¶64 This Part has assumed that author and publisher are operating with different expected values. But even if this were not the case, and both parties were fully informed as to the true probabilities on which the expected future value is based, the balance in bargaining power between authors and publishers would be impacted by another concern: how the parties manage uncertainty and risk. The next Part examines this factor.

4. Uncertainty and Risk Aversion

¶65 When initially entering into the contract, the author is faced with a choice: sell the rights to the unknown uses of a work, for which a certain amount of money will be paid immediately, or hold out in anticipation of a potential future distribution method with the hopes of selling for a higher price in the future. In this situation, opting to withhold the rights and turning down the offer of immediate payment involves considerable uncertainty around three aspects of the transaction in particular. First, there is uncertainty regarding the long-term commercial value of the work itself, because generally, the market success of creative works is extremely difficult to predict.[221] Then, there is uncertainty regarding the invention and marketability of new methods with which the

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[216] *See, e.g.*, Dino Joseph Caterini, *Contributions to Periodicals*, 10 COPYRIGHT L. SYMP. (ASCAP) 321, 378 (1959); Marvel Characters, Inc. v. Simon, 310 F.3d 280, 292 (2d Cir. 2002) (stating that the need to protect authors from "more sophisticated entities" is a policy concern).

[217] *See* VARIAN, *supra* note 190, at 694; COOTER & ULEN, *supra* note 182, at 228; POSNER, *supra* note 165, at 116.

[218] *See* MAS-COLELL ET AL., *supra* note 182, at 436; MERCURO & MEDEMA, *supra* note 182, at 66.

[219] FRITSCH ET AL., *supra* note 214, at 287–88.

[220] A classic outcome of information asymmetry in consumer markets is that less trade takes place than is optimal. *See* MAS-COLELL ET AL., *supra* note 182, at 437.

[221] CAVES, *supra* note 175, at 2–3; *see also* ARTHUR DE VANY, HOLLYWOOD ECONOMICS: HOW EXTREME UNCERTAINTY SHAPES THE FILM INDUSTRY 2 (2004); ALBERT N. GRECO, THE BOOK PUBLISHING INDUSTRY 5–6 (2d ed. 2005); Jones, *supra* note 201, at 555–56.

work could be distributed, and the point in time this would occur.[222] Furthermore, there is uncertainty regarding the potential profits to be made with the new distribution methods.

¶66 The parties calculate the expected future value of the rights by using the probabilities of these outcomes.[223] In theory, the expected value is simply the weighted average value of all possible payoffs. When comparing actual value (the price offered *ex ante*) for new use rights with expected value (the future price expected, adjusted for the risk that the amount will be less or nothing) when the values are equal, there is no immediately apparent reason to prefer one over the other. A risk-neutral person will in fact be indifferent when choosing between a certain payoff and an uncertain payoff of equal expected value. A risk-averse person, however, will not be. In particular, a risk-averse person will prefer an option in which they are certain to receive the amount offered over an option in which it is highly uncertain whether they will receive the amount offered, even if the expected value of the latter is larger.[224]

¶67 Of course, in the case of new use right contracts, both parties face the same probabilities.[225] The expected values and variabilities are no different for the publisher, because the firm bears the exact same risks when making the decision whether to purchase either now or later. However, discrepancies in choice may emerge when authors and publishers hold differing attitudes towards risk.

¶68 Individuals are generally assumed to be risk-averse when it comes to their basic income.[226] Firms, on the other hand, are assumed to be risk-neutral.[227] There are two reasons for this assumption. First, firms are able to reduce risk through diversification. This means that they disperse risk by engaging in a large number of different projects, the successes and failures of which are independent from one another. Even though the individual projects may be highly risky, they will balance themselves out in the aggregate.[228] Because firms are able to diversify on a much larger scale than most individuals, they are comparatively less exposed to concentration risk. Second, firms are believed to be more risk-neutral regarding individual transactions because of the difference in available capital. As discussed above,[229] individuals are subject to more limiting budget constraints than firms. Since absolute risk aversion is negatively

[222] Although copyrights can last for over a century (the long time-period increases the chances of commercial possibilities in unforeseen media), authors may not care as much about profits made after they are dead.

[223] To the extent the outcomes are known, see *supra* Part IV.A.3.

[224] VARIAN, *supra* note 190, at 224–25. For experimental evidence on risk aversion, see, for example, Charles A. Holt & Susan K. Laury, *Risk Aversion and Incentive Effects*, 92 AM. ECON. REV. 1644 (2002).

[225] *But see supra* Part IV.A.3 for incomplete information. Assuming, as above, that the author has less information upon which to base the calculation of the probabilities than the publisher, this will increase variability, leading to higher risk. *See* PINDYCK & RUBINFELD, *supra* note 182, at 174.

[226] *See, e.g.*, KENNETH J. ARROW, ESSAYS IN THE THEORY OF RISK-BEARING 91 (3d ed. 1976) (claiming durability of the risk aversion hypothesis); Michael G. Allingham & Agnar Sandmo, *Income Tax Evasion: A Theoretical Analysis*, 1 J. PUB. ECON. 323, 324 (1972); Joop Hartog, Ada Ferrer-i-Carbonell & Nicole Jonker, *Linking Measured Risk Aversion to Individual Characteristics*, 55 KYKLOS 3, 9 (2002).

[227] COOTER & ULEN, *supra* note 182, at 51; *see also, e.g.*, Thomas J. Rothenberg & Kenneth R. Smith, *The Effect of Uncertainty on Resource Allocation in a General Equilibrium Model*, 85 Q.J. ECON. 440 (1971); Kenneth R. Smith, *The Effect of Uncertainty on Monopoly Price, Capital Stock and Utilization of Capital*, 1 J. ECON. THEORY 48 (1969).

[228] *See* VARIAN, *supra* note 190, at 228–30.

[229] *See supra* Part IV.A.1.

correlated with wealth,[230] this creates a difference in risk attitudes between the author and publisher because the publishing firm has more capital at its disposal. The author's preference for certain income over uncertain income would lead to *ex ante* transfers of new use rights for prices that are lower than the expected future value.[231] The distributional implications would confirm the legislative intuition that publishers garner a comparatively higher share of the wealth generated by copyrighted works.

5. Implications

¶69 If authors are comparatively subject to budget constraints, fewer outside options, and incomplete information, publishers will likely reap a larger part of the bargaining surplus in contract negotiations. Furthermore, risk aversion may motivate authors to sell their rights for less than if they were to take the full expected value into account. The combined effect would be a wealth distribution that is more favorable to publishers. Therefore, the legislative assumption regarding the distributional outcome in absence of intervention appears likely from an economic perspective. Next, this Article analyzes the effects of the legislative solution.

