



MONASH University

**BACK TO THE START: RE-ENVISIONING THE ROLE OF
COPYRIGHT REVERSION IN AUSTRALIA AND OTHER COMMON
LAW COUNTRIES**

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ABSTRACT

Creative industries around the world deal with various challenges. In the book industry, authors face low incomes from writing. Publishers must deal with competition from the ‘Big Five’ publishers and Amazon’s dominant position in the book market. Meanwhile, many books will go out of print after a few years and lie unexploited: cumulatively, this represents a massive loss of cultural value and knowledge for the public. This doesn’t need to be the case because new technologies (ebooks, audiobooks, streaming, etc) have made it easier to revitalise previously dormant works, which can create new audiences and income opportunities for authors and publishers. However, existing approaches to copyright and publishing contracts can hinder authors taking these new opportunities: in many industries, it’s standard for publishers to take expansive grants of copyright (potentially lasting over a hundred years).

Copyright reversion is when authors regain their rights from publishers before their contracts end, through contracts, statutes, or private negotiation. It enables authors and other publishers to exploit new opportunities. It can also make otherwise unexploited works available to the public, reducing lost cultural value. Author associations have for years campaigned for effective contractual reversion clauses for authors, and more than half the world’s countries have reversion laws. Reversion law reform continues to pick up pace in Canada, South Africa, and the EU, driven by advocacy from scholars, artists, and organisations. However, the empirical evidence on the operation and effectiveness of these legal arrangements is scarce (in the English language at least), limiting our ability to understand the status quo and the impact of potential reforms.

This thesis presents **three** empirical contributions that inform this reversion law reform discourse in valuable new ways. First, it looks at how reversion clauses have developed in publishing contracts in Australia, helping to answer the question of whether contracts are enough or whether statutory reversion rights are needed. Second, it explores reversion models from regions underexamined in the literature (e.g., Asia and Africa), giving policymakers new schemes to consider implementing and lessons to learn. Last, it provides new empirical research into over 40 years of data on the exercise of statutory reversion rights in the US. The study provides new insight into how this hotly debated system is being used, with ramifications for policymakers considering adopting like arrangements.

These vital empirical contributions are accompanied by a robust theoretical grounding of reversion rights and normative recommendations for provisions allowing reversion when publishers are no longer using rights granted to them and provisions reverting rights to authors after specific periods. The thesis focuses on the trade book industry to contextualise the justifications for reversion and recommendations for reversion law reform, but this focus could be adapted in further research exploring other industries like the music and film industries. The law reform proposals should be further developed in consultation with industry to ensure all parties benefit: authors and publishers from greater opportunities for reward and the public from access to works that might otherwise have been lost.

PUBLICATIONS DURING ENROLMENT

1. Joshua Yuvaraj and Rebecca Giblin, ‘Why Were Commonwealth Reversionary Rights Abolished (and What Can We Learn Where They Remain?)’ (2019) 41(4) *European Intellectual Property Review* 232
2. Joshua Yuvaraj and Rebecca Giblin, ‘Are Contracts Enough? An Empirical Study of Author Rights in Australian Publishing Agreements’ (2021) 44(1) *Melbourne University Law Review* 380
3. Joshua Yuvaraj, Rebecca Giblin, Daniel Russo-Batterham, and Genevieve Grant, ‘U.S. Copyright Termination Notices 1977-2020: Introducing New Datasets’ (2021, forthcoming in the *Journal of Empirical Legal Studies*)

THESIS INCLUDING PUBLISHED WORKS DECLARATION

I hereby declare that this thesis contains no material which has been accepted for the award of any other degree or diploma at any university or equivalent institution and that, to the best of my knowledge and belief, this thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

This thesis includes **two** original co-authored papers published and accepted for publication in peer reviewed journals respectively. The core theme of the thesis is **the evaluation and implementation of statutory copyright reversion provisions for author-publisher contracts in Australia and other common law countries**. The ideas, development and writing up of all the papers in the thesis were the principal responsibility of myself, the student, working within the Faculty of Law under the supervision of Associate Professor Rebecca Giblin.

(The inclusion of co-authors reflects the fact that the work came from active collaboration between researchers and acknowledges input into team-based research.)

In the case of **Chapters II-VI** my contribution to the work involved the following:

Thesis Chapter	Publication Title	Status (published, in press, accepted or returned for revision, submitted)	Nature and % of student contribution	Co-author name(s) Nature and % of Co-author's contribution*	Co-author(s), Monash student Y/N*
3	Joshua Yuvaraj and Rebecca Giblin, 'Are Contracts Enough? An Empirical Study of Author Rights	Published	50%. Data collection, development of data coding scheme, final coding, reliability testing, generating results, writing paper.	1) Associate Professor Rebecca Giblin 50% - initial study concept and organising data access, data collection & developing coding scheme, writing paper.	No

	in Australian Publishing Agreements' (2021) 44(1) <i>Melbourne University Law Review</i> 380				
6	Joshua Yuvaraj, Rebecca Giblin, Daniel Russo-Batterham, and Genevieve Grant, 'U.S. Copyright Termination Notices: Introducing New Datasets' (2021, forthcoming)	Accepted for publication by the <i>Journal of Empirical Legal Studies</i> (publication forthcoming)	50%. Oversight of the project, data analysis, writing paper	<p>1) Associate Professor Rebecca Giblin (25%) – developing method for identifying data, feedback on data analysis & categorisation, writing paper.</p> <p>2) Dr Daniel Russo-Batterham (20%) – writing data collection code, helping with analysis, training, reviewing manuscript, writing methods section, reviewing paper.</p> <p>3) Associate Professor Genevieve Grant (5%) – writing material in methods and discussion, reviewing paper.</p>	No
2 and 4: relevant elements from paper summarised in narrative format	Joshua Yuvaraj and Rebecca Giblin, 'Why Were Commonwealth Reversionary Rights Abolished (and	Published	65%. Research into primary and secondary sources, writing up paper	1) Associate Professor Rebecca Giblin 35% - writing up paper	No

	What Can We Learn Where They Remain?') (2019) 41(4) <i>European Intellectual Property Review</i> 232				
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**If no co-authors, leave fields blank*

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I would also like to thank the following for their contributions to this thesis: my associate supervisors, Professor Mark Davison (2018-2020), Associate Professor Genevieve Grant (2020-), and Professor Martin Kretschmer (2018-), for their valuable input, suggestions, and comments; Daniel Gilbert for being a great colleague; my colleagues at the Melbourne Data Analytics Platform at the University of Melbourne, Dr Daniel Russo-Batterham and Geordie Zhang, for helping me learn Python code and assisting with the termination right study code; MDAP for the software and hardware resources used in my research; Dr Katherine Brabon for running peer writing sessions; Kay Tucker for always tracking down resources for me; Jintana Kurosawa and Associate Professor Patrick Emerton for making the administration of my PhD so smooth; Associate Professor Sue Finch for her statistical advice on the termination right study; the various other individuals who helped with my research; and my fellow PhD colleagues at Monash, with whom I felt a great sense of camaraderie throughout my candidature.

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Last, but not least, I dedicate this thesis to the Lord Jesus Christ. *‘For from him, and through him, and to him are all things. To him be glory forever. Amen.’* (Romans 11:36 ESV)

I. INTRODUCTION

I. REVERSION'S POTENTIAL

The Lion King (1994) is one of the greatest animated movies of all time. It's also been part of one of the most interesting copyright disputes in the last two decades.¹ In 2006, Disney reached a settlement with the family of South African composer Solomon Linda, who wrote the tune 'Mbube', on which the song 'The Lion Sleeps Tonight' was based (sung by Timon and Pumbaa in the movie).² The family's lawsuit relied on an almost forgotten but powerful provision of South African copyright law: a copyright reversion law. This provision automatically returned copyright that had been granted to a third party (e.g., a publisher or recording company) to an author's estate 25 years after their death.³ The law was designed to help the heirs of authors, particularly when those authors had made poor initial deals (because they were under financial pressure or were unaware of their rights, for instance).⁴

This was exactly the situation Mr Linda was in. He assigned the rights in 'Mbube' for 10 shillings in 1939, but 'died...in poverty'.⁵ Recognition for his role in creating the song was also wanting: as one journalist wrote, 'the man who produced a song the whole world recognizes is himself a complete unknown.'⁶ His family also lived in poverty, with one daughter passing away from AIDS and 'unable to afford a potentially life-saving anti-viral treatment'.⁷ However, 'Mbube' was a 'worldwide smash', forming the basis of multiple hit

¹ As recently as 2019, a Netflix documentary on this dispute was released: *ReMastered: The Lion's Share* (Netflix, 2019).

² Al Jazeera, *Disney settles Lion King song lawsuit* (online, 16 February 2006) <<https://www.aljazeera.com/news/2006/2/16/disney-settles-lion-king-song-lawsuit>>; *The Lion Sleeps Tonight* (Wimoweh), performed by Timon and Pumbaa in *The Lion King* (Walt Disney Pictures, 1994).

³ *Copyright Act 1911* (UK), s 5(2), as it applied in South Africa to assignments made prior to 11 September 1965: Caroline B Ncube, 'Calibrating copyright for creators and consumers: Promoting distributive justice and Ubuntu', in Rebecca Giblin and Kimberlee Weatherall (eds), *What if we could reimagine copyright?* (ANU Press, 2017), 279.

⁴ See below 66.

⁵ South African History Online, *Solomon Popoli Linda, singer and composer, dies*, <<https://www.sahistory.org.za/dated-event/solomon-popoli-linda-singer-and-composer-dies>>. All quotations in this thesis are reproduced without internal citations (including references or footnotes), unless otherwise specified. Citations within sources are reproduced to reflect the Australian Guide to Legal Citation (Melbourne University Law Review Association Inc, 4th ed, 2020,) unless otherwise specified.

⁶ Paul Salopek, 'Only family sings composer's praises', *Chicago Tribune* (online, 14 October 2001) <<https://www.chicagotribune.com/news/ct-xpm-2001-10-14-0110140351-story.html>>.

⁷ Lydia Hutchinson, 'The Lion Sleeps Tonight', *Performing Songwriter* (online, 1 May 2017), <<https://performingsongwriter.com/lion-sleeps-tonight/>>, reproducing Bill DeMain, 'The Lion Sleeps Tonight', *Performing Songwriter* (July/August 2006).

tracks around the world.⁸ And ‘The Lion Sleeps Tonight’ made millions following its inclusion in *The Lion King*.⁹ Nevertheless, it appears Mr Linda’s family received a very small proportion of the windfall from ‘Mbube’: the family lawyer, Mr Hanro Friedrich, indicated they received only around \$17,000 in royalties between 1991 and 2000.¹⁰

Journalist Rian Malan brought this dismal situation to light in a seminal *Rolling Stone* article in 2000.¹¹ Subsequently, Mr Linda’s family sued Disney on the basis that the rights in ‘Mbube’ were meant to have returned to them 25 years after his death in 1962 (1987), and that they had not authorised subsequent uses of the song.¹² Before trial, the parties reached a settlement which their lawyer Owen Dean subsequently described as ‘far beyond our wildest dreams...an amazing, generous settlement offer.’¹³ In this case, the reversion law helped address a situation where an author made a highly valuable contribution to culture but saw very little of the subsequent benefits. While Mr Linda died in penury, his daughters could at least walk away with more of the spoils from his creation.

Reversion rights don’t just help the authors of headline-grabbing works like ‘The Lion Sleeps Tonight’. Often the works might be less glamorous, but no less important to knowledge and the public discourse. For instance, in the mid-1990s Professor James J O’Donnell from the Arizona State Library used a reversion clause in his publishing contract to regain rights in his book *Augustine: Confessions*.¹⁴ The book was out of print, which under the contract meant Professor O’Donnell could regain his rights.¹⁵ Professor O’Donnell wanted broader circulation of his book and got it by making it available online once he regained his rights. He also benefited from the subsequent print republication of the book, which he attributed to its online availability: ‘It was surely the case that the digital presence with open access on the web kept

⁸ Alan Connor, ‘The Lion Sleeps Tonight – written by a Zulu migrant worker, made famous by Disney’, *Financial Times* (online, 4 July 2018) <<https://ig.ft.com/life-of-a-song/the-lion-sleeps-tonight.html>>.

⁹ Ibid.

¹⁰ Sharon Lafraniere, ‘Song’s success finally returns home’, *New York Times* (online, 16 March 2006) <<https://www.nytimes.com/2006/03/16/world/africa/songs-success-finally-returns-home.html>>.

¹¹ Rian Malan, ‘In the Jungle: Inside the Long, Hidden Genealogy of ‘The Lion Sleeps Tonight’ (14 May 2000) *Rolling Stone*, 14 May 2000 <<https://www.rollingstone.com/feature/in-the-jungle-inside-the-long-hidden-genealogy-of-the-lion-sleeps-tonight-108274/>>.

¹² Owen Dean, ‘Copyright Infringement Claim in Respect of The Lion Sleeps Tonight’, *Latest News, Spoor & Fisher* (Blog Post) <<https://www.spoor.com/en/News/copyright-infringement-claim-in-respect-of-the-lion-sleeps-tonight/>>.

¹³ David Browne, ‘‘The Lion Sleeps Tonight’: The Ongoing Saga of Pop’s Most Contentious Song’ (7 November 2019) *Rolling Stone* <<https://www.rollingstone.com/music/music-features/lion-sleeps-tonight-lion-king-update-879663/>>.

¹⁴ ‘Rights Reversion Success Story: James O’Donnell’, *Authors Alliance* (Blog Post, 12 February 2019) <<https://www.authorsalliance.org/2019/02/12/rights-reversion-success-story-james-odonnell/>>.

¹⁵ Ibid.

my book in mind and created the market for those who decided they needed a print copy.’¹⁶ Professor O’Donnell benefited because the open access model he adopted after reverting rights led to further print republication opportunities. But the public also had more widespread access to *Augustine: Confessions* than they otherwise might have done if the book had stayed out of print.

It’s clear from these examples that reversion can help authors share in more of the rewards from their work and create new opportunities for exploitation benefiting authors, publishers, and the public. And reversion remains just as important today. In the book industry, authors battle low incomes from writing.¹⁷ Mid-size publishers struggle against industry behemoths like the ‘Big 5’ publishers (e.g. Penguin Random House).¹⁸ Meanwhile, publishers have to deal with the unprecedented rise of Amazon in the bookselling space: its size means walking away is simply not an option (granting Amazon enormous bargaining power).¹⁹ And books often go out of print, even those that win literary awards.²⁰ This is problematic because contracts often last for a long time (sometimes over a hundred years): if works are only available for a small proportion of that time, there’s a lot of potential value that could be lost to authors, publishers, and the public.

This might be the status quo but it doesn’t need to stay that way. Reverting rights to authors when it’s clear they will no longer be used allows them to take advantage of new technologies like ebooks and audiobooks, revitalising previously out-of-print works, seeking republication by small and mid-size publishers, directly licensing those works to libraries, or self-publishing those works. Even disruptive new technologies like blockchain present new exploitation opportunities for authors and publishers.²¹ All these options can result in greater rewards for authors and publishers and greater access to works that might otherwise be lost (and not just in

¹⁶ Ibid.

¹⁷ See below, **Chapter II**, Part III(A)(D)(1).

¹⁸ See e.g., John B Thompson, ‘Trade Publishing’, in Angus Phillips and Michael Bhaskar (eds), *The Oxford Handbook of Publishing* (Oxford University Press, 2019), 249-250 (describing the struggle of mid-size publishers against large publishers).

¹⁹ Ibid 256; see also David Throsby, Jan Zwar and Callum Morgan, ‘Australian Book Publishers in the Global Industry: Survey Method and Results’ (Macquarie Economics Research Paper 1/2018, February 2018), 20 <http://www.businessand economics.mq.edu.au/_data/assets/pdf_file/0004/600997/MacquarieEconomicsPublishersReport-final.pdf> (‘Throsby et al Australian Book Publishers Survey Method and Results 2018’) for how large publishers are more affected by factors like overseas retail competition).

²⁰ See e.g. Rebecca Giblin, ‘The availability of Miles Franklin winners as ebooks, audiobooks and in print’, *The Author’s Interest* (Blog Post, 17 March 2020) <<https://authorsinterest.org/2020/03/17/the-availability-of-miles-franklin-winners-as-ebooks-audiobooks-and-in-print/>>.

²¹ See below 34-35.

the book industry, as other artists like musicians could benefit from regaining their rights from publishers and record labels).

II. REVERSION IN CONTRACT AND STATUTE

The importance of reversion rights can be seen in publishing contracts and law reform around the world. In fact, the earliest reversion right I located was from a 1694 contract between English poet John Dryden and Jacob Tonson (sen) to translate the works of Roman poet Virgil:

It is further Covenanted granted Concluded and agreed upon by and betweene the Said Parties to these presents that if the persons who Shall Subscribe . . . in manner aforemencioned doe not amount to the number of one hundred . . . by the time that the Said Translacion of the afore-said Ecclogs Georgicks and Six books of the Eneids Shall be perfected that then upon the Said Iohn Drydens his Executors or Administrators returning back to the Said Iacob Tonson all the mony aswell for Subscriptions as what he Shall otherwise have reciv'd from the Said Iacob Tonson . . . for Copy mony or otherwise then the Said Iohn Dryden Shall be at the liberty of making a new agreement with the Said Iacob Tonson or any other person whatsoever for the Said Translacion . . . (emphasis added).²²

This shows that as early as the 17th century, authors thought it important to allow themselves to regain their rights if the publishers didn't meet certain requirements,²³ so they can make new agreements with publishers who might better exploit those rights. And author associations have continued to campaign for the inclusion of reversion rights in author contracts.²⁴ They recommend contracts be time-limited (e.g., for 10 or 15 years),²⁵ which would allow authors to regain their rights much sooner than under current contract arrangements. They also call for reversion rights that appropriately reflect changing realities: allowing authors to reclaim their rights once a book is 'out of print and not available in any edition' might have been appropriate

²² Clause extracted in Rebecca Schoff Curtin, 'The Transactional Origins of Authors' Copyright' (2016) 40 *Columbia Journal of Law & The Arts* 175, 213, cited in Joshua Yuvaraj and Rebecca Giblin, 'Are Contracts Enough? An Empirical Study of Author Rights in Australian Publishing Agreements' (2021) 44(1) *Melbourne University Law Review* 380, 384 fn 9. See Curtin 2016 (n 22) at fn 180 for the primary source reference: 'The contract has been transcribed in Appendix A of VI JOHN DRYDEN, *The Works of Virgil in English*, in THE WORKS OF JOHN DRYDEN 1179-82 (William Frost & Vinton A. Dearing eds., 1987).' See Curtin 2016 (n 22) fn 185 for pincite reference (1182).

²³ See also 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 U.S. Copyright' (2010) 25 *Berkeley Technology Law Journal* 1475, 1512-1513, where the authors survey out-of-print reversion clauses from 1744 and 1774.

²⁴ See e.g., below 37.

²⁵ See below 37.

in the print era, but not in the digital era when publishers can keep an online copy available somewhere without taking steps to actively market it.²⁶

Reversion rights have also featured prominently in copyright law reform. As early as the 1980s, the World Intellectual Property Organization (‘**WIPO**’) sought to drive the drafting of ‘model’ reversion provisions for publishing contracts, showing a desire to address deficiencies in publishing contracts and the more difficult bargaining positions many authors faced when negotiating publishing deals.²⁷ As of 2019, more than half the world’s countries had some form of reversion rights in their copyright laws.²⁸ And reversion lawmaking has featured prominently in copyright discourse in the last few years. In 2019, the European Union (‘**EU**’) instituted a Copyright Directive mandating its 27 Member States to include reversion rights in their domestic copyright laws.²⁹ Canadian committees also tabled reversion law reforms in Parliament in 2019, driven by the likes of musician Bryan Adams.³⁰ Meanwhile, lawmakers in South Africa recently sought to reintroduce automatic copyright reversion after 25 years into their copyright law.³¹

III. THE NEED FOR NEW RESEARCH INTO REVERSION RIGHTS

All this shows that reversion is widely recognised as having enormous potential to address inefficiencies in existing approaches to copyright. It also tells us there are many ways reversion rights have been implemented in contracts and statutes around the world, with varying degrees of effectiveness. The question thus remains: *how* should reversion be implemented to best address these problems?

To answer this question, my thesis presents a robust theoretical basis for reversion rights, ground-breaking new empirical research into the development of these rights around the world, and normative recommendations for specific types of reversion rights, to be developed further in consultation with industry stakeholders. It focuses on Australia (with a secondary focus on New Zealand, the UK, the US, and Canada) and uses the trade book industry to illustrate how

²⁶ For further information, see Yuvaraj and Giblin 2021 (n 22), 388-391.

²⁷ See generally **Chapter IV**(III)(F).

²⁸ See below 90.

²⁹ See below n 137.

³⁰ See generally **Chapter IV**(III)(D); Terry Pedwell, ‘Bryan Adams calls for changes to Canada’s copyright laws to help artists’, *The Globe and Mail* (online, 18 September 2018)

<<https://www.theglobeandmail.com/politics/article-bryan-adams-calls-for-changes-to-canadas-copyright-laws-to-help/>>

³¹ See generally **Chapter IV**(III)(E).

reversion may be applied.³² However, the principles in the thesis are likely to be broadly applicable to other industries as well. The thesis is structured as follows.

In **Chapter II**, I make the theoretical case for reversion rights. I then explore existing legal protections for authors in Australia when it comes to publishing contracts (with further reference to the laws of other common law countries), to assess whether they are adequate for protecting the rights of authors. In **Chapter III**, I present a survey of various publishing contracts and publishing contract guides from the 1960s to the present day from Australia, the UK and the US, to assess how well publishing contracts provide reversion rights to authors. I use these combined data to assess whether statutory reversion rights are necessary or whether contracts adequately address the concerns examined in **Chapter II**.

In **Chapter IV**, I explain why it's justifiable for statutory reversion rights to restrict the freedom of contract between authors and publishers when it comes to copyright assignments. I then examine the existing literature on statutory reversion rights. In **Chapter V**, I provide an overview of reversion laws in Africa, Asia, South America, Central America, and Asia. This new data gives policymakers different reversion models, and lessons from those models, to ponder as they consider how reversion might be optimally implemented in their own jurisdictions.

In **Chapter VI**, I provide new empirical research into the US termination right from 1977-2020, based on public records available from the online US Copyright Office Catalog. The termination right permits authors to end copyright grants after 35 years or another period of time and regain their rights. It is one of the most hotly debated reversion models in the world. This new data shows who is using the termination right, the different types of works subject to termination notices, and how publishers are responding when being served with termination notices. It helps policymakers assess how this model is being used, helping them project how they might be used in other jurisdictions. Alongside the data on reversion models from **Chapter V**, the termination data also informs discussions on drafting effective reversion rights (which I undertake in **Chapter VII** and **Chapter VIII**). In **Chapter IX**, I summarise my findings and set out avenues for future research.

³² Due to the common law traditions of these countries and the dominance of English-language publishing in the global market for trade books: see e.g., Thompson 2019 (n 18), 246.

IV. REVERSION BY PRIVATE NEGOTIATION

I acknowledge reversion can take place outside contracts and statutes, through informal negotiations between authors and publishers for the return of rights. However, this is beyond the scope of my thesis because it is by nature an uncertain phenomenon: whether rights revert to authors depends entirely on the outcome of negotiations, rather than set contractual or statutory provisions. Nevertheless, further research on the practice of informal rights reversion would be welcome, particularly as it can help authors better understand how to regain their rights from amenable publishers in the absence of other mechanisms.

II. COPYRIGHT'S GOALS AND EXISTING LEGAL PROTECTIONS

I. INTRODUCTION

In **Chapter II**, I examine copyright's goals in the literature and the development of copyright law. I then show how existing approaches to copyright fail to achieve these goals, and how reversion has the potential to address these failures.³³ I conclude **Chapter II** with an examination of author protections in copyright law in Australia, New Zealand, the UK, the US, and Canada. I also examine the general legal framework regulating contracts in Australia. This is vital to determining whether statutory reversion rights are necessary. If existing copyright law provisions, or rules in the general law, can address copyright's failures, there is less of a need for statutory reversion rights. In **Chapter III**, I will do the same with publishing contracts: if publishing contracts ameliorate the failures of existing copyright approaches (e.g. by adequately providing reversion rights), then statutory reversion rights are unnecessary.

