1. Introduction

Without formal petition
Thus stands my condition:
I am closely blocked up in a garret,
Where I scribble and smoke,
And sadly invoke
The powerful assistance of claret…

*The Poet’s Condition, Thomas Brown*¹

More than three centuries ago, Thomas Brown, a graduate of Oxford, wrote about the debt-ridden fate of London hack writers.² Patron-less, they wrote for money. As Philip Pinkus details in his elaborate study of the colourful and skilled Grub Street³ writers, ‘there were arid moments when they could not squeeze a shilling from their publisher or an ounce of credit from the tavern-keeper.’⁴ Whilst their works have been at times cast as mere ‘doggerel’ since they were not the Swifts or Popes of the era, the seventeenth-century hacks revealingly display the dire condition of the common writer. Writing in destitute times, these writers deliberately chose subjects which appealed to their readers, from politics to themes like marriage. And although hacks like Thomas Brown led austere lives, they still dared to dream and they aspired for something better.

Today, Thomas Brown is the twenty-first-century freelance writer. In part because they are not the JK Rowlings of our times, freelancers illustrate more generally the current plight of the aspiring writer. They are subject to unfavourable economic, social, and legal conditions as they attempt to earn a living through writing for mainstream newspapers and magazines.⁵

¹ P Pinkus *Grub St Stripped Bare* (Constable and the Company of Orange Street London 1968) 167.
² Thomas Brown was ‘the most renowned of the Grub Street hacks.’ Born in 1663, he was educated at Christ Church, Oxford; ibid.
³ Grub Street refers to a particular time and place: London at the turn of the seventeenth century. ‘But Grub Street is itself a metaphor, evoking the eternal spirit of the hack writer.’ ibid xi.
⁴ ibid 14.
⁵ Unless otherwise specified, I will use the terms freelancer, author, freelance
Yet freelance authors are often lost in the mix of public policy discussions in copyright law. Although freelancers’ content is the fuel feeding the creative industries, their own interests are not appropriately nourished. In more recent times, creator interests have receded into the background. Take Canada for instance, where user interests have become a growing preoccupation in judicial, policy, academic and popular media circles. Discussions are misguided: polarizing the owners versus users in a ‘copyright’; how owners are shrinking the public domain; how owners’ push for technological protection measures is locking up users’ otherwise free content; how piracy is sinking the creative industries or, from the user side, how piracy does not really exist and, if it does, its impact is negligible. And when the author has been considered in academic discussions, she has been painted in a vile light; from the early 1990s scholars have laboured on debunking the notion of the ‘romantic author construct’ in copyright law. While certainly a salutary development to concentrate on user rights (not the least because freelancers are also users), creators still merit attention and, I argue, more than ever before. In this book, I am persuaded by Lionel Bently’s appeal that ‘copyright law has been right to author, writer and freelance writer to mean authors of literary works who write for mainly mainstream magazines and newspapers to earn a living but without being employed by the publication in which their work appears.

6 G D’Agostino ‘Not all sides are represented in debate on copyright bill’ Toronto Star, 19 June 2008, AA8; G D’Agostino ‘Copyright in Soundbites: Bidding for or against the Public Interest?’ (2008) 43 SCLR (2d) 413.

7 In Canada, user-centred thinking is apparent in judicial speak: CCH Canadian Ltd v Law Society of Upper Canada [2004] 1 SCR 339, 2004 SCC 13; domestic policymaking where the latest copyright reform Bill C-61 An Act to Amend the Copyright Act, 2d Sess., 39th Parl., 2008, (first reading 12 June 2008) was supposed to have been tabled in December 2007 and was delayed in large part because of user group protests against government: see Fair Copyright for Canada Groups currently springing up on Facebook http://www.facebook.com/group.php?gid=6315846683 Bill C-61 eventually died on the order paper on 17 September 2008 when Parliament was dissolved due to an election call; academic writing: CJ Craig ‘The Changing Face of Fair Dealing in Canadian Copyright Law’ in M Geist (ed) In the Public Interest: The Future of Canadian Copyright Law (Irwin Law Toronto 2005) 437 and in popular media circles: see polarized reaction to Bill C-61 best captured in M Geist’s ‘Mapping C-61 Media Coverage’ on GoogleMaps created on 24 June 2008.

