EMPOWERING AUTHORS VIA FAIRER COPYRIGHT CONTRACT LAW

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The remuneration of Australian authors has been decreasing over the last few decades, partly due to unfair contracts between authors and publishers. At the same time, Australian copyright law appears to do nothing to address the problem. The freedom of contract doctrine that still prevails in Australian copyright contract law is not able to tackle the problem of unfair distribution of revenues effectively, and its shortcomings are not well addressed by either general contract law doctrines or collective bargaining in the publishing sector. This article argues that Australia should consider addressing the problem by introducing certain rights inalienability restrictions in copyright law that are available in a number of jurisdictions overseas. The article discusses the rationales of introducing such provisions under Australian copyright law, such as unequal bargaining power, the prediction problem, fairness and utilitarian approaches. It counters the arguments that alienability restrictions are ineffective, and refers to the most recent empirical studies that show the ability of some alienability provisions to increase author remuneration.

I INTRODUCTION

According to a 2015 Macquarie University study,[1] Australian writers' creative incomes have dropped by nearly 50 per cent in the past 17 years, from an average of $22 000 in the early 2000s to just $12 900 in 2015.[2] Dropping

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1 Jan Zwar, David Throsby and Thomas Longden, 'Australian Authors – Industry Brief No. 3: Authors' Income' (Report, Department of Economics, Macquarie University, October 2015) ('*Australian Authors' Income Report*').

2 Australian Society of Authors, *Fair Contracts* (2019) <https://www.asauthors.org/campaigns/fair-contracts>.

levels of income have also been recorded in other countries overseas.[3] At the same time, publishing industry revenue has remained stable over the last few decades, despite the digital revolution and the disruption that it caused.[4] This signifies that there is an issue of unfair distribution of revenues among authors and publishers.

In particular, unfair contracts between authors and publishers are said to be one of the reasons for decreasing remuneration of authors.[5] Unfair author contracts have been highlighted as a significant issue by authors both in Australia and internationally. In recent years authors in Australia, the United States ('US'), the United Kingdom ('UK'), Europe and via international author organisations, have been campaigning to address this issue.[6] They essentially argue that authors have found themselves in increasingly unequal bargaining positions that result in contracts that are unfavourable to authors, and have asked publishers and lawmakers to address the issue.

A number of countries have copyright law provisions that seek to adjust the unequal bargaining power between authors and publishers, and in this way, reduce the likelihood of unfair contracts. They include rights reversion, bestseller clauses and other provisions that are meant to re-establish balance in the author-publisher relationship.[7]

The European Union ('EU') is currently discussing a draft directive that proposes introducing several author-protective provisions at the EU-level, such as a bestseller clause, transparency obligations in royalty reporting, and alternative dispute resolution ('ADR') mechanisms for disputes arising between authors and disseminators.[8] UK authors who lived under the freedom of contract

3 See, eg, Richard Lea, 'Most UK Authors' Annual Incomes Still Well below Minimum Wage, Survey Shows', *The Guardian* (online), 20 October 2016 <https://www.theguardian.com/books/2016/oct/19/uk-authors-annual-incomes-below-minimum-wage-survey-average-earnings>; Alison Flood, 'Income for US Authors Falls below Federal Poverty Line – Survey', *The Guardian* (online), 16 September 2015 <https://www.theguardian.com/books/2015/sep/15/income-for-us-authors-falls-below-federal-poverty-line-survey>.

4 Between 2008 and 2016, net revenue of the book publishing industry in the US did not change significantly (from $26.5 billion in 2008 to $26.27 billion in 2016). See AAP and The Digital Reader, *Net Revenue of the Book Publishing Industry in the United States from 2008 to 2017 (in Billion U.S. Dollars)* (July 2018) Statista <https://www.statista.com/statistics/271931/revenue-of-the-us-book-publishing-industry/>; see also David Thomson, *Book Publishing: A Stable Business* (September 2012) Penguin Random House <http://authornews.penguinrandomhouse.com/book-publishing/>. For Australian numbers see Books + Publishing, *The Market Down Under* (30 September 2016) <https://www.booksandpublishing.com.au/articles/2016/09/30/74713/the-market-down-under/>.

5 See Australian Society of Authors, above n 2.

6 For example, Australian Society of Authors started a campaign on Fair Contracts in 2016: Australian Society of Authors, above n 2; UK Society of Authors launched CREATOR campaign, see The Society of Authors, *SoA Calls for Action on Author Contracts* (8 July 2015) <http://www.societyofauthors.org/News/News/2015/July/CREATOR-Launch>; in 2016, International Authors Forum issued 10 Principles for Fair Contracts for Authors: International Authors Forum, *Ten Principles for Fair Contracts for Authors* (10 August 2014) <https://www.internationalauthors.org/10-principles-fair-contracts-authors/>.

7 See Part IV(A) below.

8 See *Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market* [2016] COD 2016/0280 arts 14–16 ('*Proposal for a Directive on Copyright in the Digital Single Market*').

doctrine for the last century,[9] have shown strong support for the European Commission's proposal, with the UK Society of Authors requesting the UK government to take urgent action and implement the author-protective provisions proposed by the Commission into UK law, before Brexit takes place.[10]

In Australia, copyright contracts are based on the freedom of contract principle. According to this principle, parties are free to agree to whatever contractual terms they wish, and government should not intervene in their dealings. Australia has essentially no copyright law provisions regulating copyright contracts that would aim to alleviate the unequal bargaining position of authors and address the issue of unfair contracts.

So far there has been no serious debate about the possible implementation of author-protective provisions, or alienability restrictions,[11] in Australian copyright law. Despite claims by the Australian Society of Authors that unfair author contracts are at least partially responsible for the low income of authors,[12] neither stakeholders,[13] nor governments[14] or even academics[15] have proposed any specific copyright law measures to address the question of unfair author contracts. Freedom and sanctity of contract seem to dominate the minds of Australian

9 A previous Strategic Advisory Board for Intellectual Property Policy Study that recommended some changes in relation to freedom of contract, led to no tangible results. See generally Martin Kretschmer et al, 'The Relationship between Copyright and Contract Law' (Report, Strategic Advisory Board for Intellectual Property Policy, 2010) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2624945>.

10 Authors' Licensing and Collecting Society and Society of Authors, 'Our Views on the European Commission's Draft Legislation to Modernise the European Copyright Framework and Proposed Amendments' (Briefing Note, August 2017) 1–2; Alison Flood, 'Philip Pullman Calls for UK to Adopt EU Plans to Protect Authors' Royalties', *The Guardian* (online), 21 September 2016 <https://www.theguardian.com/books/2016/sep/21/philip-pullman-calls-for-uk-to-adopt-eu-plans-to-protect-authors-royalties>.

11 In this article, 'author-protective provisions' and '(rights) alienability restrictions' are used as synonyms. Preference is given to 'alienability restrictions' since they do not have a direct paternalistic connotation.

12 Australian Society of Authors, above n 2.

13 Australian Society of Authors has been running a campaign on fair contracts, but has not proposed any legislative reforms. See Australian Society of Authors, above n 2; International Authors Forum, *Ten Principles for Fair Contracts*, Australian Society of Authors <https://www.asauthors.org/documents/item/23>.

14 The more recent copyright law reviews do not mention this issue. The Copyright Law Review Committee, Parliament of Australia, *Copyright and Contract* (2002) pt II ('*Copyright and Contract Report*') discussed user-owner contracts, namely, the ability to override copyright exceptions by mass market agreements but not contracts between authors and secondary copyright owners. The Attorney-General's Department's consultation on Australian contract law in 2012 did not mention issues relating to copyright contracts either: see Attorney-General's Department (Cth), 'Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law' (Discussion Paper, 2012).

15 Some academics have recently started a discussion on how authors' interests could be better protected via copyright law. See Rebecca Giblin, 'Author-Protective Copyright: How's it Done by Other Countries?' on Rebecca Giblin, *The Author's Interest* (16 February 2018) <https://authorsinterest.org/2018/02/16/author-protective-copyright-hows-it-done-by-other-countries/>. Rebecca Giblin's research on authors' interests has also attracted an ARC Future Fellowship grant (FT170100011, $889 500): Monash University, *Rebecca Giblin* (2019) <https://research.monash.edu/en/persons/rebecca-giblin>.

lawyers, while it is unknown what the majority of authors know about alternative approaches available in overseas jurisdictions.

This article discusses whether the freedom of contract approach in Australian copyright contract law is appropriate to address the interests and needs of authors or whether restrictions to the freedom of contract are needed. After reviewing the status quo (Part II) and demonstrating the weakness of the freedom of contract approach (Part III), this article discusses different restrictions to the freedom of contract available in different common and civil law jurisdictions (referred to as 'rights alienability restrictions'), their rationales and effectiveness in improving authors' income (Part IV). It concludes that certain alienability restrictions are promising tools in improving authors' bargaining power and, as recent studies show, some of them, such as rules on contract formation, have the potential to improve authors' economic wellbeing (Part V). The focus of this article is the book publishing industry and contracts between writers and publishers,[16] however, at least some of the arguments and conclusions could also be potentially applicable to other creative industries (eg, music).

II CURRENT STATUS QUO

Australian copyright law, similar to copyright laws in most other countries, places the author in the central position. Part III of the *Copyright Act 1968* (Cth) vests copyright in authors who created the work and gives authors exclusive rights to the work.[17] It is generally acknowledged that one of the main goals of copyright law is to provide incentives to authors to create new works by providing them time-limited exclusive rights to the works, and in this way ensuring remuneration for their endeavours.[18]

At the same time authors routinely assign their rights, often in their entirety, to exploiters (eg, publishers) immediately or soon after creating the work,[19] thereby essentially losing all entitlements under copyright law.[20] In return they receive payment that is often decided by the publisher, with the author having limited power to negotiate. Such a situation is referred to as 'unequal bargaining

16 For this reason, in this article 'author' and 'writer', as well as 'exploiter' and 'publisher' are used interchangeably.

17 *Copyright Act 1968* (Cth) s 31. In addition, Part IV of the *Copyright Act 1968* (Cth) provides rights to secondary right holders, ie, broadcasters, record producers and filmmakers.

18 Rebecca Giblin, 'Reimagining Copyright's Duration' in Rebecca Giblin and Kimberlee Weatherall (eds), *What if We Could Reimagine Copyright?* (ANU Press, 2017) 177, 192. Policy documents reiterate this rationale, see Australian Government, 'Creative Australia: National Cultural Policy' (2013) 83.

19 Interview with Juliet Rogers and Olivia Lanchester (Australian Society of Authors, 20 June 2018); see also European Commission, 'Impact Assessment on the Modernisation of EU Copyright Rules' (Staff Working Document No SWD(2016) 301 – Part 1, 2016) 175: 'The difference in bargaining power can also create a "take it or leave it" situation for creators and therefore full "buy-outs" using catch-all language that covers any mode of exploitation without any obligation to report to the creator'.

20 One exception is moral rights that cannot be assigned under the laws of some countries, including Australia.

power'.[21] Australian copyright law appears to do very little to restore the balance to the author-publisher relationship.

It is true that Australian copyright law and related statutes have a few author-protective provisions. The *Copyright Act 1968* (Cth) grants authors moral rights, namely the right of attribution, the right to integrity and the right not to be falsely attributed;[22] and prohibits a general assignment of these rights.[23] The *Resale Royalty Right for Visual Artists Act 2009* (Cth) grants visual artists a non-waivable right to receive remuneration when their works are sold at auction if certain conditions are met. Collective licensing schemes enable authors to receive remuneration for certain uses of their work (eg, reproduction in libraries or by governmental institutions) even after they have transferred most of their rights to their publisher.[24] The *Public Lending Right Act 1985* (Cth) and its implementing legislation[25] provides authors with remuneration for the lending of their works to public and educational libraries.[26]

At the same time, Australian copyright laws contain very few provisions regulating the transfer of rights from authors to secondary copyright owners. Section 35 of the *Copyright Act 1968* (Cth) contains provisions that determine the initial ownership of copyright in works, including in situations of co-authorship and employment relationship.[27] The *Copyright Act 1968* (Cth) requires that the assignment of rights should be in writing signed by or on behalf of the assignor.[28] As mentioned above, moral rights, as well as resale royalty rights, cannot be assigned.[29] These provisions make it more difficult for authors to assign – and lose – all entitlements in their works that they have under copyright law. However, apart from these rudimentary alienability restrictions, Australian law does not have any further significant requirements or restrictions on transfers of rights that are available in other common law and civil law countries.[30]

It is important to note that historically, copyright legislation and case law in the UK and Australia showed more care for the interests of authors. The *Statute*

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21 See Lucie Guibault and P Bernt Hugenholtz, 'Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union' (Final Report, Study Contract No ETD/2000/B5-3001/E/69, Institute for Information Law, University of Amsterdam, May 2002) 5; also Part IV(B)(1) below.

22 *Copyright Act 1968* (Cth) Pt IX.