II. COPYRIGHT'S GOALS

Copyright has historically been justified on two bases: incentives and rewards.³⁴ The incentive goal is for society to give authors exclusive rights in their works so they are incentivised to create works for public benefit.³⁵ The rewards goal is for society to give authors exclusive rights in their work to reward them for their creative labour or because it is an extension of their personality. Below, I examine these two accounts of copyright.

³³ Some of the analysis and sources in this chapter is based on and expands on analysis and sources from Yuvaraj and Giblin 2021 (n 22) (which is included as part of **Chapter III**).

³⁴ Stewart E Sterk, 'Rhetoric and Reality in Copyright Law' (1996) 94 *Michigan Law Review* 1197, 1197; see also Jukka Varelius, 'Is the Expiration of Intellectual Property Rights a Problem for Non-consequentialist Theories of Intellectual Property?' (2014) 220 *Res Publica* 345, 346. However, it should be noted that **there is no one overarching rationale for copyright**: Rebecca Giblin, 'A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid' (2018) 41(3) *Columbia Journal of Law & the Arts* 369, 372-373. For an overview of key pieces of scholarship on the history and philosophical underpinnings of copyright, see Christopher S Yoo, 'Review Article' in *Copyright* (Elgar Research Reviews in Law, 2011)

³⁵ See e.g. Orit Fischman Afori, 'Human Rights and Copyright: The Introduction of Natural Law Considerations Into American Copyright Law' (2004) 14(2) *Fordham Intellectual Property, Media and Entertainment Law Journal* 497, 502; Kevin J Hickey, 'Copyright Paternalism' (2017) 19(3) *Vanderbilt Journal of Entertainment & Technology Law* 415, 421 – 422.

A. Incentives (utilitarianism)

Utilitarianism underpins the incentive goal.³⁶ Under this approach, copyright is considered necessary to enable the creation of works of social or cultural value because, without exclusive rights, authors might not make those investments.³⁷ Copyright is limited because ‘exclusive rights are...only justified...to the extent that the benefits we expect to reap from granting the rights outweigh the costs.’³⁸ Granting unduly broad rights might hurt society and damage social welfare: it may limit others from benefiting from creative works and building on them for future creativity.³⁹ Therefore, copyright is designed to end so others can use it without limitation to society’s benefit.⁴⁰ As the copyright term ends, works enter the public domain where they ‘can be freely built upon, transformed, re-cast and re-imagined by others.’⁴¹ Limiting the length of an author’s exclusive rights is also thought to increase their incentives to use those rights before they expire.⁴²

Utilitarian theory has influenced Anglo-American copyright discourse since the inception of copyright law. The first copyright statute, the 1710 Statute of Anne, granted authors a 14-year term of copyright for works created after the Act’s commencement, and a 21-year term for works already in print at the time of commencement. Incentive goals could already be found in this law: as Deazley writes, ‘the [Statute of Anne] had a much broader social focus and remit, one that concerned the reading public, the continued production of useful literature, and the advancement and spread of education.’⁴³ Utilitarianism is also considered the main theory of

³⁶ See Adam D Moore, ‘Intellectual Property, Innovation, and Social Progress: The Case Against Incentive Based Arguments’ (2003) 26(3) *Hamline Law Review* 602, 608 for an explanation of utilitarianism; For an overview of the different types of utilitarianism see e.g., David McGowan, ‘Copyright Nonconsequentialism’ (2004) 69(1) *Missouri Law Review* 1, 8-11.

³⁷ Jeanne Fromer, ‘Expressive Incentives in Intellectual Property’ (2012) 98 *Virginia Law Review* 1745, 1751; see also Stephanie Plamondon Bair, ‘Rational Faith: The Utility of Fairness in Copyright’ (2017) 97 *Boston University Law Review* 1487, 1492; Lydia Pallas Loren, ‘The Pope’s Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection’ (2008) 69(1) *Louisiana Law Review* 1, 3, 6-7; J Janewa Osei-Tutu, ‘Humanizing Intellectual Property: Moving Beyond the Natural Rights Property Focus’ (2017) 20(1) *Vanderbilt Journal Entertainment and Technology Law* 207, 237; Shyamkrishna Balganesh, ‘Foreseeability and Copyright Incentives’ (2009) 122(6) *Harvard Law Review* 1572, 1577, cf the direct response to this article in Justin Hughes, ‘Copyright and its Rewards, Foreseen and Unforeseen’ (2009) 122 *Harvard Law Review* 81; Joseph P Liu, ‘Copyright and Time: A Proposal’ (2002) 101(2) *Michigan Law Review* 409, 428.

³⁸ Bair 2017 (n 37), 1493.

³⁹ Fromer 2012 (n 37), 1752; see also Alina Ng, ‘The Author’s Rights in Literary and Artistic Works’ (2009) 9 *The John Marshall Review of Intellectual Property Law* 453, 463.

⁴⁰ Fromer 2012 (n 37), 1752; Ng 2009 (n 39), 465.

⁴¹ Liu 2002 (n 37), 439.

⁴² See Balganesh 2009 (n 37), 1577; see also Michael Falgoust, ‘The Incentives Argument Revisited: A Millian Account of Copyright’ (2014) 52(2) *The Southern Journal of Philosophy* 163, 170.

⁴³ Ronan Deazley, *Rethinking Copyright: History, Theory, Language* (Edward Elgar Publishing, 2006), 13.

copyright in the US today.⁴⁴ It coheres with the US Constitution's understanding that Congress has the power to '*promote the Progress of Science and useful Arts*, by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries [emphasis added]'.⁴⁵ Utilitarian goals continue to dominate copyright discourse in the Anglosphere,⁴⁶ although scholars have raised concerns about whether incentives are an appropriate basis for copyright.⁴⁷ It is beyond the scope of this thesis to evaluate these critiques: accordingly, I proceed on the basis that incentivising creative production for social benefit is a predominant justification of copyright in Anglo-American jurisdictions.

B. Rewards (natural rights)

Copyright is also justified on rewards goals on the basis of 'natural or moral rights that authors...deserve by virtue of having created their works.'⁴⁸ There are two types of such natural rights theories: labour-desert theories, and 'personhood' theories.⁴⁹ The labour-desert view is based on John Locke's philosophy that a person should enjoy the fruits of their labour.⁵⁰ 'granting copyright or patent protection to creators that have worked sufficiently hard.'⁵¹ As property law scholar William Blackstone argues:

⁴⁴ Fromer 2012 (n 37), 1750; Balganesch 2009 (n 37), 1576; Sara K Stadler, 'Incentive and Expectation in Copyright' (2007) 58 *Hastings Law Journal* 433, 464 citing *Sony Corp of America v Universal City Studios, Inc* 464 US 417, 432 (1984): 'the ultimate aim [of copyright law] is...to stimulate artistic creativity for the general public good.'; see also Bair 2017 (n 37), 1494; Loren 2008 (n 37), 3, 6.

⁴⁵ *United States Constitution*, art I ss 8, cl 8, Fromer 2012 (n 37), 1751; Samuel Jacobs, 'The Effect of the 1886 Berne Convention on the US Copyright System's Treatment of Moral Rights and Copyright Term, and Where That Leaves Us Today' (2016) 23(1) *Michigan Telecommunications and Technology Law Review* 169, 172 – 173.

⁴⁶ Nicolas Suzor, 'Access, Progress, and Fairness: Rethinking Exclusivity in Copyright' (2013) 15(3) *Vanderbilt Journal of Entertainment and Technology Law* 297, 303; see also McGowan 2004 (n 36), 7: 'It is often said that copyright law is predominantly utilitarian.'

⁴⁷ See e.g., Eric E Johnson, 'Intellectual Property and the Incentive Fallacy' (2012) 39(3) *Florida State University Law Review* 623, 678:

The economic centerpiece in the conventional wisdom justifying intellectual property law [incentives] is a longstanding blunder. There is no broad necessity for incentives in intellectual labo[u]r. As a general matter, innovative and creative activity will thrive without artificial support.

See also generally Julie E Cohen, 'Copyright as Property in the Post-Industrial Economy: A Research Agenda' (2011) 2 *Wisconsin Law Review* 141.

⁴⁸ Fromer 2012 (n 37), 1753. See Alexander D Northover, '"Enough and as Good" in the Intellectual Commons: A Lockean Theory of Copyright and the Merger Doctrine' (2016) 65(5) *Emory Law Review* 1363 for a reconciliation of Lockean theory with the American copyright system.

⁴⁹ Fromer 2012 (n 37), 1753.

⁵⁰ Alina Ng, 'The Social Contract and Authorship: Allocating Entitlements in the Copyright System' (2008) 19(2) *Fordham Intellectual Property, Media and Entertainment Law Journal* 413, 458; Bair 2017 (n 37), 1495; see also Afori 2004 (n 35), 504; see Hickey 2017 (n 35), 429 – 450; Alfred C Yen, 'Restoring the Natural Law: Copyright as Labor and Possession' (1990) 51 *Ohio State Law Journal* 517, 523.

⁵¹ Fromer 2012 (n 37), 1753; see also Stadler 2007 (n 44), 452 fn 126, citing a statement by Larston D Farrar: 'if a man produces something, it is his': *Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, and H.R. 6835 Before the Subcomm. No. 3 of the H. Comm. on the Judiciary*, 89th Cong, 1151 (1965).

When a man by the exertion of his rational power has produced an original work, he has clearly a right to dispose of that identical work as he pleases, and any attempt to take it from him, or vary the disposition he has made of it, is an invasion of his right of property.⁵²

Personhood theories go further, conceptualising copyright not just as a created good which the creator is entitled to treat as their own, but as an ‘extension of the author’s personality.’⁵³ Because of this, authors must be granted control of their work: this is ‘essential...to protect their self-conceptions...[and] allow the author to maintain a sense of identity.’⁵⁴ Personhood theory can be traced to philosophers like Georg Wilhelm Friedrich Hegel and Margaret Radin.⁵⁵

The copyright grant envisioned by proponents of natural right theories tends to be broader than envisioned by utilitarian accounts.⁵⁶ This is because natural rights theories do not concern themselves with limiting copyright to the extent necessary to incentivise creation: ‘instead they are concerned with granting rights that properly give effect to creators’ labo[u]r and personality interests in their works.’⁵⁷ Accordingly, some argue copyright should last forever by comparing it to ownership over physical property (which also lasts forever).⁵⁸ However, others argue limiting the term of copyright is justified because creative labour uses ‘ideas, thoughts, concepts, and observations from other authors and society at large as the raw material of their work.’⁵⁹

Natural rights are also used to justify a further type of non-economic right: moral rights.⁶⁰ These rights are founded in the extension of the creator’s personality in their creation.⁶¹ They generally include:

...the author’s right to claim authorship (right of attribution), the right to object to modifications of the work (right of integrity), the right to decide when and how the work in question will be

⁵² Fromer 2012 (n 37), 1770 – 1771 fn 147, citing ‘William Blackstone ‘Commentaries *405-06’.

⁵³ Fromer 2012 (n 37), 1753; see also Ng 2008 (n 50), 462; Bair 2017 (n 37), 1495; Liu 2002 (n 37), 446 – 447.

⁵⁴ Sterk 1996 (n 34), 1239.

⁵⁵ Ibid 1240 – 1241; Liu 2002 (n 37), 447; Ng 2008 (n 50), 462.

⁵⁶ Bair 2017 (n 37), 1495.

⁵⁷ Ibid, 1495.

⁵⁸ Stadler 2007 (n 44), 460-461, citing a statement by Mark Twain from a further statement by Samuel L Clemens: *Arguments on S 6 330 and HR 19853 Before the Comms on Patents of the S and HR Conjointly, to Amend and Consolidate the Acts Respecting Copyright*, 59th Cong 115 (1906), 116; see also Varelus 2014 (n 34), 347, who questions why copyright should be limited at all if it is granted for non-utilitarian considerations.

⁵⁹ Liu 2002 (n 37), 445.

⁶⁰ Sterk 1996 (n 34), 1242.

⁶¹ Cyrill P Rigamonti, ‘Deconstructing Moral Rights’ (2006) 47(2) *Harvard International Law Journal* 353, 355-356; Sterk 1996 (n 34), 1242.

published (right of disclosure), and the right to withdraw a work after publication (right of withdrawal).⁶²

In contrast to economic rights which are given to authors on the basis of incentives theory, moral rights are inalienable: ‘they can neither be transferred to third parties nor relinquished altogether.’⁶³ Moral rights have been implemented in countries with even a traditionally utilitarian basis for copyright law, such as the UK, and Australia,⁶⁴ as required by the Berne Convention.⁶⁵

C. Interrelationship between the two theories

Both natural rights and utilitarian theories have been used to justify granting copyright protection to creative works in Anglo-American copyright discourse. Scholars disagree as to how compatible these theories are.⁶⁶ Some consider the two to be fundamentally incompatible:⁶⁷ for example, some in the US have rejected natural rights entirely, arguing the only basis for copyright protection is utilitarian.⁶⁸ However, the literature suggests that the two can be combined to justify copyright protection.⁶⁹ In the mid-20th century, one creator advocate in the US contended that granting the author the rights of their labour would benefit society as a whole:

We believe that...an author who creates something of value is entitled to enjoy the fruits of his labor; that this is accomplished...by securing to him the exclusive rights in his creation...; that

⁶² Rigamonti 2006 (n 61), 356.

⁶³ Ibid 361.

⁶⁴ Cyrill P Rigamonti, ‘The Conceptual Transformation of Moral Rights’ (2007) 55 *The American Journal of Comparative Law* 67, 68. An in-depth exploration of moral rights is beyond the scope of this thesis, but it is important to note their existence and origins in personhood theories of copyright law. See also Kylie Pappalardo and James Meese, ‘In Support of Tolerated Use: Rethinking Harms, Moral Rights and Remedies in Australian Copyright Law’ (2019) 42(3) *UNSW Law Journal* 928, 935-937 in relation to the implementation of moral rights in Australia.

⁶⁵ *Berne Convention for the Protection of Literary and Artistic Works* (as amended on 28 September 1979) (**‘Berne’**), art 6bis.

⁶⁶ Osei-Tutu 2017 (n 37), 212.

⁶⁷ Bair 2017 (n 37), 1496; see also Rebecca Giblin and Kimberlee Weatherall, ‘If we redesigned copyright from scratch, what might it look like?’ in Rebecca Giblin and Kimberlee Weatherall (eds), *What if we could reimagine copyright?* (ANU Press, 2017), 17.

⁶⁸ See Moore 2003 (n 36), 606 fns 30, 31; Joseph A Lavigne, ‘For Limited Times – Making Rich Kids Richer Via The Copyright Term Extension Act of 1996’ (1996) 73(2) *University of Detroit Mercy Law Review* 311, 347-348.

⁶⁹ Stadler 2007 (n 44), 452 – 454; Martin Senftleben, *Copyright, Limitations and the Three Step Test* (Kluwer Law International 2004), 10, cited in Giblin and Weatherall 2017 (n 67), 17 fn 68. See further Giblin and Weatherall 2017 (n 67), 17-18, on how these two rationales manifest in copyright laws domestically and in international copyright treaties, and for further see Jane C Ginsburg, ‘A Tale of Two Copyrights: Literary Property in Revolutionary France and America’ (1990) 64 *Tulane Law Review* 991, 995, cited in Giblin 2018 (n 34), 373 fn 21.

by securing these rights we provide the incentive for independent literary creation; and that all of us...will reap the benefits...⁷⁰

Justice Ruth Bader Ginsburg has echoed this perspective,⁷¹ as has the US Supreme Court.⁷² Giblin and Weatherall also note that strands of both theories can be found in domestic copyright laws and international copyright treaties.⁷³

Scholars like Jeanne Fromer and Stephanie Bair have sought to combine the two theories rather than simply acknowledging them as equally valid goals of copyright. Fromer argues incentive and rewards goals should be conceptualised together as ‘expressive incentives’.⁷⁴ She contends authors have a strong belief in the moral/natural rights of their work from both labor-desert and personhood perspectives.⁷⁵ Accordingly, the incentives given to authors to create for social benefit must not be solely financial: they must also acknowledge the deep personal connection authors have with their works (for example, allowing authors to be attributed as creators).⁷⁶ Thus, ‘an optimized intellectual property would likely contain some mix of pecuniary and expressive incentives.’⁷⁷ Such incentives include (a blend of existing law and potential changes) giving authors the right to be attributed as creators, reducing copyright’s duration to the author’s life,⁷⁸ granting them reversion rights, and requiring works to be original to receive copyright protection.⁷⁹

Bair treads similar lines when she argues that fairness, both in the labour-desert and personality accounts of natural rights theory in copyright, should itself be considered an element of utility.⁸⁰ Blair cites various organisational psychology studies to show that when people are treated fairly within organisations, they tend to produce more work and increase creativity to the benefit of those organisations than when they are treated unfairly.⁸¹ Blair also cites empirical research by Gregory Mandel into the public perception of copyright, which found the majority of respondents considered copyright to be granted because creators earned the

⁷⁰ Stadler 2007 (n 44), 453 fn 130, citing a statement by Rex Stout, President of the Authors League of America in 1965: *Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, and H.R. 6835 Before the Subcomm. No. 3 of the H. Comm. on the Judiciary*, 89th Cong, 96. See also Suzor 2013 (n 46), 306.

⁷¹ Stadler 2007 (n 44), 467-468.

⁷² Sterk 1996 (n 34), 1203; Osei-Tutu 2017 (n 37), 238.

⁷³ Giblin and Weatherall 2017 (n 67), 17-18.

⁷⁴ Fromer 2012 (n 37), 1759-1771.

⁷⁵ Ibid 1771.

⁷⁶ Ibid 1777.

⁷⁷ Ibid 1778.

⁷⁸ Ibid 1802.

⁷⁹ Ibid 1789-1809.

⁸⁰ Bair 2017 (n 37), 1502.

⁸¹ Ibid 1503-1506.

right by virtue of creation.⁸² Blair argues the law should reflect public perceptions of the role of fairness in copyright, rather than operating independently of such notions.⁸³ Her approach, therefore, is to add natural rights motivations to a utilitarian framework: we grant copyright seeking to fulfil these natural rights aspirations because doing so incentivises the production of culturally valuable works.

All this tells us that utilitarian and natural rights theories can be used to justify granting copyright to authors, whether by themselves or together. These theories remain the dominant justifications for copyright in Anglo-American copyright discourse, and under both theories authors are granted exclusive rights over their works.⁸⁴ There remain live debates about how these goals interrelate with one another and whether these are the *best* ways to justify copyright.⁸⁵ Nevertheless, for the purposes of this thesis I will proceed on the basis that copyright should fulfil both goals: it should incentivise the creation of works for society's benefit, and it should reward authors as a recognition of the labour they engaged in to produce their works and/or as an extension of their personality.

III. COPYRIGHT'S FAILURES

A. General approaches to copyright grants in legislation

We have established that copyright is predominantly justified – at least in common law jurisdictions – by utilitarian and natural rights theories. But how have these theories manifested in copyright law? To answer this, I will first examine how copyright was addressed in the *Berne Convention for the Protection of Literary and Artistic Works* (1886, hereafter '**Berne Convention**' or '**Berne**'), which Kretschmer describes as 'the modern settlement of copyright law'.⁸⁶ The Berne Convention is an international treaty with 179 contracting parties.⁸⁷ It provides for copyright to be attributed to an author once it is 'fixed', rather than upon registration. It applies copyright protection to 'literary and artistic works...includ[ing] every

⁸² Bair 2017 (n 37), 1506.

⁸³ Ibid 1506-1508.

⁸⁴ See Suzor 2013 (n 46), 306-309.

⁸⁵ See e.g., Suzor 2013 (n 46), 309-310; Loren 2008 (n 37); Carys J Craig, 'Locke, Labour and Limiting the Author's Right: A Warning against a Lockean Approach to Copyright Law' (2002) 28(1) *Queen's Law Journal* 1; Falgoust 2014 (n 42), 164 (citing Robert P Merges, *Justifying intellectual property* (Harvard University Press, 2011), 13), 176-177. It is adequate for the purposes of this thesis to acknowledge this is a live debate: future researchers may wish to further investigate whether incentives and rewards should form the bases of copyright law.

⁸⁶ Martin Kretschmer, 'Trends in Global Copyright' (2005) 1(2) *Global Media and Communication* 231, 231. The Berne Convention was last amended in 1979.

⁸⁷ 'Contracting Parties <Berne Convention (Total Contracting Parties: 179)>', *WIPO Lex* (Web Page) <https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=15>.

production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression.’⁸⁸ Authors are also granted moral rights which operate ‘independently of the author’s economic rights, and even after the transfer of the said rights’.⁸⁹ These rights are:

...the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.⁹⁰

Protection under Berne lasts for the author’s life plus fifty years, although signatories may grant longer terms.⁹¹ The copyright in these works will be protected in all signatory countries.⁹² Authors who are citizens of one of the signatory states are protected, as are works of authors who are not citizens of any signatory state but are published in a signatory state.⁹³

Because most of the world’s countries are signatories to Berne, they must abide by Berne’s minimum standards. As such, copyright subsists for a minimum of 50 years after the author’s life in most countries around the world,⁹⁴ including New Zealand and Canada.⁹⁵ In Australia, the UK, and US, the copyright term has been extended by 20 years to a total of 70 years after the author’s death.⁹⁶ My thesis focuses on the English-language trade book market, and thus the copyright legislation of these five jurisdictions has primary relevance.⁹⁷

In the next section I evaluate the extent to which these lengthy, broad, up-front grants of copyright cohere with the incentive and rewards goals outlined above.

B. Existing approaches and copyright’s incentive and reward goals

The literature indicates a disconnect between the incentive and reward goals and the scope of rights granted to creators, particularly in relation to the duration of the copyright term.⁹⁸ Terms have continually increased from the Statute of Anne’s two 14-year terms.⁹⁹ Most countries now

⁸⁸ Berne (n 65), art 2(1). See art 2(1) for examples.

⁸⁹ Berne (n 65), art 6bis(1).

⁹⁰ Berne (n 65), art 6bis(1).

⁹¹ Berne (n 65), art 7(1).

⁹² Berne (n 65), art 2(7).

⁹³ Berne (n 65), art 3(1).

⁹⁴ Jacobs 2016 (n 45), 184.

⁹⁵ *Copyright Act 1994* (NZ), s 22; *Copyright Act*, RSC 1985, c C-42, s 6(1).

⁹⁶ *Copyright Act 1968* (Cth), s 33; *Copyright, Designs, and Patents Act 1988* (UK), s 12; *Copyright Act of 1976*, 17 USC § 302(a), (b).

⁹⁷ See above n 32.

⁹⁸ The academic literature is inconclusive on what an optimal term is: see e.g., Liu 2002 (n 37), 431.

⁹⁹ See e.g., Joshua Yuvaraj and Rebecca Giblin, ‘Why Were Commonwealth Reversionary Rights Abolished (and What Can We Learn Where They Remain?)’ (2019) 41(4) *European Intellectual Property Review* 232, 232-233; Rebecca Giblin, ‘Reimagining copyright’s duration’ in Rebecca Giblin and Kimberlee Weatherall (eds), *What if we could reimagine copyright?* (ANU Press 2017), 179-180.

grant copyright for a minimum of 50 years after the author's death,¹⁰⁰ and 20-year extensions have been enacted in countries like the US and Australia.¹⁰¹ As Giblin suggests, extending copyright terms could be influenced by '[the] idea that there's no downside in granting ever-longer terms.'¹⁰² In fact, the argument that ever-increasing terms are necessary to protect authors still appears in modern copyright scholarship.¹⁰³

However, granting these 'abnormally long'¹⁰⁴ terms gets in the way of achieving both the incentive and reward goals of copyright.¹⁰⁵ First, such long copyright terms 'go far beyond incentive levels'.¹⁰⁶ Because copyright is granted for such a long time (over a century in many cases, depending on how long the author lives), the potential royalties a work will earn late in the copyright term are close to worthless.¹⁰⁷ Empirical research suggests the majority of works lose commercial value shortly after they are created, although there are exceptions (e.g. classic series like *Sherlock Holmes*).¹⁰⁸ More specifically, trade books (especially fiction) are known for their short shelf-life.¹⁰⁹

Empirical research also suggests there is no correlation between increasing the protection of copyright (e.g. by extending the term) and an increased number of works being created.¹¹⁰ The myriad non-economic reasons why authors create works (e.g. the desire for self-expression) cast doubt on the notion that those works would not have been created without exclusive rights (thus necessitating copyright as an incentive), let alone exclusive rights for a lengthy term far outlasting the author's life.¹¹¹

¹⁰⁰ Giblin 2017 (n 99), 179; Jacobs 2016 (n 45), 184.