B. Grant Restrictions and Transaction Costs

¶70 Because of the above-discussed legislatively undesired distributional outcome, restricting the grant of exclusive rights to unknown uses aims to reallocate wealth to authors. Indeed, inalienably vesting the rights to unforeseen distribution methods in the author until such methods become known seems likely to reduce uncertainty and provide further opportunity for creators to bargain over the financial benefits derived from their work.[232] Accordingly, the legislative decision to restrict the granting of rights for new uses appears to strengthen the author's financial position. However, this Part examines the effects of the restriction from a market-cost viewpoint to determine whether the legislative goal is likely to be achieved through these means.

¶71 One of the economic differences between a legal system that allows or prohibits the grant of new use rights is that the latter inevitably leads to contract renegotiation. When an unforeseen use arises, the distribution of the work over the new medium is contingent on a new license agreement between the publisher and the copyright owner. The compulsory contract negotiation raises a variety of theoretical issues. This Part focuses on important issues that are practically relevant—namely, the costs incurred by additional contracting at a later stage.

¶72 Generally, high transaction costs will lead not only to higher expenses for individual contracting parties, but can also result in costs to society by making socially desirable market exchange more difficult. For this reason, much of traditional and

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[230] MAS-COLELL ET AL., *supra* note 182, at 192–93; *see also* VARIAN, *supra* note 190, at 189; PINDYCK & RUBINFELD, *supra* note 182, at 168 ("The extent of an individual's risk aversion depends . . . on the person's income."); JEAN-JACQUES LAFFONT, THE ECONOMICS OF UNCERTAINTY AND INFORMATION 24 (John P. Bonin & Hélène Bonin trans., MIT Press 1989) (1986).

[231] *See* Kalyan Chatterjee & William Samuelson, *Bargaining Under Incomplete Information*, 31 OPERATIONS RES. 835, 848 (1983).

[232] At least in so far as the author can capture part of the bargaining surplus within the constraints of the above-described bargaining asymmetries.

contemporary law and economics research aims to increase social welfare by structuring legal rules so that endogenous and unnecessary transaction costs are minimized.[233] However, the analysis in this Article focuses on the positive question of whether the legal rule imposed by the legislature is likely to bring about an improvement in authors' financial situations by redistributing the bargaining surplus. Social costs are therefore only considered to the extent that a general reduction of wealth may decrease the wealth available for distribution to authors. Below, this Article describes the transaction costs that are likely to arise in new use contracting situations, as well as their implications for the distributional outcome.

1. Search and Information Costs

¶73 Under a system that prohibits the *ex ante* grant of rights, the parties are required to renegotiate a new license agreement when a new use of the copyrighted work arises. This means that the publisher who wishes to distribute a licensed copyrighted work over a new medium must first identify and locate the current right holder. The phrase "current right holder" extends beyond the original author; copyrights are transferable and inevitably change hands.[234] Because there is no mandatory registry for copyright ownership,[235] locating and contacting the responsible party years or decades after the initial grant of rights may require considerable effort.

2. Bargaining Costs

¶74 The publisher's next cost-incurring step is to renegotiate a license agreement or, at the very least, to obtain clearance from the right holder.[236] There is also a risk that the right holder will be unwilling to enter into an agreement. This risk raises uncertainty and decreases the expected return from bargaining.

3. Enforcement Costs

¶75 Under a restrictive system, there is likely to be uncertainty regarding the enforcement of the original copyright agreement, because the legal definition of new use has proven extremely difficult to establish.[237] Because each media development can give

[233] *See* COOTER & ULEN, *supra* note 182, at 96–97.

[234] For instance, by contractual agreement or when the original author is deceased. As mentioned above, copyright terms generally last for over a century. *Supra* note 6.

[235] The Berne Convention for the Protection of Literary and Artistic Works, which has been ratified by 165 countries (as of February 2012), establishes in Article 5(2) that copyright ownership cannot be dependent on formal registration. *See Berne Convention Contracting Parties*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 (last visited Feb. 22, 2012); Berne Convention for the Protection of Literary and Artistic Works art. 5(2), July 24, 1971, 1161 U.N.T.S. 30 (as amended on Sept. 28, 1979) .

[236] One could argue that the pure bargaining costs are at least as high for an initial negotiation in which a new use right agreement must be reached (as opposed to a system in which it is clear that these belong to the author, reducing bargaining costs). However, practice suggests that new use rights are often not bargained over and simply included in contracts as boilerplate clauses, while costly negotiation seems more likely to occur after a new use has arisen and there is something tangible to negotiate.

[237] Legal commentators claim of the previous system in Germany that, as a result of this difficulty, every major new media development led to uncertainty and litigation that lasted for up to two decades. *See* Nikolaus Reber, *Digitale Verwertungstechniken—neue Nutzungsarten: Hält das Urheberrecht der*

rise to a legal battle over whether the use is considered new in a legal sense, the probability that an initial grant of rights may lead to costly litigation in the future is likely to generate enforcement costs.[238]

¶76 Another uncertainty relates to the scope of the first license. Assuming the two uses are substitutable, meaning the old use may be replaced by the new use, the old agreement may produce more restricted rights and returns than initially assumed. Instead of being able to secure an all-encompassing copyright, independent of media form, the publisher must factor in the risk that the market segment for the granted use is appropriated by a new media development at some uncertain time in the future. While this uncertainty would lower the amount the publisher is willing to pay, it would theoretically lower the author's price limit as well, because the smaller expected value of the grant will raise willingness to sell.

¶77 The uncertainty with regard to litigation costs, on the other hand, has an effect on the parties' joint bargaining space. In negotiating the initial agreement, the expected cost of enforcement may drive down the publisher's reservation price (the maximum price the publisher is willing to pay). At the same time, the author's reservation price (the minimum price the author is willing to accept) would be influenced in the opposite direction. This leaves less bargaining room and may preclude *ex ante* agreements. The risk of a costly legal battle over who owns the right to which use will not occur where new use rights are clearly granted before the occurrence.[239]

4. Tragedy of the Anticommons

¶78 The transaction costs described above are all magnified by what is commonly called the tragedy of the anticommons.[240] This concept pertains to a market inefficiency that arises when (property) rights to complementary assets are fragmented and there are too many different owners. Excessive fragmentation of ownership in a market leads to higher transaction costs, including coordination difficulties and the danger of individuals

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technischen Entwicklung noch stand? [*Digital Distribution Technologies—New Uses: Keeping Copyright Law of Technical Development Standing Still?*], 1998 GRUR 792, 793, 798 (Ger.); Mathias Schwarz, *Das "Damoklesschwert" des § 31 Abs. 4 UrhG—Regelungsbedarf für neue Nutzungsarten* [*The "Sword of Damocles" of § 31 Para. 4 of the Copyright Act—Regulatory Requirements for New Uses*], 47 ZUM 733, 735–36 (2003) (Ger.).

[238] A good example is a German Federal Court of Justice decision from 2005, *Der Zauberberg*, BGH May 19, 2005, GRUR 917, 2005 (Ger.), which—after twenty years of legal ambivalence—finally clarified whether or not the distribution of video content over DVD qualified as an "unforeseen new use." *See* SCHUCHARDT, *supra* note 125, at 35–46.

