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BARGAINING IN THE SHADOW OF COPYRIGHT LAW AFTER *TASINI*

Maureen A. O'Rourke[†]

INTRODUCTION

Copyright law often provides the background rules against which bargaining over rights in works of information takes place. By granting creators of works of authorship certain exclusive rights and providing protection against infringement of those rights, copyright law effectively gives authors bargaining chips to use in negotiations with those who would exploit their works in some way. Generally, however, copyright law does not explicitly address imbalances in bargaining power that affect the division of the surplus between the parties to a copyright license.¹ When the would-be exploiter of the copyrighted work wields some degree of market power or brings significant value to the transaction, the author may extract little in return for licensing the work.

The *New York Times Co. v. Tasini*² case brought this point home to any freelance writer ("freelancer") who still failed to appreciate it. Since around the time a group of freelancers filed its complaint in the *Tasini* case in 1994, large publishers like Knight-Ridder and the *New York Times* have been requiring freelancers to sign work for hire agreements or to license all of their rights under so-called "all-rights agreements" that include terms permitting publishers to exploit the works in future as well as existing media – all often for no compensation above what publishers paid under

[†] Professor of Law & Associate Dean for Administration, Boston University School of Law. Thanks to Craig Nard for inviting me to attend the conference on "Copyright in the Digital Age: Reflections on *Tasini* and Beyond," and to the commentators on my panel who provided valuable insights: Emily Bass, Naomi Gray, Joel Hecker and David Lange. Thanks also to Daniela Caruso, Debra Cash, Ron Cass, Jane Ginsburg, Wendy Gordon, Ed Klaris, James Molloy, Kay Murray, Mike Meurer, Aaron Moore, Mark Pettit, Indira Talwani, Victoria Riccardi, Stephanie Smith, and participants in the BU Faculty Workshop Series for comments and research assistance. The opinions expressed here as well as any errors are my own.

¹ Copyright law does display some solicitude for authors, particularly in its rules on termination of transfers. See discussion *infra* Part V.

² 533 U.S. 483 (2001).

licenses customarily understood by the industry to grant rights only to one-time publication in North America.³

As a result, some commentators view the *Tasini* decision as primarily a moral rather than economic victory for most freelancers.⁴ Although the holding in the case ostensibly gave freelancers a bargaining chip, a lack of bargaining power precludes their obtaining additional consideration for licensing their judicially vindicated rights.

Freelancers and their advocates would, of course, like to obtain additional consideration for the transfer of electronic rights to their works. They have pursued several avenues they believe likely to achieve this result. One strategy has been to sue certain publishers under contract law. Freelancers argue that terms conditioning future work on an uncompensated transfer of electronic rights to articles that publishers have infringed are unenforceable. They also argue that agreements covering new works demanding electronic rights for no additional consideration are likewise unenforceable. On the legislative front, freelancers convinced Representative John Conyers to introduce legislation in Congress that would provide an antitrust exemption to enable "freelance writers

³ "As recently as the 1980s, the standard among periodical contracts was the licensing of 'first North American serial rights' (FNASR). The publisher got one-time publication rights for use of the article in the North American market, while the author retained all other rights, including reprints and foreign uses." Am. Soc'y of Journalists and Authors, *Historical Perspective*, at <http://www.asja.org/pubtips/wmfh01.php> (visited Feb. 20, 2003); see Dennis DeMaio, *Fighting the All-Rights Contract*, AM. WRITER, Summer 2001, at 14, 14 (noting the limited scope of traditional agreements, freelancers' reliance on retained rights for income, and how the rise of the Internet has led publishers to seek more extensive rights extending to "media not yet invented"); Robert Meitus, *Interpreting the Copyright Act's Section 201(c) Revision Privilege with Respect to Electronic Media*, 52 FED. COMM. L.J. 749, 752 (2000) (noting a move "toward unambiguous publishing contracts defining rights of future publication, electronic or otherwise"); George H. Pike, *Understanding and Surviving Tasini*, INFO. TODAY, Oct. 2001, at 18 (stating that publishers have been seeking more extensive rights since the mid-1990s), available at <http://www.infotoday.com>; Lisa Richardson, *Victory for Freelancers Leaves Librarians at a Loss*, L.A. TIMES, July 10, 2001, at E1, available at 2001 WL 2501843 (stating that many publishers have begun to require freelancers to transfer ownership to their works); Anya Sacharow, *Rights Make Might*, MEDIAWEEK, Jan. 15, 1996, at 12-13, available at 1996 WL 8522602 (noting that the trend toward requesting additional rights began in 1995, and included Knight-Ridder); Michael Traynor, *Publishing and Electronic Rights: The Tasini Case and Its Impact*, 691 PLI/PAT. 1119, 1124-25 (2002) (stating that the *Tasini* case affected contracting practices soon after its filing date, and that new contracts include media developed in the future). Note, however, that some publications do pay for electronic rights. See *Columbia-VLA Journal of Law & the Arts Roundtable on Electronic Rights*, 20 COLUM.-VLA J.L. & ARTS 605, 607-17 (1996) (involving a discussion among members of the industry, including statements that Harper's Magazine, Woman's Day, TV Guide, Health, and Sierra pay extra for electronic rights and that Time Warner pays photographers more for unrestricted rights than restricted ones); see also Sacharow, *supra* at 14 (noting that contracts vary widely, with some offering payment for electronic rights).

⁴ See Meitus, *supra* note 3, at 752 ("[G]iven that publishers wield more bargaining power than do most freelance writers, the effect of [decisions like *Tasini*] may prove primarily a moral, rather than economic, victory for authors' future rights.").

or freelance authors" to bargain collectively.⁵ Finally, the Authors Guild and National Writers Union have both established collective rights organizations (CROs) that centralize the administration of licensing re-use rights for previously published articles.⁶ These CROs provide more or less one-stop shopping for those seeking rights to exploit a work electronically.

This Article discusses the pros and cons of these strategies. It begins by considering whether policymakers should be concerned by many freelancers' inability to obtain compensation for electronic use of their works. I argue that they should indeed be concerned. Strong policy reasons support taking steps to enhance freelancers' bargaining power while not unduly undercutting publishers' incentives to distribute works.

The Article then considers the strategies freelancers are employing in search of compensation. It discusses their various contractual claims, concluding that most such claims are unlikely to provide effective remedies. The Conyers bill offers an interesting alternative, but collective bargaining faces a number of hurdles that make its success something less than assured. Also, CROs may find it difficult to provide meaningful compensation to freelancers, particularly if initial publishers routinely obtain work for hire or all-rights agreements.

The Article then considers whether the U.S. should amend its copyright law in some way. Here, it primarily discusses Germany's new copyright law that gives authors a right of adequate compensation based on the economic value of their work. It places that law against the backdrop of U.S. law that has in the past occasionally taken approaches like compulsory licensing that may have the same effect as the German law intends. It concludes, however, that the U.S. should not amend its copyright law to provide a right of adequate compensation, at least not yet.

Instead, the best strategy for freelancers in the immediate future is likely two-fold: (1) develop creative ways to use technology to their own benefit by mounting a competitive challenge to publishers; and (2) educate themselves about their rights under the copyright law and the contract terms that they should seek to protect their interests. Collective bargaining may aid them in this latter effort, but they may still make strides simply by becoming informed. If freelancers can succeed in these efforts, they will sub-

⁵ H.R. 4643, 107th Cong. (2002) available at <http://www.copyright.gov/legislation>; see discussion *infra* Part III.

⁶ See discussion *infra* Part IV.

stantially enhance their bargaining power and the compensation they receive from publishers for their works.

I. SHOULD FREELANCE WRITERS RECEIVE COMPENSATION FOR LICENSING THEIR ELECTRONIC RIGHTS?

The central issue in the *Tasini* case was a highly technical one: Did the Copyright Act's § 201(c), which permits an owner of the copyright in a collective work to make "revision[s] of that . . . work," permit a publisher to license a freelancer's article to a database provider when the express license grant between the publisher and freelancer did not provide the publisher with that right?⁷ The Court, citing legislative history and copyright policy, held that it did not.⁸

The following analysis assumes that the *Tasini* decision was correct. It focuses on considering whether lawmakers should be concerned that the practical implication of the *Tasini* decision was to grant a right under the Copyright Act that in many cases has proved valueless: Exploiters of works have enough bargaining power to obtain royalty-free licenses to make revisions of freelancers' copyrighted works. The economic case for some legal intervention is unclear, but other considerations strongly suggest that measures to enhance authors' bargaining power, while not undercutting publishers' incentives, are normatively desirable.

Initially, it is important to recognize the complexity of any policy analysis applicable to freelancers. These writers come in many shapes and sizes and have diverse motivations. Some, like academics and others seeking to influence policy debates, would happily pay a prestigious publisher to include their articles in its works. Others, however, view freelance writing as the source of their livelihood, and this Article focuses on that group.

A. Economic Considerations

An initial and potent argument (and, indeed, one made by the publishers in *Tasini*) is that freelancers do not suffer a loss if they are not paid for electronic exploitation of their works. If freelancers suffer no loss, then any lack of compensation for electronic rights has no effect on their initial incentives to create. Lack of

⁷ 17 U.S.C. § 201(c) (2000) ("In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series."); see *New York Times Co. v. Tasini*, 533 U.S. 483 (2001).