¹⁰¹ Jacobs 2016 (n 45), 185.

¹⁰² Giblin 2017 (n 99), 178.

¹⁰³ See e.g., Jacobs 2016 (n 45), 187.

¹⁰⁴ Balganesch 2009 (n 37), 1626.

¹⁰⁵ Giblin 2017 (n 99), 177-196. Similar arguments are made in Giblin 2018 (n 34), 374-395.

¹⁰⁶ Giblin 2017 (n 99), 181.

¹⁰⁷ Ibid 182.

¹⁰⁸ Ibid 182-183. See also Jessica D Litman, 'Real Copyright Reform' (2010) 96(1) *Iowa Law Review* 1, 35: 'In most cases, the intermediary distributor will make the work available to the public within a fairly narrow time window, or will decide not to do so. The work will find its audience, or not; the initial marketing effort will run its course. For the vast majority of creators, the works will then enter a dormant phase that will last for the remainder of the copyright term.'

¹⁰⁹ Giles Clark and Angus Phillips, *Inside Book Publishing* (Taylor & Francis Group, 4th ed, 2013), 51.

¹¹⁰ See e.g. Raymond Shih Ray Ku, Jiayang Sun and Yiying Fan, 'Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty' (2009) 62 *Vanderbilt Law Review* 1669, 1720.

¹¹¹ See e.g. Diane Leenheer Zimmerman, 'Copyrights as Incentives: Did We Just Imagine That?' (2011) 12(1) *Theoretical Inquiries In Law* 29, 35 – 42; Giblin 2017 (n 99), 193-195; Eric E Johnson 2012 (n 47), 640-642; Diane Leenheer Zimmerman, 'Authorship Without Ownership: Reconsidering Incentives in a Digital Age' (2003) 52(4) *DePaul Law Review* 1121, 1136 – 1137. See also Eric E Johnson 2012 (n 47), 643-646, reviewing a body of literature that suggests 'external rewards can actually *disincentivize* creative labo[u]rs' (643). See further Ruth Towse, 'Copyright Reversion in the Creative Industries' (2018) 41(3) *Columbia Journal of Law & the Arts* 467, 476: 'Finally, when asked about motivation to remain in their professions despite relatively low earnings, many

The relatively minute (or non-existent) economic benefits of most creative works beyond the initial few years post-creation, and the non-economic motivations many authors have for creating works, suggest granting exclusive economic rights beyond a period like 15 or 25 years is unlikely to incentivise authors to create more works than they would have done without those extra years.¹¹² These extra years also reduce the availability of these works to the public domain for subsequent creators to build upon.¹¹³

Two further incentive-based justifications for lengthy copyright terms can also be refuted. The first is the justification that long terms increase the potential revenues of successful works, which intermediaries can then reinvest into other works for the benefit of society. Giblin argues investors would have made their investment decisions irrespective of the potential revenue granted by long terms, with the exception of investors for whom ‘profits generated from older projects [are]...the only source of funding for new [works].’¹¹⁴ Thus, there is little evidence granting lengthy terms would incentivise new investments.

The second justification is that lengthy terms incentivise owners of works (whether authors or intermediaries) to keep investing in them. However, empirical research suggests copyright actually causes ‘less investment and narrower dissemination’ relative to works in the public domain.¹¹⁵ Furthermore, the sheer number of ‘orphan works’ – works whose owners cannot be located for the purposes of obtaining permissions for use – and works whose owners do not invest in them (‘parental neglect’) suggests lengthy copyright terms do not incentivise copyright owners to keep making those works available to the public.¹¹⁶ Again, lengthy terms exacerbate the orphan works problem. As more time passes, it becomes more difficult for potential future exploiters of a work to identify the current owner of the copyright, particularly if multiple transfers or bequests of the copyright have occurred.¹¹⁷

authors and performers report non-financial motives (love of their work, need for self-expression, independence) as their objectives, subject to being able to earn a basic income.’ However, Towse subsequently notes ‘the moral right is often reported as having a greater incentive than economic rights for that reason: creators seek recognition and status and they feel that is provided by copyright.’ (476)

¹¹² Giblin 2017 (n 99), 183-184; see Sterk 1996 (n 34), 1208, 1223; Hughes 2009 (n 37), 95; Liu 2002 (n 37), 432-433. This feeds into the live debate about whether incentives are appropriate to ground copyright at all: see e.g. Eric E Johnson 2012 (n 47), 660; Zimmerman 2003 (n 111), 1139.

¹¹³ Sterk 1996 (n 34), 1208; see also Liu 2002 (n 37), 429, 435; see also Andrew Rens and Lawrence Lessig, ‘Forever Minus a Day: A Consideration of Copyright Term Extension in South Africa’ (2006) 7 *The Southern African Journal of Information and Communication* 22, 27-28.

¹¹⁴ Giblin 2017 (n 99), 185.

¹¹⁵ Ibid 187-190. See also Giblin 2017 (n 99), 190-191 where Giblin shows how works in the public domain are subject to an ‘explosion’ of exploitation as derivative works.

¹¹⁶ Ibid 189-190.

¹¹⁷ Liu 2002 (n 37), 434-435.

Natural rights motivations have also been used to justify increasing terms in copyright: it has been argued that authors are best rewarded by increasing the terms of protection granted to them.¹¹⁸ In fact, one of the arguments against extending the term of copyright by 20 years in the US was that it would benefit heirs, who sought to benefit from the creative work of their ancestors despite contributing nothing to it, *at the expense of* the public's access to those works for the additional twenty years.¹¹⁹ However, this operates on the presumption that the author's estate still holds the rights and benefits from it after the author's death. The literature suggests this is rarely the case, especially for that tiny percentage of works that still has economic value by the point those additional rights apply. Instead, intermediaries (publishers, record companies etc) often require authors to assign or license all rights everywhere to them for the length of the copyright term.¹²⁰ This may be problematic in the case of 'lump sum' assignments (e.g., the Solomon Linda case), because authors will have no share in the subsequent profits of their work. However, even a royalty-based model might lead to publishers and other rightsholders receiving the bulk of the rewards:¹²¹ for instance, author associations argue that ebook royalty rates in common law countries are too low.¹²² And there has long been criticism that the royalty-sharing systems underlying music streaming services like Spotify inadequately reward recording artists despite record labels enjoying record profit levels.¹²³ All this suggests that it

¹¹⁸ Giblin 2017 (n 99), 192-193; Jacobs 2016 (n 45), 180.

¹¹⁹ See e.g., Joseph A Lavigne, 'For Limited Times – Making Rich Kids Richer via the Copyright Term Extension Act of 1996' (1996) 73(2) *University of Detroit Mercy Law Review* 311, 350.

¹²⁰ Giblin 2017 (n 99), 195 – 196; see also Zimmerman 2003 (n 111), 1140-1141; Yifat Nahmias, 'The Cost of Coercion: Is There A Place for "Hard" Interventions in Copyright Law?' (2020) 17(2) *Northwestern Journal of Technology and Intellectual Property* 155, 185-186; Litman 2010 (n 108), 55: '...the system still encourages creators to convey all of their rights to distributors in return for dissemination and, sometimes, a little money.'

¹²¹ Litman 2010 (n 108), 10: 'Only a few creators get rich from copyright royalties.'

¹²² See e.g. 'TWUC's Royalty Math', *The Writers' Union of Canada* (Web Page) <<https://www.writersunion.ca/twucs-royalty-math>>; 'Publishing Contract Advice', *Irish Writers Union Comhar Na Scríbhneoirí* (Web Page) <<https://irishwritersunion.org/publishing-contract-advice/>>; Jim Milliot, 'Authors Guild Slams "Inadequate" E-book Royalty', *Publishers Weekly* (Blog Post, 9 July 2015) <<https://www.publishersweekly.com/pw/by-topic/digital/content-and-e-books/article/67433-authors-guild-slams-inadequate-e-book-royalty.html>>; see also 'I need information on publishing contracts', *Australian Society of Authors* (Web Page) <<https://www.asauthors.org/findananswer/questions-about-publishing-contracts#Royalties>>, and Francina Cantatore, 'The power balance revisited: Authors, publishers and copyright in the digital sphere' (2013) 6(2) *Creative Industries Journal* 89, 101 ('**Cantatore 2013b**'), for how the Australian Society of Authors recommends higher ebook royalty rates for authors.

¹²³ See e.g. Hayleigh Boshier, 'Even famous musicians struggle to make a living from streaming – here's how to change that', *The Conversation* (online, 17 December 2020) <<https://theconversation.com/even-famous-musicians-struggle-to-make-a-living-from-streaming-heres-how-to-change-that-151969>>; Mark Savage, 'MPs to investigate whether artists are paid fairly for streaming music', *BBC News* (online, 15 October 2020) <<https://www.bbc.com/news/entertainment-arts-54551342>>; cf. David Hesmondhalgh, 'Is music streaming bad for musicians? Problems of evidence and argument' (2020) *New media & society* 1 (who criticises these arguments and their evidence base, although he acknowledges 'the current system retains the striking inequalities and generally poor working conditions that characterised its predecessors, and...better debate requires greater transparency about usage and payment on the part of streaming services and music businesses': 1, Abstract).

is intermediaries, like record labels and book publishers, who tend to reap any benefits of extended terms, rather than authors.¹²⁴

C. Reversion's potential to address these failures

The literature indicates the existing approach of granting lengthy copyright terms (at least 50 years after the author's death and up to 70 years after the author's death) actually interferes with copyright's incentive and reward goals.¹²⁵ However, it is not possible to alter the copyright terms prescribed by international treaties. Berne mandates copyright terms be a minimum of 50 years after the author's death. In any case, identifying an optimal copyright duration is notoriously difficult, particularly given the range of types of works (songs, sound recordings, literary works, etc).¹²⁶ While it is beneficial to consider what copyright might look like were we not bound by those restrictions,¹²⁷ law reform initiatives must operate within international treaty constraints or else risk litigation via the World Trade Organization's dispute resolution procedures.

Reversion has long been recognised as a means to address these failures in both common law and civil law jurisdictions.¹²⁸ The first copyright law, the *Statute of Anne* (1710), embedded a reversionary mechanism by returning rights to authors after 14 years if they were alive at that point.¹²⁹ As Bently and Ginsburg write, 'the second fourteen years should have enabled the author to grant rights anew from a stronger bargaining position should her work have earned a substantial audience', although it appears this intention was at least partly stymied by 'the

¹²⁴ Towse 2018 (n 111), 488: 'So far, copyright policy has served only to increase the term (so-called "strengthening" copyright), benefitting intermediaries who have lobbied for it, thereby increasing economic rent as they acquire more durable assets.'

¹²⁵ As Nahmias writes, 'the copyright schema demands that the author be a primary beneficiary of the system. However, it is increasingly recognized that simply providing the author with property rights is insufficient.' Nahmias 2020 (n 120), 198.

¹²⁶ However, some scholars have attempted to do so: see e.g. Rufus Pollock, 'Forever Minus A Day? Calculating Optimal Copyright Term' (2009) 6(1) *Review of Economic Research on Copyright Issues* 35; see also the review of literature on copyright length in Shinya Kinukawa, *Exploring a better design of copyright law* (Research Paper, June 2015), 2-4 <http://www.jlea.jp/2015zy_zr/ZR15-07.pdf> (note the final study appears to be published as Shinya Kinukawa, 'Exploring a better design of copyright law' (2017) 14(1/2) *Review of Economic Research on Copyright Issues* 55).

¹²⁷ See generally the thought experiment in Rebecca Giblin and Kimberlee Weatherall (eds), *What if we could reimagine copyright?* (ANU Press, 2017).

¹²⁸ See e.g. Severine Dusollier, 'EU Contractual Protection of Creators: Blind Spots and Shortcomings' (2018) 41(3) *Columbia Journal of Law & The Arts* 435, 449: 'A stronger regime of reversion rights could be promoted to help authors repossess their rights when publishers no longer effectively exploit the work'; Nahmias 2020 (n 120), 185-200.

¹²⁹ Bently and Ginsburg 2010 (n 23), 1479 citing *An Act for the Encouragement of learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned*, 8 Ann c 21 or 8 Ann c 19 ('*Statute of Anne*'), (1710). Note Bently and Ginsburg 2010 (n 23) describe this as s 11 but label it in the corresponding footnote as § 1: at 1479, 1479 fn 9.

dominant practice...of...the ritual assignment to publishers of copyright in perpetuity and for a single lump sum.’¹³⁰ Draft legislation from Britain in 1737 also indicates support for a reversion right, proposing a limit of ten years on copyright assignments after which rights would revert to the author.¹³¹ In the 20th century, Britain imposed a reversion right on copyright assignments and licences to take place 25 years after the author’s death.¹³² Rights reverted automatically to the author’s estate after this time.¹³³ Scholars and jurisprudence suggest this provision was designed ‘to protect authors and their heirs from the consequences of the imprudent disposition of the fruits of their special talent and...originality.’¹³⁴

As discussed in **Chapter I**, reversion continues to feature prominently in copyright legislation today, with more than half the world’s countries adopting a reversion law of some sort.¹³⁵ In the US, authors are allowed to terminate copyright assignments after 35 years (or other periods depending on the date and type of grant).¹³⁶ The 2019 EU Directive on Copyright in the Digital Single Market (‘**EU Directive**’) requires Member States to enable creators and performers to revoke copyright grants if intermediaries are not exploiting them at all.¹³⁷ And legislatures in South Africa and Canada are currently considering implementing reversion mechanisms for authors that take effect after 25 years.¹³⁸

Reversion law reform is often justified on the basis that authors should be able to reclaim their rights so they can better participate in the subsequent windfall of those works, particularly when they may have made poor initial assignments of copyright.¹³⁹ Further, reversion has the potential to acknowledge the deep personal connections authors have with their work:¹⁴⁰ if a publisher is no longer using the work then the author should be entitled to.

¹³⁰ Bently and Ginsburg 2010 (n 23), 1479, 1492.

¹³¹ See Giblin 2018 (n 34), 384-385, citing Lionel Bently and Martin Kretschmer (eds), ‘*An Act for the Encouragement of Learning (Draft), London (1737)*’, *Primary Sources on Copyright (1450-1900)* <http://www.copyrighthistory.org/cam/tools/request/showRepresentation?id=representation_uk_1737b>, archived at <<https://perma.cc/DM3D-N733>>; Bently and Ginsburg 2010 (n 23), 1489-1490.

¹³² *Copyright Act 1911* (UK), s 5(2).

¹³³ *Ibid.*

¹³⁴ Gillian Davies, Nicholas Caddick, Gwilym Harbottle (eds), *Copinger and Skone James on Copyright*, Sweet & Maxwell, 17th ed, 2016), para.5-118, cited in Yuvaraj and Giblin 2019 (n 99), 233.

¹³⁵ See below 90.

¹³⁶ *Copyright Act of 1976*, 17 USC §§ 203, 304.

¹³⁷ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC PE/51/2019/REV/1 [2019] OJ L 130/29 (‘**EU Directive**’), art 22.

¹³⁸ See generally **Chapter IV**(III)(D), (E).

¹³⁹ See e.g. below 74; Nahmias 2020 (n 120), 186-187.

¹⁴⁰ See e.g. Fromer 2012 (n 37), 1806-1807. See Giblin 2018 (n 34), 381, citing Fromer 2012 (n 37), 1806: ‘[the US termination right is] a powerful signal to authors that copyright law cares about the personhood, labor, and possessory interests they have in their work.’ See further Litman 2010 (n 108), 37: ‘Affording creators a mechanism to regain some control of their exploitation of their works could shore up copyright’s legitimacy by

However, reversion is also justified on its ability to better fulfil the end point of copyright's utilitarian theory: the production and dissemination of works for social benefit. This comes about principally by the revitalisation of works that would otherwise not have been exploited, whether they are in the back-catalogues of intermediaries or are orphaned works.¹⁴¹ Reversion may also increase author incentives to create, because they would have a further chance to participate in the revenues of their work post-reversion (as opposed to current realities in which intermediaries can take as many rights for as long as possible with little recourse for authors to regain them).¹⁴² For all these reasons, reversion has enormous potential to improve copyright's ability to satisfy its incentive and reward goals by promoting greater access to creative works, and facilitating more opportunities for authors to share in the financial rewards of their works.¹⁴³

D. Reversion and controversies in the book industry

The discussion above was about how reversion can address copyright's general failures, principally in relation to grants of copyright that far exceed what is necessary to incentivise the creation of and investment in culturally valuable creative works. To contextualise these principles, I now focus on how reversion can help better achieve copyright's incentive and rewards goals in the context of the trade book industry in Australia and other common law countries: the US, the UK, New Zealand, and Canada (acknowledging of course the potential for broader application to other creative industries and jurisdictions).¹⁴⁴

strengthening the connection between creators and copyrights throughout the long copyright term', although it is not clear whether the 'connection' is from a natural rights perspective as with Fromer's argument.

¹⁴¹ See e.g. Martin Kretschmer, 'Copyright Term Reversion and the "Use-It-Or-Lose-It" Principle' (2012) 1(1) *International Journal of Music Business Research* 44, 44-45; Giblin 2018 (n 34), 399; Marcella Favale, 'Bouncing back from oblivion: can reversionary copyright help unlock orphan works?' (2019) 41(6) *European Intellectual Property Review* 339, 344-346.

¹⁴² Authors might be incentivised by research showing the potential of reversion for additional rewards: see e.g., 'Contracts and Rights', *Authors' Licensing and Collecting Society* (Webpage) <<https://www.alcs.co.uk/contracts-and-rights>>: 'In recent research, we found 63% of authors who had used or relied on a reversion clause [in their publishing contracts] went on to earn more money from that work.'

¹⁴³ It is important to note that some scholars are critical of inalienable statutory reversion rights on the basis that authors might receive less upfront from publishers to compensate for the loss of the post-reversion value: see e.g., Guy A Rub, 'Stronger than Kryptonite? Inalienable Profit-Sharing Schemes in Copyright Law' (2013) 27(1) *Harvard Journal of Law & Technology* 50, 97-98; Kate Darling, 'Occupy Copyright: A Law & Economic Analysis of U.S. Author Termination Rights' (2015) 63(1) *Buffalo Law Review* 147, 165-166. It is beyond the scope of this thesis to examine these criticisms from an economics perspective, although see Giblin's response at Giblin 2018 (n 34), 398. However, as I argue in **Chapters VII** and **VIII**, reversion rights should be developed in consultation with various industry stakeholders to minimise any negative impacts on them. See also the discussion on crafting optimal time limits at **Chapter VII(III)(B)**.

¹⁴⁴ Trade publishing refers to genres like fiction, non-fiction, children's, and the like, and is also known as 'consumer publishing': Throsby et al Australian Book Publishers Survey Method and Results 2018 (n 19), 4; see also Ruth Towse, *A Textbook of Cultural Economics* (Cambridge, 2nd ed, 2019), 589.

Two concerns which continue to raise controversy in relation to authors in Australia and other common law countries are low incomes from writing and unduly expansive copyright grants. Low incomes could suggest authors are not receiving the rewards of their creative labour in keeping with copyright's reward goals. It's important to note however that they may be unavoidable due to the difficulty of succeeding in creative markets.¹⁴⁵ Nevertheless, any initiative to help 'increase the pie' for the purpose of rewarding authors coheres with copyright's natural rights goals and should be explored. Meanwhile, unduly expansive copyright grants may highlight inefficiencies in the pursuit of copyright's goals (e.g., if they last longer than is necessary to incentivise publishers to invest in books).

The analysis below focuses on the book industry and specifically trade publishing. While some of the evidence below covers educational and academic publishing as well, the dynamics of these markets are different to those of the trade publishing market.¹⁴⁶ Future research may want to explore how reversion specifically applies in the educational and academic markets, but that is beyond the scope of this thesis.

1. Low author incomes

The first controversy is the low incomes authors make from writing. Low author incomes could have different causes, some of which are unavoidable (like the fact that often, the books publishers hope will be successful turn out not to be).¹⁴⁷ Whatever the reasons, reversion gives authors the opportunity to pursue new exploitation avenues and potentially increase their incomes from writing. It also creates opportunities for small and independent presses to obtain rights to books that have gone out of print and revitalise them for financial and cultural benefit. This is particularly important given the struggles such publishers face in light of ongoing consolidation by large publishers and changes to the global publishing industry.¹⁴⁸

Several studies have been conducted in the last decade exploring author incomes in Australia, the UK, the US, Canada, and New Zealand.¹⁴⁹ Some surveys include responses from non-trade

¹⁴⁵ Towse 2018 (n 111), 475: 'The overall distribution of artists' earnings in the creative industries is typically skewed, with very few superstars earning very high incomes while the majority earn below national average incomes.'

¹⁴⁶ For an exploration of these markets, see e.g., Miha Kovač and Mojca K. Šebart, 'Educational Publishing: How It Works: Primary and Secondary Education Publishing', in Angus Phillips and Michael Bhaskar (eds), *The Oxford Handbook of Publishing* (Oxford University Press, 2019); Samantha J Rayner, 'Academic Publishing' in Angus Phillips and Michael Bhaskar (eds), *The Oxford Handbook of Publishing* (Oxford University Press, 2019).

¹⁴⁷ See Thompson 2019 (n 18), 250-251, discussing the phenomenon of 'big books'.

¹⁴⁸ See below nn 264, 355.

¹⁴⁹ I have attempted to identify as many pertinent studies as possible: therefore, while the review is comprehensive I make no representation that it is exhaustive. See also reviews in other countries e.g. Kaija Rensujeff, Arts Promotion Centre Finland, 'The Status of the Artist in Finland 2010: The Structure of the Artist Community,

authors (e.g. educational or academic textbook authors). Nevertheless, the survey results still provide valuable data on author incomes, which contextualise the need for reversion rights explored in this thesis. Below, I examine the results of these surveys alongside their methods and limitations.¹⁵⁰

(a) Australia

In Australia, the most prominent recent survey of author incomes was conducted by Throsby, Zwar and Longden at Macquarie University (2015).¹⁵¹ Throsby, Zwar and Longden sought to survey ‘authors who have published one or more books.’¹⁵² However, there was inadequate data to enable them to identify ‘the size of the target population’, due to factors like Census data recording the main occupations of individuals who *also* write books.¹⁵³ Furthermore, author organisations were unable to divulge personal information about their members to the researchers for privacy reasons, which meant the researchers could not randomly sample lists of authors from these organisations.¹⁵⁴ As such the researchers used an ‘opt-in’ method whereby the organisations (n=28) would disseminate the survey to their members.¹⁵⁵ This led to 1,632 responses from which 993 were useable (due to factors like incomplete answers).¹⁵⁶ Despite the inability to randomly sample membership lists, the researchers examined census and other data and were confident that the sample was ‘sufficiently representative of the population of Australian book authors at the present time to indicate that it will not be necessary to weight [the]...results to account for any discrepancies.’¹⁵⁷

Work and Income Formation’ (‘English Summary’, tr Edward Crockford) <https://www.taike.fi/documents/10921/0/TheStatus_of_theArtist_inFinland_2010_Summary.pdf>.

¹⁵⁰ For general criticisms of author surveys, see e.g. Jane Friedman, ‘Author Income Surveys Are Misleading and Flawed – And Focus on the Wrong Message for Writers’, *Jane Friedman* (Blog Post, 2 July 2018, updated 9 January 2019) <<https://www.janefriedman.com/author-income-surveys/>>. See also Francesco Figari et al, ‘Approximations to the Truth: Comparing Survey and Microsimulation Approaches to Measuring Income for Social Indicators’ (2012) 105 *Social Indicators Research* 387, 390 who identify various limitations of measuring incomes using survey data.