[239] However, as mentioned above, there is a considerable amount of case law in the United States, a country that allows the voluntary transfer of new use rights, regarding instances where the intent of the parties is not clear. Although one could argue that this merely relocates part of the legal battles to a different terrain, it nevertheless remains easier to avoid costly procedures by writing clear and concise contracts, especially when one has enough foresight to factor in potential enforcement costs.

[240] *See* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998); James M. Buchanan & Yong J. Yoon, *Symmetric Tragedies: Commons and Anticommons*, 43 J.L. & ECON. 1 (2000); Sven Vanneste et al., *From "Tragedy" to "Disaster": Welfare Effects of Commons and Anticommons Dilemmas*, 26 INT'L REV. L. & ECON. 104 (2006); Francesco Parisi, Norbert Schulz & Ben Depoorter, *Duality in Property: Commons and Anticommons*, 25 INT'L REV. L. & ECON. 578 (2005); Norbert Schulz, Francesco Parisi & Ben Depoorter, *Fragmentation in Property: Towards a General Model*, 158 J. INSTITUTIONAL & THEORETICAL ECON. 594 (2002); Ben Depoorter & Sven Vanneste, *Putting Humpty Dumpty Back Together: Experimental Evidence of Anticommons Tragedies*, 3 J.L. ECON. & POL'Y 1 (2006).

preventing joint transactions. In the publishing practice, many new media distribution methods will involve the clearance of more than just one right. For instance, making a periodical journal available in an online database will include many articles written by different authors. Without the possibility of securing all rights at the time of the initial publication, a publisher who wishes to make use of such a database later on will be required to seek and clear the new use rights for every single copyrighted work involved.

¶79 The situation becomes even more intricate when dealing with assembled works. Much of modern creativity draws from or collects together a variety of sources, all of which are separately copyrightable.[241] A good example is the documentary film. A standard documentary film comprises hundreds of clips of video footage, music, art, and photos, all belonging to different right holders. Securing these licenses even to simply produce the film is already quite costly. Securing them again, years or decades later, to distribute the film in a new media form has proven to be nearly impossible in practice.[242] To illustrate, the copyright to the material in the Martin Luther King documentary *Eyes on the Prize*, directed by Henry Hampton,[243] initially only included television broadcasting. Despite its cultural and historical importance, re-releasing the film in DVD format necessitated a considerable and incredibly costly joint effort. The right-clearance took twenty years, a $600,000 donation from the Ford Foundation, hundreds of thousands of dollars in contributions from others, and considerable volunteer efforts.[244] Additionally, with joint works, any one of the right holders whose contribution is essential to the work as a whole can easily "block" the entire publication by refusing permission.[245]

5. Implications

¶80 As seen above, there are many potential kinds of costs involved in renegotiating new use licenses. Furthermore, it is plausible that the magnitude thereof can be prohibitive. If the sum of all transaction costs exceeds the expected value of an agreement, these costs will hinder otherwise desirable licensing relationships. Publishers will either offset the costs with a reduction in what they are willing to pay, or they may reduce their investment in more "risky" relationships (such as promoting works with uncertain success), leading to a reduction in the number of authors who can benefit from a copyright agreement. Assuming that the legislative goal is, as noted above, distribution

[241] *See* MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES xiv (2008).

[242] Another (of many) examples is the film *John F. Kennedy* and other documentaries by Charles Guggenheim, the rights to which his daughter, Grace Guggenheim, has devoted most of her life to clearing just so that the films can be released on DVD. *See* Lawrence Lessig, *The Google Book Search Settlement: Static Good, Dynamic Bad?*, BLIP.TV (July 31, 2009), http://blip.tv/file/2471815 (video of Lessig's talk at the Berkman workshop in Cambridge, Massachusetts).

[243] EYES ON THE PRIZE (PBS 2006) (originally broadcast in 1987 and 1990).

[244] *See* HELLER, *supra* note 241, at 9–10.

[245] This is less of a problem where individual contributions can be easily separated from the work without a disproportionate loss of value. But there are also cases in which the work suffers considerably from the removal of individual pieces; for example, if Igor Stravinsky's heirs refused the DVD rights to the musical score of the movie *Fantasia*. Another example is archived news media, which arguably loses value as a historical and cultural reference if not made available as a whole.

of wealth to authors, the generation of high transaction costs would undermine the legislative intent.

¶81 In theory, these costs are not restricted to prohibitive regimes. Countries that allow the parties full freedom of contract where new use right grants are involved will theoretically also enable authors to refuse the *ex ante* transfer of their rights. Furthermore, in practice, there are always cases in which the contracting parties simply did not anticipate the possibility of future financial benefit or think to minimize future costs by stipulating the transfer of such rights at the time of contract. However, licensing contracts are increasingly including long-sighted provisions as the publishing industry learns from its mistakes.[246] The broad scope of rights transfer clauses in agreements in practice backs the assumption that publishers have a strong interest in securing the rights to future uses *ex ante*. As discussed above, there are various reasons why authors may share this interest,[247] or have too little bargaining leverage to prevent it when they do not.[248]

¶82 This implies that a regime that allows freedom of contract will essentially lead to a system in which most new use rights are assigned *ex ante*. Although contract renegotiation may continue to occur in certain cases, overall costs are likely considerably reduced by allowing publishers to secure new use rights before the event. A restrictive legal regime, on the other hand, will presumably incur far more of the above-described transaction costs. In light of this outcome, legislatures that are concerned about the distribution of wealth to authors may need to question whether the chosen solution is likely to reach its goal.

¶83 Although this analysis is theoretical and further empirical research may be required to strengthen its conclusions, it is also supported by anecdotal evidence. The following relates the story of the reform in Germany and how a growing awareness of distribution problems due to the above-described transaction costs was the driving force behind the change.

6. Anecdotal Evidence (German Reform)

¶84 In German copyright law, there has been an interesting turn of events in the area of new use right grants. Germany introduced new copyright legislation in January 2008.[249] One of the most significant changes was the abolishment of § 31(4), which had

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[246] Publishing contracts in the United States now commonly contain all-encompassing clauses: recording industry boilerplates contain wordings such as "in various formats now or hereafter known or developed . . . without any payment other than as provided herein." *See* Alan H. Kress, *in* 8 ENTERTAINMENT INDUSTRY CONTRACTS: NEGOTIATING AND DRAFTING GUIDE (Donald C. Farber & Peter A. Cross eds., 2008), form 159-1, 159-84. Newspaper article contracts claim the "transferable right to publish or include the Work in non-print media now known or hereinafter devised." Leon Friedman, *in* 3 ENTERTAINMENT INDUSTRY CONTRACTS, *supra*, at 57-8. Publishers commonly go so far as to use phrasings such as "throughout the universe, in perpetuity." Dionne Searcey & James R. Hagerty, *Lawyerese Goes Galactic as Contracts Try to Master the Universe*, WALL ST. J., Oct. 29, 2009, at A1, *available at* http://online.wsj.com/article/SB125658217507308619.html. Although this language may seem absurd, it serves to eliminate any future uncertainty regarding the extent of the grant.