23 *Copyright Act 1968* (Cth) s 195AN(3). However, authors can consent to other parties infringing their moral rights – see Arts Law Centre, *Moral Rights* (2019) <https://www.artslaw.com.au/info-sheets/info-sheet/moral-rights/>.

24 *Copyright Act 1968* (Cth) ss 113N–113U. Notably, a right to receive remuneration under collective licensing schemes can also be transferred to publishers.

25 *Public Lending Right Scheme 2016* (Cth); Department of Communication and the Arts, 'Educational Lending Right Scheme: Policies and Procedures' (2011).

26 Although the Public Lending Right and Educational Lending Right programs are considered to fall outside copyright law in Australia, it is considered to be a part of copyright law in most of other jurisdictions that provide for it, eg European Union Member States.

27 *Copyright Act 1968* (Cth) s 35.

28 *Copyright Act 1968* (Cth) s 196.

29 *Copyright Act 1968* (Cth) s 195AN(3); *Resale Royalty Right for Visual Artists Act 2009* (Cth) s 33.

30 See Part IV(A) below.

of Anne 1710 (UK) 8 Anne, c 21 ('*Statute of Anne*'), the early predecessor of the current Australian copyright law, was meant to prevent a monopoly that publishers used to hold under the privilege system, and vested exclusive rights to authors, rather than publishers.[31] Moreover, section 11 of the *Statute of Anne* provided that after the expiration of 14 years, copyright returned to authors for another term of 14 years, provided that they were alive at the time.[32] Although these provisions were not very effective in preserving the interests of authors, commentators agree that the purpose of the additional contingent term of 14 years was to assist authors.[33]

Despite the fact that section 11 of the *Statute of Anne* was repealed in 1814 due to lack of use,[34] commentators argue that in the 19th century, the relevant legislation and case law dealing with copyright contract issues was more extensive than today's copyright law statutes, and also more pro-author.[35] The *Imperial Copyright Act of 1911* (UK) (that was almost literally transposed into Australian law), also contained certain author-protective provisions, such as a 'Dickens provision', which provided that 25 years after an author's death, any copyright grant would revert to his or her heirs.[36] This provision was implemented into the laws of many former British colonies, including Australia, Canada and South Africa. However in the middle of the 20th century, this last clearly pro-author provision was eliminated from most common law jurisdictions, including in the UK and Australia.[37] As a result of these developments, it is often argued that current copyright laws are more deferential

31 See Molly Van Houweling, 'Authors versus Owners' (2016) 54 *Houston Law Review* 371, 372, 374.

32 In addition, 'the *Statute of Anne* itself limited the ability of the author or proprietor to grant licences to reprint the book by requiring the author or proprietor's consent in writing signed by two witnesses, and by containing "price control" provisions': Lionel Bently and Jane C Ginsburg, '"The Sole Right … Shall Return to the Authors": Anglo-American Authors' Reversion Rights from the *Statute of Anne* to Contemporary US Copyright' (2010) 25 *Berkeley Technology Law Journal* 1475, 1485, 1488–9.

33 Authors would routinely assign their rights to publishers: ibid 1541–7.

34 Ibid.

35 For instance, in relation to collective works, the *Copyright Act 1842*, (UK) 5 & 6 Vict, c 45 provided a detailed provision for the protection of contributors to collective works. The rules on the interpretation of contracts, as developed by British courts, were also largely in favour of authors. See Giuseppina D'Agostino, 'The History of Copyright Contract in Relation to the Freelancer' (2010) 22 *Intellectual Property Journal* 273, 275–7 ('Freelancer History').

36 *Copyright Act 1911*, 1 & 2 Geo 5, c 46, s 5(2). See *Chappell & Co Ltd v Redwood Music Ltd* [1980] 2 All ER 817, 823 where Lord Salmond agreed with the Court of Appeal that 'the object of the proviso was to safeguard authors and their heirs from the consequences of any imprudent disposition which authors might make of the fruits of their talent and originality'; for more comments on this provision see Lucy Elizabeth Kenner, 'Can Legislative Reform Secure Rewards for Authors? Exploring Options for the New Zealand Copyright Act' (2017) 48 *Victoria University of Wellington Law Review* 571, 576–7; Paul Torremans and Carmen Otero García Castrillón, 'Reversionary Copyright: A Ghost of the Past or a Current Trap to Assignments of Copyright?' (2012) 2 *Intellectual Property Quarterly* 77, 78.

37 The *Copyright Act 1956*, (UK) 4 & 5 Eliz 2, c 74 eliminated the reversionary rights provision, as did the Australian *Copyright Act 1968* (Cth). However, works made before 1 May 1969 and copyright in such works, transferred or licensed before said date, remain subject to reversion. See Alan J Hartnick, 'Stanley Rothenberg: Final Thoughts on the Dickens Provision' (2007) 54 *Journal of Copyright Society of the USA* 565, 566. The provision on the reversion of rights in Canadian copyright law has survived until today. For more see Part IV(A) below.

to publishers and indifferent to authors.[38] Commentators suggest that copyright law is not protecting the interests of authors,[39] and that 'current law has shifted the balance of copyright's incentives too far in favor of publishers and away from authors and the public'.[40]

Since the end of the 20th century, the need for author-protective provisions has become more vital than ever due to technological and market changes. The emergence of the Internet has changed the ways in which works reach the public. Digital technology and networks have reduced the costs of publishing and enabled authors to participate in the marketing and dissemination of their works, either by self-publishing or disseminating their own works produced in cooperation with a publisher.[41] However, as Houweling puts it, 'technologically-empowered authors are not always legally empowered'.[42] In many cases they assign away their copyright for the entire duration of copyright. Even when their work goes out of print and cannot be found via traditional channels of commerce, authors cannot make use of new dissemination venues without permission from the rights owner.[43]

Secondly, the digital revolution has also caused changes in the publishing industry. During the last decade the e-book publishing market has experienced steady growth.[44] Despite this growth, authors argue that they have not been receiving a fair share from e-book sales.[45] In Australia, shares in e-book income for authors have reduced (25 per cent or less), and additionally, royalty statements issued by publishers are often difficult to understand and lacking in detail.[46]

Finally, concentration in the publishing market has made it even more difficult for authors to protect their interests when negotiating with publishers.

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38 Giuseppina D'Agostino, *Copyright, Contracts, Creators: New Media, New Rules* (Edward Elgar, 2010) 114 ('*Copyright*').

39 See Jane C Ginsburg, 'The Concept of Authorship in Comparative Copyright Law' (2003) 52 *DePaul Law Review* 1063, 1065.

40 Thomas A Mitchell, 'State of the Art(s): Protecting Publishers or Promoting Progress?' (2005) 12(2) *Richmond Journal of Law and Technology* 1, 3 <http://jolt.richmond.edu/jolt-archive/v12i2/article7.pdf>.

41 See generally Jane C Ginsburg, 'The Author's Place in the Future of Copyright' (2009) 45 *Willamette Law Review* 381, 383, 388–90 ('The technology that brings works directly to users' computers and personal portable devices no longer requires traditional publishing's infrastructure of intermediaries. Maybe every reader is not truly an author, but every author can be a publisher'); Houweling, above n 33, 376.

42 Houweling, above n 31, 371.

43 Ibid 371–2.

44 For statistics on e-book market worldwide see PwC, *E-book Sales as a Percentage of Total Book Sales Worldwide in 2013 and 2018* (2019) Statista <https://www.statista.com/statistics/234106/e-book-market-share-worldwide/>.

45 In the US, authors receive 50 per cent of the net receipts for print books and only 25 per cent of the net receipts for e-books: see The Author's Guild, *Half of Net Proceeds is the Fair Royalty Rate for E-books* (9 July 2015) <https://www.authorsguild.org/industry-advocacy/half-of-net-proceeds-is-the-fair-royalty-rate-for-e-books/> ('*Half of Net Proceeds*').

46 Australian Society for Authors, above n 2. One of the reasons for the decreased authors' share seems to be currently lower e-book prices if compared with prices when e-book market was emerging, see The Author's Guild, above n 47.

Mergers and acquisitions in the publishing market is not a new phenomenon and can be traced back to the 1950s.[47] The pace accelerated in the 1990s,[48] with the last decade being titled an 'era of mergers' in the publishing industry.[49] With the increased consolidation of publishing houses, it has become more difficult, if not impossible, for authors to negotiate their rights. This is because large publishers have stronger negotiation power and an increased ability to purchase copyright ownership from authors, on terms more favourable to themselves.[50] While authors have more options to self-publish or pursue alternative dissemination methods, most authors still desire the reputation, editorial skills and marketing budgets that large publishers can provide.

In conclusion, over the last century Australian copyright law has shown limited attention to the specific interests of authors, especially as far as their relationship with publishers is concerned. With increasing consolidation occurring in the publishing industry combined with new opportunities that technology has provided for authors, it is now time to take a closer look at the needs of authors and address the challenges that they face in the 21st century, such as unequal bargaining power between authors and publishers that contribute to decreasing remuneration of authors.

III WHY THE CURRENT SYSTEM DOES NOT WORK

As a next step, I will examine the reasons for the laissez-faire approach under Australian copyright contract law and demonstrate that it is not capable of addressing the current needs of Australian authors.

A Freedom of Contract Approach is Outdated

My first argument here is that the freedom of contract that underlies Australian copyright contract law is outdated, and is no longer suitable to regulate relationships in modern copyright industries, including the book publishing industry.

1 Freedom of Contract in General

The freedom of contract generally means that parties should be allowed to enter contracts on whatever basis they choose. It is an essential part of classical

47 M H Munroe, 'Which Way Is Up? The Publishing Industry Merges Its Way into the Twenty-First Century' (2000) 14(2) *Library Administration and Management* 70, 70–8.

48 Munroe identified sixty merger and acquisition events in the years of 1998 and 1999, with more than $20 billion spent by companies to buy other companies: see Travis Kurowski, Wayne Miller and Kevin Prufer 'Introduction', in Travis Kurowski, Wayne Miller and Kevin Prufer (eds), *Literary Publishing in the Twenty-First Century* (Milkweed Editions, 2016) vii.

49 Apart from the merger of the two biggest international publishers Random House and Penguin in 2012, a number of smaller mergers and acquisitions have been taking place: see Jeremy Greenfield, *Get Ready for More Mergers and Acquisitions in Book Publishing* (22 January 2014) Forbes <https://www.forbes.com/sites/jeremygreenfield/2014/01/22/get-ready-for-more-mergers-and-acquisitions-in-book-publishing/#65b69da13ea2>.

50 Mitchell, above n 40, 3.

contract law, which is based on the belief in an individual and the power of his or her will, while the role of the state and the court remains largely restricted.[51] The freedom of contract equates the general principles of contract law with the free market economy, and suggests that governments should intervene in the acts of individuals only where necessary.

The freedom of contract started developing at the end of the 18th century, and was strongly influenced by the industrial revolution and the liberal economy theories that were dominant in the UK at the time. It became an established approach in contract law at the turn of 20th century.[52] The establishment of freedom of contract meant a retreat from interest in substantive justice and fairness that had prevailed until the end of 18th century. Until that time, the laws were rather paternalistic, with statutes often controlling prices and wages. The courts cared about 'fair agreements' and were constantly making contracts for the parties.[53] In classical contract law and as a result of the freedom of contract, the court's function became to ensure procedural fair play. The courts were not concerned with the issue of whether the bargain was fair. They did not have a function to make sure that one party did not take undue advantage of another as a result of a stronger bargaining position. It was a matter for the market to address the issue of any superiority in bargaining power.[54] As a result, classical contract law often was more advantageous to the stronger and more knowledgeable party, while leaving weaker and ignorant parties subject to substantial risks. As commentators suggest, freedom of contract 'often enabled business corporations to draft their contracts as they pleased, and once the contract was formed escape routes were very narrow'.[55]

During the 20th century, society's attitudes changed. By the mid-20th century, freedom of contract in general contract law began to decline.[56] From an economic perspective, scholars realised that it was an inherent feature of the market that the benefits are unlikely to be distributed equally. According to de Beer, 'free markets are not designed to achieve distributive justice'.[57] It has become increasingly clear that parties to the contract often have different bargaining power, which raises equity questions and calls for a need to consider the interests of the weaker party in the negotiations, especially the consumer. This was caused by the increased use of standard form agreements that consumers would have to sign on a 'take it or leave it' basis.[58] The current modern contract law is thus

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51 Peter G Heffey, Jeannie Marie Paterson and P J Hocker, *Contract: Commentary and Materials* (LBC Information Services, 8th ed, 1998) 4.

52 See P S Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, 1979) 402, 410.

53 Ibid 169, 173, 402.

54 Ibid 404.

55 Heffey, Paterson and Hocker, above n 51, 6.

56 Reasons for such a decline are discussed by Atiyah, above n 52, 716.

57 Jeremy de Beer, 'Making Copyright Markets Work for Creators, Consumers and the Public Interest' in Rebecca Giblin and Kimberlee Weatherall (eds), *What if We Could Reimagine Copyright?* (ANU Press, 2017) 147, 162, 166: 'equality is a major concern that the free market alone cannot solve'.