⁸ *Tasini*, 533 U.S. at 506.

compensation then is fundamentally consistent with the copyright law's goals of encouraging production and dissemination of creative works: Freelancers will still produce such works and publishers will still disseminate them.⁹ Indeed, by making them available electronically, publishers will expand the sheer number of consumers benefiting from these works, something the copyright law would view as an unambiguously "good" result. In contrast, paying freelancers for electronic rights would reward them excessively (since they would have created the works in the absence of this compensation) and possibly diminish the production of creative works because at least some publishers would be unwilling to purchase these rights.¹⁰

More specifically, during the *Tasini* litigation, publishers argued that freelancers derive value from association with prestigious periodicals like the *New York Times*, and it is the reputations of such periodicals that lead database providers to include freelancers' works in their products: There is simply no demand for freelance articles existing separately from the demand for the publications in which they appeared.¹¹ Even if there were, freelancers could not exploit it because database providers could not afford the transaction costs of negotiating with each freelancer.¹²

The *Tasini* dissent accepted this argument. According to the dissent, the demand for databases, and thus the price database providers can charge, "probably does not reflect a 'demand for freelance articles standing alone,' . . . to which the publishers are greedily helping themselves."¹³ In other words, users do not demand databases because they contain a "score of individual articles by" a particular freelancer.¹⁴ Rather, users demand databases for their ease of access and ability to search many periodicals quickly.¹⁵ Moreover, freelancers did not develop this new access and distribution mechanism. The publishers who spend money to

⁹ *Id.* at 519 (Stevens, J., dissenting) ("[Copyright] restricts the dissemination of writings, but only insofar as necessary to encourage their production, the bounty's basic objective.").

¹⁰ Peter Jaszi, *Tasini and Beyond*, 23 EUR. INTELL. PROP. REV. 595, 598 (2001) (stating that the dissent "apparently under[st]ood the situation presented in *Tasini* as one in which freelancers . . . received a sufficient economic incentive to write articles and part with them in the first instance, [such that] the public good can only be diminished if publishers are required to pay for the reuse of this material in a new and unforeseen medium").

¹¹ *Tasini*, 523 U.S. at 521-24 (Stevens, J., dissenting).

¹² Telephone Interview with Ed Klaris, General Counsel, *The New Yorker* (Jan. 8, 2003) (notes on file with author).

¹³ *Tasini*, 533 U.S. at 520.

¹⁴ *Id.* at 524 (Stevens, J., dissenting).

¹⁵ *Id.* at 520 (Stevens, J., dissenting).

format articles for electronic publication¹⁶ and the databases that aggregate them and provide search and retrieval tools should be entitled to apportion the value created by electronic media. Finally, freelancers may still derive income from publishing their works in anthologies or different periodicals.¹⁷

This argument, of course, does not address the lack of demand that would exist for a database with no content or the contention that freelancers may themselves (at least in some instances) contribute to the brand value of the publications in which their articles appear.¹⁸ A database with more comprehensive content is more valuable than one containing fewer publications. Its value derives not simply from ease of access and quick searching but also from content, including the content owned by freelancers and provided by publishers.

The validity of the assumption that freelancers do not suffer any revenue loss when publishers make their articles available online for no additional royalty depends on whether a market for reuse of freelancers' articles exists and, if so, whether electronic distribution impairs freelancers' abilities to exploit that market.¹⁹ In other words, customary rights to one-time publication in North America left a freelancer with rights to license other publications in North America and the rest of the world, and to make other uses of an article, such as, for example, including it in an anthology.²⁰ If those rights had value and if electronic publication, by making works easily accessible globally and instantaneously undercuts that

¹⁶ See *Experts Weigh Tasini Ruling's Impact on Freelancers and Electronic Publishers*, 62 PAT., TRADEMARK & COPYRIGHT J. (BNA) 557 (Oct. 19, 2001) (discussing the mechanics of how newspapers destroy the collective work and provide input to the databases daily).

¹⁷ See *Tasini*, 533 U.S. at 520 (Stevens, J., dissenting).

¹⁸ Cf. *id.* at 502 n.11 ("We lack the dissent's confidence that the current form of the Databases is entirely attributable to the nature of the electronic media, rather than the nature of the economic market served by the Databases."); see also Pike, *supra* note 3 (stating that the effect of the *Tasini* decision on database prices was unclear: It might cause prices to decline because less content will be available, or it might give database providers an "excuse" to increase price).

¹⁹ See Alice Haemmerli, *Case Comment: New York Times v. Tasini*, 25 COLUM.-VLA J.L. & ARTS 57, 67-68 (2001):

The dissent's argument is that 'respondents retain substantial rights over their articles', as their authorization is required for the publication of the articles in different periodicals or anthologies – but this misses the point that the marketability of the articles to those other publications has been impaired, whatever legal rights may be retained. The ability to wield legal authority is only half the battle as far as economic rights are concerned, since a legal right to compensation for a work's use is rendered meaningless if demand for the work has been eviscerated. The notion that over-exposure can increase marketability may have some persuasive force in other realms, but it is not very convincing as applied to articles written for publication.

²⁰ See *id.*

value, then freelancers may indeed suffer a revenue loss. Such a loss implicates one of copyright law's concerns: Will freelancers still retain enough incentive to create in the first place?²¹

The nature and extent of any secondary market varies among freelancers, often depending on the nature of the work.²² For example, a story about an event of the day has little resale value in comparison to stories on other, less time-sensitive topics.²³ The secondary market also varies by type of publication. Authors of magazine articles sometimes license their works for publication internationally or collect a number of articles for publication in an anthology.²⁴ Authors of newspaper articles generally lack these opportunities.²⁵

Certainly, some freelancers have lost money associated with re-use rights. Before electronic distribution, publishers had been diligent about paying for re-use and reprints of articles.²⁶ That revenue stream has, however, become a thing of the past – replaced by work for hire and all rights contracts and electronic distribution with no additional revenue flowing to the freelancer.²⁷ Additionally, freelance photographers have lost substantial income because their re-use market has largely dried up.²⁸ Publishers now demand all-rights agreements and create archives of digital images that they license to clients who formerly approached the photographer.²⁹

Does this loss of revenue so undercut incentives that some freelancers have left the profession? Opinions differ. An economist would note that even if some freelancers exit the market, there may be no cause for alarm: The desirability of decreasing the number of freelancers depends on the market's starting point.

²¹ Note that longstanding precedent would still hold the publishers as infringers even if their arguments were correct – i.e., even if their acts did enhance the value of the freelancers' copyrights. See *id.* at 68.

²² Telephone Interview with Kay Murray, General Counsel, The Authors Guild (Jan. 8, 2003) (notes on file with author).

²³ *Id.*

²⁴ Telephone Interview with Ed Klaris, *supra* note 12.

²⁵ *Id.*

²⁶ Telephone Interview with Kay Murray, *supra* note 22.

²⁷ *Id.*

²⁸ Brad Holland, Remarks at the Columbia Law School Panel Discussion on Portrait of the Artist as an Entrepreneur: Can Freelance Creators Make a Living from Traditional and Digital Media (Jan. 29, 2003) (notes on file with author) (stating that some publishers, like Conde Nast, now have their own archives of photos backed up by contracts requiring the assignment of all rights); Eugene Mopsik, Remarks at the Columbia Law School Panel Discussion on Portrait of the Artist as an Entrepreneur: Can Freelance Creators Make a Living from Traditional and Digital Media (Jan. 29, 2003) (notes on file with author) (discussing Corbis, an entity which has accumulated thousands of graphic images, and how Corbis undercuts the prices photographers charge).

²⁹ See Holland, *supra* note 28.

If the market were characterized by an oversupply of freelancers to begin with, then a decrease in their number is simply a move toward the efficient level. There is some reason to believe that, in fact, the market tends toward oversupply: Barriers to entry are low and cognitive biases may lead a non-trivial number of market participants to believe that their writing efforts are worthwhile when, in fact, their abilities might be more efficiently employed elsewhere.³⁰

That some freelancers have been able to obtain payment for electronic rights could mean that the market is working perfectly well. It compensates those who write the best articles and not others. Unfortunately, no empirical proof supports this point. The *Tasini* case itself featured established writers whose works are no longer as broadly available because they refuse to agree to the restrictive contractual terms that their publishers seek. Indeed, some argue that the quality of publications has declined because fewer and/or less skilled freelancers are writing, while others contend quality has not changed – most likely it is simply too soon to decide either way, and certainly too soon to say that quality *hasn't* suffered.³¹

Unfortunately, making a reasoned decision on which way the economic arguments cut depends on knowing the unknowable. Although some have made efforts (particularly in the patent area) to define the optimal level of intellectual property rights, none have succeeded. We simply do not know what the “efficient” number of freelancers is. Even if we could identify that number, we could not obtain reliable data about market entry and exit of freelancers: The community is too dispersed and fluid to be amenable to such measurements.

If the market for freelance writing were perfectly competitive, one would likely expect publishers to pay additional compensation for receiving a grant of additional rights in cases in which those rights have value.³² The market, of course, does not approach perfect competition on the buyer side. Media markets have become increasingly concentrated while freelancers remain numerous and

³⁰ Avishalom Tor, *The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy*, 101 MICH. L. REV. 482 (2002) (noting that authors' behaviors are characterized by optimistic bias).

³¹ Telephone Interview with Kay Murray, *supra* note 22.

³² Certainly publishers add value by editing and formatting the articles, and at least some of the formatted version's value is indeed attributable to the publisher's brand name. If freelancers' contributions were so small that the transaction costs of calculating their share exceeded either the value they contribute or what the publishers receive, then perhaps no compensation would be the correct result. This, however, is an empirical question, and no one has produced figures to support this argument.

dispersed. It would therefore be unsurprising to find that not all freelancers receive compensation for works whose electronic exploitation generates a surplus. They simply lack the bargaining power to force publishers to share any of that surplus with them.

If failure to compensate freelancers for electronic rights does not implicate copyright law's goals, however, then one might say that freelancers will just have to live with their meager bargaining power. After all, nothing distinguishes freelancers from others who lack negotiating power and whom the law leaves to fend for themselves as best they can. However, before taking such a *laissez-faire* approach, and in light of the ambiguity of the economic evidence, we should take a closer look at non-economic concerns as well as whether copyright law's goals are in fact being served by the current arrangements.

B. Other Policy Considerations

The plight of freelancers is nothing new and, indeed, is simply a subset of a much larger phenomenon. As Professor William Cornish puts it, "Authors have long hated their publishers. . . . The leg-tie which chafes peculiarly is that the entrepreneurs have secured copyright in the name of the author but use their contractual deals to reap most of the advantages from the exclusive right. So it was in the beginning . . . and so no doubt it ever shall be."³³ Why then should this be a particular cause of concern now? Considerations of fairness and the value of the authorial enterprise may provide an answer.

