

# Kluwer Copyright Blog

## Bill Cornish Memorial Lecture – Author as Revenue Sharer

Marianna Ryan (King’s College London) · Thursday, June 8th, 2023

Professor of Literary and Artistic Property Law at the Columbia Law School Jane C. Ginsburg recently visited London, where she delivered her lecture in memory of a well-known legal scholar – Professor William (Bill) Rodolph Cornish. Described as “an intellectual property pioneer and modern legal historian”, his untimely death in January 2022 was a blow for the academic community. The inaugural lecture was organised by Dr Martin Husovec and Dr Luke McDonagh of the London School of Economics and Political Science. Professor Lionel Bently of the University of Cambridge acted as a commentator.



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### Jane Ginsburg’s lecture – “Author as Revenue Sharer”

Prof. Ginsburg’s lecture took place on 3 May 2023. The full lecture is available on [YouTube](#). A summary is offered below.

Prof. Ginsburg began by noting that in 2002 Professor Bill Cornish delivered the Horace S. Manges Lecture at Columbia Law School titled “The Author as Risk-Sharer”. This examined the problem of authors’ remuneration: authors’ contracts tend to result in disproportionately low revenues relative to the returns of investors and intermediaries. Professor Cornish compared the *laissez-faire*, or risk-sharing, approach of the Anglo-American law to the more author-protective constraints on copyright contracts in continental jurisdictions, endorsing the latter.

On this prompt, Prof. Ginsburg listed several techniques for improving the position of authors and noted that [Directive 2019/790](#) (hereinafter the “DSM Directive” or the “Directive”) employs most of these. However, none guarantee the *actual* receipt of appropriate and proportionate remuneration by authors.

*Free alienability*

Common law favours the easy alienability of authors' rights, which is particularly evident in the United States (U.S.). A transfer of exclusive rights must be in writing and signed by the author, but nothing prevents the author from using this instrument to grant all of their economic rights of exploitation. Thus, it is possible for a U.S. author "for good and valuable consideration" (which could be the mere fact of disseminating the work) to assign "all right, title and interest in and to the work, in all media, now known or later developed, for the full term of copyright, including any renewals and extensions thereof, for the full territory, which shall be the Universe."

### *Reversion of rights*

That said, some balance is offered in the U.S. by rights reversion: even if the contract purports to grant rights in perpetuity and for a lump sum, the author can nonetheless retrieve most of their rights 35 years after the conclusion of the contract. A similar clause, setting a term of 14 years, existed in the UK's Statute of Anne 1710. This reversion right was abandoned in 1956, as the right was freely alienable, so had no real effect. By contrast, the 35-year termination right in the U.S is non-alienable and, therefore, is still very beneficial to authors, despite its evident shortcomings (such as the exclusion of "works for hire" and derivative works, as well as the requirement of notice from the author to effect the termination rights).

### *Authors' remuneration rights under the DSM Directive*

In the EU, Article 18 of the DSM Directive sets out the principle of appropriate and proportionate remuneration. While the Directive excludes authors of computer programs from the application of the principle, all other authors, including employee authors, appear to be covered. The transparency obligation set by Article 19 enables authors to know whether their remuneration is disproportionate. If the accounting reveals sufficient disparity, Article 20 of the Directive entitles the author to an adjustment of their contractual remuneration.

Importantly, the parties may not contract out of this right to readjustment. Article 21 establishes an unwaivable right to alternative dispute resolution (ADR), which may be a practical necessity for authors who cannot afford to litigate to enforce their rights to contract review and revision.

The DSM Directive does not limit the maximum term of an author's grant, but it does provide relief if the grantee fails to exploit the work. Under Article 22, Member States may impose time limits on the exercise of the revocation, and may allow the grantee time to begin or resume exploitation before the revocation takes effect. Member States may provide that the parties may not contract out of the revocation right unless they are covered by a collective bargaining agreement that already provides for similar rights.