8 I Tossell ‘Copyfight’ Precedent (Winter 2008); for a flavour of these polarized types of issues see Geist, ibid.


place the author at the center of its concerns.’11 In the context of the freelance writing profession, the focus of my study, there is very little romance. With the quickening pace of technology and, as publishers – (acting) more and more like the owners – necessarily reorganize their business models to keep afloat, it is paramount to cast the spotlight on the freelancer, and specifically the freelancer vis-à-vis the publisher. From this perspective, the owners’ drive for the expansion of copyright, which users challenge, is a common ground of scrutiny.12 User concerns to which I shall often refer to and indeed factor into my reform recommendations are significant; they nonetheless merit their own study and as noted increasingly gain due attention, and beyond the scope of my focus, addressing the oft-underminded freelancer perspective. Overall, evolving publishing practices call for a reevaluation of copyright law to benefit all parties.

The current proliferation of digital technologies expands the publisher’s powers and puts the supposed objectives of copyright law under strain. Publishers have become global and technologically sophisticated. Increasingly, they exploit freelancers’ works not only in print form but also digitally, often by making them available through their own web sites or by selling them to third-party databases.13 Freelancers argue that they receive no notice, give no consent, and obtain no payment for the exploitation of their works through these new digital uses. As justification, publishing conglomerates point to ambiguous contracts previously made with their freelancers to read in future uses.14 More recently, publishers have begun the practice of sending standard form letters notifying freelancers that ‘freelancers retain copyright’ but with conditions, including the newspaper’s unlimited and worldwide right to use the work in any publication or service that it owns or

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11 L Bently ‘R v The Author: From Death Penalty to Community Service’ (2008) 32 13 Columbia-VLAJLA 1, 2; also citing Oren Bracha ‘The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright’ 118 Yale LJ 186 that ‘the ideology of authorship is not so much part of the problem as part of the solution.’

12 ibid.

13 I use the term ‘exploit’ as a general term to denote a right holder’s various uses with a particular work (e.g. the owner is said to have certain exploitation rights associated with his/her work in s 3 of the Canada Copyright Act RSC 1985 c C-42 (‘CCA’) and in s 16 of the UK Copyright, Designs and Patents Act 1988 c 48 as amended (‘CDPA’). A question that is central to this book is who owns and controls (and who should own and control) these future exploitation rights.

14 Many such contracts have been oral, or ‘handshake’, contracts recording the publishing industry ‘custom’ but there is evidence that this practice has for the most part changed.
controls, in whatever media. The central issue is whether author–publisher contracts, by which copyright is transferred for publishers to print freelance works, contemplate future exploitation rights. For staff writers, the copyright ownership and control of their works is a moot point, but for freelancers who base their livelihoods on each new contract, the issue is a vital one.

Over the last several years, freelancers have turned to the courts to vindicate their rights. They allege that publishers are liable for copyright infringement and should duly compensate them for new uses of their works. At issue is the period pre-dating electronic publication (before the 1990s) where only key terms were orally agreed such as word count and submission date. This judicial phenomenon can be seen across North America and continental Europe. While the UK has yet to see litigation on the issue of whether freelancers’ contracts, which allowed publishers to print their works, contemplated electronic publishing rights, the issue has been very much alive. Indeed, Lionel Bently’s work, a representation of a collection of freelance interests (including journalists, photographers and composers) gathered together in the umbrella organization the Creators’ Rights Alliance, details the abuses that

15 NUJ ‘Freelance Briefing Paper’ http://media.gn.apc.org/fl/0007grab.html detailing various UK and US publishers that have sent letters to their contributors asking for absolute rights over their works; discussed more fully in ch 2 text to nn 61–82.