58 With the introduction of e-commerce, consumers would have to similarly accept the terms of click-wrap agreements: see generally Heffey, Paterson and Hocker, above n 51, 7.

characterised by an increased control over the contractual regime.[59] Courts have become more inclined to deal with procedural unfairness, while legislation has intervened to allow more direct control over substantive unfairness. As an example, legislatures have passed a number of statutes that provide protection to consumers;[60] and various other contracts, such as employment, hire-purchase and credit contracts are also subject to specific legislation.[61]

2 Freedom of Contract and Copyright

In copyright law, freedom of contract means that authors are free to enter into contracts and set any conditions they wish. Freedom of contract, arguably, should lead to the most appropriate distribution of rights among authors and disseminators and, accordingly, result in the best use of the work.[62] However, it has become clear that this principle does not properly function in copyright industries either. Similar to consumers, authors are subject to standard contracts offered by publishers. Also, as discussed above, their negotiating power further diminishes with the increased consolidation of the publishing industry.[63] As a result, individual creators become disempowered by free market approaches to copyright policy. According to de Beer, '[w]hile this outcome is not inconsistent with the theory or practice of welfare-maximising liberal economic policy generally, it can create distributive inequalities that sit uneasily with many people's sense of justice'.[64] Commentators have thus suggested that regulatory limits might need to be put on the freedom of contract, in order to limit the accumulation and power by intermediaries in the creative industries.[65]

These concerns related to unequal bargaining situation in author-publisher relationships have been well understood by governments in some countries. The 1965 amendments to German copyright law was one of the first initiatives to try and re-establish the balance in the author-publisher relationship.[66] It was followed

59 Ibid.

60 See, eg, *Competition and Consumer Act 2010* (Cth) sch 2; *Sale of Goods Act 1923* (NSW)*; Sale of Goods Act 1972* (NT); *Sale of Goods Act 1896* (Qld); *Sale of Goods Act 1895* (SA); *Sale of Goods Act 1986* (Tas); *Goods Act 1958* (Vic); *Sale of Goods Act 1895* (WA).

61 Leanne Wiseman, Michelle Backstrom and Pip Trowse, *Focus Contracts* (LexisNexis Butterworths, 4th ed, 2012) 6.

62 Guibault and Hugenholtz, above n 21, 5.

63 For more see Part II above.

64 de Beer, above n 57, 169.

65 Ibid 166.

66 The *Urheberrechtsgesetz* [Act on Copyright and Related Rights] (Germany) 9 September 1965, BGBI I, 1965, 3346 ('*German Copyright Act*') introduced a number of provisions limiting copyright transfer, including the rule preventing the overall assignment of copyright (§ 29); inability to grant exploitation rights to yet unknown types of use (§ 31(4)); the requirement to specifically designate the types of uses to which exploitation right extends (§ 31(5)); bestseller clause (§ 36); limitations on transfers of rights to future works (§ 40); right of revocation for non-exercise of rights (§ 41) and others. The English translation of the law (last amended 1 September 2017) is available at: Bundesamt für Justiz, *Act on Copyright and Related Rights* <https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html>. See also Adolf Dietz, 'Amendment of German Copyright Law in Order to Strengthen the Contractual Position of Authors and Performers' (2002) 33 *International Review of Intellectual Property and Competition Law* 828, 829.

by the copyright contract reform in 2002,[67] with other civil law countries following suit.[68]

The underlying rationale of these copyright law reforms was the understanding that freedom of contract does not necessarily ensure fairness in author contracts where there is often inequality between the parties. As Guibault and Hugenholtz put it:

> In principle, authors and performing artists are thus free to dispose of their right as they see fit, ie to enter into the contracts that will lead to the best allocation of those rights and to the best use of their work. An agreement concluded in the true spirit of the principle of freedom of contract normally presupposes that it has been reached at the close of a free and voluntary negotiation process conducted in good faith between equal and perfectly informed contracting parties. As De Freitas points out however, 'there is recognition that the 19th century views on freedom to negotiate and sanctity of contract are, certainly in today's world, unrealistic'. Indeed, most of the time, copyright contracts are not concluded between equal and perfectly informed contracting parties. Severe inequalities of bargaining power, of practical experience and of technical knowledge may have an impact on the authors' and performing artists' capacity to express consent at the time of conclusion of the contract.[69]

3 Freedom of Contract in Australian Copyright Law

In contrast, copyright contract law in Australia has not followed this trend. As discussed above, while a pro-author approach could still be noticed in UK copyright law in 18th and 19th centuries, in the 20th century freedom of contract took over. Since the adoption of the Australian *Copyright Act 1968* (Cth), freedom of contract has been left unchallenged. The focus of copyright law in Australia has increasingly been on the copyright owner rather than the author, often assuming that the interests of both parties coincide.[70]

The arguments in favour of the freedom of contract have been voiced by a number of commentators in common law jurisdictions. They have condemned provisions aimed at re-establishing balance between authors and intermediaries as violating the freedom of contract principle,[71] and as overly paternalistic.[72]

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67 The two main rules adopted in the 2002 law were, first, § 32 which introduced the general claim to equitable remuneration by authors and, secondly, § 36 (plus § 36a) which provided for a regulated framework for negotiations between authors and users (eg publishers) on common remuneration standards. For a detailed overview and discussion of the 2002 amendments to the *German Copyright Act*, see Dietz, above n 66.

68 The most recent and comprehensive reform took place in the Netherlands in 2015. See Thomas Dysart, 'Author-Protective Rules and Alternative Licences: A Review of the Dutch Copyright Contract Act' (2015) 37 *European Intellectual Property Review* 601. For an overview of alienability restrictions available in European countries see Part IV(A) below.

69 Guibault and Hugenholtz, above n 21 (citations omitted).

70 For instance, the Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 1999 mentions 'author' and 'creator' three times each, and '[copyright] owner' 136 times.

71 See, eg, Judy Eola and Francis Fox, 'From Gutenberg to Telidon: A White Paper on Copyright: Proposals for the Revision of the Canadian Copyright Act' (Department of Consumer and Corporate Affairs, Department of Communications (Canada), 1984) 57: the rights reversion mechanism was described as 'an inequitable intrusion into the ability of the parties to agree to expiration terms of their own choosing'.

Critics have been arguing that authors do not really need assistance from lawmakers, because authors have literary agents and lawyers negotiating contracts on their behalf. According to critics, writers' guilds set certain minimum guarantees related to copyright transfers that serve the interests of authors.[73] In many cases contractual payments are established in the form of royalties, which enables authors to participate in the future success of their work.[74]

Also, author-protective provisions arguably create an image of the author as a 'congenitally irresponsible' artist who is not capable of assuming full responsibility for the consequences of their actions and must be guarded against themselves.[75]

Such an approach and the application of freedom of contract in copyright contracts can be challenged on several grounds. First of all, while freedom of contract presupposes that parties to the contract are equal when negotiating the deal, it is well known that this is not the case for most author contracts. While a slim minority of established writers may have the experience and resources, including agents and lawyers, to negotiate author contracts that take a reasonable account of their interests, the majority of authors – especially in the beginning of their careers – do not have the necessary knowledge and capacity, and in most cases have to accept standard terms offered by the publisher (exemplifying a 'take it or leave it' situation).[76]

Secondly, freedom of contract also presupposes that parties are perfectly informed and equally aware of the consequences of their decisions. However, publishers normally possess more information about the market and are better able to assess the potential value and future success of a work. This creates an imbalance of information between contracting parties,[77] and further undermines the bargaining position of authors.

Finally, differently to what freedom of contract presupposes, writers do not always act as rational individuals seeking to maximise their profits. Their acts may be based on other motives. For example, creative labour might be more satisfying and enjoyable than other forms of work, and that can lead to

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72 See, eg, de Beer, above n 57, 168 (refers to reversion and termination provisions as paternalistic approaches within copyright law); Barry Torno, *Term of Copyright Protection in Canada: Present and Proposed* (Consumer and Corporate Affairs Canada, 1980) 39.

73 Kathleen M Bragg, 'The Termination of Transfers Provision of the 1976 Copyright Act: Is it Time to Alienate it or to Amend it?' (2000) 27 *Pepperdine Law Review* 769, 802–3.

74 See Maria Lilla Montagnani and Maurizio Borghi, 'Positive Copyright and Open Content Licences: How to Make a Marriage Work by Empowering Authors to Disseminate Their Creations' (2008) 12 *International Journal of Communications Law and Policy* 244, 262.

75 Torno submits that 'such a perception constitutes an insult and a disservice to authors; is not in keeping with the societal value placed on treating each citizen as responsible for their own acts; and constitutes an inequitable intrusion into the ability of the parties to agree to expiration terms of their own choosing, unrestricted by artificial limitations': Torno, above n 72, 39.

76 Rogers and Lanchester, above n 19.

77 See Europe Economics, Lucie Guibault and Olivia Salamanca, 'Remuneration of Authors of Books and Scientific Journals, Translators, Journalists and Visual Artists for the Use of Their Works' (Report, European Commission, 2016) 167–8 ('*Remuneration of Authors Report*').

individuals being willing to supply it at lower wages than they would otherwise work for.[78]

On several occasions the Australian government has recognised that freedom of contract does not provide an optimal solution. For instance, until 2000, Australia did not provide moral rights to authors, and left it to custom or for the parties to negotiate them in contracts. Eventually, stakeholders realised that contracts do not and cannot provide sufficient protection in this respect, and introduced a statutory set of moral rights that cannot be assigned by contract.[79] Similarly, the government realised that visual artists – especially of Indigenous origin – are often unable to secure fair remuneration from their creations, and introduced a resale royalty right.[80] Since the emergence of the Internet and the prevalence of click-wrap contracts, the Australian government has discussed the need to depart from freedom of contract in other areas of copyright law, namely in relation to contracts between right holders/intermediaries and users online. There have been a number of reports and public consultations on whether the law should prohibit the contracting-out of copyright exceptions, which limits users' opportunities to enjoy works.[81]

It is therefore questionable whether freedom of contract is still suitable as a basis for copyright contract law. It was meant for the economic and political circumstances of the 19th century, and its underlying presumptions no longer hold true in most situations involving author contracts.

B Protection under Contract Law Is Insufficient

Advocates of the freedom of contract suggest that shortcomings of this doctrine could be addressed by protections available for authors under other areas of law, such as contract law. Arguably, there are a number of doctrines and principles under contract law that may serve to protect weaker parties to the contract, including authors.

For instance, according to the general principles on the interpretation of contract, copyright licences do not extend to uses that were not considered at the time of contract signing.[82] In common law jurisdictions, there is no generally

78 That is why the US Screen Actors Guild prohibited members from taking work that does not comply with the union's minimum wage standards: see Giblin, above n 18, 194–5; Eric E Johnson, 'Intellectual Property and the Incentive Fallacy' (2012) 39 *Florida State University Law Review* 623, 668–9.

79 *Copyright Act 1968* (Cth) Pt IX.

80 *Resale Royalty Right for Visual Artists Act 2009* (Cth).

81 It has been discussed in, eg, *Copyright and Contract Report*, above n 14, and Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2013) pt 20. It is raised as an issue in the current consultation: Department of Communications and the Arts (Cth), *Copyright Modernisation Consultation* <https://www.communications.gov.au/have-your-say/copyright-modernisation-consultation>.

82 Non-express licences can only be implied if necessary to give business efficacy to the contract: see *Robin Ray v Classic FM plc* [1998] FSR 622, 640–1 (Lightman J) (Ray's consultancy agreement for creating a database for use in the UK did not imply a licence to exploit the database abroad, through deals with foreign radio stations); *Grisbrook v MGN Ltd* [2011] Bus LR 599 (Mirror Group Newspapers was held to infringe copyright in photographs supplied under a licence for print publishing by marketing back editions containing these photographs through a website); Martin Kretschmer, 'Copyright and Contract

accepted principle that a right granted by a licence may be lost due to a lack of use of a right.[83] However, a publisher's main responsibility under the contract is to publish the work. If they fail to perform, the author may bring an action for breach of contract.[84] The court may order the publisher to perform the contract by publishing the work.[85]

Some commentators suggest that the restraint of trade doctrine may also provide redress for some authors.[86] For example, in *A Schroeder Music Publishing Co Ltd v Macaulay*, an unknown 21-year-old songwriter entered into a contract with a music publisher, whereby he assigned copyright for the whole world and retained no rights to terminate the contract .[87] Under the contract, Schroeder Music had no obligation to publish the songs and could terminate the contract at any time by giving one month's notice. The Court applied restraint of trade principles and found the contract unenforceable.[88]

UK and US courts have also refused to enforce assignments of copyright because of the doctrine of unconscionability. In *Clifford Davis Management Ltd v WEA Records Ltd*,[89] the Court held that the contract between parties of unequal bargaining power was oppressive and unfair and set it aside on several legal bases, including unconscionability.[90] Undue influence doctrine has also been applied in some copyright cases.[91]

In addition, some commentators suggest that general principles in contract law could allow courts to interpret or revise terms in copyright contracts that might be deemed unfair. These include principles of good faith, imprecision, fairness and equity, custom and foreseeability.[92] Some of these principles have been applied in cases concerning copyright contracts to the benefit of authors.[93]

The use of contract law doctrines and principles in copyright contracts however, is not without problems. First, while these doctrines and principles may

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Law: Regulating Creator Contracts: The State of the Art and a Research Agenda' (2010) 18 *Journal of Intellectual Property Law* 141, 143, 155–6.