¹⁵¹ David Throsby, Jan Zwar and Thomas Longden, ‘Book Authors and their Changing Circumstances: Survey Method and Results’ (Research Paper 2/2015, September 2015) <http://www.businessand economics.mq.edu.au/_data/assets/pdf_file/0006/360726/BookAuthors_WorkingPaper_2015.pdf> (‘Throsby et al Survey Method and Results 2015’).

¹⁵² Ibid 4.

¹⁵³ Ibid 4.

¹⁵⁴ Ibid 4.

¹⁵⁵ Ibid 4.

¹⁵⁶ Ibid 7.

¹⁵⁷ Ibid 8. The researchers based this assertion on data from the 2011 Census conducted by the Australian Bureau of Statistics and a prior definition of the population of writers from a 2009 survey: Throsby et al Survey Method and Results 2015 (n 151), 7.

The researchers found that the ‘average total income for authors, *including all sources of income*, is [AU]\$62,000 and the average income derived from practising as an author is \$12,900.’¹⁵⁸ They noted:

...generally, authors’ income from their creative practice is much lower than their total income, demonstrating that most authors rely on income from other sources as a substantial part of their livelihood.’¹⁵⁹

These findings cohere with a prior survey of authors undertaken by Cantatore as part of her doctoral research at Bond university.¹⁶⁰ Cantatore conducted a survey of authors with 156 respondents (‘published Australian authors’).¹⁶¹ Of these, 132 responded to a question about gross annual incomes, and Cantatore found over a third of these received \$1,000-\$2,000 from writing annually.¹⁶² Most respondents (‘57% of full time authors and 92% of part time authors’) reported having an alternative source of income.¹⁶³ Cantatore adopted a ‘purposeful sampling’ approach which does not lend itself to statistical representativeness.¹⁶⁴ Instead, her focus was:

...to capture and describe central themes that cut across a great deal of variation...It relies on the identification of common patterns in the diversity of responses. In the case of authors and copyright, it would aim to recognise common themes emerging from the results of a diverse group of authors from different age groups, backgrounds and geographical areas.¹⁶⁵

Last, the Australian Society of Authors (‘ASA’) undertook a survey of over 1,400 Australian writers and illustrators in late 2020.¹⁶⁶ As with the Authors Guild survey, there is no detailed explanation of the ASA’s method, weighting for sample bias or discussion of representativeness, which means the results should be read with caution.

The ASA found that the average annual income of the respondents ‘from [their] creative practice’ was under AU\$15,000 for nearly 80% of respondents, and between no income and

¹⁵⁸ Jan Zwar, David Throsby and Thomas Longden, ‘Australian authors: Industry Brief No. 3: Authors’ Income’ (Macquarie University, Industry Brief No. 3, October 2015), 2 <https://research-management.mq.edu.au/ws/portalfiles/portal/122625541/3_Authors_Income.pdf> (‘Zwar et al Authors’ income 2015’).

¹⁵⁹ Ibid 2.

¹⁶⁰ See generally Francina Cantatore, ‘Negotiating a changing landscape: Authors, copyright and the digital revolution’ (PhD Thesis, Bond University, 2012) (‘Cantatore Thesis 2012’).

¹⁶¹ Ibid 131.

¹⁶² Ibid 147.

¹⁶³ Ibid 148-149.

¹⁶⁴ Ibid 130.

¹⁶⁵ Ibid 130-131.

¹⁶⁶ Australian Society of Authors, ‘ASA Survey Results – Author Earnings in Australia’, *News* (Blog Post 18 November 2020) <<https://www.asauthors.org/news/asa-survey-results-author-earnings-in-australia>> (‘ASA Author Earnings Survey 2020’).

\$1,999 for 49.7% of respondents.¹⁶⁷ Even full-time writers earned little: over half (53.6%) earned ‘on average less than \$15,000 per year from their creative practice, with 23.2% of them earning on average between \$0 and \$1,999 per year.’¹⁶⁸ As the survey was undertaken in 2020 it was able to document some of the impacts of COVID-19: over 31% of the respondents advised that their income from writing was reduced due to the pandemic.¹⁶⁹ The ASA also commissioned Nielsen Books to undertake research on book sales in the years 2018-2020.¹⁷⁰ This research found that of all unique book titles sold in Australia from 2018-2020, ‘on average, only 1% of titles sold over 1,000 copies each in a year.’¹⁷¹ At the time of writing, the Nielsen research does not appear to be publicly available.

(b) United Kingdom

In the UK, the three most recent reports that directly focused on author incomes were conducted by the Copyright & Creative Economy Centre (‘**CREATe**’) at the University of Glasgow (commissioned by The Authors’ Licensing and Collecting Society (‘**ALCS**’)) in 2018, the Royal Society of Literature (‘**RSL**’) in 2019, and the Society of Authors (‘**SoA**’) in 2021.

For the 2018 CREATe survey, the researchers conducted a survey of 50,000 writers, seeking to understand trends in the ‘working conditions’ (including incomes) of the participants.¹⁷² Questions were disseminated to approximately 50,000 members of the ALCS (whose ‘email ‘addresses [were] on record’).¹⁷³ The researchers reported 49% of the 5,521 participants who began the survey also finished the survey (n=2,696).¹⁷⁴ As the characteristics of the general ‘population of writers’ are not independently defined, the researchers did not ‘add...statistical weights to make the survey population more representative.’¹⁷⁵ To that end they do not expressly claim their results are representative of the population of writers in the UK but note both ‘Sample size and response rates are high, and allow robust statistical analysis.’¹⁷⁶ The

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Martin Kretschmer, Andres Azqueta Gavaldon, Jaako Miettinen and Sukhpreet Singh, ‘UK Authors’ Earnings and Contracts 2018: A Survey of 50,000 Writers’ (CREATe, 2019), 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3389685> (‘**CREATe 2018 Report**’).

¹⁷³ Ibid 8.

¹⁷⁴ Ibid 8.

¹⁷⁵ Ibid 9.

¹⁷⁶ Ibid 9. Note the Publishers Association CEO Stephen Loting suggested there needed to be a ‘stronger evidence base’ than this survey but has not elaborated on these criticisms despite the ALCS and the Society of Authors writing an open letter inviting him to express his concerns: see Authors’ Licensing and Collecting Society, ‘ALCS and Society of Authors write Joint Open Letter to Publishers Association on Author Earnings’, *Information For Members* (Blog Post, 2 July 2018) <<https://www.alcs.co.uk/news/alcs-and-society-of-authors-soa-write-joint->

survey report was published in 2018, following similar ALCS-commissioned studies by Queen Mary University of London (2015) and the Centre for Intellectual Property Policy & Management at Bournemouth University (2007).¹⁷⁷

In the 2018 CREATe report, the researchers found ‘the top 10 percent of writers still earn about 70% of total earnings in the profession’ and ‘a dramatic drop in average and median earnings’.¹⁷⁸ The median income from writing dropped 49% ‘in real terms’ from 2006.¹⁷⁹ For writers ‘who spend at least half of their time writing’,¹⁸⁰ median ‘self-employed earnings’ dropped 42% from the equivalent in 2006.¹⁸¹ While the average household income of writers was ‘over £81,000 per annum’,¹⁸² the researchers noted that the need for a household ‘subsidy’ for writers ‘may contribute to the lack of diversity among writers’, finding that “writers [in the survey] are mostly white (94%) and live in the South East.”¹⁸³

The 2018 CREATe report was followed by another ALCS-commissioned survey conducted by the Royal Society of Literature (‘RSL’).¹⁸⁴ The RSL surveyed ‘adults aged 16 and over, resident in the UK, who think of themselves as writers’, disseminating the survey through various arts and literary organisations in the UK.¹⁸⁵ The results were ‘based on a sample of 2,166 respondents, giving a margin error of c. ±2%, at the 95% confidence level.’¹⁸⁶ Here, I focus on the results as they relate to author incomes (although the report contains data on a range of other needs and experiences of the respondent authors).

[open-letter-to-publishers-association-pa](#)>. I have not located a response from the Publishers Association to this letter.

¹⁷⁷ CREATe 2018 Report (n 172), 7. see Johanna Gibson, Phillip Johnson, Gaetano Dimita, ‘The Business of Being an Author: A Survey of Author’s Earnings and Contracts’ (Queen Mary University of London, April 2015) <<http://orca.cf.ac.uk/72431/1/Final%20Report%20-%20For%20Web%20Publication.pdf>> (‘**Queen Mary 2015 Report**’); Martin Kretschmer and Philip Hardwick, ‘Authors’ earnings from copyright and non-copyright sources: A survey of 25,000 British and German writers’, (Centre for Intellectual Property Policy & Management, Bournemouth University, December 2007) <<https://microsites.bournemouth.ac.uk/cippm/files/2007/07/ALCS-Full-report.pdf>> (‘**Bournemouth 2007 Report**’).

¹⁷⁸ CREATe 2018 Report (n 172), 1.

¹⁷⁹ Ibid 19.

¹⁸⁰ Ibid 1.

¹⁸¹ Ibid 19.

¹⁸² Ibid 2.

¹⁸³ Ibid 2. For a further exploration of class diversity in publishing in the UK see Professor Katy Shaw, ‘Common People: Breaking the Class Ceiling in UK Publishing’ (New Writing North, Writing West Midlands, Northumbria University Newcastle, 2020) <https://northumbria-cdn.azureedge.net/-/media/corporate-website/new-site/core-gallery/departments/humanities/common-people---katy-shaw/common_people.pdf?modified=20200430161839>.

¹⁸⁴ ‘A Room of My Own: What writers need to work today’ (The Royal Society of Literature, June 2019) <<https://d16dqzv7ay57st.cloudfront.net/uploads/2019/07/RSL-A-Room-of-My-Own-Report-19-June-2019.pdf>> (‘**RSL Report**’).

¹⁸⁵ Ibid 10.

¹⁸⁶ Ibid 9.

The RSL found that 62% ‘of writers who earned any money from their writing in 2018 earned **between £100 and £10,000**.’¹⁸⁷ This was ‘slightly lower than [results in]...’ the 2018 CREATE report, which the RSL report writers note was because the 2018 report focused on ‘primary occupation writers – those who spend at least half their time writing – where the [RSL]...findings report on writers who have earned any income from their writing.’¹⁸⁸ Only five per cent of respondents earned over £30,000 in 2018 from their writing; thirty-three per cent earned nothing from their writing, while the largest group (37%) earned ‘between £100 and £5,000’.¹⁸⁹ The RSL also found 90% of the respondents had ‘paid employment beyond their writing’,¹⁹⁰ although the report is unclear on whether ‘employment’ includes benefits and other support.¹⁹¹

Last, the Society of Authors conducted a survey in 2021 to monitor the impact of COVID-19 on author incomes.¹⁹² The survey had 362 respondents and was run in March-April 2021.¹⁹³ The full report has not been published, which means I cannot evaluate the methods used. Thus, I reproduce the findings as listed on the blog post:

57% of authors have experienced a drop in income over the course of the last financial year (2020/21)...

17% reported that their incomes had remained stable, while only 9% reported an increase in earnings...

14% of authors said that they had received or expected to benefit from Government support for the self-employed...

60% who said that they had not benefitted or expected not to do so with 26% of respondents still unsure about their eligibility for HMRC help.¹⁹⁴

Beyond these surveys, the All Party Parliamentary Writers Group (‘**APPWG**’) produced a report on author incomes in 2019, drawing on evidence from various organisations, including

¹⁸⁷ Ibid 13.

¹⁸⁸ Ibid 13.

¹⁸⁹ Ibid 13.

¹⁹⁰ Ibid 14.

¹⁹¹ See RSL Report, 14 (Q 2.b).

¹⁹² Society of Authors, *Latest author incomes survey confirms ongoing impact of health crisis* (Blog Post, 26 May 2021) <<https://societyofauthors.org/News/News/2021/May/Latest-income-survey-ongoing-impact>> (‘**SoA Author Survey 2021**’).

¹⁹³ Ibid.

¹⁹⁴ Ibid.

the Society of Authors and The Publishers Association, and ‘over 30 professional authors.’¹⁹⁵ Accordingly, it appears to repeat CREATE’s findings and previous ALCs studies.¹⁹⁶ However the Group noted ‘Almost all of the responses to the Inquiry suggested a reduction in authors’ earnings’,¹⁹⁷ which supports the findings of the surveys outlined above.

The APPWG produced another report in 2021 entitled *Supporting Writers Through the COVID-19 Crisis*.¹⁹⁸ Utilising a similar method to the 2019 report (using evidence from a variety of sources, including research from the Society of Authors), the APPWG found that authors struggled through the COVID-19 pandemic. For example, ‘49% [of authors surveyed by the Society of Authors] had lost more than a quarter of their income by October 2020.’¹⁹⁹ Moreover, authors highlighted losses of income from ‘vital secondary sources of income, such as visits to schools and universities, libraries, festivals and other personal appearances’.²⁰⁰ The loss of these revenue streams:

...has led writers to consider other career paths outside the creative sector, and created increasing concern about diversity in writing as a result, when many emerging authors were already struggling to be paid appropriately before COVID-19 struck.²⁰¹

These and other findings on the experiences of authors through the pandemic led the APPWG to make various recommendations, including ‘Better government engagement with the creative workforce and their representatives’, ‘Protect[ing] the success of the UK’s creative industries and [having an] effective copyright regime’, ‘[Introducing] Better support for authors and creators [e.g. financial assistance and more Public Lending Right funding]’, and ‘Fairness in the bookselling market’.²⁰²

¹⁹⁵ ‘Supporting the Writers of Tomorrow’, (All Party Parliamentary Writers Group, 2019), 24 <https://allpartywritersgroup.co.uk/wp-content/uploads/2019/06/Authors_Earnings_Inquiry_Booklet.pdf> (‘APPWG 2019 Report’).

¹⁹⁶ Ibid 4/5, 8/9.

¹⁹⁷ Ibid 8/9.

¹⁹⁸ ‘Supporting Writers Through the COVID-19 Crisis’ (All Party Parliamentary Writers Group, 2021) <https://allpartywritersgroup.co.uk/wp-content/uploads/2021/05/APWG_Supporting_Writers_Through_the_Covid_19_Crisis.pdf> (‘APPWG 2021 Report’).

¹⁹⁹ Ibid 4/5.

²⁰⁰ Ibid 8/9.

²⁰¹ Ibid 12/13.

²⁰² Ibid 20/21, 22/23.

(c) *United States*

In the US, the Authors Guild undertook a 2018 survey of its members and those of 14 other organisations.²⁰³ The 5,067 respondents ‘included traditionally, hybrid and self-published authors who have commercially published one or more books [and] full-time and part-time authors.’²⁰⁴ Only a summary of the report is available on the Authors Guild website. The actual report is not available on the website, preventing a further interrogation of the survey’s methods: thus, my analysis is restricted to the information provided on the summary.

The Guild noted that 9,288 individuals began the survey and 55% finished it.²⁰⁵ Unlike the CREATE (2018) and RSL (2019) surveys from the UK, the Guild’s summary report does not specify its target population (presumably this is American authors, but this is not specified) or the degree to which its sample can be regarded as statistically representative of this population.²⁰⁶ It does provide a breakdown of the ways in which respondent authors describe themselves (e.g. ‘56% write fiction’, ‘22% are academic, scholarly, or textbook authors’, etc.).²⁰⁷ However, the results should be read with caution if readers seek to draw broader trends about the incomes of American authors generally from these findings.²⁰⁸

With these caveats, the data still highlights interesting trends in author incomes. The Guild found that the median income ‘for all writing-related activities’ was US\$6,080, continuing a steady downward trend from Guild survey results in 2009 (US\$10,500).²⁰⁹ When focusing on median income from ‘book-related activities’ alone, the decrease was even sharper: a 21% drop (US\$3,100) from a previous figure of \$3,900.²¹⁰ The Guild did note that ‘median income for full-time authors for all writing-related activities’ had actually increased by 3% (US\$20,300) since 2013, but highlighted that this was ‘considerably lower than the \$25,000 median income full-time authors earned in 2009.’²¹¹

²⁰³ ‘Six Takeaways from the Authors Guild 2018 Author Income Survey’, *The Authors Guild* (Blog Post, 5 January 2019) <<https://www.authorsguild.org/industry-advocacy/six-takeaways-from-the-authors-guild-2018-authors-income-survey/>> (‘**Authors Guild Six Takeaways 2019**’).

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ These details may be present in the full report, which could not be located on the Guild’s website.

²⁰⁷ Ibid.

²⁰⁸ See also criticism of the report by Amazon: Alison Flood, ‘Amazon hits back at claims it is to blame for failing author earnings’, *The Guardian* (online, 17 January 2019) <<https://www.theguardian.com/books/2019/jan/16/amazon-hits-back-author-earnings-authors-guild-survey>>.

²⁰⁹ Authors Guild Six Takeaways 2019 (n 203).

²¹⁰ Ibid.

²¹¹ Ibid.

Consistent with literature on the trade book industry, the Guild noted that factors contributing to a reduction in author incomes are the ‘blockbuster mentality’ of publishers (which involves them pursuing bestseller authors at the expense of ‘mid-list writers’), lower royalties influenced by factors like a low eBook royalty rate of 25% and ‘deep discount’ sales of >55%, for which ‘most publishing contracts provide a very reduced or no royalty.’²¹² Low incomes mean some authors have to rely on alternate income streams like second jobs to sustain themselves.²¹³

(d) Canada

A 2018 survey by The Writers’ Union of Canada (‘TWUC’) found that incomes have decreased for Canadian writers as well.²¹⁴ TWUC surveyed 1,499 participants,²¹⁵ finding the ‘average net income was [C]\$9,380, while the median net income was less than \$4,000.’²¹⁶ Overall, ‘Writers’ incomes from writing [were]...significantly below the median Canadian income of [C]\$34,204.’²¹⁷ Compared to 1998 and taking inflation into consideration, TWUC found ‘writers [were]...making 78% less than they were making in 1998 from their writing.’²¹⁸ These trends were reflected in a 2015 TWUC report.²¹⁹ For that report, TWUC surveyed 947 writers, including ‘members [of TWUC] and other writers’.²²⁰ It found the ‘median net income from writing was less than [C]\$5,000, while the average income from writing was \$12,879’, a 27% decrease from equivalent incomes in 1998 when inflation was considered.²²¹ Strikingly, the authors found that ‘For 81% of respondents, their writing income falls below the poverty line’, and that ‘writers’ incomes from writing are significantly below the average Canadian

²¹² Ibid.

²¹³ Ibid (under the heading ‘FULL-TIME MID-LIST AND LITERARY WRITERS ARE ON THE VERGE OF EXTINCTION’).

²¹⁴ ‘Diminishing Returns: Creative Culture At Risk’ (The Writers’ Union of Canada Income Survey 2018) <<https://www.writersunion.ca/sites/all/files/DiminishingReturns-Web.pdf>> (*‘Diminishing Returns 2018’*). See also a ‘benchmarking study’ summarising the literature on author incomes in Canada and other jurisdictions in 2017: Marilyn Burgess and Maria De Rosa, ‘The Remuneration of Canadian Writers for Literary Works: A Benchmarking Study’, (Report Prepared for The Writers’ Union of Canada (TWUC) and Union des écrivains et des écrivains Québécois (UNEQ), 27 September 2017) <https://www.writersunion.ca/sites/all/files/attachments/Study%20on%20Remuneration%20of%20Writers%20September%202017_0.pdf>.

²¹⁵ *Diminishing Returns 2018* (n 214), 4.

²¹⁶ Ibid 5.

²¹⁷ Ibid 5.

²¹⁸ Ibid 5.

²¹⁹ ‘Devaluing Creators: Endangering Creativity. Doing More and Making Less: Writers’ Incomes Today’ (The Writers’ Union of Canada, 2015) <<https://www.internationalauthors.org/wp-content/uploads/2017/10/Canada-TWUC-Devaluing-Creators-Endangering-Creativity.pdf>> (*‘Devaluing Creators 2015’*).

²²⁰ Ibid 2, 3.

²²¹ Ibid 4.

income of \$49,000 [and]... far behind the average salary in the information and cultural industries (\$60,011).'²²²

As with the Authors Guild and ASA surveys, neither TWUC survey explains how representative its data is or how it counteracts potential sample bias.

(e) New Zealand

Lastly, a 2018 report by Horizon Research, *Writers' Earnings in New Zealand*, reported trends slightly different to those in the Australian, UK, US, and Canadian studies.²²³ The survey comprised 356 respondents after 'invitations to participate were sent to writers throughout New Zealand via publishers and writers' associations'.²²⁴ Beyond this, no detail is given on the survey's sample methodology or representativeness.

The respondents spent an average '25% of their reported time' on writing.²²⁵ The average annual income for the respondents was NZ\$49,800 (a reduction of 12% from NZ\$56,900 in 2016).²²⁶ The average income from writing was 31% (NZ\$15,200), which was an *increase* of 24% on the 2016 figure (NZ\$13,500).²²⁷ In particular, respondents earned more from overseas income generated by their writing ('an average of 24% of total writing earnings, well up on the 14% from 2016').²²⁸ Just over a third (36%) reported an increase in writing income over the past year, under a third (32%) reported a decrease, and 30% reported their income 'had remained the same'.²²⁹

(f) Trends from the surveys

The data from these studies suggest creating literary works is not a lucrative endeavour for many authors in these countries. Few authors report earning enough to make writing their sole profession: it is more common for authors to have alternative streams of income like family members or second jobs.²³⁰

²²² Ibid 4.

²²³ 'Writers' Earnings in New Zealand', (Horizon Research, November 2018) <<http://www.copyright.co.nz/Downloads/Assets/5009/1/Writers%20Earnings%20in%20New%20Zealand%20-%20Horizon%20Research%20Report%202018.pdf>>. ('Horizon Research 2018')

²²⁴ Ibid 3.

²²⁵ Ibid 4.

²²⁶ Ibid 5.

²²⁷ Ibid 5.

²²⁸ Ibid 5.

²²⁹ Ibid 5.

²³⁰ See also Chris Flynn, 'Chris Flynn and Peter Carey on the challenging times for mid-list authors' (October 2011) *Australian Book Review* <<https://www.australianbookreview.com.au/abr-online/archive/2011/59-october-2011/568-testing-times-for-mid-list-authors>>, who highlighted this problem in 2011.

While various surveys involved and reported methodologies for identifying appropriate target populations, implementing appropriate sampling techniques, and measuring samples for population representativeness (e.g., the Throsby et al surveys, the CREATE 2018 survey, the RSL 2019 survey), others do not report taking similar steps. This is mostly an issue with surveys conducted by author associations, although the Horizon Research report into New Zealand writers also does not report taking such steps. To that end, results from the latter category of surveys should be read with more caution, because the degree to which they are representative of their respective author populations is not clear. Further research involving sample bias weighting and representative sampling would provide further data to supplement data from the latter category of surveys.

Further, these surveys do not attempt to explain the causes of low incomes. Low author incomes may not simply be due to unfavourable bargaining situations or publishers failing to fulfil their contractual obligations. Low author incomes may also be a result of the general risk of the trade book market and the fact that most books generally do not sell very well.²³¹ It may also be explained by publisher preferences for ‘brand-name authors and...backlist[s]’,²³² resulting in a ‘winner-takes-all’ market where successful authors earn most of the income.²³³ A corollary of this type of publisher behaviour is that publishers may be less incentivised to bring midlist books back into print: their authors may thus only be benefiting from the sales from initial print runs, whereas successful authors may benefit from multiple print runs. Accordingly, more

²³¹ Using the Australian book market as an example, research commissioned by the ASA suggests very few books will sell over 1,000 copies: ASA Author Earnings Survey 2020. In a 1997 book, Harvey, Maslen and Griffith referred to statistics from the *New Zealand Official Yearbook* (it is not clear which edition) to the effect that ‘the average print run of a general book was much the same, having peaked somewhere in the early 1980s, and was declining. Three hundred publishers were now thought to be active, but only about 100 were specialist book publishers. By 1995 the average print run was down to 3,000 copies and by 1996 it was thought to be approaching 2,000.’ However, the authors later go on to describe important limitations on this data at page 103. See Douglas Ross Harvey, KID Maslen, Penny Griffith, *Book & Print in New Zealand: A Guide to Print Culture in Aotearoa* (Victoria University Press, 1997), 102-103.