16 While I shall be referring to journalists’ copyright ownership occasionally in this book, it is beyond the scope of this discussion to address employed writers who in most jurisdictions fall under the purview of separate legal doctrines; in the UK, the CDPA s 11(2) provides that the copyright in works produced during the course of one’s employment prima facie belong to the employer. Pre-1988, s 4(2) of the 1956 Copyright Act had an employee journalist’s exception – like that in the current Canadian Copyright Act (stemming from the 1911 UK Copyright Act). Presumably this continues for pre-1989 works. The issue of whether employee journalists should control the copyright to their works was debated in the early 1990s in Australia; see Australian Copyright Council Inquiry into Journalists’ Copyright Submission to Copyright Law Review Committee (CLRC) on Journalists’ Copyright (18 October, 1992). But the final report recommended that s 35(4) of the Australia Copyright Act which allowed for journalists to own additional uses of their copyright material was repealed: CLRC ‘Report on Journalists’ Copyright 1994’ (Attorney-General Department Australia 1994) http://www.clrc.gov.au/www/agd/agd.nsf/Page/Copyright_CopyrightLawReviewCommittee_CLCRCReports_ReportonJournalistsCopyright. Historically, in the US, employed journalists similarly owned the copyright in their works: P Jaszi and M Woodmansee ‘US Copyright 1880–1940: The Role That Authorship Rhetoric Played in Transforming Doctrine’ (Copyright in Europe and North America – Past and Present Queen Mary ESRC Conference) (9 July 2004). But generally mainstream journalists no longer own their copyright in common law jurisdictions.

17 Updated as at April 2010.
freelancers face ‘in the UK media market-place.’ And more recently, one of the UK’s largest dailies reached a major settlement with its freelancers over these issues, and there is also evidence of other claims having been settled.

This book evaluates the adequacy of copyright law to address the exploitation of freelance authors’ works in the digital era; based on these findings, proposes recommendations to attain a more equilibrated copyright law system. I investigate the problem by looking at copyright history and philosophy; legislation; jurisprudence; and current publishing industry practices. I study professional freelance authors, contributors to mainstream newspapers and magazines who attempt to earn a living through their works. While the UK, the fount of copyright in the common law world, is the focus, this book draws on examples from civil law and other common law jurisdictions that have seen this problem erupt in the courts: in Canada, the US and various countries in continental Europe. In essence, the publishing industry is global and its contracting practices are unrestricted in laissez-faire jurisdictions.

I argue that copyright law, which purported to address the needs of the author through protection of works and thus to create incentives to produce and bolster societal well-being, has insufficiently met these objectives. While some of the UK’s predecessor copyright statutes, along with the nineteenth-century judiciary, were mindful of the disparities between authors and publishers, this is no longer the case. Copyright laws in the UK and in other common law countries such as Canada and the US do not sufficiently address copyright contract issues, a central concern to freelancers. Rather, these statutes contain few provisions on the alienability of copyright. The logic is that the economic rights of authors may be freely conveyed to third parties without restriction. By comparison, I indicate how continental European countries provide more appropriate statutory copyright mechanisms to deal with this issue but, as I shall suggest, these are not without drawbacks.

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18 L Bently *Between a Rock and a Hard Place* (The Institute of Employment Rights London 2002).

19 I use the term copyright contract, copyright transfer and copyright conveyance to refer to both assignments and licences of copyright unless otherwise specified. Copyright law sets out the rights available to freelancers; contract law manages the exercise of these rights. Copyright contract law may indeed constitute a ‘considerable and distinct area of law itself.’ JAL Sterling *World Copyright Law* (Sweet & Maxwell London 2003) 487–88. Though as I have found in writing this book this issue has been vastly underexplored. Two studies of note, in Europe: L Guibault and B Hugenholtz *Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union – Final Report* (Institute for Information Law Amsterdam May 2002); in Canada: M Hebb and W Sheffer *Towards a Fair Deal Contracts and Canadian Creators’ Rights* (prepared for Creators’ Copyright Coalition and Creators’ Rights Alliance, October 2007).
Internationally and regionally, I argue that legislation does very little to advance authors and their original entitlements. Rather, these initiatives focus predominantly on protecting business exploitation. For instance, the Berne Convention for the Protection of Literary and Artistic Works, which was trumpeted as the author’s statute, currently remains no more than a symbol. Much as one would not expect a consumers’ protection Act to protect sellers, one would not expect an authors’ international protection statute to protect publishers. Instead, throughout its long history, Berne shows a preoccupation for protecting copyright exploiters.