[247] Including the additional argument that they may also factor in future transaction costs.

[248] *See supra* Part IV.A.

[249] Zweites Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft, Oct. 26, 2007, BGBL. I at 2513 (Ger.).

prohibited the granting of copyrights for unknown uses. This Part describes the developments that led to the revision.

¶85 As mentioned previously, an analysis of the case law prior to the reform in Germany shows a gradual tendency toward a less restrictive application of the general prohibition.[250] Courts were increasingly hesitant to declare media developments to be unforeseen or new uses under the law.[251] In 1995, the German Federal Court of Justice decided (in contrast to its earlier practice) that "risk agreements" covering known technology of yet unknown economic importance were permitted, even in standard form contracts.[252] This was followed by *Klimbim* in 1997, a controversial case in which the court held that a contract granting the rights to all known television distribution methods, including those not generally applied, covered direct satellite and cable broadcast rights.[253] Although these methods arguably constituted additional sources of profit for the publisher,[254] the court did not see them as new uses. In 2005, the German Federal Court of Justice also prominently declared that DVD distribution was not a sufficiently new form of distribution media under a contract granting videocassette rights.[255]

¶86 Although criticized in the literature from all sides for its chosen methods,[256] the court's reasoning reflects growing sensitivity to the economic problems arising from the legal situation in practice.[257] Allowing "risk agreements" was intended to reduce the legal uncertainty (and thereby enforcement costs) that publishers face when investing in new media.[258] In *Klimbim*, the court stated that, while § 31(4) aims to prevent the profits from new distribution methods from being withheld from the author, the prohibition of new use right transfers should not hinder economic and technological improvement. New, independently licensable distribution methods must not be impeded by the strict legal consequence of invalidity, not least because their development is in the author's interest as well.[259]

¶87 Following this line of cases, an increasing number of voices began to call for a reform of the law.[260] In 1995, the German Parliament appointed a committee to analyze the influence of technological development and new media on copyright law in

[250] *See supra* Part II.B.

[251] Artur-Axel Wandtke, *Aufstieg und Fall des § 31 Abs. 4 UrhG?* [*Rise and Fall of § 31 Para. 4 of the Copyright Act*], *in* COPYRIGHT LAW IN THE INFORMATION AGE, *supra* note 19, at 267, 272–73 (Ger.); *see also* discussion *supra* Part II.B.

[252] Videozweitauswertung III, BGH Jan. 26, 1995, 128 BGHZ 336 (Ger.); Videozweitauswertung I, BGH Oct. 11, 1990, GRUR 133 (136), 1991 (Ger.).

[253] Klimbim, BGH July 4, 1996, 133 BGHZ 281 (Ger.).

[254] Lütje, *supra* note 53, at 128.

[255] Der Zauberberg, BGH May 19, 2005, 163 BGHZ 109 (Ger.). For further cases, see *supra* Part II.B.

[256] Reber, *supra* note 237, at 794–95; SCHUCHARDT, *supra* note 125, at 42; Schulze, *supra* note 62, at 559–60.

[257] *See generally* JANI, *supra* note 64, at 107; Lütje, *supra* note 53, at 132.

[258] SCHACK, *supra* note 108, at 302 (referring to *Risikogeschäfte*).

[259] Klimbim, BGH July 4, 1996, 133 BGHZ 281 (283) (Ger.).

[260] Lütje, *supra* note 53, at 145.

Germany.[261] They also stressed the issue of § 31(4), calling attention to substantial practical difficulties that had arisen due to the prohibition of new use right grants.[262]

¶88 According to the committee, the problem had become virulent with the development of digital media and the possibility of making compilations such as periodical journals available on CD-ROM. Because of the sheer cost and impracticality of the task, many publishers were not attempting to seek new use rights for every single work involved and were instead publishing the compilations without the authors' consent.[263] In an attempt to stay within the confines of the law, art book publishers have gone so far as to have all original photos retaken for new publications, because this reportedly cost less than having to renegotiate with the copyright owners.[264] The committee noted that it would have been impractical for the publishers to have followed the path foreseen by the legal requirement. They would have had to acquire permission from every single rights-holder, some of whom were deceased or untraceable. Additionally, any one of the authors could have prevented the entire publication of the work by refusing to give permission.[265] For this reason, the committee recommended abolishing the prohibition of granting the rights to unknown uses in § 31(4).[266]

¶89 In a 2006 draft law that aimed to implement this recommendation, the accompanying explanatory statement also emphasized the problem of prohibitively high search and information costs involved in locating rights-holders.[267] The problem of having to acquire rights from multiple parties as a result of the prohibition in § 31(4) was also one of the central arguments of the discussion.[268] The immense organizational effort required to obtain clearance from multiple rights-holders was argued to be more than just a financial burden for publishers: it was recognized as leading to the exclusion and non-publication of commercially less successful works, because law-abiding publishers were shying away from the costs of distributing them over new methods.[269] Thus, the purpose of § 31(4) was reversed: instead of securing authors a share in the financial profits of new technological developments, it was preventing some works from making any new profit at all.[270]

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[261] The committee was not limited to these functions. An inquiry committee established by enactment of the German Parliament worked closely with a variety of institutes, organizations, and experts, attempting a balanced involvement of all potentially affected interest groups. *See* Beschlussempfehlung und Bericht, Dec. 5, 1995, BT 13/3219 (Ger.).

[262] Zweiter Zwischenbericht der Enquete-Kommission [Second Interim Report of the Inquiry Committee], June 30, 1997, BT 13/8110 (Ger.), *available at* http://dipbt.bundestag.de/dip21/btd/13/081/1308110.pdf.

[263] *Id.* at 38.

[264] *Id.* at 39.

[265] *Id.* at 39.

[266] However, the committee also recognized the legislature's intended distributional goal of protecting the author's financial interests. Therefore, it suggested amending the law to allow the grant of unknown use rights, so long as the author is guaranteed reasonable participation in the proceeds. *See id.* at 40.

[267] Gesetzesentwurf, June 15, 2006, BT 16/1828, at 22 (Ger.).

[268] *Id.*; Schulze, *supra* note 62, at 547.

[269] See, for example, the argumentation of a legal committee on the impracticability of applying § 31(4) to performing artists due to the obvious difficulties of renegotiating new use rights with a large number of work participants. Beschlussempfehlung und Bericht des Rechtsausschusses, Jan. 23, 2002, BT 14/8058, at 21 (Ger.).

[270] *See* Nordemann, *supra* note 64, at 198.