²³² Thompson 2019 (n 18), 251.

²³³ An interesting angle for further research would be the extent to which Baumol’s cost disease affects the book industry. According to Towse, the argument is ‘that the high proportion of labour costs in the typical performance [in the performing arts] and the upward trend in wages would inevitably drive up the costs of production and consequently, the price of performances, at a rate exceeding the rate of inflation. This would cause the performing arts to be ever more expensive, thereby endangering access by audiences.’: Towse 2019 (n 144), 210. See generally William J Baumol and William G Bowen, *Performing Arts, The Economic Dilemma: a study of problems common to theatre, opera, music, and dance* (MIT Press, 1966), cited in Towse 2018 (n 111), 475. While Baumol and Bowen’s analysis was in the context of the performing arts, it could be the case that author incomes will continue to be affected by downward pressure because the productivity of authors does not increase relative to increases in other fields. See e.g. Rachel Soloveichik, ‘Books as Capital Assets’ (2014) 45(2) *Journal of Scholarly Publishing* 102, 114 for analysis suggesting rising book prices in the US up to 2005 bear out Baumol’s cost disease hypothesis (see further a prior version of the paper, Rachel Soloveichik, ‘Books as Capital Assets’ (Bureau of Economic Affairs), 13 <<https://www.bea.gov/system/files/papers/WP2013-11.pdf>>). While further research on this point would be welcome, it is beyond the scope of this thesis.

research is needed to establish the causes of low author incomes in Australia and other common law countries.

Irrespective of the causes of the low author incomes, these data show authors could potentially generate more income if they could use statutory provisions to regain their rights before copyright expires and pursue alternate exploitation opportunities. In the pre-digital age, authors would likely have been limited to negotiating new distribution deals from a position of greater strength with the same publishers or negotiating new publishing contracts with different publishers. However, in the digital age there are far more opportunities for rewarding literary authors who regain their rights. For example, eBooks can be marketed for a far lower cost than their print equivalents, because they have extremely low fixed and marginal costs.²³⁴ They can also be sold to a far greater audience (even across national borders) than a traditional print bookstore could reach.²³⁵ Evidence from Throsby et al's research into the Australian book industry indicates that at least some authors (10%) 'experienc[ed]...a modest increase' when their 'backlist' books were released electronically.²³⁶ This suggests that if authors were able to regain the rights to republish books which are out of print, they could potentially reap greater rewards than if those books just stayed out of print. Further, libraries may find eBooks more attractive than print books because they cost less to purchase and maintain relative to print books.²³⁷ Additionally, new technologies can help authors pursue new revenue streams through the sales of translation, adaptation, and audiobook rights. Automated translation may remove some of the expense of having books translated for foreign markets, at least for non-fiction

²³⁴ Michael Smith, Rahul Telang, Yi Zhang, 'Analysis of the Potential Market for Out-Of-Print eBooks' (Working Paper, Heinz College, School of Information Systems and Management, Carnegie Mellon University, August 2012), 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2141422>.

²³⁵ Ibid 2.

²³⁶ Jan Zwar, David Throsby, and Thomas Longden, 'Australian authors Industry Brief No. 4: Changes in Authors' Financial Position', (Macquarie University, Industry Brief No. 4, October 2015), 4 <https://research-management.mq.edu.au/ws/portalfiles/portal/122625704/4_Changes_in_Authors_Financial_Position.pdf>.

See also the following quote from author Garry Disher on the sales of his backlist books in eBook format after being published by Ligature Press in Sydney:

I'm delighted to say that sales of the Ligature eBooks have far exceeded expectations, with some individual titles being downloaded a few hundred times in just a three-month period. So clearly a demand exists.

See 'Untapped: the Australian Literary Heritage Project Launch 24.11.20', *University of Melbourne* (Web Page, from 10:54-11:08 <<https://law.unimelb.edu.au/about/mls-video-gallery/public-lectures-and-events/untapped-the-australian-literary-heritage-project-launch-24.12.20>>).

²³⁷ Jonathan Bunkell and Sharon Dyas-Correia, 'E-Books vs. Print: Which is the Better Value?' (2009) 56(1-4) *The Serials Librarian* 215, 216.

books.²³⁸ And audiobooks present a new, increasingly popular means of consuming content which authors could exploit by recording their books for release in audio format.²³⁹

It's not just authors who benefit from new technologies: small and mid-sized publishers could take advantage of technologies like blockchain to create new revenue streams. For example, the Digital Media Research Centre at the Queensland University of Technology ('QUT') recently conducted an experiment with Samuel Maguire's memoir *No Point in Stopping* (Tiny Owl Workshop 2018) in which they used blockchain technology to (among other outputs) create an 'Education Edition' of the text *and* collections of draft documents and illustrations that contributed to the final book.²⁴⁰ The researchers sought to release this information for its potential benefit to authors, educators, and students:

The various digital bundles allow purchasers to see decisions and processes involved in the creation of a publishable product. These paratexts may therefore be of interest to creative writing educators and students, both at high school and tertiary level, up-and-coming authors who are looking to break into the market, writing workshop and development organisations such as Writers Centres and State Libraries, as well as readers and fans of the author who would like to see what went into creating the final book...While the creative outcome of this project may be of interest to any reader, it creates value that may be of particular interest to the publishing industry and professional writing education...Importantly, the project also demonstrates how publishers could use blockchain technologies to effectively monetise a range of existing intellectual property in new and innovative ways.²⁴¹

This project highlighted how new technologies like blockchain can give publishers innovative new exploitation opportunities and revenue streams. In this case, material that previously had 'little more than archival value or [were]...typically seen as part of the writing and development stages in traditional publishing models' could lead to greater income for

²³⁸ See Yuvaraj and Giblin 2021 (n 22), 385.

²³⁹ See e.g. James Tapper, 'Audio is publishing's new star as sales soar across genres', *The Guardian* (online, 10 June 2018) <<https://www.theguardian.com/uk-news/2018/jun/09/audiobooks-audible-publishing-sales-boost>>; Mark Sweney, 'New chapter? UK print book sales fall while audiobooks surge 43%', *The Guardian* (online, 26 June 2019) <<https://www.theguardian.com/books/2019/jun/26/new-chapter-uk-print-book-sales-fall-while-audiobooks-surge-43>>.

²⁴⁰ See Mark David Ryan, Phoebe Macrossan, Michael Adams, and Cameron Cliff, 'No point in stopping white paper: A publisher-centred blockchain model for the book publishing industry' (Institute of Future Environments, Digital Media Research Centre, Queensland University of Technology, White Paper, Brisbane 2020), 22-26 <https://eprints.qut.edu.au/199865/8/No_Point_In_Stopping_White_Paper_PDF_FINAL_18_May_2020.pdf> ('*No Point in Stopping* 2020')

²⁴¹ Ibid 27.

publishers.²⁴² As such, publishers *and* authors benefit from the ability to use new technologies when authors regain the rights in their works.

Beyond new formats and technologies, print republication can also result in new revenue opportunities for authors. Authors could consider directly licensing their works to libraries for broader public access.²⁴³ They could also seek republication by small or medium-sized publishers, who may not be able to compete with large publishers in terms of advances but would be able to breathe new life into previously out-of-print books. This could also benefit those publishers, who may be struggling to make ends meet, by giving them more opportunities to benefit from passive backlist revenue, or even to revitalise a book with great success.²⁴⁴ The ancillary effect of mid-list publishers bringing books back into print is that culture is preserved, which is consistent with copyright's incentive (access) goals.

Of course, no success is guaranteed just because an author regains and attempts to re-exploit their rights. However, there are more opportunities for reward than there would be if a book remained unexploited in a publisher's archive, unexploited after its initial print run. Given the low incomes documented in the various surveys outlined above, any new rewards are worth pursuing to enlarge the overall rewards available from the labour undertaken by these authors. For example, the 'average gross income' Australian authors earned in the 2013/14 financial year from their work as authors ranged from \$4,000 (for poetry) to \$16,300 (for education):²⁴⁵ in those proportions, even an additional \$500 in royalties per annum from the sales of republished books would represent a sizeable increase in reward for their creative labour. Moreover, these opportunities can also give the public access to works that might otherwise have been unavailable because they were no longer in print.

2. Unduly expansive copyright grants

Another issue affecting book authors which reversion can help address is unduly expansive copyright grants. One example is the scope of the rights in a literary work typically granted to the publisher. In the US and UK trade book industry, it is standard practice for the publisher to require authors to sign over all publishing and licensing rights to literary works for the entire term of copyright.²⁴⁶ In most countries in the world, this is at least the author's life plus 50

²⁴² Ibid 35.

²⁴³ Giblin 2018 (n 34), 399.

²⁴⁴ See e.g. Yuvaraj and Giblin 2021 (n 22), 384 (discussing Madeleine St John's *The Women In Black*).

²⁴⁵ Zwar et al Authors' Income 2015 (n 158), 2.

²⁴⁶ See below n 252.

years.²⁴⁷ In Australia, it is the author's life plus 70 years.²⁴⁸ This means publishers will hold on to the rights in literary works well after the authors have passed away. This is a strange quirk in the development of literary publishing contracts when we consider the short shelf life of books. According to the Australian Bureau of Statistics ('ABS'):

...literary works provide returns for between 1.4 and 5 years on average. Three quarters of original titles are retired after one year and by 2 years, 90 per cent of originals are out of print.²⁴⁹

The Australian Productivity Commission also analysed the 'top 5000 books sold in Australia in the 12 months up to 31 May 2016...[finding] that less than 2 per cent of the titles sold were published prior to the year 2000, and only 12 per cent were published more than 5 years ago.'²⁵⁰

In light of these figures, there is no need for publishers to hold the rights for such a long time.²⁵¹ Nevertheless, it is accepted as industry practice in standard publishing contract templates and guides in the UK and US.²⁵² Even a template contract from the organisation the Mystery Writers of America provides for exclusive publishing rights to be granted for the copyright term.²⁵³ Contracts with terms ending before the copyright term ends (e.g. five or seven years) do exist,²⁵⁴ but are much less common.

Publishers may argue that their investments in producing literary works grant them the right to hold rights for the copyright term on the off chance that the works become runaway successes much later. The enduring popularity of series like *Sherlock Holmes*, *The Lord of the Rings*, and *Harry Potter* is an alluring prospect for publishers, especially as most books will not be

²⁴⁷ Berne (n 65), art 7(1).

²⁴⁸ *Copyright Act 1968* (Cth), s 33(2).

²⁴⁹ Australian Government Productivity Commission, *Intellectual Property Arrangements, Inquiry Report* (Inquiry Report No. 78, 23 September 2016), 130 <<https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf>> ('Productivity Commission 2016'), referring to Australian Bureau of Statistics, *Australian System of National Accounts: Concepts, Sources and Methods, 2014* (Catalog No 5216.0, 30 January 2015), 374-376; see also Falgoust 2014 (n 42), 169: 'On the other hand, current practice in the publishing industry leaves the majority of books entirely out of print within 28 years of publication', citing James Boyle, *The public domain: enclosing the commons of the mind* (Yale University Press, 2008) 9.

²⁵⁰ Productivity Commission 2016 (n 249), 130.

²⁵¹ Giblin 2018 (n 34), 377-381.

²⁵² See e.g., Clark and Phillips 2013 (n 109), 121; LexisNexis, *Nimmer on Copyright* (online at 27 August 2021) 23 '§ 26.03 Book Publishing' Form 26-1 Trade Publishing Agreement, Book Publishing Agreement, cl 1.

²⁵³ 'MWA Model Novel Contract', *Mystery Writers of America* (Web Document), cl 1.1 <<https://mysterywriters.org/wp-content/uploads/2013/06/MWA-Model-Novel-Agreement-2014.pdf>>.

²⁵⁴ See e.g. 'Rights Reversion Success Story: Tracee Lydia Garner', *Authors Alliance* (Blog Post, 19 April 2017) <<https://www.authorsalliance.org/2017/04/19/rights-reversion-success-story-tracee-lydia-garner/>>; see also Impress Books, 'Author Contract – Template' (Web Document), cl 1.1 <<http://www.impress-books.co.uk/wp-content/uploads/2020/05/Author-Contract-Standard.pdf>>.

successful and publishers require the profits from successful books to offset the losses of unsuccessful ones.

However, author organisations disagree. They have consistently called for shorter terms in publishing contracts. For example, the Australian Society of Authors advocates for a 15 year term in its recommended template for publishing contracts.²⁵⁵ Similarly, the International Authors' Forum recommends that 'Contracts should not be forever', seeking that author contracts have 'defined time limits and clear termination triggers'.²⁵⁶ The Authors Guild (US) has argued that the "'standard" contract should last for a limited period of time from the date of publication...well before the 35 year termination window [in § 203 of the US Copyright Act]'.²⁵⁷ Model contracts from other US writers' organisations also support a shorter contract term, like ten years²⁵⁸ or six months following publication, after which publishers would hold rights nonexclusively (for 'short fiction published in a magazine').²⁵⁹ Furthermore, the UK Society of Authors is campaigning for 'Reasonable contract terms (including time limits) with regular reviews where appropriate to take into account new forms of exploitation.'²⁶⁰ Accordingly, publishers and author organisations tend to be at odds on the scope of rights necessary to be granted to publishers.²⁶¹

²⁵⁵ Australian Society of Authors, *Australian Book Contracts* (Keesing Press, 4th ed, 2009), 3.

²⁵⁶ 'Authors: Ten Principles for Fair Contracts for Authors', *International Authors Forum* (Web Document), Principle 1 <<https://www.internationalauthors.org/wp-content/uploads/2019/01/Authors-Ten-Principles.pdf>>.

²⁵⁷ 'A Publishing Contract Should Not Be Forever', *The Authors Guild* (Blog Post, 28 July 2015) <<https://www.authorsguild.org/industry-advocacy/a-publishing-contract-should-not-be-forever/>> ('**Authors Guild, A Publishing Contract Should Not Be Forever 2015**')

²⁵⁸ Philip Mattera, Maria Pallante (authors) and Christine Ammer (revision), 'Guide to Book Contracts', *National Writers Union* (Web Document, 1995, rev 2007), 12 <<https://nwu.org/wp-content/uploads/2015/07/Guide-to-Book-Contracts.pdf>>.

²⁵⁹ 'SFWA Model Magazine Contract, Version 3.2', *Science Fiction & Fantasy Writers of America* (Web Document, 2 March 2017), cl 3(a), (b), pg 1 <<https://www.sfwawriters.org/wp-content/uploads/2016/05/Model-Magazine-Contract-3.2.pdf>>.

²⁶⁰ 'C.R.E.A.T.O.R. – fair contract terms', *Society of Authors* (Web Page) <<https://www.societyofauthors.org/where-we-stand/c-r-e-a-t-o-r-campaign-for-fair-contracts>>.

²⁶¹ For a recent comparison between a real-world publisher contract and the Australian Society of Authors' model contract, see Cantatore Thesis 2012 (n 160), 97:

Significantly, the SC [publisher contract] makes provision for the publisher to be granted the sole right and license to publish and sell the author's work, (including in ebook form or any abridgement), and to sublicense it '**for the legal period of copyright and throughout the World**'. In contrast, the ASAC [Australian Society of Authors' model contract] suggests a clause that grants the publisher a **two year licence to publish and sell the work in the Territory**, which is specifically defined. The difference in approach is evident, especially as the legal period of copyright is usually until the death of the author plus seventy years. [emphasis in original]

However, Cantatore does not compare out-of-print or other reversion clauses in the two contracts in her thesis.

Unduly expansive copyright grants are problematic because authors are often considered to enter contracts heavily weighted towards publishers due to their unequal bargaining position.²⁶² Many authors may not be legally trained and may lack the financial capacity to engage lawyers or agents to help them with publisher negotiations or with advice on terms offered to them. Further, authors newly commencing their careers might feel more pressured to accept literary publishing contracts ‘as is’ without negotiating the terms offered to them, carrying the fear of missing out on a rare opportunity to be published.²⁶³ Lastly, publishers are often more well-equipped than literary authors in terms of knowledge, experience, and finances. This is further exacerbated by increasing consolidation in the book publishing industries in the Anglosphere, which shows no sign of abating with Penguin Random House’s recent attempted takeover of Simon & Schuster.²⁶⁴ Publishers can also prefer more established revenue streams like popular authors and backlists²⁶⁵ as opposed to new authors, which may further add to the pressure on authors to accept publishing contracts when they are offered. All this means that if a publisher’s standard form contract provides for an expansive copyright grant and limited means to regain rights in an out-of-print book, it can be difficult for most authors to negotiate substantive changes.

It should be noted that authors are not always helpless when negotiating with publishers. In the 2018 CREATE survey, nearly half the authors surveyed (46%, n=462) reported they had succeeded in altering the terms of a contract they had initially been offered.²⁶⁶ The 2007 predecessor to this survey found similar results in surveying ‘professional authors’ in the UK and authors in Germany: 43.1% (n=202) of respondents in the UK and 40.2% (n=82) in Germany reported successfully ‘changing the terms of a contract [they]...were offered in

²⁶² See e.g., Towse 2019 (n 144), 596: ‘Bargaining power is mostly strongly on the publisher’s side.’

²⁶³ See e.g., Rita Matulionyte, ‘Empowering Authors Via Fairer Copyright Contract Law’ (2019) 42(2) *UNSW Law Journal* 681, 684 fn 19.

²⁶⁴ See Maureen A O’Rourke, ‘A Brief History of Author-Publisher Relations and the Outlook for the 21st Century (2002-2003) 50 *Journal of the Copyright Society of the USA*, 425, 452-453; see generally Peter Curwen, ‘Competition in Book Publishing’ (1985) 6(1) *Economic Affairs* 23; Claire Squires, *Marketing Literature: The making of contemporary writing in Britain* (Palgrave Macmillan, 2007) 24, cited in Ann Steiner, ‘The Global Book: Micropublishing, Conglomerate Production, and Digital Market Structures’ (2018) 34 *Publishing Research Quarterly* 118, 119; Mark Sweney, ‘UK watchdog investigates Penguin owner’s Simon & Schuster takeover’, *The Guardian* (online, 22 March 2021) <<https://www.theguardian.com/books/2021/mar/22/uk-watchdog-investigates-penguin-owner-simon-schuster-takeover-random-house>>; Franklin Foer, ‘The Monster Publishing Merger Is About Amazon’, *The Atlantic* (online, 26 November 2020) <<https://www.theatlantic.com/ideas/archive/2020/11/penguin-random-house-simon-schuster-monster-about-amazon/617209/>>; Jeffrey Chan, ‘Canadian Publishing Industry Policies and the Big Five (Timeline)’ (2017) *The Structure of the Book Publishing Industry in Canada* 371 <<http://course-journals.lib.sfu.ca/index.php/pub371/article/view/54/55>>.

²⁶⁵ Thompson 2019 (n 18), 251.

²⁶⁶ CREATE 2018 Report (n 172), 31.

2005’.²⁶⁷ This suggests negotiation of contractual terms between authors and publishers *does* take place, at least in the UK (data from Germany was not available in the 2018 survey). However, this does not negate the unequal bargaining positions many authors can find themselves in, particularly in light of the finding that 59% of ‘primary occupation writer [respondents]’ (n=772) ‘never’ sought ‘legal/professional advice before signing a publishing/production contract’.²⁶⁸ Further, the content of the changes secured by authors responding to the CREATE and Bournemouth surveys is not reported, so it is not clear that those changes would have materially altered the dynamic between author and publisher in relation to the scope of the rights granted.

E. Conclusion: the rationale for reversion rights

Reversion rights can help address failures in existing approaches to copyright, specifically in relation to duration. Rightsholders do not require whole-term grants to incentivise their initial investments or investments in the continuing availability of works, but often take such grants anyway. In this context it’s vital for authors to be able to regain their rights when they are no longer being used so they can take advantage of new opportunities, like republication in different formats or by different, smaller publishers.

It is appropriate to note that reversion forms part of, not the whole, solution to these problems. *It should not be regarded as a ‘silver bullet’ or ‘one-size-fits-all’ solution.* Other initiatives in law and contractual practice may help address these failings in the trade book industry and beyond. For example, granting authors a right to seek a readjustment of their royalty arrangements following the unexpected success of their works might help address concerns about low incomes, particularly if the royalty rates initially negotiated were undesirable.²⁶⁹ Similarly, requiring publishers to provide regular, comprehensive account statements to authors²⁷⁰ would enable authors to more readily assess the performances of their works in the market, so they could decide whether to regain their rights or leave them with their publishers. On a contractual level, campaigns by author organisations for fairer contracts remain important, particularly in common law countries where copyright legislation does not regulate the content

²⁶⁷ Bournemouth 2007 Report (n 177), 176, Table 9.3. The authors define ‘professional authors’ as ‘those who allocate more than 50% of their total individual *income* from writing’: 8 [3.2].

²⁶⁸ CREATE 2018 Report (n 172), 44. However note these figures were much lower in the Bournemouth 2007 Report: 37.4% of UK ‘professional author’ respondents (n=210) reported sometimes ‘tak[ing] legal/professional advice before signing a publishing/production contract’, 28.3% (n=159) reported doing so ‘as a matter of course’, and only 34.3% (n=193) reported never doing so: Bournemouth 2007 Report (n 177), 175, Table 9.2.

²⁶⁹ See e.g. EU Directive (n 137), art 20.

²⁷⁰ See e.g. EU Directive (n 137), art 19.

of such contracts.²⁷¹ Authors may also benefit from campaigns for greater access to legal or other representation, and ongoing education on how to engage their publishers for the purposes of informal reversion even where they have no statutory or contractual reversion rights: publishers may simply be willing to revert rights to authors, which would open up opportunities for new exploitation. These and other initiatives should be investigated in further research but are beyond the scope of this thesis: thus, my advocacy for reversion rights is complementary, rather than in opposition to, these other potential solutions.

IV. EXISTING LEGAL PROTECTIONS

We have seen that reversion rights present a viable part of the solution to failures of existing approaches to copyright. Lawmakers around the world have already implemented, are in the process of implementing or are considering implementing reversion into their domestic copyright laws. However, to assess whether such reforms are necessary in Australia and other common law countries, we must first understand a) the legal frameworks regulating author-publisher relationships in these jurisdictions; and b) the terms of author-publisher contracts, and whether either of these adequately address the concerns raised above. After all, author-publisher contracts do not exist in a vacuum: they are regulated by the laws applicable to all contracts, which may provide recourse in light of extensive copyright terms. Similarly, contracts may themselves include shorter terms or effective reversion provisions. If the general law or contracts address the concerns above, there is little need for statutory reversion rights.

In this Part, I examine the copyright legislation of Australia, the UK, Canada, the US, and New Zealand to evaluate whether and how they provide reversion rights for authors. I also examine the general law restrictions on contracts in Australia as an example of the regulation of contracts typical in common law jurisdictions.

A. Australia, the UK, and New Zealand

In Australia, the UK, and New Zealand, there are no statutory provisions regulating the content of creator-intermediary contracts (including book publishing contracts). Copyright assignments in these jurisdictions must be in writing and signed, and may specify limits (e.g. duration, territory) but are not required to.²⁷² There is also no case law in these jurisdictions regulating the content of creator-intermediary contracts for the publication/distribution of

²⁷¹ Discussed below at Part IV(A).