83 Such a right exists in some civil law jurisdictions, see Part IV(A)(4) below.

84 *Malcolm v the Chancellor, Masters and Scholars of the University of Oxford* [1994] EMLR 17; *Remuneration of Authors Report*, above n 77, 105.

85 *Remuneration of Authors Report*, above n 77, 105.

86 Kenner, above n 36, 575.

87 [1974] 3 All ER 616, 622 (Lord Reid).

88 For other copyright cases on restraint of trade see *Zang Tumb Tuum Ltd v Johnson* [1993] EMLR 61.

89 [1975] 1 All ER 237.

90 For other cases see *Buchwald v Paramount Pictures Corp*, 13 USPQ 2d 1497 (Cal Sup Ct, 1990) ('*Buchwald*'); D'Agostino, 'Freelancer History', above n 35, 131.

91 See *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428; *John v James* [1991] FSR 397; Séverine Dusollier et al, Directorate General for Internal Policies, 'Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States' (Report, European Parliament's Committee on Legal Affairs, 2014) 58–9 ('*Contractual Arrangements Applicable to Creators*').

92 D'Agostino, *Copyright*, above n 38, 129–30.

93 For example, the foreseeability principle was applied by UK, Canadian and US courts. UK: *Hospital for Sick Children (Board of Governors) v Walt Disney Productions Inc* [1968] Ch 52; US: *Bourne v Walt Disney Co*, 68 F 3d 621 (2nd Cir, 1995). Freelancers and publishers have used custom to substantiate their copyright claims: see, eg, *Robertson v Thomson Corp* (2001) 15 CPR (4th) 147 (Ontario Superior Court of Justice); *Robertson v Thomson Corp* (2004) 243 DLR (4th) 257 (Ontario Court of Appeal); *Robertson v Thomson Corp* [2006] 2 SCR 363. All the above cases are cited in D'Agostino, *Copyright*, above n 38, 137.

be useful to supplement legislative gaps (especially in common law jurisdictions), they are applied in exceptional cases only.[94] Courts are likely to intervene only when there are striking facts with a particularly immoral flavour, and unequal bargaining power alone is not a sufficient ground to request a review of a contract. Furthermore, doctrines such as unconscionability require the assessment of the situation at the time of contract formation. Meanwhile, copyright contracts often appear to be unfair after certain time passes (eg, when the success of a work becomes apparent).[95] Secondly, the general nature of contract law principles means that the results of their application remain uncertain, and sometimes contradictory.[96] Thirdly, relying on general principles of contract law necessitates litigation, where lack of time and money are at least two of the main deterrents for authors.[97] Therefore, even if general contract law could fill certain gaps where legislation is inadequate or absent, it is not capable of providing a comprehensive solution to the problem of unequal bargaining power in author contracts.

C Collective Bargaining Is Not Effective in Australia

The proponents of freedom of contract further suggest that if authors are unable to ensure their interests in individual negotiations, they should rely on collective bargaining. Collective bargaining could arguably address inequalities caused by the concentration of market power on the side of a publisher.[98]

In some jurisdictions like the US, collective bargaining has a long tradition and plays a significant role in securing authors' interests. US trade unions and guilds, such as Writers Guild of America ('WGA'), have had a very important role in negotiating guarantees for their members. These guarantees are set in binding collective bargaining agreements, such as the 2017 WGA Theatrical and Television Basic Agreement ('WGA Agreement').[99] These agreements grant rights that do not exist under copyright law and regulate their transfer. For instance, the abovementioned 2017 WGA Agreement includes specific provisions protecting writers' credit and 'creative rights'.[100] Members are not

94 *Contractual Arrangements Applicable to Creators*, above n 91, 58–9.

95 Kenner, above n 36, 574–5.

96 *Buchwald* 13 USPQ 2d 1497 (Cal Sup Ct, 1990): unconscionability was found because Paramount used 'unconscionable' means of determining how much to pay authors; *Batfilm Productions Inc v Warner Bros*, (Cal Ct App, No BC 051653 and BC 051654,14 March 1994): finding no unconscionability in a case involving a similar attack on a net profits definition as in the *Buchwald* case.

97 As D'Agostino correctly points out, 'litigation is uncertain, inefficient and unsatisfactory for both parties. Bright line rules are necessary to avoid litigation of difficult terms and provide some administrative efficiency and overcome access to justice issues': D'Agostino, *Copyright*, above n 38, 138.

98 de Beer, above n 57, 167.

99 The Agreement is available at Writers Guild of America, *2017 Writers Guild of America Theatrical and Television Basic Agreement* <http://www.wga.org/contracts/contracts/mba>.

100 For example,

> [w]hile the script is still in the development stage, those rights include the right to perform the first rewrite after the writer's script is acquired or optioned and the right to perform the first revision after there is a new element on the project, such as a new director or star. Before production begins, and if a director has

allowed to waive these rights and they can be enforced under an established procedure.[101] These rights do not completely protect the writer's right to integrity which is a statutory right in other jurisdictions. However, commentators agree that they help mitigate the loss of the guarantees that copyright law provides and, therefore, they are steps in the right direction.[102]

The UK, Australia and Canada also have certain traditions with collective bargaining in the literary sector, however its role is less significant. The Writers' Guild of Great Britain ('WGGB') is a trade union representing professional writers in TV, film, theatre, radio, books, comedy, poetry, animation and videogames, and negotiate national agreements with key industry bodies.[103] Similarly the Australian Writers' Guild ('AWG'), the professional association representing writers for stage, screen, radio and online, has been negotiating minimum standards that are set in industry agreements, such as the Theatre Industry Agreement.[104] Apart from guilds and trade unions, authors' professional associations in the US, UK, Australia and Canada also play a certain role in negotiating better terms with publishers.[105] The Australian Society for Authors negotiate with the Australian Publishers' Association on standard book publishing agreements,[106] and the publishers' code of conduct.[107]

Self-regulatory measures, such as collective bargaining, model contracts and codes of conduct have also been available in some civil law countries. For instance, in the Netherlands, the latest Dutch model agreement for the publication of Dutch literary works sets standards for the licencing and transfer of copyrights, and contains guidelines on how to fix any individually negotiated remuneration.[108] In some countries they are supported by statutory provisions. For instance, in Germany, the duty of authors' associations to negotiate with

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not been engaged, the writer has a right to meet with the producer for a 'meaningful discussion of the translation of his/her vision to the screen'.

Rick Mortensen, 'DIY after Dastar: Protecting Creators' Moral Rights through Creative Lawyering, Individual Contracts and Collectively Bargained Agreements' (2006) 8 *Vanderbilt Journal of Entertainment & Technology Law* 335, 357–8.

101 Ibid 357.

102 Ibid 357–8.

103 The national agreements they have in place cover the BBC, ITV, Pact, National Theatre, Royal Court and Royal Shakespeare Company, see Writers' Guild of Great Britain, *Rates & Agreements* <https://writersguild.org.uk/rates-agreements/>.

104 See Australian Writers' Guild, *Industrial Advice* <https://awg.com.au/industrial-advice/>.

105 See, eg, American Author's Association (2015) <www.americanauthorsassociation.com/>; The Society of Authors (UK) (2019) <https://www.societyofauthors.org/>; Canadian Authors Association <https://canadianauthors.org/national/>.

106 See, eg, standard book agreements at Australia Society of Authors, *Online Store: Contract Templates* <https://www.asauthors.org/products/contract-templates>.

107 Australian Society for Authors and Australian Publishers Association also negotiate the Publishers' Code of Conduct which regulates publishers' relationships with authors, available at Australian Publishers Association, *Code of Conduct: Publisher Relationships with Authors* <https://www.publishers.asn.au/membership-information/eligibility>.

108 Dutch model agreement used to contain arrangements as to the minimum royalties, but Dutch competition authority found that this was infringing competition law. However, the model agreements are still accompanied with explanatory notes that also contain tariffs and percentages that are regarded as the norm by the associations of publishers and writers: see *Remuneration of Authors Report*, above n 77, 60.

users on remuneration rules is established by law.[109] In France, when a collective agreement is reached by representatives of producers and of authors in the audio-visual sector regarding author remuneration, it can be made mandatory for the entire audio-visual sector.[110] The European Commission has also been encouraging stakeholder dialogue in the copyright sector, with some recent success.[111]

One should acknowledge that collective bargaining agreements have significant potential in solving issues related to copyright contracts.[112] One of the advantages is that they are agreed by all involved parties and cannot be altered without consulting authors themselves.[113] Parties tend to voluntarily comply with collective bargaining agreements, while statutory rights or guarantees for authors are more likely to be varied or transacted by contract.[114] Also, trade unions and associations who participate in collective bargaining exchange and share information, which promotes economic efficiency, fairness and transparency in copyright contracts.[115]

At the same time, there are a number of issues that can cause collective bargaining to be less effective than one may wish it to be. Trade unions of authors have not been set up in all countries, for various legal and cultural reasons.[116] In countries where collective bargaining is culturally acceptable and possible under law, the rights and guarantees they provide are often limited and narrower than what is available under copyright laws in other jurisdictions.[117] For instance, the abovementioned 2017 WGA Agreement grants rights related to author credit that are narrower than the moral rights available to authors under copyright law in civil law jurisdictions. Also, agreements entered into by trade unions often extend to certain publishing industries only, such as to writings for film, television and theatre, but do not cover all sectors (for example, book

109 *German Copyright Act* § 36 ('authors' associations together with associations of users of works or individual users of works shall establish joint remuneration agreements'); see also ibid 58–9.

110 *Code de la Propriété Intellectuelle* [Intellectual Property Code] (France) art L132-25 ('*French Intellectual Property Code*'). See also *Contractual Arrangements Applicable to Creators*, above n 91, 63.

111 For example, one of the stakeholder dialogues that have been promoted by the European Commission resulted in European Commission, *Memorandum of Understanding on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works* (2011) <http://www.eblida.org/Experts%20Groups%20papers/EGIL-papers/MoU-OOC.pdf>; collective bargaining has been suggested as one of the measures in the *Proposal for a Directive on Copyright in the Digital Single Market*, above n 8, recital 41.

112 See, eg, *Remuneration of Authors Report*, above n 77, 123; Guibault and Hugenholtz, above n 21, 155.

113 *Contractual Arrangements Applicable to Creators*, above n 91, 65.

114 Kretschmer et al, above n 9, 41.

115 *Remuneration of Authors Report*, above n 77, 123.

116 For instance, European rules on competition law have posed on numerous occasions a major obstacle to the collective action in creative industries. The legal tensions with respect to various categories of self-employed creators have recently occurred in Ireland, Denmark, and in the Netherlands. See, eg, ibid 118–19; Dietz, above n 66, 830–1; Kretschmer et al, above n 9, 11.

117 For example, the current 2017 WGA Agreement does not give the directors any say in how their movies are edited by third parties that are not authorised by the studios. See also Michael Kurzer, 'Who Has the Right to Edit a Movie?: An Analysis of Hollywood's Efforts to Stop Companies from Cleaning Up Their Works of Art' (2004) 11 *UCLA Entertainment Law Review* 41, 80.

publishing).[118] They do not cover all writers either; in particular, they do not apply to all freelancers.[119]

In Australia, collective bargaining traditions in the publishing sector are relatively weak. The Australian Writers Guild, the trade union for scriptwriters, represents only writers for film, television, radio, theatre and similar industries, and does not cover other sectors of the publishing industry. It negotiates, on behalf of their members, certain agreements and rates that are binding,[120] but a number of agreements they offer are advisory in nature.[121] The Australian Society of Authors on the other hand, represents a broader range of authors. However, notably, they do not have union status. The measures that they provide, such as standard book publishing agreements and codes of conduct,[122] are not binding, do not have clear enforcement mechanisms, and therefore their effectiveness remains questionable.

Overall, collective bargaining is not sufficiently effective in the Australian publishing industry, with only certain authors in certain sectors being represented by trade unions. Collective bargaining is therefore not a viable mechanism to address the challenges that Australian authors face in individual negotiations with publishers.

IV RIGHTS ALIENABILITY RESTRICTIONS AS AN ALTERNATIVE?