¶90 Another argument that various interest groups presented prior to the reform was the legal uncertainty regarding the scope of copyright agreements and the risk of costly litigation procedures.[271] Depending on the technology in question, there was considerable difficulty determining what constituted a new distribution method and whether or not it was "unforeseen."[272] Take the case of the DVD, for example. German legal opinions differed considerably on the question of whether it constituted a new distribution method as compared to the previous VHS technology.[273] As discussed, it was not until 2005 that the DVD was declared not a sufficiently different distribution method to qualify as new.[274] The German Federal Court of Justice's decision was preceded by over twenty years of legal uncertainty regarding DVD distribution rights.[275] Due to the lack of sufficient measures for defining unforeseen and new uses, practically every new medium had inevitably become a source of legal uncertainty.[276] Because courts were unable to standardize the issue, every new technological development led to an increase in litigation.[277] Thus, in a world in which technological innovation occurs more and more rapidly, having each new medium become the subject of court proceedings lasting fifteen years or longer[278] made it increasingly clear that § 31(4) was creating an inefficient legal framework. This uncertainty was criticized as an additional high cost, often having prohibitive effects.

¶91 Interestingly, the German media industries were not alone in pushing for change. Naturally, the media lobby was very much in favor of abolishing § 31(4), its main interest being a reduction in publishing expenses.[279] The ability to secure the rights to new uses in advance would reduce all three types of transaction costs that publishers faced.[280]

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[271] *See* Reber, *supra* note 237, at 793, 798; Castendyk & Kirchherr, *supra* note 140, at 754; BÖRSENVEREIN DES DEUTSCHEN BUCHHANDELS, ERWERB VON UNBEKANNTEN UND UMGANG MIT NEUEN URHEBERRECHTLICHEN NUTZUNGSARTEN [ACQUISITION OF THE UNKNOWN AND DEALING WITH NEW TYPES OF COPYRIGHT USE] (Ger.), http://www.boersenverein.de/sixcms/media.php/976/Merkblatt_unbekannte_Nutzungsarten.pdf (last updated Mar. 2011); Schwarz, *supra* note 237, at 735–36; Nikolaus Reber, *Die Bekanntheit der Nutzungsart im Filmwesen—ein weiterer Mosaikstein in einem undeutlichen Bild* [*The Recognition of Usage Types in the Film Industry—Another Mosaic Stone in an Unclear Picture*], 1997 GRUR 162, 169 (Ger.) [hereinafter Reber, *The Recognition of Usage Types*]; Peter Weber, *Statement ZDF*, 47 ZUM 1037 (2003) (Ger.); *Stellungnahme der Filmwirtschaft zum Gesetzesentwurf der Bundesregierung für ein Zweites Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft "Zweiter Korb"* [*Opinion of the Film Industry of the Bill of the Federal Government for a Second Act Governing Copyright in the Information Society "Second Basket"*], INSTITUT FÜR URHEBER- UND MEDIENRECHT 6 (2006) (Ger.), http://www.urheberrecht.org/topic/Korb-2/st/ra-2006-nov/teil-1/SPIO.pdf [hereinafter *SPIO Proposal*].

[272] *See* ZSCHERPE, *supra* note 53, at 202; Reber, *The Recognition of Usage Types*, *supra* note 271, at 162–69.

[273] *See* SCHUCHARDT, *supra* note 125, at 45 & n.245.

[274] Der Zauberberg, BGH May 19, 2005, 163 BGHZ 109 (Ger.).

[275] *See* Schwarz, *supra* note 237, at 736.

[276] BT 16/1828, at 22 (Ger.).

[277] *Id.*; ZSCHERPE, *supra* note 53, at 202; SCHUCHARDT, *supra* note 125, at 35–46; Reber, *The Recognition of Usage Types*, *supra* note 271, at 163.

[278] *See* SCHUCHARDT, *supra* note 125, at 18; Schwarz, *supra* note 237, at 738.

[279] *SPIO Proposal*, *supra* note 271; *see also* Schwarz, *supra* note 237, at 741; *Zweiter Korb: Comments* [Second Basket: Comments], INSTITUT FÜR URHEBER- UND MEDIENRECHT [INSTITUTE FOR COPYRIGHT AND MEDIA LAW], http://www.urheberrecht.org/topic/Korb-2/st/ (last visited Mar. 30, 2012) (Ger.).

[280] Search and information costs, bargaining costs, and enforcement costs. *See supra* Part IV.B. The reduction in enforcement costs would result from the possibility to use clauses with which all copyrights are clearly transferred in their entirety and less subject to court interpretation. Although courts must still deal with all cases in which the scope of the transfer is not clear (such as in the United States, as mentioned

However, there were also many voices arguing for reform for reasons other than publishers' interests. A number of German legal scholars strongly advocated reforming the law, not on behalf of the media industry, but instead in the interest of author protection.[281] Many recognized that the economic hindrances that publishers faced could have negative effects on authors. Where costs are prohibitively high, authors could miss out on follow-up contracts altogether.[282] As seen above, fewer contracts and lower reservation prices of contracting partners are not advantageous to authors, who usually have an interest in widespread dissemination of their work and are financially dependent on granting their copyrights to publishers.[283] As in the example of CD-ROM distribution, publishers facing high costs were either illegally evading new licensing contracts or finding alternatives to contracting with the original right holders.[284] Experts realized that instead of giving the author more control, as originally intended by the legislature, § 31(4) was taking it away.[285]

¶92 Advocates for change also argued that new media development may be slowed down by the restrictive system.[286] This concern was initially expressed in the case law prior to the reform[287] and was also included in the official reasoning for the draft law and the aforementioned commission report.[288] By making distribution through new use methods difficult and costly, many viewed the prohibition in § 31(4) as an impediment to new technologies entering the market.[289] Considering the author's strong interest in information dissemination, improved distribution methods should not be economically discouraged.[290]

¶93 The legislature and many of the discussion participants recognized, however, that simply getting rid of the prohibition would also thwart the original distributional aim of the legal intervention. There were concerns that the author's financial interests, the protection of which remains a fundamental purpose of German copyright law, would be

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above), reducing legal uncertainty would nevertheless lie more in the power of the parties.

[281] *See, e.g.*, Joachim Bornkamm, *Erwartungen von Urhebern und Nutzern an den zweiten Korb* [*Expectations for Authors and Users of the Second Basket*], 47 ZUM 1010, 1012 (2003) (Ger.); ZSCHERPE, *supra* note 53, at 205; Adolf Dietz et al., *Entwurf eines Gesetzes zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern (Stand: 22. Mai 2000)* [*Draft Law to Strengthen the Contractual Position of Authors and Performing Artists (as of May 22, 2000)*], 2000 GRUR 765, 765 (Ger.); Castendyk & Kirchherr, *supra* note 140, at 751–55; Schwarz, *supra* note 237, at 738–39; THOMAS DREIER, URHEBERRECHT UND DIGITALE WERKVERWERTUNG: DIE AKTUELLE LAGE DES URHEBERRECHTS IM ZEITALTER VON INTERNET UND MULTIMEDIA: GUTACHTEN [COPYRIGHT LAW AND DIGITAL WORK RECOVERY: THE CURRENT STATE OF COPYRIGHT LAW IN THE ERA OF INTERNET AND MULTIMEDIA: REPORT] 34 (1997) (Ger.), *available at* http://www.fes.de/fulltext/stabsabteilung/00391toc.htm; DANIELA DONHAUSER, DER BEGRIFF DER UNBEKANNTEN NUTZUNGSART GEMÄSS § 31 ABS. 4 URHG [THE CONCEPT OF UNKNOWN USES UNDER § 31 PARA. 4 OF THE COPYRIGHT ACT] 152 (2001) (Ger.); Reber, *supra* note 237, at 792–98.