Freelancers fare little better in the courts. While they are usually victorious in the courts, I argue that common law cases inadequately deal with the conveyancing of copyright work since they apply seemingly neutral copyright provisions to resolve the contractual ambiguities of new uses. Rather, these decisions highlight publishers’ superior bargaining power. Publishers expect to own the copyright in freelancers’ works outright: they fail to seek permission for additional uses and thereby avoid compensating freelancers. Moreover, through private ordering, publishers undermine any victory won by freelancers by digitally purging their articles, blacklisting them or demanding that they forgo compensation. While freelancer lawsuits in continental Europe apply more progressive and specific legislation, and render rulings more favourable to freelancers, some national statutory principles such as the foreseeability principle are still disadvantageous to freelancers and indicate a curious similarity between the two systems. By ‘foreseeability principle’ I mean a legal test used by the courts to interpret an ambiguous transfer or licence that can be construed to cover a new disputed use; the controlling factor in determining the scope of the licence is whether the use was known and could have been contemplated when the parties entered the agreement. There are many disadvantages to applying the foreseeability principle: these start with defining when the use was known. In practice, freelancers have typically become subject to publishers, the real right holders who benefit through the copyright system.

One of the final objectives of this book is to propose solutions based on these findings for a more equilibrated copyright system where all parties’ interests can be addressed. I develop a theoretical framework, starting with a perhaps slightly unconventional investigation of the twin philosophies underpinning western copyright: the natural and economic theories. My premise is that usually each theory is taken to justify the respective rights both of authors

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20 9 Sept 1886 168 Consol TS 185.
and copyright exploiters. So the natural law perspective, which purports to champion authors’ rights, ought to be most advantageous to freelancers, whereas the economic approach, which seeks to protect investors whilst encouraging freelancers to produce creative works, ought to be more publisher-friendly. Indeed, many pro-author and pro-publisher advocates have relied on natural law and economic-type arguments to support their respective positions. My analysis suggests that neither theory entirely meets its said objective. Each theory is double-edged: it can equally undermine its purported aims. The natural law theory can support a pro-publisher argument, and the economic can support a pro-freelancer perspective. When reconfiguring copyright policy (either in the legislature(s), the judiciary or in academia) relying on theory can be useful, but relying on such double-edged philosophies is unhelpful. As a result, I propose a more transparent theoretical approach. The merits of natural law theory to freelancers, on the one hand, and the limitations of economic theory to publishers, on the other, may combine to help advance the theoretical concepts essential to a new equilibrated theory. This approach of using both theories supports, in part, Lionel Bently and Brad Sherman’s assertion that, when an intellectual property claim is made for works not previously protected, or for the expansion of conferred rights, in lobbying, parties may use several justifications in tandem. I do not however adopt both theories wholesale but shall rather draw key concepts from each. Since the theories are not only double-edged but also incomplete in that they cannot account for fundamental aspects of the freelancer–publisher relationship, I consider other theories. I draw from key concepts of critical, and contract theory to develop a tailor-made equilibrated perspective. The goal is a more balanced theoretical framework where the interests of freelancers, which have long been neglected in copyright discourse and practice, are brought forward to approximate those of publishers. Equipped with this theory, solutions both within and outside copyright law shall be proposed to reconfigure the copyright treatment of freelance work. Indeed, in the final chapter, I test the proposed solutions by revisiting the examined caselaw and suggest that had such copyright proposals been in place, more favourable decisions would have resulted for freelancers.

I recognize that there are other ways to investigate this problem, for instance, through competition and labour law, but while relevant at certain points in this book, these are beyond the scope of my analysis. Equally, the issue of the continued control of freelance works is not solely an issue of

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22 e.g. economic stance in *Tasini v New York Times Co* 533 US 483, 121 S Ct 2381 (2001) discussed in ch 7 text to nn 39–52.
contract law. While contract doctrine is certainly material, as it deals with transfer issues between parties, the question of freelancers’ transfer rights necessarily implicates copyright law. Also, simply because this problem can be studied through other legal means is no reason to exclude it from being recognized and studied as a copyright problem. Copyright law requires a management system that should strive to balance the interests of its stakeholders: creators, owners, users, and the general public. Copyright alone may be no panacea for safeguarding freelancers’ rights but, with other mechanisms (such as government and industry forces), it can and should be an effective tool of social policy.

