

Bad Bargains by Authors and Performers: What's Fair, and Who Cares?

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Abstract

The ability of authors and performers to control exploitations of their creative work, and to share in the economic proceeds, ultimately depends on their bargaining positions. As a result, few obtain rights greater than the default minimum provided by law. The question whether some standard of fairness demands stronger default protection for individual creators' rights highlights a philosophical gap between the European Union and the United States – the same gap that exists in unfair competition law.

In general, United States law favors capital over labor. The impact on authors and performers is evident. Despite international agreements, moral rights remain virtually non-existent. Federal law implicitly prohibits resale royalties. Typically, creators must negotiate for any semblance of moral or economic rights. Even in the entertainment industry, where organized labor extracts significant concessions from employers, and where copyright law provides a narrow performance right for musicians, the balance of power overwhelmingly favors producers.

While the European Union places individual artists in a stronger position, a creator's specific rights still depend on the nature and genre of the contribution, the mode of exploitation, and the Member's domestic law. In a move toward greater harmonization, the proposed Directive on Copyright in the Digital Single Market would heighten the standard of fairness with respect to creators' economic rights, entitling them to increased remuneration whenever their contracted-for compensation is disproportionately low compared to the ultimate economic success of the work. Currently, these provisions are rife with ambiguities, and the practical ability of individuals to assert their rights is in doubt. If these provisions achieve even a fraction of their goals, however, they will significantly enlarge the "fairness gap" between the treatment of individual creators in the United States and Europe, and forever alter the creative industries in Europe.