²⁷² *Copyright Act 1968* (Cth), s 196(2), (3); *Copyright Act 1994* (NZ), ss 113(2), 114; *Copyright, Designs and Patents Act 1988* (UK), s 90(2), (3).

particular works.²⁷³ The recourse authors may seek for contracts that do not adequately protect their interests comes from beyond copyright law. I will focus on Australia's law but note that similar features to those highlighted below are reported by scholars examining the laws of New Zealand and the UK.²⁷⁴

In Australia, an author may bring legal action against a publisher, arguing there was some fault that vitiated the agreement: for example, that the publisher procured the execution of the contract by misrepresentation, that there was some fundamental mistake, or that consent was procured under duress, undue influence, or via unconscionable conduct.²⁷⁵ If the publisher appears to have breached a clause – for example, not reverting rights to an author once the book is out of print as defined in the contract – the author may also seek recourse for breach of contract.²⁷⁶

These avenues are not likely to assist most authors with problems in their contracts. There is no recourse available to authors who have entered into a disadvantageous agreement that does not meet the high standard of vitiated consent.²⁷⁷ Even if an author could successfully argue one or more vitiating factors affected their agreement, they may need to participate in costly and time-consuming litigation to prove it. In light of low and declining incomes this is unlikely to be attractive.²⁷⁸ Furthermore, authors may fear that in bringing legal action they risk being 'blacklisted' from future book deals with other publishers.²⁷⁹ As such, even with reasonable

²⁷³ However, note case law on whether contracts binding songwriters to publishers for a period of time are unjustified restraints of trade in the UK: see below n 280.

²⁷⁴ For analysis of UK law, see e.g. Dusollier 2018 (n 128), 442; Severine Dusollier, Caroline Ker, Maria Iglesias, Yolanda Smits, 'Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States' (European Union, Study PE 493.041, 2014), 78 <https://www.itm.nrw/wp-content/uploads/contractual_arrangements.pdf>; Martin Kretschmer, 'Copyright and Contract Law: Regulating Creator Contracts: The State of the Art and a Research Agenda' (2010) 18(1) *Journal of Intellectual Property Law* 141, 161-163. For an analysis of New Zealand law, 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, 574-576.

²⁷⁵ For a general discussion of vitiating factors, see Jeannie Paterson, Andrew Robertson, and Arlen Duke, *Principles of Contract Law* (Thomson Reuters, 5th ed, 2015), 607-844. For further information, see e.g., Australian Law Reform Commission, *Copyright and the Digital Economy* (Report No 122, 13 February 2014) [20.28] ('ALRC 2014').

²⁷⁶ See generally LexisNexis, *Halsbury's Laws of Australia* (online at 27 August 2021) 110 Contract, '(B) Breach of Contract – Failure to Perform'; See also generally Melvin Simensky, 'Redefining the Right and Obligations of Publishers and Authors' (1985) 5 *Loyola Entertainment Law Journal* 111.

²⁷⁷ See e.g., *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447. For more information on vitiated consent, see generally Peter MacDonald Eggers, *Vitiation of Contractual Consent* (Routledge, 1st ed, 2017).

²⁷⁸ See **Chapter II(III)(D)(1)**.

²⁷⁹ See e.g., Giuseppina D'Agostino, 'Freelance Authors for Free: Globalisation of Publishing, Convergence of Copyright Contracts and Divergence of Judicial Reasoning' in Fiona Macmillan (ed), *New Directions in Copyright Law* (Edward Elgar Publishing, 2005) 167; Towse 2018 (n 111), 473; Nahmias and Dusollier both make the same point in relation to legal proceedings seeking to enforce *ex post* mechanisms: Nahmias 2020 (n 120), 214, Dusollier 2018 (n 128), 447-448.

grounds under the common law it is difficult to see authors using these mechanisms to secure more effective contracts for themselves.²⁸⁰

The Australian Consumer Law ('ACL') may provide another avenue of protection for authors.²⁸¹ The ACL is designed to regulate 'consumer contracts' and 'small business contracts'.²⁸² As party to a contract for the 'supply of goods or services', an author could potentially argue certain terms of their contract are 'unfair' on the following grounds:²⁸³

- (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

If the contract was procured by misleading or unconscionable conduct, the author may also have grounds to set it aside.²⁸⁴ There are presently no judgments on whether the ACL would

²⁸⁰ There have been some UK cases where musicians have used the doctrines of restraint of trade and undue influence to successfully obtain orders rescinding their agreements: for more information, see e.g. Andrew Evans, 'The Doctrine of Restraint of Trade in Relation to Music Industry Agreements', *Music Law Updates* (Web Article, March 2003) <<http://www.musiclawupdates.com/wp-content/uploads/pdf-articles/Article-The Doctrine of Restraint of Trade in Relation to Music Industry Agreements.pdf>>; Matulionyte 2019 (n 263), 694; Kenner 2017 (n 274), 574-576. However, these decisions appeared to generally relate to exclusive agreements whereby songwriters could not produce works for anyone other than the other contracting party. As book publishing agreements tend to be focused on specific works, it is unlikely that the restraint of trade ratio would be binding, although elements of the decisions could be persuasive where they dealt with similar clauses in book publishing agreements.

²⁸¹ *Competition and Consumer Act 2010* (Cth), Schedule 2 ('ACL'). As I write from an Australian perspective, I have not attempted a comparative law analysis of the UK and NZ consumer protection regimes. Future researchers may wish to do so.

²⁸² ACL (n 281), ss 23(3) and (4):

A **consumer contract** is a contract for:

- (a) a supply of goods or services; or
- (b) a sale or grant of an interest in land;

to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

A contract is a **small business contract** if:

- (a) the contract is for a supply of goods or services, or a sale or grant of an interest in land; and
- (b) at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and
- (c) either of the following applies:
 - (i) the upfront price payable under the contract does not exceed \$300,000;
 - (ii) the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed \$1,000,000.

²⁸³ ACL (n 281), s 24(1)

²⁸⁴ ACL (n 281), ss 18, 21, 22.

apply to the conduct of a book publisher when negotiating a publishing agreement with an author. However, the Federal Court has previously applied s 21 (the rule against unconscionable conduct) against a company in relation to misleading representations it made in negotiating to advertise a sole trader's jumping castle business.²⁸⁵ This suggests that author-publisher negotiations could fall under the ACL's purview because authors can be considered 'sole traders'.²⁸⁶ However, as with the common law grounds above, access to justice issues (cost, fear of potential blacklisting) may hinder authors from bringing ACL actions against publishers in respect of their contracts. Moreover, there can still be disadvantageous agreements where no misleading or deceptive conduct was involved.

Thus far, we have learned that the relationship between authors and publishers in Australia, the UK, and New Zealand is not governed by copyright legislation, but by the terms of publishing contracts. In Australia, the common law and statutory consumer protection law can only come to the author's aid under limited circumstances.²⁸⁷ Even if the author has a legitimate basis at common law to bring legal action against a publisher, financial constraints and fears of reputational damage may preclude them taking such action.

B. The US and Canada

The situation in the US and Canada is similar to those in the countries surveyed above, with the following exceptions. In the US, authors can terminate copyright assignments and licences (hereafter referred to as 'grants') after a certain time, regardless of the terms of their contracts. For grants made before 1978, termination can take place either 56 years from copyright being

²⁸⁵ *ACCC v Multimedia International Services Pty Ltd* [2016] FCA 439 ('*Multimedia*').

²⁸⁶ The ACL (n 281) does not define 'sole trader', but the Court in *Multimedia* (n 285) appeared to adopt a common-sense understanding of the phrase, assuming the relevant party was a sole trader without further explanation: [15] According to the *Encyclopaedic Australian Legal Dictionary*, a sole trader is:

1. A person who trades alone, without the use of a company structure or partners, and who bears alone full responsibility for the activities of the business. A **sole trader** can trade under his or her own name or can register a business name. A **sole trader** unable to meet debts as they fall due is deemed to be insolvent. In such circumstances, the **sole trader** may alleviate the position by negotiating with creditors and entering a scheme of arrangement. Beyond such an arrangement, the **sole trader** may be declared bankrupt under Commonwealth bankruptcy law or may be declared bankrupt by a court by a petition from the creditors. 2. A person who is a member organisation of a securities exchange: (CTH) Corporations Act 2001 s 9.

Encyclopaedic Australian Legal Dictionary (online at 27 August 2021), 'sole trader' (defs 1, 2).

²⁸⁷ See further Dusollier 2018 (n 128), 443, who notes that 'because common contractual rules are not designed to specifically protect authors, their use is infrequent and may be inconsistent with an author-protective approach, or even hinder specific copyright protections. Given their breadth of applicability, general principles of contract law sometimes fail to take into consideration the possibly weak bargaining positions of author[s].'

‘secured’ or 1 January 1978.²⁸⁸ For grants made after 1978, termination can take place 35 years after the grant was made, or potentially forty years if ‘the grant covers the right of publication of the work’.²⁸⁹ Congress introduced termination rights out of concern that creators were making poor initial assignments early on in their careers without the chance to rectify those grants later in their careers. An example used in the law reform process was that of the creators of the comic book character Superman, who sold their rights for \$130 in 1938.²⁹⁰ Because creators have to transfer rights in their works when the value is unknown, Congress intended to improve creator remuneration by allowing authors to regain their rights and negotiate better deals when the value of their works was better known (e.g. after 35 years).²⁹¹

Despite their author-protective intentions, the termination rights have been fiercely criticised.²⁹² Common issues in the literature include the ease with which parties can contract around them,²⁹³ their lack of enforceability to contracts signed in foreign jurisdictions,²⁹⁴ and the difficulties of meeting all the statutory formalities necessary to successfully execute a termination.²⁹⁵ Law and economics scholars have also criticised the termination system for having negligible or negative impacts on creative markets.²⁹⁶ Modelling by economists Michael Karas and Roland Kirstein suggests authors exercising the termination right may receive a lower initial payment from their works relative to non-terminating authors,²⁹⁷

²⁸⁸ *Copyright Act of 1976*, 17 USC § 304(c)(1), (3); see also an extension to 75 years for works that had not been terminated by 1998, when the copyright term was extended by 20 years: § 304(d)(2).

²⁸⁹ *Copyright Act of 1976*, 17 USC § 203(a)(3).

²⁹⁰ See e.g. Sean McGilvray, ‘Judicial Kryptonite: Superman and the Consideration of Moral Rights in American Copyright’ (2010) 32(2) *Hastings Communications and Entertainment Law Journal* 319, 322; Barbara Goldberg, ‘Check that bought Superman rights for \$130 sells for \$160,000’, *Reuters* (online, 17 April 2012) <<https://www.reuters.com/article/entertainment-us-usa-superman-idUSBRE83G02F20120417>>.

²⁹¹ See e.g., *Mills Music v Snyder* 469 US 153 (1985), 172 – 173, cited in Lydia Pallas Loren, ‘Renegotiating the Copyright Deal in the Shadow of the “Inalienable” Right to Terminate’ (2010) 62 *Florida Law Review* 1329, 1345.

²⁹² See generally Dylan Gilbert, Meredith Rose, and Alisa Valentin, ‘Making Sense of the Termination Right: How the System Fails Artists and How To Fix It’, (Public Knowledge, December 2019) <<https://www.publicknowledge.org/wp-content/uploads/2019/12/Making-Sense-of-the-Termination-Right-1.pdf>>.

²⁹³ See **Chapter VIII(II)(B)(2)**.

²⁹⁴ See e.g., Graeme W Austin, ‘Authors Human Rights and Copyright Policy’ (2017) 40 *Columbia Journal of Law & The Arts* 405, 427-429.

²⁹⁵ See Joshua Yuvaraj, Rebecca Giblin, Daniel Russo-Batterham, and Genevieve Grant, ‘U.S. Copyright Termination Notices 1977-2020: Introducing New Datasets’ (2021, forthcoming in the *Journal of Empirical Legal Studies*), 35.

²⁹⁶ See e.g., generally Rub 2013 (n 143); Darling 2015 (n 143); Hickey 2017 (n 35); Amy Gilbert, ‘The Time Has Come: A Proposed Revision to 17 U.S.C. § 203’ (2016) 66(3) *Case Western Reserve Law Review* 807; see also Towse 2018 (n 111), 483-484 for an overview of studies by Karas and Kirstein and Gilbert.

²⁹⁷ Michael Karas and Roland Kirstein, ‘Efficient contracting under the U.S. copyright termination law’ (2018) 54(C) *International Review of Law and Economics* 39, 43 cf Giblin 2018 (n 34), 396 – 397. For further modelling on the termination right, see Michael Karas, ‘The U.S. Copyright Termination Law, Asymmetric Information, and Legal Uncertainty’ (2019) 16(1/2) *Review of Economic Research on Copyright Issues* 1. Versions of the papers

although there is no real-world evidence corroborating this modelling. Despite these criticisms, there is limited empirical research into the effects of termination on the availability of works or author incomes.²⁹⁸ I discuss the US termination rights in more detail in **Chapter VI**.

In Canada, copyright grants are not limited by the *Copyright Act* except for a provision limiting assignments to 25 years after the death of the author: after this time, rights will revert to the author's estate.²⁹⁹ Like the US provision, this provision operates irrespective of agreements to the contrary between creators and intermediaries.³⁰⁰ This provision is a holdover from the British Imperial Copyright Act of 1911.³⁰¹ A review of the academic literature and jurisprudence suggests that the British Parliament's intention for this provision was to provide for authors and their heirs particularly in cases where authors had made poor initial assignments of copyright.³⁰² However, lawmakers in the UK, Australia, and New Zealand felt it was of little value and contravened the Berne Convention, leading them to repeal it in the mid-20th century.³⁰³ Canada is one of the only countries in the world that that still retains this law.³⁰⁴

In Australia, the law still applies to assignments made before 1969, and authors are not permitted to assign the reversionary interest during their lifetime.³⁰⁵ This is different in the UK and New Zealand. In those countries, the reversion right still applies to copyright grants made before 1957 and 1963 respectively.³⁰⁶ However, authors are permitted to assign the reversionary interest for assignments (the period of copyright which would automatically revert to authors' estates) during their lifetimes.³⁰⁷ Only in the absence of such an assignment would rights revert to the author's estate.³⁰⁸ I examine this provision and the literature concerning it in more detail in **Chapter IV**.

by Karas and Kirstein and Karas are included in Michael Karas, 'Copyright reversion in creative industries' (PhD thesis, Otto-von-Guericke-Universität Magdeburg, Fakultät für Wirtschaftswissenschaft, 2019).

²⁹⁸ See literature review in Yuvaraj et al 2021 (n 295), 4-7 (included in this thesis as part of **Chapter VI**).

²⁹⁹ *Copyright Act*, RSC 1985, c C-42, s 13(4), 14(1).

³⁰⁰ *Ibid* s 14(1).

³⁰¹ *Copyright Act 1911* (UK), s 5(2).

³⁰² See below 66.

³⁰³ Yuvaraj and Giblin 2019 (n 99), 234-237.

³⁰⁴ *Copyright Act*, RSC 1985, c C-42, s 14(1). See also below 89, discussing the law of Eswatini.

³⁰⁵ *Copyright Act 1968* (Cth), s 239(4)(c): 'any agreement entered into by the author as to the disposition of that reversionary interest is of no force or effect'.

³⁰⁶ *Copyright, Designs, and Patents Act 1988* (UK), Schedule 1, s 27 (end date: 30 May 1957); *Copyright Act 1994* (NZ), Schedule 1, Part 1, s 38 (between 1 April 1914 and 30 March 1963).

³⁰⁷ *Copyright, Designs, and Patents Act 1988* (UK), Schedule 1, s 27(2); *Copyright Act 1994* (NZ), Schedule 1, Part 1, s 38(1)(3). See also *Novello & Company Limited v Keith Prowse Music Publishing Company Ltd* [2004] EWHC 766 (Ch), which confirmed a 1973 assignment of the reversionary interest was valid.

³⁰⁸ *Copyright, Designs, and Patents Act 1988* (UK), Schedule 1, s 27(2); *Copyright Act 1994* (NZ), Schedule 1, Part 1, s 38(1)(2).

Beyond these limited time-based reversion rights, copyright legislation in Canada and the US does not regulate the substance of author-publisher contracts. Accordingly, authors must rely on their publishing contracts for rights against their publishers.³⁰⁹

C. Conclusion: general law restrictions

The analysis above shows contracts are the main method of regulating author-publisher agreements in the five common law countries which are the focus of this thesis. In Australia, the UK, and New Zealand, there are no author-protective provisions for present-day assignments. There are also statutory reversion schemes in effect in Canada and the US designed to address copyright's reward failures. I will evaluate these rights in more detail in **Chapter IV** and **VI**, especially in light of the limited research into their impacts on rewards and availability.

The general law may offer some relief to authors in the absence of statutory reversion mechanisms. Using the law of Australia as an example, I found potential protections in the law of contract and statutory consumer protection law. However, these may not necessarily help authors seeking to rescind or terminate contracts due to high thresholds for vitiating conduct and a lack of precedent. Further research should be conducted into the general legal frameworks of other common law countries to establish whether the situation is more author-friendly there, although the continued advocacy for fairer author contracts in these countries³¹⁰ suggests that such measures are unlikely to help address copyright's failures.

V. CONCLUSION

Copyright (in the Anglo-American tradition at least) is justified on incentive and rewards grounds. We grant copyright to authors because we want them to produce works for society's benefit. We limit these grants because we want these works, at some point, to pass into the public domain for broader society to benefit from them, and for future creators to build on them for new creative expressions. We also grant copyright to authors because we want to reward their creative labour. We acknowledge authors should profit from their works by virtue of having created them. We also acknowledge the inherent link between an author's personality

³⁰⁹ As with the UK and New Zealand, further comparative research is necessary into whether other parts of the law in these jurisdictions (e.g. consumer protection law) may offer recourse to authors.

³¹⁰ See e.g. 'C.R.E.A.T.O.R. – fair contract terms', *Society of Authors* (Web Page) <<https://www.societyofauthors.org/where-we-stand/c-r-e-a-t-o-r-campaign-for-fair-contracts>>; 'Fair Contracts', *Australian Society of Authors* (Web Page) <<https://www.asauthors.org/campaigns/fair-contracts>>.

and their work; this means that we grant authors certain rights they cannot alienate, such as the right to be attributed as the author.

The practice of granting lengthy, ‘lump sum’ awards of copyright, though enshrined in international copyright treaties and domestic copyright laws, can actually get in the way of achieving these goals. The literature suggests authors are not incentivised to create more works just because they have the prospect of earnings in the distant future under lengthy copyright terms (especially if those terms last well after those authors pass away). Few works will still be successful at that point: most commercial value in works is extracted just a few years after creation, especially in the case of trade books in Australia and other common law countries.

Further, there is no evidence such above-incentive terms persuade intermediaries to increase their investments in making works available for social benefit, or to invest in new works in which they otherwise would not have invested. Nor are such lengthy terms justified on the grounds of rewarding authors for their creative labour. Creative industries often involve contracts whereby authors are divested of all copyright for the whole term (again, the trade book industry is a prime example of this). This diverts the majority of rewards to intermediaries, while authors and author advocates continue to raise concerns about low incomes from creative labour.

Rights reversion can help address these problems. It enables authors and publishers to take advantage of new exploitation technologies and. This can create potential new revenue streams and making more works available to the public.

When it comes to reversion rights in copyright law, no such provisions exist in Australia, the UK, or New Zealand (beyond various legacy provisions applying to assignments made over fifty years ago). Further, neither the common law of Australia (drawn from the Commonwealth) nor its statutory consumer protection law provides adequate protection for authors in the absence of reversion rights. Thus, we need to understand whether contracts adequately provide such protections for authors to determine whether statutory reversion rights are necessary. I address this question in **Chapter III**.

Meanwhile, Canada and the United States both have reversion rights, and Canada is currently considering a new reversion right after 25 years (partly modelled on the US system). If contracts are not enough, we need to understand how to construct reversion rights that achieve copyright’s incentive and reward goals by reference to these and other systems around the world. Such an assessment is also beneficial even if contracts were adequate because it can

show whether the reversion rights have a positive, negative, or negligible impact on creative markets in those countries (and accordingly, whether they should be retained, amended, or removed to better achieve copyright's incentive and reward goals in Australia and elsewhere). I explore the US, Canadian, and other reversion models in more depth in **Chapters IV-VI**.

III. REVERSION RIGHTS IN BOOK PUBLISHING CONTRACTS

I. INTRODUCTION

In **Chapters I** and **II** I drew attention to the potential for reversion rights to address copyright's failures to reward authors and make culture more available ongoing. I also identified statutory reversion right as existing in some countries, which I will examine in more detail in **Chapters IV-VI**. However, such rights are not present in Australia, New Zealand, or the UK.

Accordingly, authors mostly rely on the terms of their publishing contracts to regulate their relationships with publishers. Examining the terms of these contracts is necessary to establish whether there is a case for new statutory reversion rights. If contracts provide such rights for authors, then statutory intervention would be unnecessary.

In this Chapter, I examine existing evidence on the presence and use of reversion clauses in book publishing contracts. I then present new empirical evidence on the terms offered to authors in Australia.

II. AUTHOR SURVEYS ON THE USE OF REVERSION CLAUSES

There are difficulties in obtaining data on what is in publishing contracts because they are private documents, unlike statutes which tend to be more available to the public. One way of identifying terms within publishing contracts is by surveying authors and publishers. Survey evidence suggests the following about reversion rights in publishing contracts.³¹¹ **First**, reversion rights are not always present in publishing contracts. In their 2018 survey of UK authors, Kretschmer et al found just over half (52.4%) of respondents (n=616) had a reversion clause in their contracts at some point.³¹² This is consistent with a 2015 study from Queen Mary

³¹¹ The sampling methods and limitations of most of these studies have been canvassed in **Chapter II(III)(D)(1)**. The exceptions are the 2016 study below at 50 which has been described in more detail in **Chapter IV(III)(A)(2)**, and the 2015 Queen Mary University study (Queen Mary 2015 Report, n 177). The latter comprised nearly 1,500 respondents who finished the survey (n=1,477): Queen Mary 2015 Report (n 177), 5. The researchers consider 'The results...[to be] a fair reflection of UK authors in 2014' (5), although their methodology does not elaborate on how they ensured the representativeness of the data (see 6). Readers can peruse the report for further results: as the 2018 CREATe report was the latest in this series of surveys on author incomes and experiences, I focused on that in **Chapter II** and only extract in **Chapter III** results relevant to the experiences of authors and reversion clauses in book publishing contracts.

³¹² CREATe 2018 Report (n 172), 39.

University of London which found 57% of the respondents' contracts (n=869) appeared to have reversion clauses.³¹³

A 2018 survey of writers in New Zealand found 62% of writers had a reversion clause in at least one of their publishing contracts (an increase from the 53% figure in 2016).³¹⁴ The question defined a reversion clause as a clause 'which gave... [the author] their publishing rights or copyright back to them if their work was out of print or if a defined period of time had elapsed.'³¹⁵ The report writers found that the authors 'most likely to have a reversion clause in their contracts' were young adult writers (81%) and children's writers (79%).³¹⁶ The least likely writers to have reversion clauses were fiction writers (37%).³¹⁷ Meanwhile, a 2016 report on the effects of legal frameworks on author remuneration in European Union Member States identified several issues with publishing contracts reported by author associations, including a 'lack [of] termination provisions'³¹⁸ or 'weak reversion clauses'.³¹⁹ The most recent author surveys in Australia, the US, and Canada do not report on the presence or use of reversion rights in publishing contracts,³²⁰ although the Authors Guild (US) is currently seeking responses from authors on their experience with reversion.³²¹

³¹³ Queen Mary 2015 Report (n 177), 16. Note the report is ambiguous as to whether the 57% figure refers to the number of respondents or the number of contracts.

³¹⁴ Horizon Research 2018 (n 223), 47.

³¹⁵ Ibid 47.

³¹⁶ Ibid 47, 7.

³¹⁷ Ibid 47.

³¹⁸ 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' (Final Report, A study prepared for the European Commission DG Communications Networks, Content & Technology, 2016), 115 <<https://op.europa.eu/en/publication-detail/-/publication/81acd376-d896-11e6-ad7c-01aa75ed71a1#>> ('Guibault and Salamanca 2016').

³¹⁹ Ibid 113.