The copyright control of future exploitation rights to freelance works similarly concerns copyright law and its future, since the development of new technologies will continue to open up new markets of exploitation and thus pose renewed challenges to copyright law. Also, freelancers, as independent contractors, will continue to be a growing labour law category that will define the nature of future creative work. The vast majority of writers in all genres are freelancers and there is evidence that this number will only increase. As independent contractors, freelancers will continue to be vulnerable to publishers. As a result, they cannot secure their economic position in a free-enterprise world whilst providing the public with worthy works. The UK Department of Trade and Industry, as it then was, now the Department for Business, Enterprise and Regulatory Reform, may encourage freelancers to be traders in a global marketplace, but it is difficult to see how this goal is at all possible with current publishers’ practices and legislative apathy.

Such phenomena cannot be viewed as a temporary reflection of market forces. It is unlikely, even given time, that new industry customs will develop to resolve the current uncertainty in copyright conveyancing of new uses.

26 M Vessillier-Ressi The Author’s Trade (Columbia University, Center for Law and the Arts, New York 1993) 8.
27 See Department for Business Enterprise & Regulatory Reform http://www.berr.gov.uk.
28 Copyright law has coped despite the past influx of new technologies from the creation of Edison’s phonograph (1877) to compact discs (1982): A Murphy ‘Queen Anne and the Anarchists: Can Copyright Survive the Digital Age?’ Oxford Intellectual
Should such a laissez-faire approach be adopted, publishers, from their more powerful position, will continue to exact disproportionate benefits from their freelancers. This is already seen in caselaw where publishers seize on ambiguous copyright contract language to justify their rights. Publishing is now less a ‘public trust’ than part of a multimillion-dollar industry where multimedia conglomerates vie for a greater share of the online market.\(^{29}\) This problem reflects a relationship of historical imbalance exacerbated through these new uses. The right to exploit works in new media has arisen before and in other industries such as film, for example when silent films turned into ‘talkies’.\(^{30}\) Here the question in part becomes whether to allow freedom of contract to govern vulnerable author–publisher relations or to introduce measures to regulate copyright contracting. Publishers do need clarity and safeguards for their investment,\(^{31}\) but these should be balanced against freelancer safeguards as well, which are currently non-existent (notably in the UK).

Some publishers who benefited from these new uses may not at the onset of electronic publishing have appreciated the extent of their rights, but they are all now well aware. Yet they continue to press on with their digital publishing agenda, or terminate contracts to avoid solutions involving equitable remuneration. Indeed, while copyright laws facilitate advantageous terms for publishers, they do little for authors and, I argue, little for users of such works.\(^{32}\)

The problem with newspapers and magazine freelancers arises for other categories of freelancers – photographers, musicians, and film industry participants from actors to screen-play writers. Indeed, Fiona Macmillan details how the film industry in particular is also in the process of buying up all future works.\(^{33}\) The issue is thus not only one of author–publisher but applies more widely to other freelance parties in the copyright industries. For reasons of compactness, while I limit my discussion to freelance authors and publishers of mainstream newspapers and magazines, this book may possibly serve as a template for studies in other industries, as I mention at various junctures within.

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\(^{30}\) *Hospital for Sick Children (Board of Governors) v Walt Disney Productions Inc* [1968] Ch 52.


\(^{32}\) e.g. FW Grosheide ‘Copyright Law from a User’s Perspective: Access Rights for Users’ (2001) 23(7) EIPR 321–5, 321.