As has been demonstrated above, the current approach to copyright contract law in Australia is not an optimal solution. Freedom of contract that underpins copyright legislation ignores the fact that authors in most cases find themselves in unequal bargaining positions, which are further weakened by the imbalance of information that parties hold about the market. This often leads to unbalanced contracts between authors and disseminators. General contract law doctrines and principles, such as unconscionability, undue influence and others, are of limited help. They apply in exceptional scenarios only and are unlikely to cover most of the cases involving unequal bargaining power. Application of these general principles leads to uncertain outcomes and requires high litigation costs. Collective bargaining, although generally a desired solution, does not have a strong tradition in Australia, with most writers not represented by trade unions.

In this context an alternative solution could be the introduction of legislative provisions, the so-called 'author-protective provisions' or '(rights) alienability restrictions'.[123] Their purpose is to re-establish a legal balance in author-publisher

118 For example, Australia Authors' Guild Theatre Industry Agreement applies to screenplay writers only.

119 D'Agostino, *Copyright*, above n 38, 119–20.

120 For example, the AWG has agreements negotiated with Screen Producers Australia and the Australia Major Performing Arts Group: see 'Negotiated Agreements' in Australian Writers' Guild, *Membership* <https://awg.com.au/membership/>.

121 See a list of 'Recommended Agreements' on the AWG website: ibid.

122 See Australian Publishers Association, above n 107.

123 For the purposes of this article, these concepts are used interchangeably as synonyms. Preference is given to 'alienability restrictions' since it is a more neutral term that does not have direct connotations with a paternalistic approach towards authors in copyright law.

relationships, and improve the chances of fairer author contracts leading to increased remuneration for authors.

A What are Alienability Restrictions?

In contrast to the current situation in Australia, a number of civil and common law countries have a variety of rights alienability restrictions that seek to improve the balance in the author-publisher relationship.[124] For the purpose of this article, four categories of alienability restrictions are discussed below.[125]

1 Rules on Contract Formation and Interpretation

Civil law jurisdictions have a variety of statutory rules on the formation and interpretation of copyright contracts. For instance, under the German 'purpose of transfer' doctrine, author contracts have to specify uses to which a work is put.[126] In Belgium and France, copyright contracts must specify the duration, place of exercise, and the amount of remuneration for each of the rights transferred.[127]

Under the copyright law of many European countries, rights transfer contracts should be interpreted strictly, in favour of the author. For instance, in Germany and the Netherlands, the so called 'purpose of grant' principle applies. It requires courts to interpret a grant of rights as encompassing only those rights that are required by the purpose pursued in the transfer at issue.[128] Similarly, in Italy, copyright law suggests that, in the absence of an agreement to the contrary, the transfer of one or more of the exploitation rights shall not imply the transfer of other rights which are not necessarily dependent on the right transferred.[129]

2 Limitations on Transfer

A number of civil law countries expressly regulate the transfer of rights relating to forms of exploitation that are unknown or unforeseeable at the time the copyright contract was concluded.[130] For instance, in Hungary, any such licence would be considered null and void. In Germany, the *German Copyright Act* states that a contract concerning future modes of exploitation has to be concluded in writing. The author has a right to additional remuneration if the

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124 In civil law countries, legislators tend to assume a more paternalistic approach towards authors and all parties in weaker bargaining positions: see Paul Goldstein, *International Copyright: Principles, Law, and Practice* (Oxford University Press, 2001) 216.

125 For detailed studies of various author-protective provisions in different European countries see *Contractual Arrangements Applicable to Creators*, above n 91; *Remuneration of Authors Report*, above n 77. Note: in different studies, provisions are called and classified differently.

126 *German Copyright Act* § 31(5).

127 Kretschmer et al, above n 9, 70.

128 *Remuneration of Authors Report*, above n 77, 43.

129 Ibid. See also *Auteurswet* [Dutch Copyright Act] (Netherlands) 23 September 1912, Stb 1912, 308, art 2(2) ('*Dutch Copyright Act*') which provides that the transfer of rights covers 'only those rights that are specified in the contract or necessarily derive from the nature or purpose of the title'.

130 For example, France, Germany, Hungary, Italy, Poland and Spain. *Remuneration of Authors Report*, above n 77, 45.

exploiter commences a new form of exploitation[131] or may revoke the right to use the work in future formats.[132]

Many civil law jurisdictions also have restrictions with regard to rights transfer to future works. The laws of France, Hungary, Poland, and Spain expressly prohibit general transfers of rights to future works. Other countries (Germany, Italy) allow it, however, subject such transfer to certain conditions, such as a mandatory time limit or the obligation to pay additional remuneration to authors.[133]

3 Bestseller Clauses

Another unique way to protect authors in civil law countries is to provide them with additional rights to remuneration. In Germany, the so-called 'bestseller' clause allows authors to ask for a modification of the contract if the remuneration agreed upon is not proportionate to the income generated from the use of the work.[134] France,[135] Spain,[136] Poland[137] and some other EU Member States[138] have similar bestseller clauses that require the remuneration indicated in the contracts to be 'proportionate' or 'equitable' and enable authors to request the amendment to the contract if this happens not to be the case.[139] These clauses are meant to ensure that in case an author's work becomes highly popular, the revenues generated are fairly shared with the author, notwithstanding the remuneration provisions in the initial contract.

4 Rights Reversion and Termination Clauses

A number of common and civil law countries contain in their copyright statutes rights reversion clauses. In the US, transfers of copyrights can be terminated 35 years after the transfer, either by the author or her heirs.[140] Notice must be given to the original transferee, and a filing should be made in the copyright office to perfect the interest of the author or her heirs.[141] It is meant to give a 'second chance' to authors who, due to weak bargaining power, had initially entered into bad deals with exploiters.

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131 *German Copyright Act* § 32c.

132 *Remuneration of Authors Report*, above n 77, 46.

133 Ibid 47.

134 *German Copyright Act* § 32a.

135 *French Intellectual Property Code* art L131-5.

136 *The Intellectual Property Act* (Spain), Royal Legislative Decree 1/1996, 12 April 1996, art 47.

137 *Ustawa z dnia 4 lutego 1994 r. o Prawie Autorskim i Prawach Pokrewnych* (Poland) art 44 ('*Polish Copyright Act*').

138 For more on these clauses see *Remuneration of Authors*, above n 77, 107.

139 For example, France, Poland, Spain, Netherlands, see ibid 107–8; Kretschmer et al, above n 9, 74. The European Commission has recently proposed to introduce bestseller provisions at the EU level, see *Proposal for a Directive on Copyright in the Digital Single Market*, above n 8, art 15.

140 *Copyright Act of 1976*, 17 USC § 203 (2003) (applies for works published after 1978). Transfers of copyrights of books published between 1 January 1950 and 1 January 1978, may be terminated 56 years after publication, or 75 years after publication, if the opportunity at year 56 went unexploited: at § 304 (2002).

141 *Copyright Act of 1976*, 17 USC § 203 (2002).

The Canadian *Copyright Act* contains a slightly different reversionary provision.[142] Under section 14(2), any rights granted by the author during his or her lifetime are only valid until 25 years after the death of the author; they then automatically revert to the author's estate.[143] In contrast to the US reversionary right, the Canadian provision ties the term of reversion with the death of the author and is meant to benefit the author's estate. It has automatic effect without the need for authors or the estate to fulfil any formalities.

A number of continental European countries also have provisions on rights reversion. In most cases, these provisions allow reversion of rights if a publisher fails to exploit the rights (*non usus* or 'use it or lose it' provisions). For instance, French laws prescribe a duty on publishers to exploit the copyright and grant a right to authors to dissolve the contract wholly or in part where this duty is not discharged within a reasonable period.[144] In Germany and Hungary, laws allow termination of a contract due to lack of exploitation, at least two years from the exclusive licence agreement.[145] Under the EU Directive extending the term of protection for sound recordings, the performer may terminate the contract in the extended term if copies of the recording are no longer available in the market.[146]

B Rationales of Alienability Restrictions

Alienability restrictions available in different civil and common law countries are justified on a number of grounds. Namely, they are meant to address the problems of unequal bargaining power, the prediction problem and a need for more fairness in copyright law. Some of them, such as rights reversion provisions, arguably have a utilitarian function and are capable of increasing public access to works. Last but not least, authors have a human right to receive fair rewards for their creation, and rights alienability restrictions help to ensure that this human right is effective in practice.

1 Unequal Bargaining Position

The main argument in favour of regulating author contracts is unequal bargaining power of parties to the contract.[147] As suggested above,[148] freedom of contract allowing authors and disseminators to freely agree on the terms of the

142 'Reversion was originally introduced in Canada in 1924 to complement the new, longer 50-year term also enacted at that time': D'Agostino, *Copyright*, above n 38, 117.

143 See also *Copyright Act*, RSC 1985, c C-42, s 60(2) (applies to pre-1924 works) ('*Canadian Copyright Act*'); for a discussion of how these provisions apply see Bob Tarantino, 'Long Time Coming: Copyright Reversionary Interests in Canada' (2013) 375 *Développements Récents en Droit de la Propriété Intellectuelle* <http://ssrn.com/abstract=2368464>.

144 *French Intellectual Property Code* art L132-17.

145 See *German Copyright Act* § 41; *1999. Évi LXXVI. törvény a szerzői jogról* [Act LXXVI of 1999 on Copyright] (Hungary) July 6 1999, art 56.

146 *Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 Amending Directive 2006/116/EC on the Term of Protection of Copyright and Certain Related Rights* [2011] OJ L 265/3, art 1(2)(c).

147 Guibault and Hugenholtz, above n 21, 5.

148 See Part III(A) above.

contract, is based on the assumption that parties to the contract are equal and perfectly informed. In practice however, this is often not the case. Creative industries, and the publishing industry in particular, are characterised by a large number of authors, many of whom are in the early stages of their career, and a rather small number of large publishers. Authors in most cases are not well informed and have limited (if any) experience in negotiation, while large publishers have access to important market information that allows them to better estimate market demand and prospects of a work. Authors are therefore in a weakened bargaining position from the outset.[149]

The unequal bargaining power argument is the underlying rationale of the reversion provisions in the US[150] and Canada.[151] Reversion provisions are meant to improve the balance in the author-disseminator relationship by giving authors another possibility to exploit their work after rights transfer agreements have been terminated. It also underlies author-protective provisions in civil law countries.[152] Laws that set certain minimum requirements for author contracts (eg, requirements to indicate remuneration for each mode of exploitation), restrictions on rights transfer (eg, prohibitions on transfer rights to future unknown modes of exploitation), or corrective measures (eg, termination rights, bestseller clauses), are supposed to strengthen the legal bargaining position of authors vis-à-vis publishers.

The unequal bargaining position of authors has been recognised in Australia on a number of occasions. For instance, it has been indicated by the Copyright Law Review Committee when discussing the introduction of moral rights,[153] in the Myer Report on Contemporary Visual Arts and Craft Inquiry,[154] and subsequent Government Inquiry that set the ground for the introduction of the resale royalty scheme.[155] It led to the introduction of author-enabling provisions in Australian copyright law such as moral rights and resale royalty rights.[156] It is therefore not a new concept in the Australian copyright policy debates, and the problem is well recognised among Australian stakeholders and policy makers.

2 Prediction Problem

Another related rationale underlying alienability provisions is the so-called 'prediction problem'. It is essentially impossible to, in advance, predict the

149 Kenner, above n 36, 572–3. See also Shane Valenzi, 'It's Only a Day Away: Rethinking Copyright Termination in a New Era' (2013) 53 *IDEA – The Intellectual Property Law Review* 225, 227.

150 See, eg, Neil Netanel, 'Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law' (1994) 12 *Cardozo Arts & Entertainment Law Journal* 1, 8.

151 See Tarantino, above n 143, 2.

152 See, eg, Dietz, above n 66, 828: the German copyright law amendments of 2002 were meant 'to strengthen the bargaining power of – mainly freelance – authors and performers'.

153 Copyright Law Review Committee, Parliament of Australia, *Report on Moral Rights* (1988) 66 [9] ('*Report on Moral Rights*').

154 Contemporary Visual Arts and Craft Inquiry, 'Report of the Contemporary Visual Arts and Craft Inquiry' (Department of Communications, Information Technology and the Arts (Cth), 2002) 120.

155 Department of Communications, Information Technology and the Arts (Cth), 'Proposed Resale Royalty Arrangement Discussion Paper' (2004) 27.

156 See Part III(A) above.

success of a work.[157] If the work becomes more successful than expected, the initial agreement may no longer reflect the real value of a work and may result in unfair distribution of revenue between the parties.[158] Although both authors and publishers are not able to exactly predict the exact commercial value of work, authors normally hold much less information about the market that would enable them to assess the potential success of the work ('information asymmetry' problem).[159] Some alienability restrictions are meant to address this information asymmetry problem. For instance, US reversion provisions were introduced due to the inherent difficulty of determining a work's value before its commercial exploitation.[160] The prediction problem is also the underlying rationale of 'bestseller' clauses available in many European countries.[161] When a work (unexpectedly) becomes successful and the contract does not allow for the adequate sharing of profits with the author, bestseller clauses create the possibility for the author to ask the publisher for additional remuneration that is consistent with the commercial success of the work.