³²⁰ See generally 'About', Macquarie University Department of Economics <http://www.businessandeconomics.mq.edu.au/our_departments/Economics/econ_research/reach_network/book_project/about>; Australian Society of Authors, *ASA Survey Results – Author Earnings in Australia*, 18 November 2020 (Webpage) <<https://www.asauthors.org/news/asa-survey-results-author-earnings-in-australia>>; Australian Society of Authors, 'ASA Survey Results – Advances & Royalties', *News* (Blog Post, 1 December 2020) <<https://www.asauthors.org/news/asa-survey-results-advances-royalties>>; Authors Guild Six Takeaways 2019; *Endangering Creativity 2015*; Burgess and De Rosa 2017. However see the 2018 survey of publishers in Canada: The Writers' Union of Canada, 'Publishers in 2018: The Good, the Bad, and the Disappointing' (2018 Publishers' Report Card, Winter 2019), 23 <<https://www.writersunion.ca/sites/all/files/2018-publishers-report-card.pdf>>.

Of those [publishers] surveyed, only 19 percent indicated that rights revert to them for non-payment, 55 percent indicated rights revert when the work is out of print in Canada, 19 percent indicated rights revert from insufficient sales, and 6 percent indicated rights revert if the publisher fails to include the title in the publisher's marketing materials.

³²¹ The Authors Guild, *The Authors Guild Seeks Your Input on Rights Reversion* (Web Page) <<https://www.authorsguild.org/member-services/legal-services/the-authors-guild-seeks-your-input-on-rights-reversion/>>.

Second, the exercise of contractual reversion rights may lead to additional income for authors. In the 2018 CREATE survey, Kretschmer et al found 63% of the respondents (n=216) reported additional income from a ‘new publisher or through self-publishing’ after rights in the work reverted (70% in the 2014 survey).³²² The authors offer the following explanation:

These tables suggest a decline in the number of times reversion clauses have been exercised and also in the money earned as a result of reversion. This trend warrants further research. Since there is no statutory reversion in the UK, a possible explanation might be that it is easier and cheaper for publishers to keep works on the e-market.³²³

However, they also suggest a potential link between authors who are more ‘financially successful’ the exercise of reversion clauses, although they were not able to identify whether this link is due to their financial success or use of the clause itself.³²⁴

The 2015 Queen Mary University study also found ‘38% of writers have exercised their right to reversion’ (n=329), and 70% of writers who exercised reversion clauses proceeded to generate additional revenue from that work.³²⁵ The Authors Alliance also provides accounts of authors who have successfully reverted their rights, although these accounts depend on authors self-reporting and are not produced by established survey methods (nor are they intended to be).³²⁶ Last, the 2016 EU report found that despite the deficiencies in their contracts (‘weak’ or absent termination provisions), an inability to regain rights because ‘there was no legal possibility to terminate the contract or to opt-out’ was the least common problem reported by respondent authors.³²⁷ The researchers highlight the distinctiveness of this finding because while ‘these issues are not identified by...respondents as the main ones...[they] are often mentioned by representative bodies and organisations as some of the most important ones.’³²⁸ This would suggest that the surveyed authors either had no problem regaining their rights, or did not attempt to do so at all.

III. BACKGROUND TO NEW RESEARCH

These data are important because they help us understand reversion clauses can be used to secure additional rewards for authors. However, research into the actual contracts and the

³²² CREATE 2018 Report (n 172), 40.

³²³ CREATE 2018 Report (n 172), 40.

³²⁴ CREATE 2018 Report (n 172), 41.

³²⁵ Queen Mary 2015 Report (n 177), 16.

³²⁶ ‘Rights Reversion Success Stories’, *Authors Alliance* (Web Page) <<https://www.authorsalliance.org/category/resources/rights-reversions/rr-successes/>>.

³²⁷ Guibault and Salamanca 2016 (n 318), 224.

³²⁸ Ibid 224 fn 496.

reversion clauses offered to authors is also necessary. Such research is vital because how a reversion clause is constructed determines its effectiveness to return rights to authors once publishers are no longer willing or able to effectively exploit them. Author organisations have consistently advocated for more effective reversion clauses, particularly in the digital age.³²⁹ They are particularly concerned by clauses that allow reversion only when works are ‘not available in any edition’, since they can allow publishers to simply offer the work online, without making any serious attempt to sell it, and thereby hold on to the rights indefinitely.³³⁰ Despite the importance of the issue to authors rights groups throughout the English-language world, the evidence on trade book publishing contracts in the digital age has long been based on survey responses and anecdotal evidence.³³¹ Thus, while ‘best practice’ is to include reversion clauses,³³² there is a gap in the literature as to whether they are actually included and if so, how they are structured.

To fill this gap, I present an article co-authored with my supervisor, Associate Professor Rebecca Giblin, and published in the *Melbourne University Law Review*.³³³ An 18-month-long project, this study summarises existing empirical evidence on reversion rights in publishing contracts, surveys best-practice publishing contract guides from the US and UK, and documents the terms offered to book authors based on contracts from 1960 to 2014 from the archive of the Australian Society of Authors (‘ASA’). The archive study uses content analysis to produce quantitative data from the terms of the analysed contracts.³³⁴ Our work also included

³²⁹ ‘Ten Principles for Fair Contracts for Authors’, *International Authors Forum* (Blog Post, 10 August 2016) <<https://www.internationalauthors.org/news/fair-contracts/10-principles-fair-contracts-authors/>>; ‘C.R.E.A.T.O.R. – fair contract terms’, *Society of Authors* (Web Page) <<https://www.societyofauthors.org/where-we-stand/c-r-e-a-t-o-r-campaign-for-fair-contracts>>; ‘Fair Contracts’, *Australian Society of Authors* (Web Page) <<https://www.asauthors.org/campaigns/fair-contracts>>; ‘Fair Publishing Contracts’, *The Authors Guild* (Web Page) <<https://www.authorsguild.org/where-we-stand/fair-contracts/>>.

³³⁰ See Authors Guild, *A Publishing Contract Should Not Be Forever* 2015 (n 257).

³³¹ I have not located research systematically examining multiple trade publishing contracts published beyond 1991: Yuvaraj and Giblin 2021 (n 22), 393-395. There have been some digital-age reviews of publishing contracts in the educational context: while these have similarities to trade publishing contracts, they were not the focus of my research due to the differences between the academic and trade publishing markets: 394 fn 70. I also note Cantatore conducted a comparison between a present-day publishing contract and the ASA’s model contract at the time as part of her doctoral research, but note this does not examine multiple contracts, nor did it involve a comparison of the out-of-print clauses between the contracts: see Cantatore Thesis 2012 (n 160), 97-102. As such, it was not included in the literature review of author-publisher contract studies.

³³² See e.g. Melody Herr, ‘The Rights Provisions of a Book Publishing Contract’ (2018) 6(eP2273) *Journal of Librarianship and Scholarly Communication* 1, 8; Caroline Walsh, ‘Publishing Agreements’, *Writers & Artists* (Blog Post, 27 July 2012, edited 5 October 2020) <<https://www.writersandartists.co.uk/advice/publishing-agreements>>.

³³³ Joshua Yuvaraj and Rebecca Giblin, ‘Are Contracts Enough? An Empirical Study of Author Rights in Australian Publishing Agreements’ (2021) 44(1) *Melbourne University Law Review* 380.

³³⁴ Content analysis is a social science method which makes ‘replicable and valid inferences from texts (or other meaningful matter) to the contents of their use.’: Klaus Krippendorff, *Content Analysis: An Introduction to Its Methodology* (SAGE, 3rd ed, 2013), 24. Drisko and Maschi further define it as ‘a family of research techniques

some semi-structured interviews with literary agents and author association staff members to enable us to better understand the trends identified in the data.³³⁵ This is the first in-depth study of reversion clauses in book publishing contracts across such a long time span.³³⁶ As such, it provides new insights into how publishing contracts (particularly their reversion clauses) have evolved from the pre-digital age to the digital age.

This work meets Monash University's threshold for inclusion in a thesis as a published work. I conducted the literature review of publishing contract guides and existing empirical literature on publishing contracts. Dr Giblin supplemented this with further research into new exploitation opportunities for authors. We co-wrote the literature review and worked on data collection and initial analysis together. I conducted further data collection and prepared instructions which I used to perform final coding of the data. I also oversaw the process of testing the reliability of the coding instructions with the help of an independent third-party coder. I then generated all tables and charts reporting our results. Dr Giblin provided oversight and we co-wrote the results and discussion sections of the article.³³⁷

for making systematic, credible, or valid and replicable inferences from texts and other forms of communication.'; James Drisko and Tina Maschi, *Content Analysis* (Oxford University Press, 2015), 7.

See Yuvaraj and Giblin 2021 (n 22), 395-397 for a description of our sampling method and limitations.

³³⁵ Monash University Human Research Ethics Committee Project 15009.

³³⁶ Although note Bently and Ginsburg conducted a review of practice around publishing contracts following the passing of the Statute of Anne, including how they responded to the Statute of Anne's two-term reversion system: see Bently and Ginsburg 2010 (n 23), 1491-1508.

³³⁷ Versions of the paper have been presented at various conferences in Australia, Europe, and the United States. These include the Australasian IP Academics Conference (2018), the Intellectual Property Research Institute of Australia (IPRIA) Mini-Conference in 2020, at the University of Michigan Law School (Giblin only), the Society of Authors (London, Giblin only) in 2019, and the Creative Commons Virtual Global Summit in 2020. For short-form versions of the research involving preliminary and final results, see e.g. Rebecca Giblin and Joshua Yuvaraj, 'Five ways to boost Australian writers' earnings', *The Conversation* (online, 1 February 2019, updated 4 February 2019) <<https://theconversation.com/five-ways-to-boost-australian-writers-earnings-110694>>; Joshua Yuvaraj and Rebecca Giblin, 'Are contracts enough?', *Kluwer Copyright Blog* (Blog Post, 3 March 2020) <<http://copyrightblog.kluweriplaw.com/2020/03/03/are-contracts-enough/>>; Joshua Yuvaraj and Rebecca Giblin, 'Reversion around the world', *The Author* (Spring 2020). We have also written various posts about our research on the Author's Interest project blog, which we invite any interested parties to read: *The Author's Interest* (Web Page) <<http://www.authorsinterest.org>>.

**IV. JOSHUA YUVARAJ AND REBECCA GIBLIN, ‘ARE CONTRACTS
ENOUGH? AN EMPIRICAL STUDY OF AUTHOR RIGHTS IN
AUSTRALIAN PUBLISHING AGREEMENTS’ (2021) 44(1) *MELBOURNE
UNIVERSITY LAW REVIEW* 380**

ARE CONTRACTS ENOUGH? AN EMPIRICAL STUDY OF AUTHOR RIGHTS IN AUSTRALIAN PUBLISHING AGREEMENTS

JOSHUA YUVARAJ^{*} AND REBECCA
GIBLIN[†]

A majority of the world's nations grant authors statutory reversion rights: entitlements to reclaim their copyrights in certain circumstances, such as their works becoming unavailable for purchase. In Australia (as in the United Kingdom) we have no such universal protections, leaving creator rights to be governed entirely by their contracts with investors. But is this enough? We investigate that question in the book industry context via an exploratory study of publishing contracts sourced from the archive of the Australian Society of Authors. We identify serious deficiencies in the agreements generally as well as the specific provisions for returning rights to authors. Many contracts were inconsistent or otherwise poorly drafted, key terms were commonly missing altogether, and we demonstrate that critical terms evolved very slowly in response to changed industry

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realities. In response to this new evidence we propose that consideration be given to introducing baseline minimum protections with the aim of improving author incomes, investment opportunities for publishers and access for the public.

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I INTRODUCTION: REVERSION’S POTENTIAL

We expect copyright to fulfil a variety of aims. We want it to incentivise investments in the initial creation and production of works, and then in their ongoing availability, so society can benefit from widespread access to knowledge and culture. We also intend copyright to recognise and reward authors for their creative contributions.¹ Yet copyright laws worldwide are under sustained attack for doing a poor job of achieving these aims. Many creators are struggling financially, threatening their ability to continue their creative work. Writers’ incomes in particular are in sustained sharp decline throughout the English language world, and it is growing harder to make a

¹ See Rebecca Giblin and Kimberlee Weatherall, ‘If We Redesigned Copyright from Scratch, What Might It Look like?’ in Rebecca Giblin and Kimberlee Weatherall (eds), *What if We Could Reimagine Copyright?* (Australian National University Press, 2017) 1, 16–18.

living from writing.² Many publishers are also struggling to continue in the market, competing with a handful of behemoth rivals that enjoy vastly different economies of scale.³ The economics of independent print publishing in Australia are particularly unforgiving: a 'bestseller' might shift perhaps 7,000 copies, making it hard even to keep the lights on.⁴ If such publishers were to disappear, it would further reduce competition, thereby making it still more difficult for authors to sustain their craft — and reducing the diversity of voices that get to be heard. At the same time, copyright makes certain works, particularly older works, difficult to access. Long copyrights lead to 'orphaning', whereby the owners of works cannot be found to seek permission to use them. Other times rightsholders are ascertainable but uninterested in licensing their catalogues, since transaction costs would outweigh likely revenues. An increasing corpus of evidence also shows that older books can be far less available than equivalents in the public domain, suggesting that copyright sometimes stands in the way of new investments in making works available.⁵

² See, eg, David Throsby, Jan Zwar and Callum Morgan, 'Australian Book Readers: Survey Method and Results' (Research Paper No 1/2017, Department of Economics, Macquarie University, March 2017) archived at <<https://perma.cc/X2RT-9RRJ>>; Martin Kretschmer et al, *UK Authors' Earnings and Contracts 2018: A Survey of 50,000 Writers* (Report, 2019) archived at <<https://perma.cc/9379-6L7P>>; 'Six Takeaways from the Authors Guild 2018 Author Income Survey', *The Authors Guild* (Web Page, 5 January 2019) archived at <<https://perma.cc/NRS4-B9UZ>>; Horizon Research, *Writers' Earnings in New Zealand* (Report, November 2018) archived at <<https://perma.cc/7KD8-EK5N>>; Writers' Union of Canada, *Diminishing Returns: Creative Culture at Risk* (Income Survey, 2018) archived at <<https://perma.cc/9L3Y-T7MT>>.

³ See, eg, Shirley Biagi, *Media/Impact: An Introduction to Mass Media* (Cengage Learning, 12th ed, 2017) 40, noting that '[l]arge publishers are continuing to consolidate, and the number of small publishers is decreasing', and 'because [small publishers] have limited distribution capabilities and don't have the money to invest in e-books, most small presses today are struggling to survive'.

⁴ See @MirandaLuby (Miranda Luby) (Twitter, 13 September 2018, 6:23pm AEST) <<https://twitter.com/MirandaLuby/status/1040410631986339840>>, archived at <<https://perma.cc/JD7P-AP2V>>.

⁵ See, eg, Paul J Heald, 'Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Bestsellers' (2008) 92(4) *Minnesota Law Review* 1031; Paul J Heald, 'How Copyright Keeps Works Disappeared' (2014) 11(4) *Journal of Empirical Legal Studies* 829, 839–44; Christopher Buccafusco and Paul J Heald, 'Do Bad Things Happen when Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension' (2013) 28(1) *Berkeley Technology Law Journal* 1, 13; Jacob Flynn, Rebecca Giblin and François Petitjean, 'What Happens when Books Enter the Public Domain?: Testing Copyright's Underuse Hypothesis across Australia, New Zealand, the United States and Canada' (2019) 42(4) *University of New South Wales Law Journal* 1215. Cf B Zorina Khan, 'Does Copyright Piracy Pay?: The Effects of US International Copyright Laws on the Market for Books, 1790–1920' (Working Paper No 10271, National Bureau of Economic Research, January 2004).

Rights reversion — returning rights in copyrighted works to their creators — is a promising avenue for addressing each of these problems. By freeing up rights to new exploitations, reversion could help recover currently lost culture, give authors new opportunities to financially benefit from their works, and facilitate new investment opportunities.⁶ Whilst reversion has interesting potential for many creators, in this article we focus specifically on its potential for authors publishing books.

Madeleine St John's *The Women in Black* usefully illustrates reversion's promise. First published in 1993, it quickly went out of print despite another of St John's novels being shortlisted for the 1997 Booker Prize. Australian independent publisher Text Publishing rediscovered the title, acquired the rights, and republished it as part of its *Text Classics* series in 2012, 19 years after its original release.⁷ Since then it has sold over 100,000 copies in physical and digital forms, been developed into a musical and a feature-length film, and translation rights have been sold in Germany, Italy, France and Israel.⁸ This book's potential was realised, new creative work was made possible and substantial economic value was unlocked through the rights becoming available for new investment. Of course, not all out of print books will find a new publisher eager to invest. Yet entitlements to reclaim rights to out of print titles create possibilities for new investments, new income, and new access.

Reversion rights predate copyright itself, with the earliest located dated 1694.⁹ However, they have not always had the broad potential they have today. In the pre-digital era, high marginal costs of copying and distribution used to mean most books disappeared quickly from sale.¹⁰ Authors might have had legal rights to reclaim their out of print titles, but that meant little unless

⁶ Rebecca Giblin, 'A New Copyright Bargain?: Reclaiming Lost Culture and Getting Authors Paid' (2018) 41(3) *Columbia Journal of Law and the Arts* 369, 396–400 ('A New Copyright Bargain').

⁷ Madeleine St John, *The Women in Black* (Text Classics, 2012).

⁸ 'The Women in Black: Text Classics', *Text Publishing* (Web Page) <<https://www.textpublishing.com.au/books/the-women-in-black/>>, archived at <<https://perma.cc/GM63-3BYJ>>; 'Ladies in Black', *Text Publishing* (Web Page) <<https://www.textpublishing.com.au/books/ladies-in-black>>, archived at <<https://perma.cc/7XUF-CFWL>>; 'Think Australian' (2018) *Books+Publishing* <https://www.booksandpublishing.com.au/newsletter/think/2018/11/15/*%7CUNSUB%7C*/>, archived at <<https://perma.cc/KW25-6483>>; Email from Anne Beilby (Rights and Contracts Director, Text Publishing Company) to the authors, 18 November 2019.

⁹ Rebecca Schoff Curtin, 'The Transactional Origins of Authors' Copyright' (2016) 40(2) *Columbia Journal of Law and the Arts* 175, 212–13.

¹⁰ *To Amend and Consolidate the Acts Respecting Copyright: Hearings on S 6330 and HR 19853 Before the H and S Comm on Patents*, 59th Cong 117–18 (1906) (Samuel L Clemens [Mark Twain]).

another publisher was interested in making the substantial investments necessary to bring them back to market. Now there are vastly more options. Digital printing makes smaller print runs financially feasible — right down to single copies via print on demand ('POD') — enabling books to be physically available for longer. Further, the marginal costs of digital production and global instantaneous delivery are virtually zero, opening new opportunities for online sales, including in foreign markets, via publishers or author-to-reader direct. Technological advances give rise to new licensing opportunities, too — for example, to public libraries for 'eLending'. This has become big business, with market leader OverDrive facilitating over 185 million ebook loans in 2018 alone.¹¹ Rapid improvements in AI technologies are also creating new opportunities. While AI-powered translation is not yet close to being substitutable for human expertise, it is already being used to reduce the costs of translating books for foreign language markets.¹² In the audio realm, AI-powered text-to-speech technologies are already on the market,¹³ and for those who still want a human reader, high quality online home recording is drastically reducing the costs of audiobook production.¹⁴ All this creates new investment and revenue opportunities, but what if the original publisher controls the rights and is not interested in pursuing them? In that case, taking advantage of these new possibilities depends on appropriately drawn reversion rights.

Reversion's potential is being recognised by lawmakers the world over. The European Union ('EU') has just enacted a directive requiring member states to enact reversion rights entitling creators to recover copyrights that have been assigned but not exploited.¹⁵ In Canada, two parliamentary committees recently recommended a law that would allow creators to terminate their

¹¹ Rakuten OverDrive, 'Public Libraries Achieve Record Breaking Ebook and Audiobook Usage in 2018' (Press Release, 8 January 2019) <<https://company.overdrive.com/2019/01/08/public-libraries-achieve-record-breaking-ebook-and-audiobook-usage-in-2018/>>, archived at <<https://perma.cc/W8DR-UV69>>.

¹² Joanna Penn, 'Tips for Self-Publishing in Translation: Adventures with AI and German', *The Creative Penn* (Blog Post, 22 November 2019) <<https://www.thecreativepenn.com/2019/11/22/self-publishing-german-ai/>>, archived at <<https://perma.cc/S85N-QRWN>>.

¹³ See, eg, 'Amazon Polly', AWS (Web Page) <<https://aws.amazon.com/polly/>>, archived at <<https://perma.cc/R4EC-M8QL>>; 'Cloud Text-to-Speech', Google Cloud (Web Page) <<https://cloud.google.com/text-to-speech>>, archived at <<https://perma.cc/US8J-6HLS>>.

¹⁴ See, eg, the Findaway Voices service, which provides high quality audiobook narration via at-home narrators: *Findaway Voices* (Web Page) <<https://findawayvoices.com/narrating-audiobooks/>>, archived at <<https://perma.cc/KA2E-5LQR>>.

¹⁵ *Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC* [2019] OJ L 130/29, art 22(1) ('EU Directive').

contracts after 25 years.¹⁶ And a majority of the world's nations already have some form of statutory reversion law benefiting authors or their heirs.¹⁷ Yet common law countries are lagging behind. With the exception of a single narrow right in each of the United States ('US') and Canada,¹⁸ authors in the Anglosphere are legally entitled to recover their rights only if and as their publishing agreements permit. Author advocacy associations have expressed growing concern that such contracts, in their current forms, do not adequately protect author rights. The CREATOR principles adopted by the United Kingdom's ('UK') Society of Authors'¹⁹ and 'Ten Principles for Fair Contracts' of the International Authors Forum²⁰ both call for fundamental changes to author–publisher contracts, particularly around reversion. By contrast, some rightsholders contend there is nothing to worry about — that author interests are adequately taken care of by their contracts.²¹ In this article we explore whether contracts are indeed enough, or whether there is a case for additional statutory rights.

Part II identifies the main types of reversion right and reviews the literature analysing reversion in publishing contracts to date. Part III sets out the method and results of our new exploratory study of publishing contracts, analysing the rights taken, provisions for returning them to authors, and their evolution over time. This makes a vital contribution to the existing literature: such contracts govern author rights in Australia, and without analysing them, we have no way of knowing what those rights are, or when and how they apply. In Part IV, we argue that problems identified in our study suggest that contracts should not be

¹⁶ House of Commons Standing Committee on Canadian Heritage, Parliament of Canada, *Shifting Paradigms* (Report No 19, May 2019) 31 ('*Shifting Paradigms*'); House of Commons Standing Committee on Industry, Science and Technology, Parliament of Canada, *Statutory Review of the Copyright Act* (Report No 16, June 2019) 39 ('*Statutory Review*').

¹⁷ Joshua Yuvaraj, 'Reversion Laws: What's Happening Elsewhere in the World?', *The Author's Interest* (Blog Post, 4 April 2019) <<https://authorsinterest.org/2019/04/04/reversion-laws-whats-happening-elsewhere-in-the-world/>>, archived at <<https://perma.cc/7F3J-4ENW>>. See also Rita Matulionyte, 'Empowering Authors via Fairer Copyright Contract Law' (2019) 42(2) *University of New South Wales Law Journal* 681, 700–1.

¹⁸ 17 USC §§ 203, 304; *Copyright Act*, RSC 1985, c C-42, s 14(1).

¹⁹ 'CREATOR: Fair Contract Terms', *The Society of Authors* (Web Page) <<https://www.societyofauthors.org/Where-We-Stand/C-R-E-A-T-O-R-Campaign-for-Fair-Contracts>>, archived at <<https://perma.cc/68BN-DBP4>>.

²⁰ 'Authors: Ten Principles for Fair Contracts', *International Authors Forum* (Web Page) <<https://www.internationalauthors.org/wp-content/uploads/2019/01/Authors-Ten-Principles.pdf>>, archived at <<https://perma.cc/SJX3-M4KZ>> ('Ten Principles').

²¹ See, eg. Publishers Association of New Zealand, Submission to Ministry of Business, Innovation and Employment, *Review of the Copyright Act 1994: Issues Paper* (5 April 2019) 9 <<http://publishers.org.nz/wp-content/uploads/Submission-PANZ-Copyright-Issues-Paper.pdf>>, archived at <<https://perma.cc/2SBY-DXTB>>; *Statutory Review* (n 16) 36–7.

the sole repositories of author rights. We conclude by proposing various potential statutory reversion rights that could benefit authors, publishers and the public, together with the key issues that would need to be resolved if they were to be implemented into law.