Fairness arguments focus not on economic considerations but on the welfare of the particular creator.³⁴ In American intellectual property law, the fairness argument that has gained the most currency is the labor-desert theory of John Locke.³⁵ Roughly, this theory holds that one has a natural right to control the results of one's own efforts.³⁶ Electronic distribution undercuts this right.

³³ William Cornish, *The Author as Risk-Sharer*, 26 COLUM. J.L. & ARTS 1, 2 (2002).

³⁴ See Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CAL. L. REV. 241, 283 (1998) (addressing fairness arguments in the context of trade secret law, and stating, "Arguments from rights and fairness focus not on aggregate welfare effects or economic costs but on the harm to trade secret owners. In particular, one cannot justify limiting protection of rights or giving an individual less than his fair share simply on the ground that providing more would increase overall social cost; one must also show why the cost increase should warrant concern on moral grounds.").

³⁵ See Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540 (1993) (explaining how Lockean theory applies to intellectual property law); see also Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 521 (1990) (discussing the role of natural rights in U.S. copyright law).

³⁶ See Bone, *supra* note 34, at 283.

Freelancers fear loss of the ability to determine both the markets and the form in which their creative efforts will be disseminated if publishers distribute their works globally on-line.³⁷

Another fairness norm is reciprocity – the principle of fair play that essentially holds that if one participates in an activity and gains benefits from it, it is fair to impose conditions that make the effort better for all involved.³⁸ One can certainly argue that “enforcing the freelancers’ rights will have permanent and positive incentive effects, increasing the quantity and quality of work produced.”³⁹ If this is the case, the size of the aggregate “pie” (dollars generated from electronic and other publication) may increase, and why shouldn’t *all* participants – database providers, publishers, and freelancers benefit?⁴⁰

Publishers might counter with an argument based on custom: A custom favoring non-payment for electronic rights has arisen, and the law generally respects custom because repeat players will not long engage in a practice that is either inefficient or unfair.⁴¹ However, that some publishers are willing to pay for electronic rights casts doubt on whether or not a custom really does exist.⁴² To the extent it does, it is unilateral and, if the *Tasini* decision is correct, at odds with the Copyright Act.⁴³ Further, the law often recognizes custom because it performs a useful function in providing information to the contracting parties: It does not serve such a purpose here.⁴⁴

³⁷ See generally Holland, *supra* note 28 (stating that freelancers object to giving up rights because they do not want others to make changes to their works).

³⁸ Cf. Robert G. Bone, *Procedural Fairness by Agreement* (draft on file with author) (discussing different versions of fairness).

³⁹ Wendy J. Gordon, *Fine-Tuning Tasini: Privileges of Electronic Distribution and Reproduction*, 66 BROOK. L. REV. 473, 495 (2000).

⁴⁰ Cori Flam, Remarks at The Columbia Law School Panel Discussion on Portrait of the Artist as an Entrepreneur: Can Freelance Creators Make a Living from Traditional and Digital Media, (Jan. 29, 2003) (notes on file with author) (noting that she finds this argument persuasive but that certain publishers do not acknowledge the desirability of sharing part of an expanded “pie” with freelancers).

⁴¹ See *id.*

⁴² See Sacharow, *supra* note 3, at 13.

⁴³ Gordon, *supra* note 39, at 495. Professor Gordon argues that no deference should be accorded the custom of distributing content electronically without freelancers’ consent or payment to them because:

First, the so-called custom is unilateral. Second, the relevant statute attempts to limit the relevance of changes in custom. Third, the primary reason that customs are often helpful to decision-makers – because they provide useful information about efficiency – does not apply to the publishers’ practice of proceeding without obtaining specific consent from the copyright holders.

Id.

⁴⁴ *Id.* Note also that even a strict law and economics approach supports the rule in *Tasini*. As Professor Gordon notes, economic theory posits that a default rule (like the Copyright Act’s

Additionally, other customs may point in the opposite direction. For example, many freelancers work on a regular basis for certain customers. These customers tend to treat such freelancers the same as employees, including them in office meetings and assigning work to them like any other employee. But the publishers don't have to pay these "independent contractors" benefits or give them any of the other protections that accompany employment.

One might argue that, once again, this is simply the market at work. Publishers can only support a certain number of staff writers. Freelancers either don't make the cut or prefer to work independently, forgoing employment and its associated benefits (and restrictions) for the opportunity to work with a number of different publishers. Certainly though, a non-trivial percentage of freelancers traditionally worked on that basis because they wanted to retain their copyrights and whatever value might be associated with them.⁴⁵ Electronic distribution, work for hire, and all rights agreements have effectively deprived freelancers of that value without giving them the benefits accompanying the employment relationship.⁴⁶

There may also be some social value associated with an independent voice not beholden to a particular employer, as well as a group of authors who spend full-time thinking about and developing expertise in writing generally and in a particular subject matter area.⁴⁷ At least one writer "believes that a culture stays alive through the vitality of its *avant-garde*. To her the major new creators in each generation will include those who cannot focus on the need to secure their economic position in a free-enterprise world or who are ideologically opposed to capitalistic behavior."⁴⁸ Such creators and even "the lesser talents at their side" need some protection from the rough and tumble of the marketplace and, in par-

§ 201(c)) should be drawn to encourage the party with superior information (the publisher) to disclose it: Publishers are likely better informed about new ways to exploit a work and their plans to do so than freelancers, making a case for drawing the rule to encourage them to bring it to freelancers' attentions. *Id.* at 497 ("[T]o the extent that a publisher has superior knowledge about the value or imminence of a new technological use, there will be asymmetric information when that publisher meets a freelancer over the bargaining table.").

⁴⁵ Cf. Holland, *supra* note 28 (noting the value freelancers place on independence and an ability to control their works).

⁴⁶ This assumes, of course, that the market is not compensating all of those whose works actually have a re-use value. See *supra* Part I.A.

⁴⁷ See Flam, *supra* note 40 (emphasizing the social utility of having multiple voices not controlled by a media conglomerate and the ability of those voices to make a living through their creative efforts).

⁴⁸ Cornish, *supra* note 33, at 8 (discussing the views of Madame Vessilier-Ressi).

ticular, from the more restrictive provisions of their publishers' contracts.⁴⁹

Indeed, ultimately, one might ask what the purpose of copyright law is. Its theoretical foundation, expressed in the constitutional grant of power and embodied its statutory structure, rests on the notion that protecting authors is a primary means to its end of enhancing the public welfare. If the Copyright Act provides authors with a right that the market often renders valueless, has its goals necessarily been thwarted?⁵⁰ As Professor Cornish says:

Why after all do we continue to have copyright laws which derive their legal and moral force from the act of creativity? Why do we not simply have producers' investment laws? . . . If we are not prepared to provide legal buttresses for the interest of the author, why are authors there at all?

Whether you think the question is of much importance will in the end turn on your view of the significance of lively cultural expression, at various social levels, to twenty-first century existence. It is easy enough to take a jaundiced view of the pretensions of the authorial crafts: the grandiloquent voices that lead each high art as it seeks new fashions for its survival, the absurd earnings of the chart-toppers of the pop scene, the fat cat image of some professional promoters of the authors' cause. . . . I hope, however, that you see these irritations are easily outweighed by the richness which flows from literary and artistic creativity to all of us lucky enough to live above starvation level.⁵¹

What are we to make of all this? Depending on the numbers (which we cannot obtain), failing to pay freelancers for electronic rights may or may not be an "efficient" result from an economic perspective. Any economic analysis should take into account the social value associated with the independent voice of authors, but

⁴⁹ *Id.* (stating that Madame Vessilier-Ressi advocates such protection to give writers "a chance to some reasonable share in the returns which flow from exploitation protected by copyright. Then [writers] are not obliged to live by a constant search for grants or prizes or...the need for employment which may or may not make use of their talent").

⁵⁰ See Telephone Interview with Kay Murray, *supra* note 22 (noting that giving a right to authors that proves valueless is to begin a descent along a slippery slope if the reason for copyright is to provide an incentive to authors); Jane Ginsburg, Remarks at The Columbia Law School Panel Discussion on Portrait of the Artist as an Entrepreneur: Can Freelance Creators Make a Living from Traditional and Digital Media (Jan. 29, 2003) (notes on file with author) (pointing out that the Constitution recognizes copyright as vesting in authors, and raising the question whether copyright, in the face of market realities, is doing its job to help authors live by the fruits of their intellectual labors).

⁵¹ Cornish, *supra* note 33, at 12.

that value is likewise not quantifiable. It is nonetheless difficult to escape the intuition that publishers have treated freelancers badly and, indeed, have simply driven too hard a bargain. In Dickensian terms, the freelancers have been “scrooged” because they have effectively been prevented from sharing in the surplus that results, at least in some measure, from their creative efforts. Indeed, freelancers’ “real” income has not increased since the 1960s.⁵²

Certainly, it seems worthwhile to consider whether the law could assist freelancers by helping to enhance their bargaining power. “Legal constraints cannot do a great deal to alter hard economic realities, but it is important to spot the pressure points where they can have some real effect.”⁵³ This Article now turns to the strategies that freelancers have employed in an effort to turn the law to their benefit. Many are likely to be futile and, indeed, freelancers may have to employ more creative ways than they have to date to address the bargaining power imbalance between them and their publishers.

II. THE COMMON LAW ATTACK ON FREELANCER CONTRACTS

Contractual claims against publishers are complicated because the contracts themselves can be difficult to locate, the terms hard to define, and the contractual arrangements numerous, making it virtually impossible to conduct an analysis that would apply to all freelancers.⁵⁴ Contract law is, of course, state law, which increases the prospect of non-uniform results: Even if freelancers nationwide all entered into contracts with the same literal wording, results in particular cases would vary. Thus, contract claims are unlikely to offer freelancers uniform redress.⁵⁵

The analysis here focuses on generally accepted principles of common law. It argues that freelancers will likely find contract doctrine most useful – although not necessarily successful – in arguing the unenforceability of publishers’ agreements conditioning continued “employment” on the uncompensated transfer of elec-

⁵² Richardson, *supra* note 3.