In Australia, one could suggest that the resale royalty right[162] is meant to address the prediction problem that visual artists face when selling their works to intermediaries. If the work becomes successful and is sold at public auction, the law entitles an artist to a share of the resale price.[163] This corrective measure helps to address the problem that commercial success of artistic works cannot be predicted in advance, and ensures better distribution of profits between an artist and an intermediary. The introduction of the resale royalty right in Australia therefore demonstrates that both the Australian government and stakeholders understand the prediction problem that is common in creative industries, and have shown their willingness to address this problem by introducing appropriate legislation.

3 Fairness Argument

Alienability restrictions can also be justified by referring to general moral principles such as fairness. According to Wong, a common justification of the termination provisions in the US looks to basic fairness concerns:

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157 Kate Darling, 'Contracting about the Future: Copyright and New Media' (2012) 10 *Northwestern Journal of Technology and Intellectual Property* 485, 513.

158 Kenner, above n 36, 573; see also Montagnani and Borghi, above n 74; Pierre B Pine, 'You're Terminated!: Termination and Reversion of Copyright Grants and the Termination Gap Dilemma' (2014) 31(1) *Entertainment and Sports Lawyer* 1, 1 (the real commercial value of a work is difficult to foresee and to price fairly at the time the contract is signed).

159 See Part III(A) above.

160 HR Rep No 94-1476, 94th Congress,124 (1976); S Rep No 94-473, 94th Congress, 65 (1975), cited in Kiley C Wong, 'Beyond the Gap: A Practical Understanding of Copyright's Termination of Transfers Provisions' (2012) 27 *Berkeley Technology Law Journal* 613, 623.

161 See Part IV(A) above.

162 See *Resale Royalty Right for Visual Artists Act 2009* (Cth).

163 In order to qualify for a share of the resale right, certain requirements have to be met, eg, it applies to artworks only, can be claimed by artists that meet residency requirement, and the resale price should be no less than $1000: *Resale Royalty Right for Visual Artists Act 2009* (Cth) ss 6–11.

> The provisions allow the author to recapture rights from a transferee because between the two parties, society finds it 'more fair' for *the author* to reap the benefits of the lasting commercial success of her work than for a producer or distributor to do so.[164]

Similarly in Germany, the bestseller provision that entitles authors to 'equitable remuneration'[165] explicitly suggests that it is supposed to provide an 'equitable' measure on which authors can rely.

In Australia, the need to ensure that copyright law is fair to authors has been highlighted in a number of copyright policy debates. For instance, when arguing in favour of moral rights, it has been suggested that 'such legislation is fair and equitable',[166] and that there is a moral argument to introduce moral rights.[167]

The weakness of the fairness argument is the lack of definition as to what is 'fair'. As a moral concept, different stakeholders will have different opinions on which copyright law provisions are considered fair or not.[168] One could only refer to a general feeling of fairness or justice among public members,[169] which is not easy to define. Despite the uncertainty surrounding the concept of fairness, this argument often plays an important role in copyright policy discussions, and, therefore should not be entirely discounted.

4 Utilitarian Justification

In addition, some alienability restrictions are meant to serve utilitarian functions of copyright law, namely by helping make works accessible to the public.[170]

Some commentators suggest that, apart from the function to incentivise authors by rewarding them for their works, copyright has a purpose to ensure that as many works as possible are accessible to the public.[171] This is sometimes referred to as the 'communication function' of copyright law. It is meant to provide the public with access to works and – to a certain extent – free use of the content, which in turn enhances cultural and social progress.[172]

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164 Wong, above n 160, 620 (emphasis in original). See also Pine, above n 158, 1: 'The purpose and rationale of the termination provisions was clearly equitable in nature, to allow authors or their heirs a second opportunity to share in the economic success of their works'.

165 *German Copyright Act* § 32.

166 *Report on Moral Rights*, above n 153, 6 [9], 56–8 [58]–[62].

167 Ibid 56–8 [58]–[62]. More recently, the fairness argument has been employed by users to advocate for user-friendly copyright law reforms: see, eg, Freedom of Access to Information and Resources ('FAIR') campaign by Australian Library and Information Association, FAIR, *Freedom of Access to Information and Resources* <https://fair.alia.org.au/>.

168 For an interesting discussion on the meaning of fairness in copyright law in different legal traditions, see Jean-Luc Piotraut, 'An Authors' Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared' (2006) 24 *Cardozo Arts & Entertainment Law Journal* 549.

169 See, eg, de Beer, above n 57, 169: 'distributive inequalities … sit uneasily with many people's sense of justice'.

170 See generally Montagnani and Borghi, above n 74, 246–7.

171 See, eg, ibid 248–9.

172 Tim Wu, 'Copyright's Communications Policy' (2004) 103 *Michigan Law Review* 278: arguing authorship function of copyright versus its communication policy; Montagnani and Borghi, above n 74, 252.

Intermediaries do not always do a satisfactory job in the dissemination of works. When exclusive rights are held by intermediaries, such as publishers, they might be exploited commercially, which would mean that the work would reach the public. However, this is not always the case. If a publisher thinks that the work is not commercially viable, they may refuse to invest in its release into the market and keep it away from the public. Keeping in mind the short commercial cycle of the majority of works, large volumes of them soon become out of print.[173] For a large number of such works, the right holder is no longer known (so called 'orphan works').[174] When third parties, such as libraries, want to digitise 'orphan works' and make them better accessible to the public, they cannot get consent from right holders.[175] Since copyright remains valid for an extensive period of time, nobody else apart from the intermediary who has these rights can release it to the public.[176] Also in some cases, intermediaries buy extensive rights into works with no intention of commercialising them, but rather to pre-empt the competition with other similar products they own.[177]

Commentators suggest that some alienability restrictions, such as rights reversion clauses, 'could be a key tool for opening up unexploited back-catalogues, and enable artist-led cultural and social innovation'.[178] Arguably, reversion rights allow the freeing up of many such works that are currently 'locked' in the hands of intermediaries, and give them back to authors who might be willing to search for alternative dissemination routes.[179]

5 Human Rights Argument

Last but not least, it is submitted that international human rights law requires protecting authors' right to a fair reward.

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173 Deirdre K Mulligan and Jason M Schultz 'Neglecting the National Memory: How Copyright Term Extensions Compromise the Development of Digital Archives' (2002) 4 *Journal of Appellate Practice and Process* 451.

174 European cultural institutions estimate that orphan works constitute from 13 per cent to 43 per cent of their collections: Martin Kretschmer, 'Short Paper: Copyright Term Reversion and the "Use-It-Or-Lose-It" Principle' (2012) 1 *International Journal of Music Business Research* 44, 45.

175 Some countries have adopted legislative solutions to this problem: see, eg, *Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Work*s [2012] OJ L 299/5. In Australia, for the most recent attempt to solve this problem, see Department of Communication and the Arts (Cth), 'Copyright Modernisation Consultation Paper' (March 2018) 19–26.

176 Montagnani and Borghi, above n 74, 253.

177 Ibid 252–3.

178 Kretschmer, 'Short Paper: Copyright Term Reversion', above n 174, 46; see also Paul J Heald, 'Copyright Reversion to Authors (and the *Rosetta* Effect): An Empirical Study of Reappearing Books' (Research Paper, 8 December 2017) 4–5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3084920>.

179 Rebecca Giblin and Kimberlee Weatherall, 'A Collection of Impossible Ideas' in Rebecca Giblin and Kimberlee Weatherall (eds), *What if We Could Reimagine Copyright?* (ANU Press, 2017) 315, 326–7; See also Nicole Cabrera et al, 'Understanding Rights Reversion: When, Why, and How to Regain Copyright and Make Your Book More Available' (Guidebook, Authors Alliance, 2016) 9 <https://authorsalliance.org/wp-content/uploads/Documents/Guides/Authors%20Alliance%20-%20Understanding%20Rights%20Reversion.pdf >.

In particular, article 27(2) of the *Universal Declaration of Human Rights* of 1948 ('*UDHR*'),[180] which Australia has signed, states that '[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'. In an almost identical manner, article 15(1)(c) of the *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*') of 1966,[181] to which Australia is a party, requires that '[t]he States Parties to the present Covenant recognize the right of everyone: … [t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'. While the *UDHR* is an aspirational instrument and generally non-binding, the *ICESCR* takes the form of a treaty and as such, it imposes legally binding obligations to implement its provisions on States that became contracting parties to it.[182]

Notably, the listing of authors' rights in the *UDHR* or *ICESCR* does not necessarily mean that authors' rights in international human rights law equate to intellectual property rights, such as copyright.[183] In legal literature, there is no agreement whether intellectual property rights are human rights[184] or not.[185] It would therefore be difficult to argue that copyright or, more specifically, contract law provisions restricting the transfer of rights from author and publisher, have a human rights status and therefore oblige countries to implement them in national laws.

On the other hand, copyright law is one of the legal instruments under which authors' human right to benefit from their creative production is guaranteed.[186] The Special Rapporteur in the Field of Cultural Rights has referred to different copyright law measures, such as rights reversion provisions and formality requirements for rights assignment contracts, as techniques to protect authors from vulnerabilities posed by their weaker bargaining power.[187] As previous analysis shows,[188] a number of *ICESCR* signatories have introduced different measures to regulate copyright contracts under national copyright laws and more developments in this respect are under way.[189]

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180 GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

181 Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

182 Paul L C Torremans, 'Is Copyright a Human Right?' [2007] *Michigan State Law Review* 271, 278.

183 The UN Committee on Economic, Social and Cultural Rights draws a clear distinction between the two: see Committee on Economic, Social and Cultural Rights, *General Comment No 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of which He or She Is the Author*, 35th sess, UN Doc E/C.12/GC/17 (12 January 2006) [1].

184 See Torremans, above n 182, 290.

185 Lea Shaver and Caterina Sganga, 'The Right to Take Part in Cultural Life: On Copyright and Human Rights' (2009) 27 *Wisconsin International Law Journal* 637, 650; Graeme W Austin, 'Authors' Human Rights and Copyright Policy' (2017) 40 *Columbia Journal of Law & Arts* 405, 409–10.

186 Notably, there are close similarities between the human right of authors and copyright: *ICESCR* art 15(1)(c) requires that an author's 'moral and material' interests are protected, which are similar to moral and economic rights protected under copyright law. See also Austin, above n 185, 415.

187 Farida Shaheed, Special Rapporteur, *Report of the Special Rapporteur in the Field of Cultural Rights*, 28th sess, Agenda Item 3, UN Doc A/HRC/28/57 (24 December 2014) 9–10 [40]–[51].

188 See Part IV(A) above.

189 See *Proposal for a Directive on Copyright in the Digital Single Market*, above n 8.

Australia, as a signatory of *UDHR* and *ICESCR*, has a duty to implement measures that would guarantee authors' rights to benefit from their creative production. Although the Australian government has policies and programs to support authors and other artists financially,[190] the decreasing income of authors[191] allows us to assume that the measures undertaken are not sufficient. It is therefore suggested that alienability restrictions in copyright contracts could be a complementary measure with a goal to make authors' human rights effective in practice.

In summary, alienability provisions have several rationales and are meant to serve a number of legal and socio-economic goals. The next question is whether the alienability provisions are effective in achieving these goals.

C Are Alienability Provisions Effective?

Effectiveness has been the main issue related to alienability restrictions. Some commentators, even those in favour of author-protective provisions under copyright law, have expressed doubts about whether certain alienability provisions are effective in achieving their goals.[192] Critics in common law countries (US, Canada, New Zealand) have been arguing that reversion clauses are infrequently used in practice and, instead of improving the situation of authors, are likely to lead to decreased royalties by authors.[193] In Europe, where author-protective provisions have been gaining increasing support from law makers, there has been limited empirical data on the effectiveness of these provisions.[194]

In the following sections I will revisit this discussion by analysing the effectiveness of selected alienability restrictions available in different jurisdictions, namely, rights reversion (or termination) provisions, bestseller clauses, and limitations on the scope of transfer.[195] When examining the effectiveness of particular legal provisions, different questions might be raised.[196] For the purposes of this article, I will examine the effectiveness of the selected provisions by looking at two criteria: first, whether they strengthen the author's

190 See, eg, programs run by Australia Council for the Arts: Australia Council for the Arts, *What We Do* <https://www.australiacouncil.gov.au/>.