### *Circumventing author protections through private international law*

Author contracts often have an international dimension. Because general principles of private international law leave the parties to determine the law applicable to their contract, the parties can potentially avoid domestic protections for authors' economic interests by choosing (or by the

stronger party imposing) that the law of a less author-interventionist jurisdiction governs the full territorial extent of the transfer. The extent to which the stronger party may, in fact, elude national author protections depends on whether those measures are characterised as substantive copyright norms, or as contract rules.

Thus, given the issue of characterisation, it does not suffice for the grantee to choose the contract law of a State lacking the EU's author protections; to achieve the objective of "contracting out" of those protections, the grantee will also want to include a forum selection clause designating a national court whose rules of characterisation will consider the scope of a grant to be a matter of contract rather than of substantive copyright law.

To avoid this kind of circumvention, some countries, such as France, introduced mandatory rules, with a more aggressively author-protective approach in its Code of Intellectual Property, Art. L132-24:

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

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

Notably, France seeks to ensure the benefits on French territory of its author-protective laws whatever the nationalities of the author and the grantee. Likewise, the U.S. termination right allows all authors whose works are protected under the U.S. law to recover their rights, with respect to exploitations in the U.S., whatever the law chosen to govern the contract, and whatever the forum selected to hear disputes arising out of the contract.

This approach, however, curtails author autonomy. This is because the whole purpose of an author-protective approach is to override party "autonomy." Such autonomy enables the stronger party to impose a favourable jurisdiction in the first place. As Prof. Ginsburg noted, when there is an imbalance in the power of the parties to a contract, the rule of party autonomy is "neutral" only in appearance. In fact, it favours the stronger party. What is needed, therefore, is a combination of substantive legislation to counterbalance most authors' weaker bargaining positions plus counterworkaround measures.

*Platform Terms of Service*

The Internet seems to have created a new problem for authors – by getting access to new audiences, authors lose control over the dissemination of their work. The author-protective mandatory remuneration rules of the DSM Directive do not seem to apply to platform licences. Recital 82 of the DSM Directive states: *“Nothing in this Directive should be interpreted as preventing holders of exclusive rights under Union copyright law from authorising the use of their works or other subject matter for free, including through **non-exclusive free licences for the benefit of any users**”*.

The U.S. courts, meanwhile, have upheld “clickwrap” and “browsewrap” agreements, even where the platform reserves and then exercises the right to make unilateral changes to the Terms of Service. As an example, Prof. Ginsburg quoted an extract from the Terms used in the case of *Gray v Amazon, Inc*, No. 2:22-cv-800-BJR, 2023 WL 1068513, at \*5 n.9 (W.D. Wa. Jan. 27, 2023):

*“We may revise these terms from time to time by posting a revised version. Your continued use of any of these sites and apps after we post such changes will constitute your acceptance of such changes”*.

Platform licences are generally broad, and, despite significant variations in phrasing, may have little practical difference in terms of rights given up by the author. Prof. Ginsburg provided an illustration of the scope of rights actually surrendered by the authors in the Terms of Service of Instagram, YouTube and Twitter. All of these appear strongly imbalanced in favour of the relevant platform.

The incorporation of works of authorship into Artificial Intelligence (AI) “training data” is another contentious topic, especially among photographers and graphic artists who fear that AI systems will “learn” from the training data how to generate images that will compete with those authors’ present or future work. Some advocates have proposed that the data compilers enable artists and photographers to opt out of inclusion in training data. However, if those authors have already made their work available on the Internet, then, based on the platform licences, many of those who post their work on Internet platforms will have already authorised the works’ inclusion and further use through such training data and creation of derivative works.

## Conclusion

In conclusion, Prof. Ginsburg returned to the challenge that Bill Cornish posed – how do we achieve “real benefits from copyright laws for the authors in whose name the copyrights are granted”? Prof. Cornish spoke of authors sharing with publishers the risks and – with proper adjustment – the rewards of a work’s dissemination. Platforms, unlike traditional publishers, do not invest in the creation of works of authorship, but they reap the benefits of the authors’ risk-taking. One solution suggested by Prof. Ginsburg, may be to allow and encourage creators to form collectives to bargain, free of antitrust constraints, with the platforms over the Terms of Service, and to introduce methods of remuneration. That way, authors would not just remain “risk-sharers”

but may have a chance to become revenue-sharers, too.