[282] ZSCHERPE, *supra* note 53, at 205.

[283] *Id.*; *see also* MARACKE, *supra* note 120, at 596–97; Castendyk & Kirchherr, *supra* note 140, at 755; Bornkamm, *supra* note 281, at 1012.

[284] BT 13/8110, at 39 (Ger.).

[285] *See* SCHUCHARDT, *supra* note 125, at 18; ZSCHERPE, *supra* note 53, at 205; *see also* Gesetzesentwurf, June 15, 2006, BT 16/1828, at 22 (Ger.).

[286] *See, e.g.*, Nordemann, *supra* note 64, at 198; Castendyk & Kirchherr, *supra* note 140, at 755.

[287] Klimbim, BGH July 4, 1996, 133 BGHZ 281 (283) (Ger.).

[288] *See* BT 16/1828, at 22; BT 13/8110, at 39.

[289] *See, e.g.*, SCHUCHARDT, *supra* note 125, at 18; *see also* Schwarz, *supra* note 237, at 735.

[290] This was, of course, also strongly pushed as a public interest argument. As such, it escapes the scope of this Article, which focuses on the legislative goal of distributing wealth to authors.

endangered if legal intervention in copyright agreements were to be completely withdrawn. In reforming the law, the German legislature was confronted with the task of protecting this distribution preference, but also mitigating the previously unrecognized negative effects on the market.[291]

¶94 The much-debated and finally implemented solution came in the form of a revocation right.[292] As of the copyright law reform in 2008, the grant of unknown-use rights is possible in Germany, but authors can revoke the grant within three months of a new distribution method. According to the newly introduced statute, § 31a, the author is explicitly allowed to grant the rights to unknown uses, provided the grant is made in written form.[293] Section 31a(1) establishes an inalienable revocation right, allowing the author to back out of the copyright contract within three months of being notified of the new use, no matter what was originally stipulated in the contract.[294]

¶95 This solution allows those authors who were at an informational or economic disadvantage when entering the contract to correct the situation *ex post* and increases the general bargaining leverage of authors.[295] But because the revocation right is limited to the original author,[296] and the publisher's notification duty is fulfilled with notice to the last known address,[297] the new system should have the effect of considerably reducing transaction costs in comparison to the previous, more restrictive regime. Limitation of the revocation right to the original author means that there is no need to track down copyrights that have repeatedly changed hands. In particular, the many cases in which an author is deceased or untraceable are no longer a hindrance. Furthermore, for all authors who do not explicitly object to the new distribution method, there is no need to draw up or negotiate a new contract. In addition, § 31a(3) holds that for conglomerate works with multiple authors, no individual may make use of the revocation right in "bad faith."[298] This serves to prevent dire cases of blocking within the tragedy of the anticommons problem.[299] Coming back to the example of the newspaper publisher in Part I, this solves much of the problem she faces when trying to release compilations of previous articles in digital form.

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[291] Schulze, *supra* note 62, at 565; BT 16/1828, at 22.

[292] SCHACK, *supra* note 108, at 299.

[293] Urheberrechtsgesetz [UrhG] [Copyright Act], Sept. 9, 1965, BGBL. I at 1273, as amended by Zweites Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft [Second Law Regulating Copyright in the Information Society], Oct. 26, 2000, BGBL. I at 2513, art. 1, § 31a(1) (Ger.) ("Ein Vertrag, durch den der Urheber Rechte für unbekannte Nutzungsarten einräumt oder sich dazu verpflichtet, bedarf der Schriftform."); *see, e.g.*, LOEWENHEIM, *supra* note 62, at 1260; *see also supra* note 249.

[294] UrhG, Sept. 9, 1965, BGBL. I at 1273, as amended, art. 1, § 31a(1) (Ger.) ("Der Urheber kann diese Rechtseinräumung oder die Verpflichtung hierzu widerrufen."); *see also* REHBINDER, *supra* note 62, at 214; SCHACK, *supra* note 108, at 299.

[295] *See* BT 16/1828, at 24; *see also* Schulze, *supra* note 62, at 566, 570.

[296] The revocation right is also non-transferable. *See* SCHACK, *supra* note 108, at 300; SCHUCHARDT, *supra* note 125, at 91. It also expires upon death. *See* UrhG, § 31a(2) (Ger.); *see also, e.g.*, LOEWENHEIM, *supra* note 62, at 1264.

[297] *See* UrhG, § 31a(1) (Ger.). It is more or less the author's responsibility to inform the publisher of any address changes. BT 16/5939, at 44 (Ger.); *see also* Schulze, *supra* note 62, at 566, 575; SCHUCHARDT, *supra* note 125, at 104.

[298] "Sind mehrere Werke oder Werkbeträge zu einer Gesamtheit zusammengefasst, die sich in der neuen Nutzungsart in angemessener Weise nur unter Verwendung sämtlicher Werke oder Werkbeiträge verwerten lässt, so kann der Urheber das Widerrufsrecht nicht wider Treu und Glauben ausüben." *See also* Schulze, *supra* note 62, at 548, 570, 579–82.

[299] BT 16/1828, at 25.

¶96 It must be said that a system granting the author a revocation right is still likely to incur more transaction costs than a non-paternalistic system that freely allows the grant. First, there will still be some search and information costs involved in fulfilling the notification duty. Second, the threat of revocation may be used by the author to induce a negotiation over a new contract,[300] which will raise bargaining costs. Furthermore, this threat introduces legal uncertainty regarding the initial grant of the rights from the beginning of the contractual relationship until three months after the new distribution method has been introduced.[301] Finally, there is still the risk of enforcement costs due to the remaining uncertainty regarding the definition of a new use.[302] However, the chosen solution is still suitable for eliminating a considerable amount of "unnecessary" transaction costs.

¶97 To sum up, one of the main factors that appears to have led to the reform in Germany was the realization that the restrictive law had caused high transaction costs, leading to a distributional outcome that was different—even contrary—to what had been originally intended by the regulation. While the chosen solution is debatable on many levels, the intent of the new legislation is clear: to conserve the original distributional aim of the legal intervention in new use right contracts, while structuring the law to account for economic costs that had previously been insufficiently considered. The developments leading to this reform nicely demonstrate the importance of looking more closely at the distributive arguments behind restricting grants of new use rights, and considering their potential market effects in practice.