191 See *Australian Authors' Income Report*, above n 1.

192 See, eg, Bently and Ginsburg, above n 32, 1586–7 (criticises the effectiveness of US reversion clauses).

193 In many publishing contracts, authors arguably shift the risk of failure back to publishers against the transfer of economic rights of exploiting the work. When authors shift back only part of the risk that is limited in time, they are likely to receive a smaller amount of money in exchange. See Montagnani and Borghi, above n 74, 261; Tarantino, above n 143, 17; Kenner, above n 36, 584. A similar argument was applied by Consumer and Corporate Affairs Canada arguing that reversion rights 'might adversely affect the author's … bargaining position' and calling for its repeal: A A Keyes and C Brunet, *Copyright in Canada: Proposals for a Revision of the Law* (Consumer and Corporate Affairs Canada, April 1977) 76, quoted in Tarantino, above n 143, 16.

194 Kretschmer et al, above n 9, 5.

195 These three provisions have been selected since they appear to be most frequent in national legislation and there is some recent empirical data that allows for an assessment of their effectiveness.

196 For example, whether the provisions have been successfully enforced in courts; whether they strengthen legal status of a weaker party; whether they improve socio-economic wellbeing of authors, etc.

bargaining power in an author-publisher relationship (legal effectiveness), and second, whether they lead to a general increase of author incomes and, thus, general wellbeing of authors (socio-economic effectiveness).

1 Rights Reversion Provisions

Rights reversion (or termination) provisions are the most common alienability restrictions. As discussed above,[197] different versions of rights reversion provisions are available both in common law jurisdictions, such as the US and Canada, and in civil law jurisdictions. Although these rights reversion provisions are an important legal tool available for authors, it is questionable whether they effectively strengthen the bargaining position of authors and whether they lead to increased levels of remuneration among the general population of authors.

(a) Legal Effectiveness

Generally speaking, one could argue that rights reversion clauses help to address the unequal bargaining power and prediction problem to a certain extent. Authors who are unaware of the future success of their work and are in a weak bargaining position when dealing with exploiters often sign rights transfer contracts that are not favourable to them. Rights reversion provisions allow them to terminate such transfers and regain rights to their work, after the success of the work has been tested in the market and they can better appreciate its value.

However, rights reversion provisions are arguably little used in practice, both in common and civil law jurisdictions.[198] A few reasons may cause this. Firstly, some rights reversion provisions contain such restrictive terms that the author might not be interested in the right at all. For instance, termination rights in the US can be exercised only 35 years after the rights transfer takes place. In Canada, they become effective 25 years after the death of the author. Needless to say, few works remain of value after this period. According to empirical evidence, the vast majority of a work's commercial value is generally extracted shortly after its creation.[199] After a few decades, when commercial value of works is largely or entirely lost, few authors remain interested in the opportunities given by reversion rights.[200]

Secondly, some rights reversion provisions are difficult to exercise in practice. For instance, US commentators suggest that the 'daunting intricacies of the [right reversion] scheme [in the US] make it difficult for authors to take

197 See Part IV(A)(4) above.

198 For example, in Canada, disputes related to rights reversion clauses have reached courts only on a few occasions. See Tarantino, above n 143, 1. In Europe there is little case law related to author-protective provisions: Kretschmer et al, above n 9, 5.

199 See, eg, William M Landes and Richard A Posner, 'Indefinitely Renewable Copyright' (2003) 70 *University of Chicago Law Review* 471, 501–7. In the case of books, the number of copies sold tends to drop sharply within a year: see, eg, HM Treasury, 'Gowers Review of Intellectual Property' (Independent Review, December 2006) 52–3.

200 Houweling, above n 31, 383; see de Beer, above n 57, 166–7.

advantage of their rights'.[201] Due to complicated notice requirements, only authors of works that still have significant value and who are able to pay for good legal advice, are able to make use of this right effectively.

Another problem is the unwillingness of authors to exercise their reversionary rights. Termination of a rights transfer contract is likely to negatively affect an author's relationship with the publisher, which is often based on long-term prospects and mutual trust. Meanwhile, for authors with limited bargaining power, long-term career prospects are likely to prevail over enforcing certain rights (such as rights reversion clauses) even when they are entitled to do so.[202] In addition, attempts to reverse rights might lead to disputes with the publisher ending up in court, which would require financial resources not available for many authors.

Last but not least, publishers may circumvent reversionary rights by opting to apply to the contract the law of the country that does not have such rights, and in this way undermine the effectiveness of these rights. In the *Duran Duran* case,[203] the contract that assigned the defendants' (authors') worldwide copyright to a publisher was subject to UK law. The UK High Court applied UK contract construction rules and found that the broad terms of the rights assignment contract prevented the defendants from exercising their US reversionary rights.

Certainly, some of the issues that make rights reversion provisions of little effectiveness in practice could be addressed by appropriate legislation. For instance, in order to make rights termination provisions more useful, the point of time when authors are eligible to claim the termination of a transfer could be reconsidered. Instead of applying a term of 35 years (as prescribed under the US law), lawmakers could consider shortening the term to a more reasonable one.[204] A number of European countries have much shorter time frames (for example, only two years in Hungary and Germany).[205] Alternatively, the termination of rights transfer might depend on the actual exploitation of rights by the disseminator (ie, the 'use it or lose it' clause).[206] A number of US commentators agree that 35 years is an unreasonable term and suggest that, in order to make US reversionary rights more effective, the term should be shortened or the right to terminate the contract should be made subject to the actual exploitation of rights transferred under the contract.[207] This would increase the chances that, at the time

201 See also Houweling, above n 31, 383. There are efforts by author organisations to make authors aware of this right: see, eg, Cabrera et al, above n 179, 9.

202 Kenner, above n 36, 585.

203 *Gloucester Place Music v Simon Le Bon* [2016] FSR 27.

204 See, eg, Jessica Litman, 'Real Copyright Reform' (2010) 96 *Iowa Law Review* 1, 48 (suggests shortening the term when rights termination could be carried out to 15 years).

205 See also *Legge 22 aprile 1941, n 633 sulla protezione del diritto d'autore e di altri diritti connessi al suo esercizio* (Italy) [Law No 633 of April 22, 1941, Law for the Protection of Copyright and Neighbouring Rights], art 122 ('*Italian Copyright Law*').

206 Maureen A O'Rourke, 'A Brief History of Author-Publisher Relations and the Outlook for the 21st Century' (2002) 50 *Journal of the Copyright Society of the USA* 425, 466 (refers to the suggestion that termination might be triggered not only by the passage of time, but also by the transferee's non-exploitation of the work).

207 See, eg, Litman, above n 204, 48.

of reversion of rights, commercial value of works has not been entirely lost, and authors could get a real new chance to profit from works in relation to which rights were reverted.

Similarly, if the exercise of a particular right requires following a certain procedure (eg, in the case of US termination rights), the procedure could be clarified and streamlined so that authors could easily understand and follow it, without the need for costly legal advice.[208] In order to decrease the costs of litigation and encourage authors to enforce their rights, states could offer ADR mechanisms that are more affordable and accessible to authors.[209] Creation of such alternative dispute mechanisms is envisaged under the EU *Proposal for a Directive on Copyright in the Digital Single Market*.[210] Finally, the law should envisage safeguards that would not allow publishers to circumvent reversionary, and other author-protective, provisions by merely subjecting rights assignment contracts to other foreign law that does not contain such clauses.[211]

(b) Socio-Economic Effectiveness

Although such improvements (shortening the term, solving procedural issues, facilitating dispute resolution, etc) could make reversion clauses more attractive, it is still questionable whether they would lead to increased levels of remuneration for the general population of authors. Reversion clauses that exist in some European jurisdictions already address the problems discussed above. For instance, in Germany, rights transfer can be terminated two years after transfer if the transferee does not exploit the rights to the work.[212] Despite this, there is little (if any) evidence that these provisions have any measurable effect on the overall income of authors in those countries.

A recent report commissioned by the European Commission and conducted by the Amsterdam University and Europe Economics ('Report') has failed to establish a direct correlation between the availability of rights reversion provisions and the level of remuneration of authors in a particular country.[213] The Report assessed the remuneration of authors within the print industry, and the impacts that alienability provisions have on remuneration levels of authors. Among other things, the Report looked at 10 selected EU Member States, identified the alienability restrictions they provided under national copyright laws, compared remuneration levels of authors in the print industry and searched

208 For example, the reversion of rights under the *Canadian Copyright Act* is automatic and does not require following any procedure.

209 Voluntary ADR mechanisms are available in some EU Member States, eg the Netherlands *Dutch Copyright Act* art 25g and the UK. See European Commission, 'Impact Assessment – Part 1', above n 19, 180 n 560.

210 Above n 8, art 16.

211 Such attempts can be seen in, eg, *German Copyright Act* § 32b and *Dutch Copyright Act* art 25h(2) (the latter provides that regardless of the law that governs the copyright contract, the Act's provisions shall apply if (a) the contract would have been governed by Dutch law in the absence of a choice of law clause or (b) the acts of exploitation of the work take place or will take place wholly or predominantly within the Netherlands).

212 *German Copyright Act* § 41.

213 *Remuneration of Authors Report*, above n 77.

for correlations between these findings. The Report concluded that '[w]hile [rights reversion clauses] also contribute to strengthening the position of authors in their contractual relationship with publishers, they lack the kind of direct, up-front impact on remuneration'.[214] These findings were corroborated by statistical analysis.[215]

Several reasons may have influenced this outcome. Firstly, as discussed above,[216] rights reversion provisions are post-contractual corrective measures that require authors to take action and question their existing relationship with the publisher, which is likely to affect their future career prospects. Presumably, few authors would take this risky path. Secondly, since few works are profitable even a few years after they are released in the market,[217] the chances that authors will be able to receive additional revenue from works in relation to which rights have reverted are still minimal.[218] Those cases where authors revert their rights and successfully commercialise their works are likely to be very limited in number and, therefore, are unable to contribute to a noticeable increase in remuneration for the general author population.

It is interesting to note that rights reversion clauses are more likely to serve another function. As discussed above,[219] some commentators suggest that they have the potential to improve public access to works. Recent empirical research has provided evidence that supports this proposition. Heald, in his recent study, compared the availability of books whose copyrights are eligible for statutory reversion under US law, with books whose copyrights are still exercised by the original publisher. [220] His goal was to determine which set of books are more available to the public. After examining three different datasets totalling 1909 titles, he found strong support for the conclusion that the US reversion rights result in a significantly increased availability of book titles to the public.[221] Of a sample of 1909 books collected, an estimated 20 per cent to 23 per cent of the titles are currently in print due to statutory reversion/termination statutes and due to the *Rosetta* effect.[222]

It is important to add that this utilitarian function of rights reversion clauses might become more important in the near future.[223] With the increasing likelihood

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214 Ibid 7.

215 Ibid 6–7.

216 See Part IV(c)(1)(a) above.

217 See, eg, Landes and Posner, above n 199, 501–7. In the case of books, number of copies sold tends to drop sharply within a year: see, eg, HM Treasury, above n 199, 52–3.

218 Also, if the rights are terminated because the publisher is not exploiting the work, it is likely that it does not have commercial value in the market anyway.

219 See Part IV(B)(4) above.

220 Heald, above n 178.

221 Ibid 7.

222 The latter refers to the decision in *Random House Inc v Rosetta Books Inc,* 283 F 3d 490 (2nd Cir, 2002) in which the Second Circuit affirmed the District Court decision establishing that contracts in which authors signed away the rights to their works 'in book form' do not extend to publishing of works in e-book format. See Heald, above n 178, 47.

223 See, eg, Giblin, above n 18, 210; Caroline B Ncube, 'Calibrating Copyright for Creators and Consumers: Promoting Distributive Justice and Ubuntu' in Rebecca Giblin and Kimberlee Weatherall (eds), *What If*

of authors reaching audiences online and the proliferation of digital publishing, even less successful authors might become interested in using reversion provisions and making their works accessible via digital venues (either for profit or for free), or innovate on the basis of their old works. Even if this will not necessarily guarantee additional revenues in case the commercial value of the work has been exploited, this would open up unexploited back catalogues to the public and in this way increase public access to previously unavailable works.[224]

2 Bestseller Clauses

Bestseller clauses share some of the potential and some of the problems associated with rights reversion provisions. Similar to the termination right, a bestseller provision is a post-contractual measure that aims at addressing the unequal bargaining power and prediction problems *after* the contract has been made. If an author, due to inability to determine the future value of the work or due to a weak bargaining position (or both), agrees to unreasonable terms in the contract (ie, disproportionately low remuneration), and their work becomes more successful than expected, they are able to correct the situation by claiming additional remuneration.

Differently from the termination right, the bestseller provision can be invoked at any point of time. Actually, bestseller clauses are supposed to be used at the time when the work reaches its peak of popularity (thus, 'bestseller') and the author realises the inequitable nature of the remuneration envisaged in their publishing contract. In contrast to rights reversion provisions, bestseller provisions do not lead to the termination of the contract or a change of the right holder but, instead, result in the adjustment of the contract.