\(^{33}\) F Macmillan ‘The Cruel ©: Copyright and Film’ (2002) 24(10) EIPR 483, 488.
My research confirms that a sizeable body of (mainly American) literature exists dealing with digital technologies and freelancers’ digital uses. Commentators who have mainly studied one key US decision\(^34\) have typically neglected to look beyond their domestic system.\(^35\) In Canada and Europe, very little legal commentary exists,\(^36\) and almost no scholars have taken into account the history and theory of publishing practices relating to freelancers.\(^37\) More importantly, there is an insignificant amount of literature that analyses the UK system and its copyright treatment of freelancers in the digital era.\(^38\) This book fills this gap. At the same time, I recognize that there is a burgeoning body of commentary that evaluates the efficacy of copyright to cope with ongoing digitization. At least two scholarly camps have evolved which align themselves with either the ‘copyright is dead’\(^39\) or the ‘copyright can cope’\(^40\)


\(^{35}\) e.g. IS Ayers *‘International Copyright Law and the Electronic Media Rights of Authors and Publishers’* (1999) 22 Hastings Comm & Ent LJ 29–63 examines freelancers’ caselaw in various countries but does not undertake an international, comparative, historical or theoretical analysis; an exception comparing the US to Germany though ultimately arguing that German law not be followed: M O’Rourke *‘Bargaining in the Shadow of Copyright Law after Tasini’* (2003) 53 Case Western Reserve LRev 605.

\(^{36}\) The issue has yet to be explored in the Canadian legal academic community. In Europe, more commentary exists; e.g. B Hugenholtz and A de Kroon *‘The Electronic Rights War’* (Intl IP L and Policy 8th Annual Conference Fordham U School of L 27–28 April 2000) 1–14 and L Guibault and B Hugenholtz *Study on the Conditions Applicable to Contracts Relating to Intellectual Property In the European Union – Final Report* (Institute for Information Law Amsterdam May 2002).


\(^{38}\) Bently (n 11) is a notable exception; one law article was found, T Naprawa *‘Secondary Use of Articles in Online Databases Under UK Law’* (1996) 9 Transnational Lawyer 331–56 providing an overview of applicable UK law with very little commentary.


ethos. I wish to be part of neither. Copyright law can and should cope, but it should by no means do so alone: government, industry players, authors and publishers’ groups, and collecting societies must cooperate in reconfiguring the copyright system.

In more recent times, collaborative authorship communities have challenged traditional mainstream publishing. A direct case in point is the uprise of online citizen journalism.\footnote{But see R Blood ‘Weblogs and Journalism: Do They Connect?’ 2003 57(3) Nieman Reports 62 stating: ‘… the vast majority of Weblogs do not provide original reporting – for me, the heart of all journalism.’} Its advocates argue that decentralizing information and power through Internet media can further democratize the public sphere.\footnote{D Gilmour \textit{We the Media: Grassroots Journalism by the People, for the People} (O’Reilly Media Inc Sebastopol 2006) and Y Benkler \textit{The Wealth of Networks: How Social Production Transforms Markets and Freedom} (University Press New Haven 2006).} One of the more recent sites, CitizenNews, has been launched by YouTube, ‘to tell stories that might not otherwise be heard’ and become a ‘go to destination for news on the web.’\footnote{http://www.youtube.com/user/citizennews (launched in May 2008); others include: Open Directory Project – www.dmoz.org; Global Voices – www.globalvoicesonline.org; Now Public – www.nowpublic.com; Indymedia (Independent Media Center) – www.indymedia.org; Slashdot – www.slashdot.org; Open Democracy – www.opendemocracy.net} Training of citizen journalists is now also available.\footnote{The Uptake.org is a leading online group that trains citizen journalists.} Largely due to easy-to-use software, bloggers generate posts writing as much or as little on a given topic.\footnote{Four main types of weblogs are: (1) those written by journalists; (2) those written by professionals about their industry; (3) those written by individuals at the scene of a major event; and (4) those that link primarily to news about current events. ibid 61.} This blogging is typically done on a volunteer-basis by the ‘former audience’ and has been, on the most part, unremunerated.\footnote{A notable exception is CitizenSide.com; see http://www.citizenside.com/Documents/more.aspx where the site has devised some mechanism for citizen journalists to enter into an exclusive three-month licence until their content is purchased at a 75 per cent royalty.} The popularization and significance of these citizen-based initiatives is obvious from the proliferating conferences, courses, academic scholarship and blogging on point.\footnote{e.g. work at the Center for Citizen Media directed by Dan Gilmour; studies and scholarship proliferate: M Joyce ‘The Citizen Journalism Web Site “OhmyNews” and the 2002 South Korean Presidential Election’ (December 2007) Berkman Center Research Publication No. 2007-15 online: available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1077920; R MacKinnon and E Zuckerman ‘Gathering Voices to Share with a Worldwide Online Audience’ (2006) 60 Nieman Reports 45; JB Singer ‘Stepping Back from the Gate: Online Newspaper Editors and
media largely defined by unfriendly content-provider arrangements – the very practices this book takes issue with – it remains important to address directly publishers’ and freelancers’ practices in the mainstream press, which will continue to prevail. It may be more essential than ever to do so, since mainstream publishers have seized on the new ‘must have’ features of participatory journalism (for example readers commenting in real time or offering audio podcasts) to bolster their own mainstream online advertising and public appeal (and longevity).48