⁵³ Cornish, *supra* note 33, at 12-13.

⁵⁴ Rod Dixon, *Profits in Cyberspace: Should Newspaper and Magazine Publishers Pay Freelance Writers for Digital Content?*, 4 MICH. TELECOMM. TECH. L. REV. 127, 149-50 (1998), available at <http://www.mtlr.org/volfour/dixon.pdf> (“Historically, freelance writers and publishers have been lax in creating written, let alone unambiguous, contracts. Until recently, magazines and newspapers bought articles simply on the basis of oral agreements, and the freelance contracts that did exist did not expressly address the parties’ rights in electronic media.”).

⁵⁵ The Copyright Act does impose a variety of limitations on contractual form. For example, it requires a signed writing to transfer copyright ownership. 17 U.S.C. § 204 (1996). It does not, however, contain rules that limit publishers from seeking work for hire or all-rights agreements or terminating contracts with freelancers for refusal to license electronic rights.

tronic rights to articles that publishers infringed. Even if freelancers succeed in having courts hold such terms unenforceable, they will not recover much in the way of damages or obtain protection for the future. Indeed, contract law will likely not assist at all in setting aside work for hire or all rights agreements applying to new works, unless freelancers can convince courts that such contracts are unconscionable.

A. *Retroactive Transfer of Rights Clauses*

1. *Marx v. Globe Newspaper Co.*

After *Tasini*, some publishers began requiring freelancers to grant electronic rights to their past works without additional compensation as a condition of continued employment. In the case of *Marx v. Globe Newspaper Co.*, a group of freelancers sued the *Boston Globe*, seeking to enjoin it “(1) from threatening to terminate, or terminating, their oral contracts with [the Globe] if they do not agree to enter into a “License Agreement” with [the Globe]; and (2) from enforcing such “License Agreement” entered into by any Plaintiffs or similarly situated person.”⁵⁶ The License Agreement included a license to “use all past works previously accepted from the freelance contributor.”⁵⁷

The plaintiffs sued under Chapter 93A of Massachusetts General Laws, essentially a state law counterpart to § 5 of the FTC Act, which makes illegal unfair methods of competition and unfair or deceptive practices.⁵⁸ The court granted summary judgment to the defendant *Globe*.⁵⁹

The court first rejected the argument that the defendant had breached the covenant of good faith and fair dealing implicit in every contract.⁶⁰ It stated:

The key issue in this case . . . is whether the meaning of a breach of the implied covenant of good faith and fair dealing . . . should be enlarged to include the *Globe*’s threatened termination of a freelance relationship that was terminable at will in order to pressure the freelancers partially to relinquish

⁵⁶ First Amended Complaint for Injunctive Relief and Damages, *Marx v. Globe Newspaper Co.*, 2002 WL 31662569, at *1 (Mass. Super. 2002).

⁵⁷ *Id.* at ¶ 19.

⁵⁸ See Mass. Ann. Laws ch. 93A, § 2 (West 1997) (prohibiting “[u]nfair methods of competition and unfair or deceptive acts or practices,” with courts to “be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1) . . .”).

⁵⁹ *Marx v. Globe Newspaper Co.*, 2002 WL 31662569, at *3 (Mass. Super. 2002).

⁶⁰ *Id.* at *11.

the copyright they had been permitted to keep earlier in that relationship.

Here, whether one characterizes the freelance relationship as an overarching, indefinite term contract or a series of contracts governing each piece of freelance work, the relationship was certainly terminable and there was nothing that prevented the *Globe* from seeking to renegotiate its terms.

The *Globe* . . . is not asking its freelancers to surrender the monies they were paid for their work . . . ; rather, it is asking them essentially to relinquish, in part, their copyright in work already published.⁶¹

The court held that copyright law did not prevent the *Globe* from conditioning continuing the at-will relationship on, effectively, the freelancers' agreements not to sue it for copyright infringement.⁶² Generally, an employer may terminate an at-will employee for any reason that does not violate a "clearly established public policy" – an exception to be construed narrowly:

[The Copyright Act] certainly conferred on the plaintiff freelancers the right to bring a suit for copyright infringement and the existence of a statutory claim certainly reflects a public policy to allow redress to those whose copyrights have been infringed. Yet . . . this public policy relates more to the financial well being of the copyright holder and "does not rise to the level of importance required to justify an exception to the general rule regarding termination of employees at will." . . . The freelancers' copyrights did not relate to or arise from their status as employees. In fact, they were never employees, only independent contractors, and their copyrights arose from work they performed as independent contractors. Therefore, this Court concludes that public policy does not prohibit the *Globe* from terminating a freelancer for bringing a copyright infringement claim and, therefore, does not prohibit the *Globe* from requiring a freelancer essentially to release any copyright claim as a condition of continuing the freelance relationship.

⁶¹ *Id.* at *6-7.

⁶² *Id.* at *8-11.

Nor . . . is there any prohibition in the Copyright Act that prohibits retaliation against a copyright holder for bringing or threatening an infringement claim.⁶³

The court, using a Uniform Commercial Code (UCC)-type analysis, also held that the new provisions, if viewed as modifications to existing contracts, did not show bad faith.⁶⁴

[T]he concern of the Uniform Commercial Code regarding the modification of contracts focuses on the danger of “extortion of a ‘modification’ without legitimate commercial reason.” . . . This Court acknowledges that the Boston Globe newspaper has the largest circulation of any daily newspaper in the region, that there are limited opportunities for freelance writers and photographers to earn a living if they cannot sell their work to the Globe, and that, for those who have done freelance work for the Globe, the loss of this relationship poses a significant blow to their career and financial well-being. This Court also acknowledges that all of these factors gave the Globe substantial leverage in its dealings with freelancers, and that the Globe took advantage of that leverage in requiring its freelancers to surrender part of their copyright in previously published work to preserve their freelance relationship with the Globe. Yet, this Court also finds that the Globe did not demand this modification of the previous oral agreement simply to extract another concession from its freelancers; it demanded this modification to solve a problem that it found itself in when the Second Circuit reversed the District Court’s decision in *Tasini*. Therefore, even if one were to characterize this modification as “extortion” obtained through the Globe’s strong bargaining position, the legitimate commercial reason for the Globe to have demanded this modification places its demand within the rough and tumble, yet reasonable, commercial standards of fair dealing in the trade.⁶⁵

The court’s decision might be interpreted as a strong statement in favor of settling copyright infringement suits. Essentially, continued “employment” of at-will freelancers functioned as the

⁶³ *Id.* at *10-11 (citations omitted).

⁶⁴ *Id.* at *11-12. Of course, the UCC did not govern the contract at issue because the UCC applies to contracts for the sale of goods, U.C.C. § 2-102 (2001), and freelancers provide services. However, the court found it appropriate to apply the UCC test for an enforceable modification. Under U.C.C. § 2-209(1), for a modification to be enforceable, it must be made in good faith. U.C.C. § 2-209 cmt. 2 (2001).

⁶⁵ *Marx v. Globe Newspaper Co.*, 2002 WL 31662569, at *13 (Mass. Super. 2002) (citations omitted).

consideration supporting "settlement" of the infringement claim: Freelancers relinquished their claims for damages from infringement in return for new assignments from the publishers/infringers. Certainly, the law favors settlement, including settlement of intellectual property disputes. Here though, one might question whether the deal was simply too hard a bargain for the law to enforce.

The Globe created its own problem by choosing to rely on the Second Circuit's pro-publisher decision in *Tasini* (rather than waiting for the Supreme Court's holding), and provided databases with electronic versions of freelancers' articles without the authors' permissions. By extracting royalty-free licenses to the works they infringed as a condition of future employment, the Globe was able effectively to foist the business risk of its decision to freelancers, rather than bear it itself. The modification does look rather extortionate as the court itself noted.⁶⁶ Indeed, in the court's opinion, the juxtaposition of its acknowledgement that one might characterize the modification as extortionate alongside its reference to a "legitimate commercial reason" for that extortion is jarring.

Fears of a slippery slope may have at least partially motivated the court. Parties both contract with respect to copyrights and settle copyright disputes all the time. If the court were to set aside the particular "settlement" in *Marx*, it might open floodgates of litigation in which the relatively weaker party challenged the license agreement or settlement as lacking good faith. Moreover, there may be cases in which a court might appropriately enforce a settlement in which the copyright owner relinquishes its damages claim in return for continued employment at, for example, a higher rate than normal. It would be difficult for the court to formulate a sufficiently limited rule that would not throw all licenses and settlements into doubt.

This is not to say, however, that some court should not make such an effort. Indeed, a court might limit its holding to the particular facts in *Tasini* to avoid opening the door to non-frivolous challenges to all licenses and settlements concluded by parties with unequal bargaining power.

The *Marx* court's ruling in favor of the Globe might also have been motivated in part by the futility of formulating an adequate remedy. The usual remedy in bad faith termination cases is damages in the amount of the benefit earned, not an injunction to prevent or undo the termination.⁶⁷ Thus, at least for those who did not

⁶⁶ See *id.*

⁶⁷ *Marx v. Globe Newspaper Co.*, 2001 WL 43746, at *4 (Mass. Super. 2001).

sign the contract, there appears to be no remediable harm: They retain their rights to sue for damages for infringement.⁶⁸ For those who did sign, the question is whether the provision waiving compensation is void.⁶⁹ Even if a court were to hold it void, the publisher may still terminate the at-will freelancer or refuse to hire him or her in the future. Thus, like those who did not sign the contract, those who did would, at best, be able to sue for infringement damages but they would not be able to force publishers to hire them in the future.

