

Copyright World  
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#### COPYRIGHT AND CONTRACT: MARTIN KRETSCHMER IS PUZZLED BY AN UNHOLY ALLIANCE

Without copyright, no copyright contracts. Without copyright contracts, no earnings. Thus goes a familiar reasoning, linking the creator's livelihood to the existence of copyright law. On a current project on copyright history, I stumbled upon a sophisticated early publishing agreement that seems to suggest otherwise. In 1794, Friedrich Schiller concluded a contract with publisher J. F. Cotta for the *Horen* journal (one of the most important periodicals of the German enlightenment). At that time, there was no statutory copyright law in the jurisdiction where Cotta was established (the Southern German state of Württemberg), and unauthorised reprints in other German language jurisdictions were common.

The *Horen* contract includes advances, royalties, options, and even a moral right type clause. Clause (5) reserves the right of the author to make modifications. Clause (8) provides that an essay submitted to the journal may not be re-printed elsewhere until the end of four years after the publication in *Horen*. Clause (9) secures an option to the publisher on all future writings of the editors, provided that they are not already contracted elsewhere. Clause (15) promises a royalty to the editors of one third of profits on sales beyond 2000 copies. (A transcript and translation of the contract will be available soon on [www.copyrighthistory.org](http://www.copyrighthistory.org)).

Although this agreement looks uncannily like a copyright contract, it is simply a bilateral contractual arrangement *sans droit d'auteur*, much like signing a footballer player (which typically includes complex "royalty" features that depend on appearances and success). How little do we know about the role of statutory copyright law in creators' earnings!

I was reminded of this again as I read the latest statement of the Musicians' Union backing the campaign for the extension of the copyright term for sound recordings. What will the typical performing artist whom the union is supposed to represent get out of the proposed term extension? The artist's additional bargaining power will be nil: "Here is your fee. Please sign on the dotted line. That was your copyright contract. You are not Cliff Richard, or Friedrich Schiller for that matter." The typical performing musician will happily sign, and earn not a penny more than she would without the existence of any right just transferred.

But wait, I hear a protest. Does not (UK) collecting society PPL collect royalties for the broadcast and public performance of sound recordings (of which 50% are distributed to performers)? Following an increase of the term from 50 to 95 years, would not an additional 45 years of PPL payments benefit our performing musicians? This is actually a complicated issue. The benefits to musicians, if there are any, are comparably small, and the costs of awarding another period of protection to record companies will largely be borne by the consumer – in the form of higher prices.

The Musicians' Union proposes a range of implementations that interfere with the contractual freedom of record companies, turning in effect the exclusive copyright in a sound recording into a right to remuneration. According to the MU's "settlement conditions" (*The Musician*, summer 2006), the extension period should be registered with an official body, and only accepted if one of the following conditions is met:

- (a) The record company keeps the recording in the current catalogue, and profits will be split with the artist at no less than 50/50.
- (b) The record company agrees to licence the recording to another recording, and will split net receipts at 50/50.
- (c) If the record company opts for on-line distribution only, the artist is free to manufacture and sell CDs of the recording herself at an agreed royalty (in fact, this amounts to a compulsory licence).
- (d) The record company transfers the copyright to the artist at no cost.
- (e) If the record is not being registered, or none of conditions (a) to (d) are met, the copyright in the recording falls automatically to the artist.

There are many questions here: about disagreements and monitoring of appropriate royalties; about artists featured on a recording (e.g. who should the title revert to?); about whether these prescriptive conditions should apply to every new sound recording contracts drawn up after a term extension has been extended, or only to existing releases?

In fact, the proposal calls to mind a well-known economic argument under which devices that limit the assignability of copyright "reduce the incentive to create by preventing the author or artist from shifting risk to the publisher or dealer". If "future speculative gains" must be shared, the creator will be paid less in the first place. See Landes and Posner (1989), "An Economic Analysis of Copyright Law", *Journal of Legal Studies* 18: 325-366, at 327.

It seems that copyright can only ensure the reward of the vast majority of artists by regulating copyright contracts in some way, thus turning them less efficient. This is a paradox that needs to be taken seriously. Meanwhile, I am left with one question: Does Cliff Richard need another plantation-style mansion in Barbados?

About the author

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