These new citizen sites may indeed mirror traditional publishers, giving little return and freedom to authors or users who provide and use such content. Rosemary Coombe posits that such collaborative authorship communities may be just as romantic as the oft-criticized ‘autonomous authorial genius’, thereby making the work of creativity appear ‘more collective, communal, and comfortable than it actually is.’49 New participatory mechanisms may reveal ‘new forms of labor and exploitation that are emerging.’50 Dan Gilmour, citizen media expert, argues in particular reference to YouTube’s initiative that as the site begins to commercialize content, he would not want it to shun the creators and adopt the business model ‘You do all the work and we’ll take all the money, thank you very much’ and continue to maintain its current restrictive terms of service.51 Billy Bragg details how in reference to similar initiatives in the music industry creators have been left empty-handed, while so-called user-centred groups are making millions.52 Until online citizen journalism can become a substitute for mainstream journalism (in an open and fair remunerative fashion for professional freelancers), accompanied by ironically some type of filtered go-to credibility, studying and reforming mainstream

48 BBC News invites audiences to submit their photographs and videos; comments are invited in ‘World Have Your Say: The Daily Interactive Show Where You [the audience] Set the Agenda’ The New York Times has a ‘Readers’ Comments’ section including a number of discussion forums/blogs; CITY TV in Toronto advertises to the public to report and provide photos of ‘breaking news’ in return for posting these at the broadcaster’s discretion. Users can comment and read other users’ comments following the end of each of the digitally showcased articles on the Globe and Mail web site based in Toronto; users can further share, e-mail, or recommend the article, and can also view the most recommended articles (globelandmail.com).


50 ibid.


publishing remains essential. Moreover, the two ‘systems’ cannot be seen in a vacuum. Studying and reconfiguring one will inevitably help the other. There is therefore a need to improve the preferred mainstream publishing profession: an immediate credible venue that could allow freelancers the ability to earn a decent living through their works.

This book is divided into 12 chapters. In Chapter 2, I explore freelancers’ current imbalance of power vis-à-vis their publishers in the digital milieu and explore this alongside copyright policy objectives. I argue that this problem will not go away since freelancers, as independent contractors, are part of the demographics of future employment. There are fewer employees, let alone employee authors. Today, the vast majority of writers in all genres are freelancers. Across western industries, the number of freelance authors is growing. Increasingly publishers outsource their work for limited contract periods. Rather than employing staff authors and paying benefits, publishers opt for cheaper labour. At the same time, publishers increasingly obtain control of freelancers’ works in new media and thereby, I argue, undermine the very objectives of copyright law. As I begin to investigate the adequacy of the legislative and judicial copyright treatment of freelance work, Chapter 3 analyses copyright’s historical underpinnings. I argue that while copyright law has often been painted as an author’s right, it emerged because of publishers and was largely a publisher’s right. In the early days of copyright protection, the author was only figuratively considered as the object of social policy. In Chapter 4, the historical fight over copyright in the UK courts is outlined. While literature proliferates on the history of copyright and on the genesis of the Statute of Anne, only a negligible amount has examined the legal history of copyright contracting between authors and publishers.