2. *The Duty to Negotiate in Good Faith*

The *Marx* court generally avoided classifying the relationship between the *Globe* and its freelancers as a single overarching contract or a series of discrete contracts for each article. If each contract were separate, the plaintiffs in the *Marx* case might also have argued that the *Globe's* presentation of and negotiations over the new License Agreement violated a duty to negotiate in good faith. This argument, however, is likely to be unsuccessful in most jurisdictions, not just that of the *Marx* court (Massachusetts).

American law recognizes a duty of good faith and fair dealing in negotiations only in limited circumstances. Generally, the common law will uphold an action for breach of such a duty only in cases of misrepresentation (including a failure to disclose a material fact), unjust enrichment, or breach of a promise made during negotiations.⁷⁰ Strict application of this law suggests that publishers do not violate any duty by asking for terms that freelancers find onerous.

This legal rule regarding the conduct of negotiations contrasts with the good faith requirement that applies to the performance (including any modification) and enforcement of a contract once concluded, and under which freelancers have a better chance (in non-*Marx* jurisdictions) of winning their cases. Ultimately, how-

⁶⁸ *Id.* at *5 (stating that freelancers who failed to sign the contract remain entitled to compensation, and are seeking an extension of the law by arguing that they should receive some remedy).

⁶⁹ *Id.*

⁷⁰ See E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 239 (1987) (discussing grounds for liability for behavior during negotiations as including unjust enrichment, misrepresentation and breach of a promise made during negotiations, and also stating "American courts . . . have declined to find a general obligation that would preclude a party from breaking off negotiations, even when success was in prospect"); Nadia E. Nedzel, *A Comparative Study of Good Faith, Fair Dealing, and Precontractual Liability*, 12 TUL. EUR. & CIV. L.F. 97, 98, 107-08, 128 (1997) (stating that "promissory estoppel and various tort doctrines" including misrepresentation provide some remedies for "precontractual misbehavior").

ever, in a case in which the parties have a longstanding relationship that generates a set of expectations regarding the nature and terms of any contractual dealings, it may be appropriate to impose some obligation of good faith in negotiations – or to avoid the question altogether by treating the “new” deal as a modification of an already existing one and applying the standard of good faith which the *Marx* court did. As noted above, the result of that analysis would likely vary.

3. *Unconscionability*

The *Marx* court also did not comment on the plaintiffs’ argument that the License Agreement was unconscionable.⁷¹ However, given the court’s holding that neither the agreement nor its terms violated the implied covenant of good faith and fair dealing, it is unlikely that the court would have found it unconscionable. Other courts might rule differently.

Generally, under common law⁷² and the UCC,⁷³ courts are free to reform unconscionable contracts. Often, courts require a showing of both procedural and substantive unconscionability before branding a clause or clauses unconscionable.⁷⁴ Procedural unconscionability refers to the absence of meaningful choice by one party, while substantive unconscionability refers to the unfavorable nature of the term itself.⁷⁵ Generally, courts will not use unconscionability as a device to level otherwise unequal bargaining power.⁷⁶

Freelancers may find it difficult to show procedural unconscionability. Simple lack of bargaining power should not result in a finding of procedural unconscionability. Lack of meaningful choice “is usually founded upon a recipe consisting of one or more parts of assumed consumer ignorance and several parts of seller’s

⁷¹ First Amended Complaint for Injunctive Relief and Damages, *Marx v. Globe Newspaper Co.*, 2002 WL 31662569, at ¶ 32 (Mass. Super. 2002).

⁷² See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979).

⁷³ U.C.C. § 2-302 (2002).

⁷⁴ JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE, § 4-7, at 168 (5th ed. 2000) (“Most courts take a ‘balancing approach’ to the unconscionability question, and to tip the scales in favor of unconscionability, most courts seem to require a certain quantum of procedural, plus a certain quantum of substantive, unconscionability.”).

⁷⁵ *Id.* § 4-3, at 156-57.

⁷⁶ RESTATEMENT (SECOND) OF CONTRACTS § 208, cmt. d (1979) (“A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party.”); U.C.C. § 2-302, cmt. 1 (2002) (“The principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power.”).

guile.”⁷⁷ Freelancers know what the terms are; they just don’t like them. Even though the publisher buyers have market power, the freelancers may have some choice: Not all publishers offer the same terms, and some are willing to pay for additional rights.⁷⁸

Some courts, however, take a more expansive view of procedural unconscionability. One court construing California law stated:

A contract or clause is procedurally unconscionable if it is a contract of adhesion. . . . A contract of adhesion, . . . is a “standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.” . . . [A] claim of procedural unconscionability cannot be defeated merely by “*any* showing of competition in the marketplace as to the desired goods and services.”⁷⁹

Courts in such jurisdictions may find the publisher-drafted contracts unconscionable, particularly if they consider competition in the market for buying freelancers’ articles limited. Economists note that many firms in an industry often offer the same standard terms, and this may evidence competition as much as not. The publishing industry, however, warrants close analysis before concluding that its standard terms are competitive. The industry has become increasingly consolidated, suggesting that the marketplace may be something less than competitive and, in fact, leave freelancers with no “meaningful choice.” On the other hand, as discussed in Part I, the fact that some freelancers can obtain compensation for transfers of electronic rights suggests that the marketplace may be arriving at the competitive result. If that is the case, the question is whether that market outcome is the one which society desires.

Some courts will find unconscionability even in the absence of procedural irregularities if the term at issue is substantively objectionable.⁸⁰ Freelancers have an interesting argument here that the retroactive, uncompensated transfer of rights is unconscionable because it is both unfair and inconsistent with copyright policy. In *Tasini*, the Supreme Court stated that copyright law provides freelancers with a set of rights. Those rights have value and publishers

⁷⁷ WHITE & SUMMERS, *supra* note 74, § 4-3, at 157-58 (noting that many unconscionability cases involve uneducated and poor consumers, and cautioning courts against finding unconscionability simply because a consumer lacks bargaining power).

⁷⁸ See Sacharow, *supra* note 3, at 13.

⁷⁹ *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1172-73 (N.D. Cal. 2002).

⁸⁰ WHITE & SUMMERS, *supra* note 74, § 4-7, at 168.

owe the freelancers whatever that value is and, indeed, continue to litigate the dollar amount of that value. It would be unconscionable to permit them to escape liability through the expedient of exercising superior bargaining power to condition future business on relinquishing a vested right. These arguments are essentially the same as those the *Marx* court considered (and rejected) in assessing bad faith, but may stand some chance of success in other jurisdictions.

B. Prospective Transfer of Rights Clauses

Freelancers have also challenged all rights and work for hire agreements that pay them at the same rate as contracts for one-time North American publication rights. Their arguments here resemble quite closely those they are making in the context of uncompensated transfers of rights to works already produced and infringed. Their claims, however, with respect to the terms governing new works, stand even less chance of success.

1. The Duty to Negotiate in Good Faith

In negotiating contracts governing future works, publishers likely have not breached any obligation of good faith and fair dealing. The terms are written on the face of the contract, limiting the possibility of any misrepresentation to extraordinary factual situations;⁸¹ no transfer of consideration occurs until the contract is signed, making an unjust enrichment claim unlikely; and the probability of publishers' breaching a promise made during discussions seems quite low, barring unusual facts.

2. Unconscionability

Even if contracts for new works are appropriately formed and generally enforceable, a court may set aside particular terms as unconscionable. One ground of attack could be that the compensation paid under the contracts is unconscionable because of the disparity between the amount paid by the publisher and the value provided by the freelancer. The result of such a challenge would likely vary by state and, in many, would favor the publisher.

⁸¹ Interestingly, such extraordinary circumstances may exist in the *Marx* case. There, freelancers have raised a misrepresentation claim against the Boston Globe for its conduct during negotiations over its new contract. The Globe had mailed its freelancers and posted on its web site a letter that described a new License Agreement. The plaintiffs in the *Marx* case argue that the letter and other representations made by the Globe mischaracterized the nature of the License Agreement. First Amended Complaint for Injunctive Relief and Damages, *Marx v. Globe Newspaper Co.*, 2002 WL 31662569, at *1 (Mass. Super. 2002).

Courts have occasionally been willing to hold a contract unconscionable when the price is excessively high or low.⁸² However, the real question here is the empirically difficult one of valuing both a freelancer's article and the associated electronic rights. If the disparity between the value of the work and the price the freelancers receive (effectively zero) is large, the contract may be unconscionable. No bright-line rule defines the level of disparity sufficient to justify an unconscionability finding. Certainly, one could argue that because copyright law supports compensating freelancers for their transfer of rights, the difference in value required to show unconscionability should be somewhat lower than in garden variety cases not involving intellectual property rights.

Even if a court were to hold the provision unconscionable, freelancers' positions would likely not improve significantly. Practically, they can't force publishers to hire them, and any rate of pay for additional rights is likely to spiral down to that of the cheapest freelancer publishers can hire – likely close to zero, a level which undercuts the unconscionability argument.

The real problem that no contractual doctrine can solve is that the sellers' (freelancers') market is extremely competitive while the buyers' (publishers') is not. Classically, in such situations, collective bargaining rights for sellers can help to close the bargaining power gap.

III. THE LEGISLATIVE ATTACK: THE FREELANCE WRITERS AND ARTISTS PROTECTION ACT OF 2002

In May 2002, Representative John Conyers (D – Mich.) introduced the Freelance Writers and Artists Protection Act of 2002.⁸³ Conyers described the bill as intended to ameliorate the bargaining imbalance between information creators and “large media conglomerates” to enable creators to share in the benefits of the electronic market, particularly the Internet.⁸⁴ The bill attempts to achieve this goal by affording freelancers an antitrust exemption to permit them to bargain collectively, with the hope that the combined force of freelancers will have more negotiating clout than

⁸² WHITE & SUMMERS, *supra* note 74, § 4-5, at 159-63.

⁸³ H.R. 4643, 107th Cong., (2002).