### **Lionel Bently's addendum**

Professor Lionel Bently then took over to add more, specifically with regard to the position of authors in the U.K.

Prof. Bently stated he was sympathetic to the idea of intervention into authors' contracts, for the same reasons as Prof. Cornish and Prof. Ginsburg. He noted that the goal was to produce some positive economic effect for the authors.

He noted that before the DSM Directive many Member States (except for the U.K. and Ireland) already had author-protective provisions in their laws. There were, of course, a number of challenges to effectively implementing these, such as private international law and free licences.

Prof. Bently then proceeded to describe what has been happening in the U.K. since the implementation of the DSM Directive. The starting point was that the U.K. had decided not to implement the Directive.

Nonetheless, at least in the context of music, there has been an attempt to import a very similar regime for the benefit of composers and musical performers. Following the Department for Digital, Culture, Media & Sport (DCMS) committee on the [Economics of Music Streaming](#) it was recommended that the U.K. introduce an equitable right of remuneration for performers in relation to the making available of their works; and that the other mechanisms in the DSM Directive also apply to composers and performers, with the addition of the reversion right on the basis of non-exploitation in the EU with the reversion right after 20 years. These proposals were introduced in a Bill led by Opposition MP Kevin Brennan but unfortunately the U.K. Government did not support the Bill and it did not pass to the second reading.

The Government gave three reasons for this decision: 1) there was an ongoing Competition and Markets Authority (CMA) investigation into the record industry; 2) the UK Intellectual Property Office (IPO) was looking into the impact of the EU laws on Member States within the EU; 3) there was a possibility of voluntary adjustment to the position of composers and performers taken by the industry itself.

As a result, the CMA reported last year that it was not going to launch a market investigation. The IPO, in Prof. Bently's view, appears to be doing nothing (at least publicly) about this problem, but it did issue a report on musicians and streaming, which Prof. Bently recommended reading.

There has, however, been some voluntary movement by the record industry in relation to the position of composers and performers. Universal, Warner and Sony have all agreed to waive deductions on advances and their right to recoup advances from the award of royalties based on streaming. Interestingly, the CMA has also noted a trend towards the increases in gross royalty rates, shorter contract terms, fewer contracts where the label takes ownership of the copyright in perpetuity, and shorter average periods for the retention of recording rights by the labels.

It therefore seems that the U.K. government's non-interventionist approach appears to be working and so, in Prof. Bently's view, we may not expect any great legislative intervention in this area in

future.

Prof. Bently finished his speech by referencing Prof. Ginsburg's solution of overcoming the problems of free licence terms in terms of collective bargaining and alluding to the importance of collective bargaining in the U.S.

When Prof. Bill Cornish discussed the issue of intervention in the field of copyright contracts, he expressed a preference for the German model, as he thought the French concept was too individualistic and was likely to only benefit a few authors in practice. By contrast, the German conception is built around collective agreements and he thought this approach to copyright contracts law had the benefit of allowing flexibility, nuance, and adaptability to change. It appears, therefore, that Prof. Jane Ginsburg found her inspiration for some of the problems that she has identified in Prof. Cornish's solutions.

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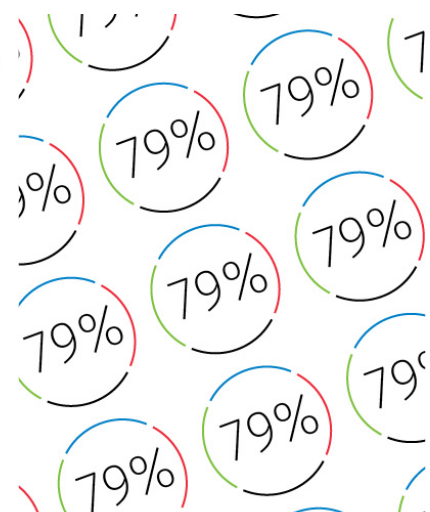
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