53 There are some drawbacks to online citizen journalism, e.g. credibility. But as Dan Gilmour has eloquently put it, discussing sustainability issues does not necessarily mean ‘profitable, or long-lasting’. ‘I still believe, even now, that traditional media remain in the best position not just to seed these ventures – internally as well as externally – but to make them a linchpin in their own long-term viability.’ D Gilmour Sustainability in Citizen Media (blog entry posted 26 March 2008) http://citmedia.org/blog/2008/03/26/sustainability-in-citizen-media/.

54 J Metzl ‘Information Technology and Human Rights’ (1996) 18 Human Rights Quarterly 705, 727: ‘Despite its frequent superficiality, however, the news media plays a vital societal role in filtering the endless amounts of information which might be presented as news. While news coverage may be biased or unfair, alternative viewpoints still require alternative filters which the Internet does not adequately provide.’


56 While there is no shortage of material on general historical accounts of authors and publishers e.g. N Cross The Common Writer: Life in Nineteenth Century Grub Street (Cambridge University Press Cambridge 1985) and J Loewenstein The
unexplored area is necessary to understanding the current issue of copyright control over new uses of freelance works, and more generally on the imbalance in contractual relations between authors and publishers. Thus we learn that in that print era ‘it [was] seldom worth the while of proprietors to assert the copyright in articles in a newspaper.’\textsuperscript{57} So this section begins to tackle this relatively uncharted area. I argue that after the Statute of Anne, early copyright laws placed some restraints on publishers’ unlimited rights. For example, a more recent case in the Pretoria High Court on reversion rights applies one of these ‘archaic piece[s] of colonial legislation.’\textsuperscript{58} Despite these copyright laws, much was left to free bargaining and litigation. Caselaw nevertheless applied a restrictive approach to interpreting contract conveyances mainly to favour authors. By restrictive or strict interpretive approach, I mean that when courts interpret a copyright contract they read in no more terms than necessary to give business efficacy to the contract, such that it is not necessary to imply a term if the contract is effective without it.\textsuperscript{59}

Chapters 5 to 8 examine the legislative and judicial copyright treatment from national, regional and international perspectives. In Chapter 5, I analyse the international and regional framework available to freelancers and show how the author remains inconsequential to policy-making. Legislative apathy also prevails at the national level as Chapter 6 examines the predominantly common law jurisdictions of the UK, Canada and the US. While civilian jurisdictions feature more express provisions, drawbacks such as the foreseeability principle remain, inevitably favouring publishers. In Chapters 7 and 8, these legislative mechanisms are found to be reinforced by the judicial treatment of the issue, particularly in North America and continental Europe. In North America, with few express statutes, courts struggle to delineate the differences

\textsuperscript{57} Cox v Land and Water Journal Company (1869) LR 9 Eq 324, 331.

\textsuperscript{58} South African heirs of the original composer of what is commonly known as ‘The Lion Sleeps Tonight’, used in Walt Disney’s Lion King, sued Disney based on section 5(2) of the 1911 Act and settled based on an undisclosed amount: S LaFraniere, ‘In the Jungle, the Unjust Jungle, a Small Victory’ The New York Times, Johannesburg Journal (22 March 2006) online: nytimes.com; R Carroll ‘Lion Takes on Mouse in Copyright Row’ The Guardian (3 July 2004); discussed in ch 4 text to nn 124–9.

\textsuperscript{59} The same principle is applied in Robin Ray v Classic FM plc [1998] ECC 488 (Ch D) in ch 9 text to nn 128–32.
between print and electronic media. In continental Europe, specific rules facilitate decision-making, but again with some drawbacks. Since the UK has no decided case on point, Chapter 9 examines other copyright sectors such as the film industry, relating to conveyancing of copyright, to provide some insight on how courts deal with new uses of freelance works. The result is to show that copyright law insufficiently addresses the problem. While other judicial mechanisms are in place, such as the *contra proferentem* rule, such approaches remain uncertain short of codification.

I then move to explore solutions. Chapter 10 begins to expound a theory to set a bedrock for recommendations based on an equilibrated perspective balancing various interests. Finally, Chapter 11 advances these solutions and tests them against an equilibrated theory to re-craft a balanced copyright treatment of freelance authors in the digital era. Chapter 12 concludes this book.