⁸⁴ *Freelance Writers and Artists Protection Act of 2002: Introduction of HR 4643*, 107th Cong., (2002) (statement of Rep. John Conyers, Jr.), available at <http://www.nwu.org/pic/at2.htm> (visited Jun. 20, 2002) (noting that information creators often have to sign adhesion contracts surrendering all their rights, “Individual writers and artists don’t stand a chance of negotiating favorable terms and fees when they must go up against media giants”).

each freelancer individually.⁸⁵ Whether the bill if enacted would succeed is another matter.

Under its terms, the freelance writer is defined as "an individual who creates (A) an article, book, essay, poem, or other written material; . . . for present or future compensation other than on a 'work made for hire' basis."⁸⁶ The antitrust laws apply to such freelance writers' activities "for purposes of negotiating the terms and conditions of contracts for the sale of written material . . . created by them to publishers, in the same manner as such laws apply to collective bargaining by employees who are members of a bargaining unit recognized under the National Labor Relations Act [NLRA]. . . to engage in collective bargaining with an employer."⁸⁷

The reference to "work for hire" in the definition of "freelance writer" is curious. It seems to create an incentive for publishers of periodicals and other collective works to take advantage of the statutory option that §§ 101 and 201(b) of the Copyright Act give them to seek work for hire agreements. Such agreements would prevent freelancers from taking advantage of the statutory opportunity to bargain collectively. The legislation might more appropriately exempt employees from the definition of "freelance writer." The NLRA already governs an employee's collective bargaining rights.

Freelancers also worry about the reference to the NLRA contained in the Conyers bill. Since the NLRA governs rights of employees, there is a risk that courts could interpret the reference to it in the Conyers bill as an invitation to treat freelancers as employees under the copyright law.⁸⁸ Copyright law considers works of employees works made for hire, with the copyright vesting in the employer.

⁸⁵ *Id.* ("[T]his legislation gives freelance writers and artists an antitrust exemption so they can present a united front against the big media companies who have been forcing them to sign non-negotiable contracts that surrender all their rights. In doing so, the bill makes it easier for freelancers to bargain fairly for their rights as a collective."). Note that freelancers' fears of antitrust scrutiny are well-founded. The American Society of Media Photographers (ASMP) has been the subject of a number of Department of Justice investigations centering around its members' discussion of rates, rights, and working conditions. Mopsik, *supra* note 28.

⁸⁶ H.R. 4643, 107th Cong., § 4, (2002).

⁸⁷ *Id.* at § 2. Publisher is defined as "a person that produces any periodical, magazine, newspaper, book, manual, advertising materials, or other similar material, whether in printed, electronic, or other form." *Id.* at § 4(3). "The term 'antitrust laws' (A) has the meaning given it in subsection (a) of the first section of the Clayton Act . . . except that such term includes section 5 of the Federal Trade Commission Act . . . appli[cable] to unfair methods of competition; and (B) includes any State law similar to any of the laws referred to in subparagraph (A)." *Id.* at § 4(1).

⁸⁸ See Holland, *supra* note 28.

The ultimate question is whether freelancers would be willing to bargain collectively. Collective bargaining is most successful when the parties in the unit have a commonality of interests and services of roughly equal value to offer. Freelancers are quite diverse, and so are their rates of pay.⁸⁹ For the collective to be successful, it would have to attract at least some individuals whose reputations provide them with bargaining power in negotiations with publishers. Whether they would be willing to join such a group is an open question.

Past experience suggests that freelancers are reluctant to engage in joint activities. The American Society of Media Photographers (ASMP) has explored a number of options for enhancing the bargaining power of freelance photographers.⁹⁰ It set up an independent entity organized as a cooperative to provide services like setting minimum prices for classes of works.⁹¹ They discovered that ASMP members were so fiercely independent that they wanted "nothing to do" with anything smacking of collective action.⁹² As a result, the cooperative is floundering.⁹³

Moreover, under the Conyers bill, authors could choose to organize in many different units.⁹⁴ Publishers would not want to negotiate with a number of different collectives representing different groups of writers.⁹⁵ Also, practically, the circulation and reputation of many publications will enable them to hire writers that are not members of any collective organization.⁹⁶ Publishers would likely have no incentive to hire any of the probably small percentage who would organize.⁹⁷

Even if "enough" writers joined a collective and the sheer number of collectives were manageable, the benefits may be few. The exemption from the antitrust laws is, of course, useful. But the legislation stops short of permitting the writers to form a union protected under the NLRA. The NLRA permits employees to un-

⁸⁹ James H. Johnston, *Free-Lance Writers Lost in Cyberspace*, LEGAL TIMES, June 3, 2002 at 28 (stating that the "going rate for free-lance articles ranges from nothing more than a byline to an upscale \$2 per word, depending on the publication and the reputation of the writer"); Richardson, *supra* note 3 (noting that rates range from 10 cents a word to up to \$3).

⁹⁰ Mopsik, *supra* note 28.

⁹¹ *Id.* Note that antitrust law permits cooperatives to set prices for certain types of products.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* (stating that under the Conyers bill, any number of writers could form a group to negotiate a fee structure but that would not preclude another group from negotiating another, different deal).

⁹⁵ *Id.*

⁹⁶ Telephone Interview with Kay Murray, *supra* note 22.

⁹⁷ *Id.*

ionize⁹⁸ and protects them from the employer's use of unfair labor practices.⁹⁹ In particular, the NLRA requires the employer to recognize a duly constituted union and to bargain in good faith with it.¹⁰⁰ It also protects union members from discrimination based on their union activity.¹⁰¹

Because freelancers are independent contractors, they are ineligible for protection under the NLRA. Thus, publishers can refuse to bargain with any collective organized under the Conyers bill and can boycott or "black-list" the collective's members as long as the publishers' activity is not concerted. Further, even if a publisher chose to bargain with the collective, an obligation of good faith is unlikely to apply. As discussed above, the common law generally refrains from imposing obligations of good faith and fair dealing in pre-contract discussions.

In response to objections, Representative Conyers' staff is working on a new version of the bill to be introduced as this Article is going to press. This new bill will likely be modeled after proposed legislation targeted toward increasing the bargaining power of playwrights.¹⁰² The playwrights' bill does not refer to the NLRA, instead simply providing generally that the antitrust laws will not apply to joint agreements to establish minimum terms and conditions.¹⁰³

Another approach that freelancers might consider is that which screenwriters have used. Substantially all of those who

⁹⁸ 29 U.S.C. § 157 (2000) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities for the purpose of collective bargaining . . .").

⁹⁹ 29 U.S.C. § 158(a) (2000) (listing unfair labor practices by an employer).

¹⁰⁰ 29 U.S.C. § 158(d) (2000).

¹⁰¹ 29 U.S.C. § 158(a)(3) (2000) (stating that "[I]t shall be an unfair labor practice[to] . . . discriminat[e] in regard to hire or tenure of employment . . . [in order] to encourage or discourage membership in any labor organization").

¹⁰² Flam, *supra* note 40.

¹⁰³ H.R. 3543, 107th Cong. (2001):

The antitrust laws shall not apply to – (1) any – (A) agreement by and among playwrights, or by and among representatives or associations of playwrights; or (B) concerted action taken by playwrights or by representatives or associations of playwrights; for the purpose of establishing and enforcing the minimum terms and conditions on which the works of such playwrights will be developed, licensed, or produced, or (2) any discussion by and among – (A) representatives or associations of playwrights; and (B) producers; for the purpose of negotiating, implementing, or enforcing a standard form contract or other collective agreement governing the terms and conditions on which playwrights' works will be developed, licensed, or produced);

see also S. 2082, 107th Cong. (2002) (introducing a similar but not identical bill in the Senate providing for an antitrust exemption for concerted conduct whose purpose is to develop a "standard form contract containing minimum terms of artistic protection and levels of compensation for playwrights.").

write for both TV and movies have long been represented by a union, the Writers Guild of America (WGA).¹⁰⁴ The union has been relatively successful in attaining reasonable levels of compensation for its members.¹⁰⁵ It has essentially given copyright ownership to the studios in return for decent rates of pay, including pay for residuals, and the ability largely to control the credit screenwriters receive when their works are broadcast.¹⁰⁶

Could the same approach work for freelancers? Unions protecting staff writers in the newspaper industry already exist, so any additional union would face the question of how it fits with those organizations. Unionization naturally raises the same questions as collective bargaining under the Conyers bill, including whether enough freelancers would be willing to join. Historically, freelancers have been an independent lot, possibly valuing retention of copyright more than screenwriters. Indeed, in discussions with Representative Conyers' staff, many freelancers indicated their strong opposition to joining a union.¹⁰⁷ Additionally, the nature of the creative effort also seems different, with screenwriting a lengthier process involving more revisions than freelance writing for magazines or newspapers. Also, many collaborate in the production of a film, with the screenplay melded into a much larger enterprise: This differs from collective works where each contribution more or less retains its integrity.

Freelancers may find the Conyers bill a more useful first step than unionization. It will certainly enhance the probability that freelancers will form collectives. Congress should, however, also extend NLRA-type protections to freelancers to prevent publishers from breaking any collective that may arise. Specifically, a new bill should include a requirement to bargain in good faith with a

¹⁰⁴ See Lionel S. Sobel, *A Practical Guide to Copyright Ownership and Transfer: The Differences Between Licenses, Assignments and Works Made for Hire . . . and Suggestions for Analyzing which One is "Best" for a Particular Transaction*, ENT. L. REP., Feb. 1984, at 3, 7 ("Virtually all successful screenwriters belong to the Writers Guild of America which has entered into a collective bargaining agreement with virtually all producers."); see also John M. Kernochan, *Ownership and Control of Intellectual Property Rights in Audiovisual Works: Contracts and Practice - Report to the ALAI Congress, Paris, September 20, 1995*, 20 COLUM.-VLA J.L. & ARTS 379, 402 (1996) (noting that the writers are employees and workers for hire and represented by the WGA East or West); WRITERS GUILD OF AMERICA, COMMON QUESTIONS, at <http://www.wgaeast.org/faq.html> (last visited Feb. 18, 2003) (explaining that the WGA is a labor union with membership of around 11,000 and that members east of the Mississippi belong to the WGA East, and those west to WGA West).