C. Further Considerations

¶98 Requiring contract renegotiation between publisher and author in cases of unforeseen uses may have more effects on the market than merely that of high transaction costs. This Part considers other potential influences on the distributional outcome. Although perhaps not as directly observable or evident as the above-described issue of transaction costs, economic theory provides further insights into what could prove useful to investigate in subsequent research. For example, empirical studies could look at the likelihood and practical impact of "hold up" effects.

1. Hold Up in Incomplete Contracts

¶99 The classic theory of hold up in incomplete contracts can be outlined as follows. A contract is regarded as incomplete when it does not stipulate what is to happen in every possible future scenario. In the case that an event with unspecified consequences occurs, the parties must renegotiate the contractual relationship. The trouble arises when one party has made a relationship-specific investment prior to the renegotiation[303] and is

[300] *See* Lars Klöhn, *Verträge über unbekannte Nutzungsarten—§§ 31a, 32c UrhG: Eine* Behavioral Law and Economics-Perspektive [*Contracts for Unknown Uses—§§ 31a, 32c of the Copyright Act: The* Behavioral Law and Economics Perspective], *in* DAS URHEBERVERTRAGSRECHT IM LICHTE DER VERHALTENSÖKONOMIK [THE COPYRIGHT CONTRACT LAW IN LIGHT OF ECONOMIC BEHAVIOR] 79, 85 (Karl Riesenhuber & Lars Klöhn eds., 9th ed. 2009) (Ger.); *see also* Schulze, *supra* note 62, at 571.

[301] Schulze, *supra* note 62, at 548.

[302] For example, cases of newly developed media are "new" and "unknown" in the sense of the law. *See* Schulze, *supra* note 62, at 548–49, 555.

[303] *See* PATRICK BOLTON & MATHIAS DEWATRIPONT, CONTRACT THEORY 490–91 (2005). Salanié

thereby dependent on the continuance of the contractual relationship to recoup her investment. The other party could threaten to withhold cooperation *ex post* and expropriate the bargaining surplus, essentially holding up the party that has invested. The investing party will likely try to avoid being held up or at least attempt to minimize the loss in profit, which results in investments that are not socially optimal. This is the classic hold up problem.[304]

¶100 The most obvious solution to this predicament is to induce the parties to create a written contract in advance that fixes the terms with regard to the future event. However, this may not be possible if the relevant circumstances of the event are unknown prior to its occurrence. Property rights theory provides the following classic solution to the hold up problem: assignment of a property right to the party more likely to make relationship-specific investments, the underinvestment in which would be socially undesirable.[305] The owner can thus determine the consequences when the event occurs and enjoy the right to all unanticipated proceeds. Within this framework, it is socially desirable to give the investing party all of the *ex post* bargaining power, as this will prevent him from falling prey to the hold up situation and thereby enable a socially optimal level of investment.

¶101 This theory can be applied to new use copyright licenses. A copyright contract can be incomplete in that it does not specify what happens to the contractual relationship in the case that a future, unforeseen use of a copyrighted work arises.[306] Assuming the absence of a legal rule to fill the gap, if the contract says nothing about which party owns the rights to unstipulated distribution forms, the parties have no choice but to renegotiate their agreement when new media are developed. With regard to the distribution of copyrighted works, the party that makes relationship-specific investments is likely to be the publisher, who invests in new distribution methods or media technology.

¶102 Consider, for example, the newspaper publisher who buys into CD-ROM technology to make previous, archived issues available by month or year. She will likely incur costs to look into the technical possibilities, assess the marketability, bargain with suppliers, or even develop and customize the new technology herself. Because of the initial uncertainty regarding the feasibility and value of the new method, this will generally happen before the publisher can begin the rights-clearing process. Therefore, by the time of the contract renegotiation, the publisher has (at least some) sunken investment costs. Assuming that the archived issues are to be made available in their entirety,[307] the cooperation of all involved right holders is needed. Now that the publisher is dependent on all of the follow-up contracts in order to distribute the new media and regain the sunken investment, each of the involved journalists (or the successors who own the copyrights) can hold up the publisher by threatening to withhold

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defines relationship-specific investment as "an investment that increases the productivity of the relationship under study, has a lower value outside of this relationship, [or] is costly for the party that makes it." *See* BERNARD SALANIÉ, THE ECONOMICS OF CONTRACTS: A PRIMER 196 (MIT Press 1997) (1994) (Fr.).

[304] *See* BOLTON & DEWATRIPONT, *supra* note 303, at 490–91.

[305] *See* Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691 (1986); *see also* Oliver Hart & John Moore, *Incomplete Contracts and Renegotiation*, 56 ECONOMETRICA 755 (1988).

[306] This could be because the parties did not anticipate a new use at all or because they were unable to evaluate the future situation and chose to leave the consequences unspecified.

[307] This assumption is valid either because it would be difficult and costly to leave out individual contributions, or because the market value is contingent on complete volumes (e.g., because the targeted consumers have a strong preference for unperforated issues).

their rights. Because the publisher will anticipate this situation, she will try to avoid being held up or at least attempt to minimize losses, leading to less *ex ante* investment in CD-ROM technology.

¶103 In the situation at hand, the copyrights to future uses of copyrighted works can be viewed as the property right in the classic solution to the hold up problem. The legislature can therefore influence the hold up potential of incomplete contract situations by making the *ex ante* decision to grant the copyright to either the author or the publisher. By legally prohibiting the grant of new use rights, the legislature very firmly assigns this right to the author.[308] However, as seen above, the decision as to which party receives the property right should be conditioned on which side's underinvestment would be more detrimental. If it is indeed the case that publishers tend to be more in danger of making relationship-specific investments, then allocating the copyright to the author will aggravate, not solve, the hold up problem.

¶104 However, the applicability of this framework may be subject to limitations. First, the efficient allocation of the right depends on which party is more likely to make desirable investments that could be subject to a hold up situation. Given the current structure of most publishing industries, it is intuitively plausible that publishers run more risk of sunk investments before a contract renegotiation can be initiated. However, it is theoretically possible that the underinvesting party could be the artist. For example, the assignment of all rights to a publisher could undermine the incentives of authors to invest in the value of their work through, for example, self-promotion.[309]

¶105 Furthermore, the theory may be limited in that it is too static. In the case of new use right grants, the hold up situation outlined above assumes that the copyrighted work already exists. A more dynamic view would consider sequential investments.[310] Although authors are less prone to underinvestment in distribution, their incentives may nevertheless be influenced by the assignment of copyrights to publishers, leading to underinvestment in the creation of works and, perhaps, less authorship altogether.[311] A legislature that intends to protect authors' financial interests will likely not desire a decrease in general authorship and, thus, other means of incentivizing creation would be necessary. Depending on the costs of such intervention, they could outweigh the benefits of preventing hold up, the impact of which is theoretical and may not be of great importance in practice. For example, the amount of actual publisher investments that are relationship-specific, thus prone to hold up, may be quite small.[312]

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[308] It is even true without leaving the parties (who may be better informed than the state) the opportunity to bargain and allocate it differently *ex ante*.