(a) Legal Effectiveness

At first glance, bestseller provisions are tools which have the potential to improve the legal position of authors. During the pre-contractual stage, when negotiating publishing contracts, the provision encourages publishers to agree on proportionate remuneration levels. At the post-contractual stage, it entitles authors to claim additional remuneration if the remuneration envisaged in the contract does not meet the minimum required by the law.

On the other hand, the legal effectiveness of bestseller provisions has raised some concerns. Commentators have noted that in countries that have bestseller provisions, there is little case law where authors have enforced these provisions against publishers.[225] Several explanations for the lack of litigation could be provided. An optimistic argument suggests that case law in relation to these provisions is scarce, since disputes tend to be dealt with internally between authors and exploiters.[226]

We Could Reimagine Copyright (ANU Press, 2017) 253, 278–9 (suggesting reversion rights as a solution to the author remuneration problem).

224 Martin Kretschmer, 'Short Paper: Copyright Term Reversion', above n 174, 46.

225 Kretschmer et al, above n 9, 5.

226 *Remuneration of Authors Report*, above n 77, 55.

Another more pessimistic explanation is that bestseller provisions are not being used in practice by authors. Bestseller provisions are post-contractual adjustment measures, which means that an author needs to approach the publisher and request them to adjust the remuneration envisaged in the contract. Similar to reversion clauses, entering into a dispute with a publisher is likely to ruin the relationship with the publisher; the author also risks being 'blacklisted' by other publishers, which would negatively affect their future career prospects.[227]

Also, authors might lack information about revenues from a particular work. In many European countries, publishers have no transparency obligations as to their profits and therefore authors might be unaware of the actual success of their work and the amount of remuneration that they could reasonably expect as a result of success. Even when a publisher has a statutory or contractual duty to report, they often tend not to follow this duty.[228]

Finally, a dispute with a publisher may need to be resolved in court, which is a costly and time consuming procedure.[229] In some European countries, bestseller provisions have been introduced in laws relatively recently[230] and authors might not be aware of them or might be unsure how to make use of them in practice. For these and other reasons, current bestseller provisions in European countries seem to fail to reach their full potential as legal tools that are meant to improve the situation of authors.[231]

(b) Socio-Economic Effectiveness

In addition, there is little (if any) evidence to indicate that bestseller provisions have a measurable effect on average author incomes. The authors of the abovementioned study,[232] after carrying out a legal and economic empirical analysis, concluded that bestseller clauses, similar to rights termination clauses, have the potential to contribute to strengthening the position of the author in their contractual relationship with publishers, but 'they lack the kind of direct, up-front impact on remuneration'.[233]

This result might be caused by the problems related to bestseller provisions, as discussed above. It is true that some of these issues could be addressed by appropriate legislation or industry practices. For instance, the lack of information about the actual profits generated from the work by a publisher could be solved by introducing transparency obligations on publishers. Such transparency

227 Ibid 122.
228 Ibid.
229 Ibid.
230 For example, in the Netherlands, the bestseller provision was introduced in 2015. See also Dysart, above n 68.
231 *Remuneration of Authors Report*, above n 77, 122.
232 *Remuneration of Authors Report*, above n 77.
233 Ibid 7.

obligations exist in some EU member states,[234] and have been suggested at the EU level in recent legislative proposals.[235] In order to address difficulties related to the enforcement of rights in courts, the law could facilitate out-of-court dispute settlement, for instance by introducing ADR mechanisms that would make it easier and cheaper for authors to solve their disputes with publishers.[236] Professional author organisations could do a better job in educating authors about bestseller provisions and how they could be used in practice.

These measures might help authors to enforce bestseller provisions, when they wish to do so. Despite this, it remains questionable whether the improved legal framework for the enforcement of bestseller provisions would lead to higher average earnings by authors in a particular country. Bestseller provisions are normally relevant in exceptional cases only, ie when a particular work becomes very successful. It means it could be of use only to bestselling authors, the number of which is certainly small. Furthermore, the small number of authors who could potentially benefit from the provision is further decreased by the fact that the provision applies only in cases where the remuneration envisaged in the contract was generally disproportionate to the benefits generated from the exploitation of the work. Few contracts would meet this requirement, which leads to a low number of cases in which bestseller provisions could apply. Consequently, a small number of cases where a bestseller provision is relevant and where authors decide to make use of it, is unlikely to lead to a noticeable rise of income for the general author population.

3 Rules on Contract Formation

The third type of alienability restrictions to be discussed here is rules on contract formation and interpretation. They have attracted the least attention in the literature.[237] However, according to some recent studies, they have proven to be more effective in ensuring higher remuneration levels to the general author population than post-contractual legal measures, such as rights reversion or bestseller clauses.[238]

As discussed above,[239] rules on contract formation and interpretation are generally available in many European countries. These provisions require that parties to the contract specify the rights that are being granted, the territorial and

234 See, eg, *French Intellectual Property Code* arts L132-13–L132.14. For an overview of transparency obligations in EU Member States, see European Commission, 'Impact Assessment on the Modernisation of EU Copyright Rules' (Staff Working Document No SWD(2016) 301 – Part 3, 2016) 200–11.

235 *Proposal for a Directive on Copyright in the Digital Single Market*, above n 8, art 14.

236 ADR mechanisms for such disputes exist in the Netherlands and the UK; the introduction of ADR mechanisms has been suggested in *Proposal for a Directive on Copyright in the Digital Single Market*, above n 8, arts 14, 16.

237 In most studies, they are either not mentioned at all or mentioned in a general list of alienability restrictions but do not attract a more in-depth analysis: see, eg, Kretschmer et al, above n 9 (not mentioned at all); *Contractual Arrangements Applicable to Creators*, above n 91, 31–3 (briefly mentions obligations to define in the contract the transferred rights, modes of exploitation, duration and geographical scope of transfer).

238 See discussion below.

239 See Part IV(A)(1) above.

temporal scope of grant, and give instructions to courts to interpret rights transfers restrictively.

(a) Legal Effectiveness

Rules on contract formation are *ex ante* measures, ie, they apply at the stage of negotiation rather than after the contract was concluded. They are meant to ensure more transparency and clarity in rights transfer agreements, as well as circumscribe the scope of the transfer of rights, thereby strengthening the position of the author in his or her negotiations with the publisher.[240] The transparency during the pre-contractual negotiations is supposed to serve the purpose of letting authors know what rights they are giving away and which ones they are keeping. This transparency potentially enables authors to negotiate better terms, as compared to the situation when a contract contains only general and broad transfers of rights for the entire duration of copyright and for the entire universe ('buy-out' clauses). When authors see the exhaustive list of rights/modes of exploitation that the contract covers, they should be more able to negotiate with the publisher which modes of exploitation should be left out of the contract.

Such legal provisions therefore strengthen the bargaining power of authors in the negotiation process and enable them to require that publishing contracts meet at least the minimum requirements set in law. Also, when the requirements on the formation of the contract are set in statute, many publishers are likely to comply with these requirements and avoid legal risks by defining the scope of transfer in a way that is compatible with the law.[241] This allows the publisher to establish a better balance among the success of the work, the degree to which the work is exploited commercially and the remuneration the author receives.[242]

(b) Socio-Economic Effectiveness

The next question is whether these requirements on the formation of the contract are likely to lead to increased levels of remuneration for authors. Interestingly, the abovementioned Report has found that these provisions were most likely to have the greatest impact on remuneration of authors.[243] In particular, the Report concluded that, among different author-protective provisions, the obligation imposed on publishers to specify the scope of the transfer of rights (geographical scope, duration and modes of exploitation), is the measure with the greatest positive effect on the remuneration of authors.[244] These findings were corroborated by statistical analysis.[245]

240 *Remuneration of Authors Report*, above n 77, 122.

241 Certainly, some publishers disregard the mandatory nature of rules and bend them in their favour, or take advantage of loopholes in the legislation: see ibid.

242 Ibid 121.

243 Ibid 6.

244 Ibid 6–7.

245 Ibid.

It might be surprising to see such results keeping in mind that provisions regulating formation of contracts do not seem to drastically change the legal situation of authors. Namely, authors neither acquire their rights back (a result of rights reversion), nor are they entitled to additional remuneration (a result of bestseller clauses). The main result of these provisions is more transparency in rights transfer contracts and, possibly, narrower scope of transfer, as compared to all-encompassing rights assignment contracts.

Several reasons may influence the finding of a correlation between limitations on the scope of transfer and author remuneration levels. First, in contrast to reversion and bestseller clauses that are generally relevant only in cases when the work is highly successful, regulations on the formation of the contract are important in *all* contracts and for *all* authors, even when a work will generate relatively small revenues for authors. As a result, while the successful application of a reversionary right or a bestseller clause in a particular case may lead to a significant increase of remuneration by a particular author, these cases are few and are not able to contribute to a noticeable increase in the average income of authors in a particular country. As far as requirements on the scope of transfer are concerned, they apply to every single contract. Even if the application of this provision may lead to a small increase in the remuneration of a particular author, this incremental increase in remuneration in each individual contract may result in a measurable increase of remuneration across the entire author population.

For instance, when digital technology and the Internet emerged, authors in countries that followed the 'purpose of grant' principle were able to argue that their previously signed contracts did not have a purpose to transfer rights into digital forms of exploitation since they did not exist at the time of contract.[246] As a result, publishers wishing to disseminate works using new digital technologies had to sign additional contracts with authors and provide additional remuneration for this new form of exploitation.[247] Authors who sign contracts today can expect that, if a publisher wishes to exploit the work in a way not envisaged in the contract (eg in a form that is not available today), the transfer of rights will be read narrowly and publishers will have to get additional permission from the author to exploit the work in the way not explicitly envisaged in the contract.

Second, rights termination and bestseller clauses become effective at the post-contractual stage and require active engagement by the author, which means that these provisions are not used that often. Pre-contractual measures, such as

246 A number of European countries also have provisions that prohibit or restrict rights transfer with respect to future modes of exploitation: see Part IV(A) above.

247 For example, in Germany, in Bundesgerichtshof [German Federal Court of Justice], I VR ZR 63/93, 26 January 1995 reported in (1995) 128 BGHZ 336 ('*Videozweitauswertung* case'), the German Federal Court of Justice concluded that the copyright to the new VHS technology was not transferred in a 1968 licence granting the rights to all known and future uses, see Bundesgerichtshof [German Federal Court of Justice], I ZR 59/89, 11 October 1990 reported in (1991) GRUR 133 (135-36); in Bundesgerichtshof [German Federal Court of Justice], I ZR 311/98, 5 July 2001 ('*Spigel-CD-ROM case*') the court found that, based on the 'purpose of grant' theory, the publication rights to newspaper articles did not extend to CD-ROM technology, see Hanseatisches Oberlandesgericht [Hanseatic Court of Appeal], 3 U 212/97, 5 November 1998.

requirements on contract formation, operate at the pre-contractual stage when parties are negotiating the agreement. They result in immediate legal pressure on the publisher to clearly define the scope of transfer and pre-empt all-encompassing rights transfer provisions.

Certainly, there are risks associated with such provisions. Rules on contract formation have the potential to increase administrative costs for publishers. Such restrictions may also set a need to ensure that contracts are constantly updated, taking into account the development of technology, business models and new modes of exploitation.[248] In other words, publishers cannot be guaranteed that a contract assigns them all rights for all territories and for all possible uses in the future. With the development of technology and new business models, they may need to renegotiate contracts to include new types of uses and, respectively, provide additional remuneration to authors. How this is likely to affect remuneration of authors agreed in initial contracts is uncertain.

Despite this, rules on contract formation that require parties to clearly define rights granted, geographical scope, duration, and modes or exploitation of the work, is a legal measure that deserves greater attention than it has received to date. Apparently, it may be more significant in practice and have more potential than the measures that are more often discussed when talking about the re-establishment of balance in author-publisher relationships, such as rights reversion and bestseller clauses. The Report discussed above is the first step in assessing the actual impacts of this alienability restriction. It suggests that policymakers should consider requirements on the formation and interpretation of contracts as one of the possible solutions that would strengthen the position of authors and has actual potential to increase their income levels.

V CONCLUSION

The above analysis has shown that current Australian copyright laws do not address the problem of decreasing remuneration of authors, which is likely to be partially caused by unfair author contracts. The freedom of contract that prevails in Australian copyright contract law is an outdated concept that is not able to take into account the weaker bargaining position of authors. General contract law is not sufficient to address the shortcomings of the freedom of contract, while collective bargaining – though a promising solution – does not have a strong tradition in Australia.

Various rights alienability restrictions that are available in a number of common and civil law countries are some of the viable options worth discussing in Australia. These provisions are meant to address the issues that are disregarded by the currently dominant freedom of contract, such as unequal bargaining power of authors, the prediction problem they face, and unfairness in the distribution of remuneration between authors and disseminators. Although the effectiveness of alienability restrictions has been a controversial issue, recent empirical studies

248 Remuneration of Authors Report, above n 77, 244–6.

provide some evidence that at least certain provisions, such as rules on contract formation, have the potential to improve the remuneration levels of authors in a noticeable manner.