¹⁰⁵ See Kernochan, *supra* note 104, at 402 ("Over the years, the Guild has been able to better the compensation of its members significantly . . .").

¹⁰⁶ *Id.* ("[T]he Guild has . . . established minimum scales of payment . . . negotiated basic 'residual' payments . . . reserved rights of 'novelization' . . . [and] control[led] the determination . . . of writing credits for screenplays . . .").

¹⁰⁷ Flam, *supra* note 40.

duly authorized representative and outlaw discrimination, including blacklisting, of collective members. This "Conyers plus" approach may prove more effective than attempting to re-organize the entrenched print publication industry to look more like the heavily unionized entertainment field in which screenwriters work.¹⁰⁸ Even if such a bill never passes, its mere existence may bring some pressure on publishers and lead to more equitable contracts.¹⁰⁹

IV. COLLECTIVE RIGHTS ORGANIZATIONS

In the *Tasini* case, publishers argued that it was simply too difficult to locate and seek permission from freelancers who had created works for them in the past.¹¹⁰ Prospectively, of course, obtaining permission has not been a problem because publishers simply now explicitly address obtaining electronic rights (and more) in contracts. But publishers would have less need to obtain all rights initially if they could more easily obtain additional rights when technology makes new uses possible. In other industries, particularly music, when copyright law created rights for a dispersed group of creators that translated into high transaction costs for those who sought to use the copyrighted works, collective rights organizations (CROs) arose to address the transaction cost problem by providing a centralized licensing system.¹¹¹

For example, copyright law grants composers of music exclusive rights to the public performance of their works.¹¹² Imagine the difficulty if every radio station and TV broadcaster had to seek out the composer to obtain a license each time it wanted to play the

¹⁰⁸ That screenwriters are unionized and willing to cede copyright control to the studios may be a result of the peculiar history of the film industry:

Th[e] pattern [we see today] came about largely as a result of the history of the United States film industry and the emergence of the so-called 'studio system' — a kind of assembly-line . . . organization Under the oligopolistic 'studio system' there developed a vertical integration. . . . These vertically integrated monopolies were seriously curtailed by anti-trust proceedings. . . . But the 'factory' model with its pattern of contractual control by producers over ownership of creative contributions has persisted.

Kernochan, *supra* note 104, at 385.

¹⁰⁹ Flam, *supra* note 40 (stating that the Conyers bill faces an "uphill battle" for passage because a number of large publishers are opposed to it, but also noting that merely introducing the bill may give artists some negotiating leverage).

¹¹⁰ *New York Times Co. v. Tasini*, 533 U.S. 483, 510 (2001) (Stevens, J., dissenting).

¹¹¹ See Stanley M. Besen, et al., *An Economic Analysis of Copyright Collectives*, 78 VA. L. REV. 383 (1992) (considering why copyright collectives emerge and the laws that govern such collectives); Robert P. Merges, *Contracting Into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293 (1996) (discussing copyright and patent CROs lowering transaction costs).

¹¹² 17 U.S.C. § 106(4) (2000).

composer's song. At the same time, consider a composer's dilemma – how can he or she police all of the infringing performances in, for example, restaurants, dance halls, theaters, and over the air? Courts were not receptive to arguments that the sheer difficulty of obtaining the requisite licenses should lead to a legal rule undercutting the public performance right. Instead, they left it to copyright owners and users to develop a system that would vindicate the rights the law provides.¹¹³

To solve the problem, industry participants joined together to form the American Society of Composers, Authors, and Publishers (ASCAP), a phenomenally successful CRO.¹¹⁴ By the 1990s, ASCAP counted more than 31,000 composers and around 24,000 music publishers among its members.¹¹⁵ ASCAP offers those who would publicly perform its members' songs a blanket license to all of the songs in its library.¹¹⁶ The price it charges varies according to the nature of the licensee.¹¹⁷ It uses "a combination of self-reporting by licensees and sophisticated sampling techniques" to determine how to allocate income among its members.¹¹⁸

Freelancers or at least their advocates are well aware of the ASCAP experience. The Authors Guild, the self-identified "largest organization of published book author and freelance journalists in America," has established the Authors Registry.¹¹⁹ In its own words:

The Authors Registry is a not-for profit organization that functions as a clearinghouse for rights payments. It has 30,000 writers in its database and has paid writers more than \$1.5 million in photocopy and electronic rights royalties to date. These payments have been made for re-use – including electronic database use – of freelance articles and books.

¹¹³ Merges, *supra* note 111, at 1330-32 & accompanying notes (discussing the cases involving ASCAP's early legal struggles and the courts' uniformity in upholding the public performance right).

¹¹⁴ See *id.* at 1329, 1334 (stating that nine music industry participants joined to form ASCAP to fight infringing performances, and noting that ASCAP has had a "meteoric rise"). The two other major music industry CROs are BMI and SESAC. DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 233 (2001).

¹¹⁵ Merges, *supra* note 111, at 1334.

¹¹⁶ PASSMAN, *supra* note 114, at 234; Meitus, *supra* note 3, at 774; see also Besen, et al., *supra* note 111, at 388 (noting that all CROs use blanket licenses but that a consent decree restricts certain aspects of ASCAP's licensing practices).

¹¹⁷ PASSMAN, *supra* note 114, at 234 (stating, "The fee can range from a few hundred dollars per year for a small nightclub, to millions of dollars per year for television networks").

¹¹⁸ Merges, *supra* note 111, at 1335.

¹¹⁹ AUTHORS GUILD, *AUTHOR'S GUILD AND FREELANCERS BRING COPYRIGHT INFRINGEMENT SUIT AGAINST NEW YORK TIMES*, at http://www.authorsguild.org/news/freelancers_bring_class.htm (last visited Feb. 24, 2003).

Writers need not be Guild members to enroll; 36 writers' organizations and 109 literary agencies have signed up to include their members and clients.¹²⁰

The National Writers Union (NWU) operates a similar service, the Publication Rights Clearinghouse (PRC).¹²¹ The PRC is open to non-members,¹²² has contracts with a number of organizations¹²³ and offers non-exclusive licenses to its inventory, with 75-90% of the fee it collects remitted to authors. Between the Authors Registry and the PRC, it seems that the administrative structure to compensate freelancers for re-use of their articles exists.

Yet, for a number of reasons, these freelancer CROs have been nowhere near as successful as ASCAP. First, if freelancers contract away all their rights to publishers, the need for those who seek permission for re-use to go to a CRO decreases and, depending on the specific terms of the initial agreement, disappears altogether. From a publisher's perspective, it is more cost-effective (especially when the cost is zero) to obtain all rights initially rather than limited rights that may be augmented by contracting with a CRO later. Second, the CROs face the problem of convincing freelancers to join,¹²⁴ how to value the inventory, and how best to package the product. Certainly ASCAP faced similar problems but it was able to attract a critical mass of composers. The freelancer CROs simply have not been able to match the scale of ASCAP's operation.

Finally, interestingly, composers generally likely have as little bargaining power as freelancers. However, in the music industry, a powerful intermediary – music publishers – exists between composers and exploiters. Most composers either own or hire a music publisher to administer the licensing of their works. Generally, music publishers require that a composer assign his or her copyright to them and agree to a 50/50 royalty split. Some writers employ literary agents but many, if not most, freelancers do not.

¹²⁰ *Id.*

¹²¹ Jane Braxton Little, *Publication Rights Clearinghouse: Promoting Principle and Profits*, AMERICAN WRITER, Summer 2001, at 6-7, 21 (stating that the PRC was established in the mid-1990s to combat on-line copying and distribution and it was intended to be a "union-run agency that protects writers' rights and pays us every time our works are included in an electronic database, faxed or photocopied").

¹²² PUBLICATION RIGHTS CLEARINGHOUSE, FREQUENTLY ASKED QUESTIONS, at <http://www.nwu.org/prc/prcfaq.pdf> (last visited Feb. 24, 2003).

¹²³ Little, *supra* note 121, at 6-7, 21 (stating that the PRC has contracts with Contentville.com, In these Times, Uncover, the Copyright Clearance Center, and SIRS Mandarin).

¹²⁴ DeMaio, *supra* note 3, at 14, 18 (citing the need for the PRC to include a larger number of writers).

Thus, no significant intermediary can bargain on freelancers' behalf.

The ultimate message is clear. A CRO that lacks substantial membership that is itself backed by some measure of bargaining power is likely to fail. Unfortunately, this may be an apt description of freelancer CROs, at least at this point in time.

V. CHANGES TO COPYRIGHT LAW – THE EXAMPLE OF GERMANY

The preceding discussion paints a fairly bleak picture for freelancers. Yet, notably, freelancers in the U.S. have yet to seek any amendment of the Copyright Act as a result of either the *Tasini* decision or publishers' contracting practices. This is not altogether surprising. U.S. copyright law has traditionally been relatively reticent about directly regulating the content of private contracts, including their compensation terms. European countries, particularly Germany, have been somewhat less restrained.¹²⁵ This section discusses the German law, considers the U.S. experience with analogous types of legislation, and argues that the U.S. should not yet implement the German approach.¹²⁶

¹²⁵ Cornish, *supra* note 33, at 5-6:

How very different . . . within the temple of authors' rights are the laws of Continental Europe [from those of the United States. In Continental Europe] one is likely to find a whole splay of rules, either presumptive or mandatory, which constrict the market-frame of negotiations, particularly at those points in a creator's career when he or she is not running with special fame and fortune. . . . In authors' rights laws there may be a set of presumptions about the contractual terms, which act at least as a model of basic fairness. There may be a positive requirement that each aspect of copyright be specifically assigned or licensed . . . general assignments of future works may be disallowed; equally, there will probably be severe limitations on the assignment of any work so far as concerns exploitation by technology unknown at the contract date

¹²⁶ Note that European courts addressing the *Tasini* issue arrived at essentially the same result as the U.S. Supreme Court. Courts in Austria, Belgium, France, Germany, and the Netherlands all held in favor of authors when publishers exploited the authors' works electronically without express permission. Bernt Hugenholtz & Annemique de Kroon, *The Electronic Rights War*, COPYRIGHT LAW IN THE DIGITAL AGE (a monograph), at 9-13 (2000) (describing the cases in some detail). Not surprisingly, some of the European decisions used the language of moral rights, a philosophical justification for intellectual property law that European countries embrace but the U.S. does not. (This is a bit of an oversimplification. The Berne Convention, which the U.S. joined in the late 1980s requires recognition of moral rights. The TRIPs Agreement, which has much more effective enforcement mechanisms than Berne, does not.) For example, in reaching its decision, the Belgian court emphasized the author's right to choose his or her audience and the context in which the work is presented. See Irene Segal Ayers, *International Copyright Law and the Electronic Media Rights of Authors and Publishers*, 22 HASTINGS COMM. & ENT. L.J. 29, 54-55 (1999) (noting that European courts emphasize the author's right to choose the medium of exploitation "and thereby to choose the political or ideological context in which it will appear, as well as the size, location, and political leanings of its intended audience.").