[309] Currently, given the somewhat limited author investment possibilities in practice, this moral hazard is likely to be outweighed by the risk of the publisher's underinvestment in new media technology. However, it should be kept in mind that most creative industries are currently undergoing or standing on the brink of considerable changes. It is not completely unthinkable that the underinvestment may in some future cases lie with the author.

[310] *See, e.g.*, Yeon-Koo Che & József Sákovics, *A Dynamic Theory of Holdup*, 72 ECONOMETRICA 1063 (2004); *see also* Georg Nöldeke & Klaus M. Schmidt, *Sequential Investments and Options to Own*, 29 RAND J. ECON. 633 (1998).

[311] A counterargument to this dynamic effect on investment incentives could be that allocating copyrights to publishers would achieve a reduction in transaction costs, increasing the *ex ante* surplus, thus leading to more incentive for creation. Furthermore, if the costs of hold up are already borne by authors, allowing more publisher investment may make less of a difference for authors than immediately assumed.

[312] As mentioned above, the situation could be that a publisher invests in a new technology covering inseparable works with multiple owners, or in author-specific marketability. However, it is indeed difficult

¶106 Finally, assuming that the above-discussed financial and informational asymmetries between firms and individuals put authors at a bargaining disadvantage, this may mitigate or outbalance an author's power to extract the surplus in negotiations.[313]

2. Implications

¶107 Given the assumption that publishers are more likely to make socially desirable investments that could be endangered by hold up situations, classical hold up theory implies that initially granting the author the right to all distribution methods is inefficient, as renegotiation in cases of incomplete contracts will incur the problem of publisher underinvestment. As one can imagine, the overall effect of many publishers underinvesting could be to slow or hinder the socially desirable development and distribution of new media technologies. The societal disadvantage of such underinvestment is clear, but even disregarding social welfare and focusing solely on authors' interests, less investment in distribution and distribution methods is hardly to the advantage of artistic creators. Therefore, at least within this theoretical framework, it would be undesirable even for a purely distribution-oriented legislature to forbid the *ex ante* grant of new use rights (or even allocate these rights to authors in the first place).[314] Under a non-restrictive system, the parties are more able (and likely) to draft complete contracts *ex ante*, considerably reducing the overall problem.

¶108 However, considering the limitations of this very theoretical framework, further research would be necessary to derive concrete implications. Although this Part suggests that the attempt to find out whether hold up problems apply to new use right practice may be useful, the question of how to conduct such research is not easy. Hold up-related underinvestment may be difficult, if not impossible, to measure in this area. Cross-border comparisons are likely to be too complicated because of the multitude of other factors that may account for differences, such as market structures and the work made for hire doctrine.[315] However, one method could be to conduct qualitative studies, such as interviews with publishers, in an attempt to determine whether hold up expectations discourage investments in practice.

D. Summary

¶109 From an economic perspective, the legislative picture of the financially disadvantaged author is plausible. Taking into account that authors in practice are generally individuals, while publishers are often firms,[316] it is likely that authors are subject to more budget constraints, fewer outside options, less complete information, and increased risk aversion. When bargaining over contracts with new use right clauses, this may allow their contracting partners to reap a larger share of the joint surplus, leading to

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to find good examples for relationship-specific investments in new media that would need to occur prior to a potential renegotiation.

[313] *See supra* Part IV.A.

[314] This assumes that there is a less costly way to achieve the desired wealth distribution. Given the abundance of different possibilities, this is likely. However, exploring such alternatives remains beyond the scope of this Article.

[315] *See supra* note 95.

[316] This distinction does not necessarily apply in the U.S. legal system, which employs the "work made for hire" doctrine, but is likely to hold true for the other jurisdictions.

a distributional outcome that is more favorable to publishers. For legislatures that deem this situation undesirable and prefer to allocate more wealth to authors, restricting the grant of new use rights intuitively appears to reduce uncertainty and give authors more bargaining leverage.

¶110 However, requiring contract renegotiation when new distribution methods arise can generate a variety of costs. According to the economic theory and anecdotal evidence discussed in this Part, a legal regime that restricts the *ex ante* grant of new use rights will lead to high transaction costs, causing a reduction in the amount of trade that takes place or the prices that publishers are willing to pay for exclusive rights and potentially impeding the distribution of copyrighted works, as well as the investment in new media technology. Restricting the grant of rights to unknown uses could also potentially lead to underinvestment arising from hold up situations. All in all, authors may be unable to reap the financial benefits assumed by the legislature, and the distributional goal could in effect be thwarted entirely.

V. CONCLUSION

¶111 Comparative legal analysis reveals that the treatment of new use right grants varies across borders. United States copyright law, while recognizing author termination rights, generally allows the parties freedom of contract in assigning the rights to new distribution methods. Other countries have chosen to restrict such assignments. Many European countries set high barriers to granting the rights or simply prohibit unknown uses of copyrighted works. The reasoning for this measure is regularly distributive. Creators are believed to be morally entitled to the financial benefits of their works. Because authors are assumed to be at a bargaining disadvantage when entering into copyright agreements with publishers, there is a fear that they will not be able to reap enough of the distributable profits arising from the use of their creations. Legal intervention is thus deemed necessary to protect their financial interests and achieve redistribution of wealth.

¶112 This Article finds that the legislative assumption that wealth distribution will be more favorable to publishers in a system without intervention is economically plausible. However, it also finds that restricting new use right grants may entail economic costs that thwart the intended goal of redistributing wealth to authors. In light of this result, preventing the grant of unknown-use rights may not be a suitable instrument for legislation to protect authors' financial interests.[317] These insights can be of value to the ongoing legislative discussion over author-protective copyright laws, particularly in countries that are rethinking the approach to new use right grants.

¶113 That said, this Article does not attempt to normatively determine the optimal design of new use right laws for two reasons. First, factors specific to individual countries influence copyright legislation in the real world, which makes a one-size-fits-all solution unfeasible. Empirical research may be helpful in recognizing these factors and designing national laws that reach the desired outcome within their respective borders. This Article helps to determine relevant directions for such research on a local scale. Second, an approach that disregards the "fairness" argumentation of legislatures and focuses solely on economically efficient mechanism design may be interesting in theory, but it

[317] Whether or not this should be the ultimate goal of copyright law remains outside the scope of the analysis.

completely ignores the reality of legislative discourse. Although the chosen approach may be frustrating to some economists, one of the major contributions that lawyers can make in the field of law and economics is not detailed knowledge of legal statutes, but rather an understanding of legal discourse and lawmaking in practice. This allows lawyers to identify relevant issues and make well-founded arguments for changes that can be implemented realistically, given the structure of today's political world.[318] For this reason, this Article looks closely at the legal arguments surrounding these laws and raises issues that are tangible enough to find their way into the legislative discussion and get the consideration they deserve.

[318] This is not to say that optimal mechanism design is not both valuable and important—only that building bridges is essential as well.