A. German Legislation

European freelancers face the same lack of bargaining power as their U.S. counterparts. To address this bargaining power imbalance, a group of German copyright scholars proposed an "Act for Reinforcement of the Contractual Situation of Authors and Artists."¹²⁷ The publishing industry objected to a number of its provisions, and the German Parliament enacted a compromise bill in 2002.¹²⁸

The bill's purpose is to ensure authors a reasonable return on their works. It provides them with the right to seek reformation of a contract that does not provide such remuneration.¹²⁹ What is reasonable is determined from the perspective of the time at which the parties contracted, and depends on custom, the market, sales volume, the investment in bringing the work to market, and any other relevant circumstance.¹³⁰ Compensation set collectively by representatives of authors' and exploiters' associations is considered equitable.¹³¹ An author may not contract away his or her right to adequate compensation.¹³² The bill will likely result in increasing royalties to some authors while cutting out of the market some who formerly worked at low rates.¹³³

This approach is not a new one in Germany which has had laws in effect for some time that provide doctors, lawyers, and architects a right to demand appropriate compensation.¹³⁴ This particular legislation probably depends on collective bargaining for its success. An individual freelancer is unlikely to seek reformation of a contract for fear of being blackballed in the industry.¹³⁵ The

¹²⁷ Bettina C. Goldmann, *New Law on Copyright Contracts in Germany*, 9 COMPUTER & INTERNET L. 17, 17 (2002).

¹²⁸ *Id.*

¹²⁹ *Government Strengthens Rights For Authors', Artists' Pay*, WORLD INTELL. PROP. REP. (BNA), April 2002, at 5 ("The basic idea of the law [is] to ensure appropriate compensation based on the economic value of the author's work") [hereinafter *Government Strengthens Rights*].

¹³⁰ Goldmann, *supra* note 127, at 18.

¹³¹ *Id.*; see also Cornish, *supra* note 33, at 10, 15 (quoting the German law: "Remuneration is equitable if it is determined by a common remuneration standard. . . . In order to settle the equity of remunerations . . . , associations of authors may establish common remuneration standards with associations of users of works or individual users of works.").

¹³² Goldmann, *supra* note 127, at 18.

¹³³ Cornish, *supra* note 33, at 10 ("[The German law] sets some minimum standard of fairness, and it ought to increase the proportion of authors on royalty contracts. More generally it may improve the remuneration of some authors close to the margin of viability. On the other hand, inevitably, some who previously found low-paid work will simply not get it.").

¹³⁴ *Government Strengthens Rights*, *supra* note 129.

¹³⁵ See Cornish, *supra* note 33, at 10 ("Few authors who are not headline news will be prepared to take their publishers or record companies or whoever to court for fear that there will be no work for them in [the] future.").

law provides a mechanism for individual writers to act as a group. It provides that a collective labor agreement may determine the remuneration standard for employees.¹³⁶ Non-employees like freelancers may set standards through "representative associations of authors and entrepreneurs in an industry," or, if this fails, by mediation in which both authors and publishers will be represented.¹³⁷

B. *The U.S. Approach*

The German law deserves scrutiny because it represents one of the first copyright law attempts to redress authors' (including freelancers') lack of bargaining power.¹³⁸ Perhaps surprisingly, this approach is not entirely unknown in the U.S. Indeed, the Copyright Act intervenes in market transactions in many ways, although none of its provisions resemble the sweeping German approach.

Section 203 provides one example of such intervention. Under that section, Congress intentionally provided authors with a second opportunity to obtain remuneration for their creations. Section 203 generally permits authors to terminate a license "at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant."¹³⁹ Authors cannot contract away this right.¹⁴⁰ Certainly some have found the termination right (in its incarnation under section 304(c))¹⁴¹ useful although many fail to comply with statutory requirements for its exercise, or are unaware of or simply forget about its existence.¹⁴² It offers no solace to freelancers whose works generally lose value before the time at which they could terminate a transfer. Moreover, the provisions on termination of transfers do not apply to works made for hire, giving publishers another incentive to seek such agreements.

The Act also contains a number of compulsory licenses. For example, under section 115, a recording artist may make a "cover" of a previously distributed song by paying a statutorily set fee to

¹³⁶ *Id.* ("[W]here a collective labor agreement (i.e. one for employees) determines the remuneration of a group of authors, none of them can claim improved terms individually . . .").

¹³⁷ *Id.* at 11; see also Goldmann, *supra* note 127, at 18.

¹³⁸ French law has, since the Law of 1957, provided authors with an inalienable right to "proportional remuneration." Cornish, *supra* note 32, at 7. The intent was to avoid lump-sum payouts. *Id.*

¹³⁹ 17 U.S.C. § 203(a)(3) (1976).

¹⁴⁰ 17 U.S.C. § 203(a)(5) (1976).

¹⁴¹ 17 U.S.C. § 304(c) (governing termination rights of licenses granted before January 1, 1978).

¹⁴² *Estate of Hogarth v. Edgar Rice Burroughs, Inc.*, No. 00 CIV. 9569(DLC), 2002 WL 398696, at *1 (S.D.N.Y. 2002).

the composer. Sections 111 and 119 provide for compulsory licenses of certain cable and satellite transmissions. In all of these cases, the compulsory licenses cannot be explained simply as transaction cost savings devices; they were all intended at least in part to regulate rates of remuneration.

The U.S. could provide a compulsory license for reproduction and distribution of freelance articles once published. Under traditional law, though, a freelancer may assign ownership of the copyright in his or her work freely. If publishers require such assignments or own the copyright initially as a work for hire, any royalty would accrue to them. To be effective in providing freelancers with compensation, a compulsory license scheme might have to make the freelancers' copyrights inalienable – a fairly radical departure from the U.S. approach to copyright law generally. The German approach is a compromise between the exercise of unfettered market power by publishers and government regulation that limits freelancers' abilities to bind themselves to unfavorable agreements. The right to adequate remuneration protects authors even if they assign away all of their rights.

Nevertheless, this approach may be a bit too radical for the U.S., at least at this time. U.S. copyright law provides the framework for contract negotiations rather than generally ensuring any particular allocation of returns received from exploitation of the copyrighted work. Exceptions have been few. Extending rights of reasonable remuneration to all authors is not a narrowly tailored solution to particular cases of unequal bargaining power. The better approach may be for freelancers to find other ways to create bargaining power.

VI. OTHER OPTIONS

Freelancers might best be served in the immediate future by educating themselves about their rights under the Copyright Act and exchanging information about the types of deals others have been able to obtain. Second, they should try to use electronic technology to their advantage by becoming self-publishers, mounting a competitive challenge to publishers.

The ASMP publishes a volume that has become a standard on the business practices in its industry.¹⁴³ Likewise, the Illustrators Partnership has produced a three hour video discussing business issues, and it sends this video to every art school in the U.S.¹⁴⁴

¹⁴³ See Mopsik, *supra* note 28.

¹⁴⁴ See Holland, *supra* note 28.

The American Society of Journalists and Authors maintains a database called Contracts Watch that provides information to its members about trends in contractual terms and tells them what provisions are particularly troubling and why.¹⁴⁵ Simply getting the word out to the community of freelancers about what their rights are and giving them tips on negotiating strategies may help them in at least some negotiations.

The most effective strategy for freelancers likely would be to try to compete directly with publishers. The Internet can function as a great equalizer, helping to address problems of disparate bargaining power. Freelancers might, for example, become their own publishers, and band together to create sites of general interest. In other words, they should think about ways to use technology to their advantage to at least tilt – if not even – the playing field a bit more towards their interests. Search engines can help users find them on the Internet. Once technology exists that will allow them to tag and track the information they provide electronically to prevent large scale infringements, they may indeed be able to compete, at least in some fields, with publishers.¹⁴⁶

CONCLUSION

Ultimately, the point to remember is that copyright is about both creation and dissemination. Publishers have been arguing that they function as the public's champions because they distribute works that help to create an informed citizenry – a goal of the copyright law. But publishers do not engage in this activity for free. And the Copyright Act does not and should not generally compel them to provide their products to those who refuse to pay for them. Likewise, nothing in the Copyright Act suggests that authors should have to make their works available for free to publishers. What we must not lose sight of is that distribution depends on creation, and if publishers do not treat authors fairly, society risks losing both the quality and quantity of expression it has historically enjoyed.

¹⁴⁵ See <http://www.asja.org/cw/cw.php> (describing the service).

¹⁴⁶ See Mopsik, *supra* note 28 (stating that technology exists to process orders but freelance photographers fear putting their images on the Internet because once released, the images become extremely difficult to track). Mopsik also noted that Internet search engines by allowing users to locate desired information decrease the need for individuals to invest money in promotion and marketing: This should make it easier for freelancers to compete with large publishers like Corbis. *Id.*