II REVERSION RIGHTS IN PUBLISHING CONTRACTS

Rights reversion can have any number of different triggers. In the Anglosphere, the only existing statutory reversion rights are time based: applying 35 years after transfer in the US and 25 years after the author's death in Canada.²² Outside these, reversion is left to the contracts. Here we introduce the main types of reversion clause found in book publishing contracts.

A Reversion Clause Types and Controversies

1 Out-of-Print Clauses

'Out-of-print' clauses are publishing's best known and most controversial reversion rights. Traditionally, out-of-print clauses have entitled authors to reclaim all the rights they have granted under a publishing contract (usually excepting those that have previously been sub-licensed) once the book has gone 'out of print'. Sometimes such clauses operate automatically: for example, by reverting rights after the book has been out of print for more than six months.²³ More commonly however, reversion occurs after the author gives notice that the book is no longer available for purchase, and the publisher fails to re-print.²⁴ Out-of-print clauses spur publishers to keep works selling, since if they do not, authors might reclaim their rights.²⁵ Exercise of out-of-print rights can also benefit publishers by freeing up rights to fresh investments, as demonstrated by Text Publishing's experience with *The Women in Black*.²⁶ Some 50 countries

²² 17 USC § 203(a)(3); *Copyright Act*, RSC 1985, c C-42, s 14(1).

²³ *The Publishers' Weekly: An American Book Trade Journal* (Office of Publishers' Weekly, 1906) vol 69, 667; *Harper & Bros v M A Donohue & Co*, 144 F 491, 493 (Sanborn J) (ND Ill, 1905).

²⁴ See, eg, Alexander Lindey and Michael Landau, Thomson Reuters, *Lindey on Entertainment, Publishing and the Arts* (online at 3 May 2020) § 5:109 ('Lindey'). Cf Lynette Owen (ed), *Clark's Publishing Agreements: A Book of Precedents* (Bloomsbury Professional, 10th ed, 2017) 57 ('Clark's 10th ed').

²⁵ 'A Publishing Contract Should Not Be Forever', *The Authors Guild* (Web Page, 28 July 2015) <<https://www.authorsguild.org/industry-advocacy/a-publishing-contract-should-not-be-forever/>>, archived at <<https://perma.cc/T3U6-FUKV>>; Australian Society of Authors, *Australian Book Contracts* (Keessing Press, 4th ed, 2009) 24.

²⁶ See above n 8 and accompanying text.

have enacted legislative out-of-print rights,²⁷ but in Australia, the US, the UK, Canada and New Zealand ('NZ'), they are governed entirely by contracts.

(a) *When Will a Title Be 'Out of Print'?*

'Out of print' means different things in different publishing industry segments, and its meaning tends to change over time.²⁸ Accordingly, authors' organisations have long insisted that contracts should provide clear, objective standards for determining print status. In 1968, for example, the UK Society of Authors' model contract defined a book as being out of print if the publisher had 'fifty (50) copies or less in stock'.²⁹ By 1991, it was recommending that rights should revert if a book was out of print *or* average sales over a two year period had fallen below 250 copies, and the publishers had declined to reprint.³⁰ At the same time, the US Authors Guild recommended that authors should be allowed to terminate publishing contracts if books were out of print *and* annual royalties did not meet a particular threshold after 10 calendar years.³¹ Meanwhile, the Australian Society of Authors' ('ASA') 1994 model contract specified that 'a book shall be deemed to be out of print where the Publisher's stocks are less than fifty (50) or where less than twelve (12) copies are shown as having been sold in any six (6) months accounting period'.³²

Rather than adopting objective criteria for determining print status, some publishing guides simply replaced outdated 'out of print' language with alternative formulations, like 'off the market', 'out of print in all editions', or 'not available in any edition'.³³ Such formulations require books to be entirely unavailable, including as an ebook or via POD, before authors are entitled to reclaim their rights. In this era of natively digital manuscripts, making a title

²⁷ Yuvaraj (n 17).

²⁸ For example, Cavendish describes that '[a] book is said to be out of print ('o/p') when not enough copies are available from stock to satisfy reasonable public demand': JM Cavendish, *A Handbook of Copyright in British Publishing Practice* (Cassell, 1974) 155. In comparison, Jonathan Kirsch notes that '[a] book is "out of print," according to book industry practice, when it is no longer generally available to consumers through ordinary channels of trade in the book industry': Jonathan Kirsch, *Kirsch's Handbook of Publishing Law* (Acrobat Books, 1995) 224.

²⁹ Andrew O Shapiro, 'The Standard Author Contract: A Survey of Current Draftsmanship' (1968) 18 *Copyright Law Symposium* 135, 165, referring to Society of Authors' Representatives, *Contract*, cl 13(a).

³⁰ Denis De Freitas, 'Copyright Contracts: A Study of the Terms of Contracts for the Use of Works Protected by Copyright under the Legal System in Common Law Countries' [1991] (November) *Copyright* 222, 241 [107].

³¹ *Ibid* 250 [166].

³² Australian Society of Authors, *Australian Book Contracts* (Keesing Press, 2nd ed, 1994) 36.

³³ Owen (ed), *Clark's 10th ed* (n 24) 54. See also Roy S Kaufman, *Publishing Forms and Contracts* (Oxford University Press, 2008) 19.

available via such media requires relatively little investment — and certainly far less than a fresh print run would require. However, under these ‘technical availability’ standards, such minimal contributions can be enough to enable publishers to hold on to the rights forever, even if the book stops selling and no royalties are being paid.³⁴

That quickly caused new concerns to be raised about the application of out-of-print clauses in the digital context. In 1994, the US National Writers Union argued that out-of-print clauses needed to be ‘rethought in the electronic era, when small quantities or even single copies of a work can be reproduced easily and cheaply’.³⁵ The Union noted that ‘[t]he real criterion for whether a publisher can retain rights is whether the work is still being actively marketed’, although instead of suggesting objective sales or stock-based thresholds it recommended that the publisher should be required ‘to notify the author when it has decided that it no longer makes sense to make even minimal efforts to promote the work’.³⁶ Since then, author associations around the English speaking world have regularly warned their members about the dangers of out-of-print clauses being based on ‘technical availability’ standards that could be satisfied by ebooks or POD, as early as 2000 (US Authors Guild),³⁷ 2001 (ASA),³⁸ and 2006 (UK Society of Authors).³⁹ As the UK Society of Authors further explained in 2008:

Publishers will be tempted to argue that a book is ‘available’ — the term now often used in preference to ‘in print’ — if it can be supplied as [POD] or as an ebook. It becomes all the more important for authors to ensure that they have the option of reverting rights if sales — preferably in units, but possibly in revenue — fall below figures agreed in the publishing contract.⁴⁰

While there are some variations in the criteria different author associations recommend authors to use, especially the appropriateness of unit sales versus

³⁴ ‘A Publishing Contract Should Not Be Forever’ (n 25).

³⁵ National Writers Union, ‘Statement of Principles on Contracts between Writers and Electronic Book Publishers’ (Web Page, April 1994) <<https://faculty.georgetown.edu/jod/nwu2.html>>, archived at <<https://perma.cc/66WZ-WGZZ>>.

³⁶ Ibid.

³⁷ Ed McCoyd, ‘Watch Your Out of Print Clauses: They Mean More than Ever’ (Spring 2000) *Authors Guild Bulletin* 5.

³⁸ Australian Society of Authors, *Australian Book Contracts* (Keesing Press, 3rd ed, 2001) 31.

³⁹ Society of Authors (Winter 2006) *The Author* 129.

⁴⁰ Society of Authors (Autumn 2008) *The Author* 94.

dollar amounts,⁴¹ the message of each organisation has long been consistent: that objective criteria are needed to make it possible for authors to reclaim rights where publishers are no longer meaningfully investing in their books' success.⁴²

Despite this, our analysis shows that industry practice guides have been slow to adopt objective criteria to define out-of-print clauses. As late as 2010, *Clark's Publishing Agreements* ('Clark's'), a leading UK guide to publishing contracts,⁴³ still recommended that contracts give authors the right to reclaim their rights if their book was 'out of print and unavailable in all editions' and the publisher had not at least commenced a new edition within nine months of having received a written request from the author to do so.⁴⁴ It did however acknowledge that the 'main trend' since its 2007 edition was the move to definitions based on objective criteria, and described the question of when a book is 'out of print' as 'one of the significant by-products of the move into the digital/electronic era'.⁴⁵ It was not until 2013 that *Clark's* finally recommended permitting the author to reclaim their rights in a work if the work failed to meet a minimum sales threshold based either on quantity of copies sold or royalty value.⁴⁶ The 2017 edition noted that setting appropriate levels was an 'inexact science', but that 'authors should be entitled to get their rights back if the

⁴¹ The ASA is comfortable with sales measures: 'Contracts,' *Australian Society of Authors* (Web Page, 2020) <<https://www.asauthors.org/findananswer/contracts>>, archived at <<https://perma.cc/PS4F-36ZY>>. But the UK Society of Authors recommends that authors only agree to contracts that give them a right to recover their rights when the work is available only in digital/POD editions, or where 'sales have dwindled below an agreed level' (leaving it open whether that is calculated with reference to revenue or copies sold): 'Before You Sign: Getting Your Rights Back,' *Society of Authors* (Web Page, 16 February 2018) <<https://www.societyofauthors.org/News/Blogs/Before-you-Sign/February-2018/Before-You-Sign-Getting-Your-Rights-Back>>, archived at <<https://perma.cc/PN8L-24W6>> ('Before You Sign'). By contrast, the US Authors Guild is wary of using unit sales as a benchmark: 'Publishers might ... be able to game the clause by offering one cent e-books the way they've gamed existing clauses by using e-books and print-on-demand': 'A Publishing Contract Should Not Be Forever' (n 25). It prefers yearly income thresholds (eg US\$250–\$500), below which authors can terminate the contract and exploit their books via other means.

⁴² See, eg, above n 19.

⁴³ *Clark's* has been described as an 'integral reference work for the publishing industry': Huw Alexander, 'Clark's Publishing Agreements: A Book of Precedents (8th edn)' (2011) 22(1) *Logos* 68, 70. See also Martin Woodhead, 'Clark's Publishing Agreements: A Book of Precedents, 9th edn' (2014) 27(4) *Learned Publishing* 315, 317.

⁴⁴ Lynette Owen (ed), *Clark's Publishing Agreements: A Book of Precedents* (Bloomsbury Professional, 8th ed, 2010) 55 ('Clark's 8th ed').

⁴⁵ *Ibid* 54.

⁴⁶ Lynette Owen (ed), *Clark's Publishing Agreements: A Book of Precedents* (Bloomsbury Professional, 9th ed, 2013) 54–5.

publisher is not properly supporting the book'.⁴⁷ *Clark's* now states that termination clauses based on minimum sales or minimum income 'have become the norm';⁴⁸ however, some publishing guides still do not reflect that today.⁴⁹

As of 2019, the leading author advocacy associations in the US, UK and Australia report that, whilst objective criteria have finally now been adopted by all or almost all major trade publishers, they *still* see new contracts with 'out of print' defined by technical availability standards rather than objective criteria (particularly from academic publishers and small trade presses).⁵⁰

2 Other 'Use-It-or-Lose-It' Rights

'Out-of-print' rights are the main form of a 'use-it-or-lose-it' provision, but there are others. For example, contracts might take rights in multiple territories or languages, but then provide for their return if the publisher fails to exploit them within a certain period.⁵¹

⁴⁷ Owen (ed), *Clark's 10th ed* (n 24) 56.

⁴⁸ *Ibid* 34.

⁴⁹ See, eg, Mark A Fischer, E Gabriel Perle and John Taylor Williams, Wolters Kluwer, *Perle, Williams & Fischer on Publishing Law* (4th ed), vol 1 (at May 2019) § 2.16 ('Perle'); *Lindey* (n 24) §§ 5:14 cl 16, 5:109, 5:110, 5:117, 5:118, 5:163; Leon Friedman, 'Book Publishing' in Doug Nevin (ed), LexisNexis, *Entertainment Industry Contracts: Negotiating and Drafting*, vol 3 (at Release 93) form 41-1 cl 15(b) ('*Entertainment Industry Contracts*').

⁵⁰ See, eg, Email from Bryony Hall (Contracts Advisor, UK Society of Authors) to the authors, 12 August 2019: 'Yes, very much so. This is the case for all academic/professional contracts, but I do see it for trade titles too sometimes'; Email from Umair Kazi (Staff Attorney, US Authors Guild) to the authors, 13 August 2019: 'Yes, we do see the old OOP clauses "not available in any edition."'; Email from Juliet Rogers (CEO, ASA) to the authors, 13 August 2019: 'The problem emerges in the less traditional contracts and the small publishers, where the publisher has either failed to keep their contract current or has deliberately left a broad out of print clause in, without explaining to authors that availability in digital format or licensed format will prevent them from terminating. There is no doubt, however, that this issue occurs frequently enough for us to continue to have to educate authors about the need for this clause to be correctly defined/drafted.'

⁵¹ For instance, a template contract from 'Big Five' publisher Random House in *Lindey* allows the author to revoke the publisher's rights to license the work in the British Commonwealth (except Canada), South Africa and the Republic of Ireland if those rights have not been exercised within 18 months of the work first being published in the United States: *Lindey* (n 24) § 5:14 cl 1(b). A further right of revocation is included for the 'right to license in all foreign languages and all countries' if no license or option is granted three years after the book is first published in the United States: *Lindey* (n 24) § 5:14 cl 1(c). See also *Perle* (n 49) § 2.10(C); *Entertainment Industry Contracts* (n 49) form 41-1 cl 1.

Some countries enshrine ‘use-it-or-lose-it’ rights in national legislation.⁵² In the major English language markets however, such rights are governed entirely by contract. The UK Society of Authors has observed that ‘[m]any publishers will agree’ to such mechanisms on request.⁵³ However, not all authors know to negotiate for ‘use-it-or-lose-it’ rights to be included in their contracts, and many simply agree to whatever terms they were originally offered, particularly early in their writing careers.⁵⁴ If ‘use-it-or-lose-it’ clauses can be included on request, but not by default, that risks disproportionately disadvantaging emerging and less well resourced authors.

3 Liquidation Rights

Publishing contracts may also contain clauses allowing authors to reclaim their rights if publishers go into bankruptcy or liquidation. Such clauses regularly appear in publishing contracts, though their enforceability under domestic legislation depends on jurisdiction and phrasing.⁵⁵ Publishing rights and earnings due to authors are corporate assets, and since liquidators have legal obligations to maintain value,⁵⁶ they may be unable to return them to authors absent a legal obligation to do so. *Clark’s* states that ‘[p]rovision should always be made’ for the publisher’s going out of business, and recommends that contracts be automatically terminated and rights returned upon entry into

⁵² For example, rights to reclaim unexploited language rights after five years: *Law on Copyright and Related Rights* (Lithuania) 18 May 1999, No VIII-1185, art 45(3); *Revised Law on Intellectual Property, Regularizing, Clarifying and Harmonizing the Applicable Statutory Provisions* (Spain) 12 April 1996, art 62(3) [tr International Bureau of the World Intellectual Property Organization, ‘Revised Law on Intellectual Property, Regularizing, Clarifying and Harmonizing the Applicable Statutory Provisions’, *WIPO Lex* (Web Document) <<https://wipolex.wipo.int/en/text/126674>>]. See also the right to reclaim digital rights in books that publishers have failed to exploit: *Code de la propriété intellectuelle* [*Intellectual Property Code*] (France) art L132-17-5 (*‘Intellectual Property Code’*).

⁵³ ‘Before You Sign’ (n 41).

⁵⁴ Martin Kretschmer, ‘Copyright and Contracts: A Brief Introduction’ (2006) 3(1) *Review of Economic Research on Copyright Issues* 75, 80–1; Lucie Guibault, ‘Relationship between Copyright and Contract Law’ in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar, 2009) 517, 519; David Caute, ‘Publish and Be Damned: A Comparative Survey of Book Contracts Issued by 60 British Publishers’ (13 June 1980) *New Statesman* 892.

⁵⁵ In Australia, ‘ipso facto’ stay provisions in the *Corporations Act 2001* (Cth) (*‘Corporations Act’*) prevent parties from terminating a contract in the event that one party goes into insolvency (as opposed to liquidation): see, eg, at ss 415D(1), 451E(1). See also 11 USC §§ 363(l), 541(c)(1). Cf at §§ 365(c), (e).

⁵⁶ See, eg, *Corporations Act* (n 55) s 420A(1).

liquidation.⁵⁷ Most other guides make similar recommendations for authors to be able to terminate their contracts in such situations.⁵⁸

B *Previous Studies of Contractual Reversion Practice*

Various empirical studies have previously investigated contractual reversion rights. Andrew Shapiro and David Caute respectively documented the types of provisions publishers were using in their standard publishing contracts.⁵⁹ Shapiro looked at contracts ‘currently in use by the more active houses in New York City’,⁶⁰ while Caute looked at ‘standard printed contracts issued by 60 British book publishers.’⁶¹ Both criticised the drafting of some out-of-print clauses, for example for only requiring publishers to exercise ‘minimal effort’ to keep books in print,⁶² or for giving publishers overly generous (3–5 year) periods to decide whether to reprint.⁶³ Caute also found five publishers requiring authors to repay unearned parts of their advances to exercise out-of-print rights, and three publishers requiring authors to buy back all plant (such as moulds and engravings) made for the work at half their original cost.⁶⁴ He was unconvinced by the reasons publishers gave for including such clauses in their boilerplate:

One of [the publishers’] comments that he invariably strikes out this clause [requiring repayment of the advance]. Good — but why not eliminate the clause from the printed contract?⁶⁵

Additionally, Denis De Freitas’ 1991 study spanning contracts and contract templates for publishing, film, broadcasting and music in the US, UK and Australia found examples of reversion clauses that implemented objective criteria promulgated by the US and UK author organisations.⁶⁶ However, he also identified clauses in US model contracts that simply made termination

⁵⁷ Owen (ed), *Clark’s 10th ed* (n 24) 54–5.

⁵⁸ *Lindley* (n 24) § 5:14 cl 20; Kaufman (n 33) 34; *Perle* (n 49) § 2.17; *Entertainment Industry Contracts* (n 49) form 41-1 cl 27.

⁵⁹ Shapiro (n 29); Caute (n 54).

⁶⁰ Shapiro (n 29) 135.

⁶¹ Caute (n 54) 892.

⁶² Shapiro (n 29) 165.

⁶³ Caute (n 54) 898.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ De Freitas (n 30) 250 [167], [169].

contingent on books going 'out of print' without further definition.⁶⁷ In contrast to his lengthy surveys of material from the US and the UK, he did not comment on book publishing contracts in Australia.⁶⁸ He only highlighted the similarities between songwriter–publisher contracts in Australia and the UK, extrapolating from this that it would be 'reasonable to assume that in other sectors of the copyright field contractual practices in Australia are similar to those in the United Kingdom'.⁶⁹

Reversion clauses have also been studied in the context of academic publishing contracts. These have some key differences to general trade book publishing contracts,⁷⁰ but reversion clauses are also common. Baumol and Heim found examples of out-of-print clauses that had objective criteria (referring to minimum stock and sales figures that publishers needed to meet to 'continue selling copies out of stock ... [or] reprinting ... the volume').⁷¹ However, some clauses did not state that rights reverted to authors when the book went out of print, and 'even fewer' stated how long publishers had to reprint and make available out of print works.⁷² Finally, in her 1991 study of 68 standard form academic publishing contracts, Stephenson found that some 30% had no out-of-print clause at all.⁷³

These studies help capture publishing industry practice in relation to out-of-print clauses at given points in time. However, the time span of contracts they studied were limited. Only Cate (1968–80)⁷⁴ and De Freitas (1971–90)⁷⁵

⁶⁷ Ibid [167]–[168], citing Donald C Farber (ed), LexisNexis, *Entertainment Industry Contracts: Negotiating and Drafting Guide*, vol 2 (at 1990) form 41-1 cl 14 and Alexander Lindey and Michael Landau, Sweet & Maxwell, *Lindey on Entertainment, Publishing and the Arts*, vol 1 (2nd ed) 216 cl 16.

⁶⁸ De Freitas (n 30) 246 [140].

⁶⁹ Ibid.

⁷⁰ For example, academic contracts tend to involve assignments of copyright to the publisher rather than exclusive licences: see Anne Fitzgerald and Amanda Long, 'A Review and Analysis of Academic Publishing Agreements and Open Access Policies' (Report, February 2008) 12; Elizabeth Gadd, Charles Oppenheim and Steve Proberts, 'RoMEO Studies 4: An Analysis of Journal Publishers' Copyright Agreements' (2003) 16(4) *Learned Publishing* 293, 295.

⁷¹ William J Baumol and Peggy Heim, 'On Contracting with Publishers: Or What Every Author Should Know' (1967) 53(1) *American Association of University Professors Bulletin* 30, 45. This study was later updated in Martin Shubik, Peggy Heim and William J Baumol, 'On Contracting with Publishers: Author's Information Updated' (1983) 73(2) *American Economic Review* 365, 381.

⁷² Baumol and Heim (n 71) 45–6.

⁷³ Helen Stephenson, 'Negotiating the Bottom Line: A Closer Look at University Press Contracts' (1991) 29(4) *Perspectives on History*.

⁷⁴ Cate (n 54) 894.

⁷⁵ De Freitas (n 30) 261–2.

specified the dates of the documents they surveyed. The others appear to have been limited to contracts being offered to authors around the time of the studies. Further, the most recent of these studies took place in 1991. With rapid developments in technology making books widely distributable in other formats (eg ebooks, audiobooks, POD), there is a need to understand whether and how reversion clauses have changed over time to reflect these developments.

III EXPLORATORY STUDY INTO AUSTRALIAN PUBLISHING CONTRACTS

The above discussion shows a disconnect between what authors' organisations have long advocated for in terms of reversion rights, and industry practice (as reflected in model publishing agreements and identified in previous studies). That led us to ask — are author rights adequately taken care of by the contracts, or is there a case for additional minimum rights?

A Research Questions

We investigate that umbrella question via three distinct research questions:

- 1 What rights have authors assigned or licensed to publishers via publishing contracts?
- 2 What provisions have those contracts made to return those rights to authors?
- 3 How have those practices evolved over time?

We address these questions by analysing contracts sourced from the archive of the ASA.

B Methods

1 Data Selection

The contracts in the archive were provided to the ASA by authors between 1960 and 2014 to obtain advice on their provisions. The contracts are likely to have been supplied by Australian authors or authors living in Australia, without agent representation (otherwise, their agents would have provided that advice). They usually (but not always) involved Australian publishers. We looked at the contracts within the archive on conditions of strict confidentiality. We did not

collect or use personal information. We conducted our research independently of the ASA and our results do not necessarily reflect its views.

The archive was the only practicable way of obtaining contracts spanning the time horizon in which we were interested. However, it had some limitations. First, it was not complete. In 2016, the ASA destroyed a large portion of its archive due to space constraints. In deciding which contracts to retain, it aimed to keep contracts spanning its full history (commencing in 1960), for a variety of different forms of writing (books, plays and television shows) and for a variety of publisher types (trade fiction and non-fiction, educational, children's and academic), but not for the culled collection to be representative of the original. Second, there were few contracts available in the archive for earlier years relative to later ones. Third, the contracts are not representative of the overall publishing industry as they are more likely to be from authors without other access to contractual advice. Accordingly, the contracts in the archive are not independently and identically distributed from the population of all book contracts in Australia.

Our primary interest was to conduct an exploratory study of the archive identifying actual terms offered to book authors from a diverse range of publishers between 1960–2014, and to examine their evolution over that period. The aims and exploratory nature of this study, the limitations of the archive, and our conditions of access led us to adopt a non-probability sampling framework using purposive sampling to select contracts for inclusion. Purposive sampling requires researchers to use their judgment to determine the subjects which 'best fit the criteria of the study'⁷⁶ based on their 'knowledge of and/or experience' with the focus of empirical inquiry.⁷⁷ It is 'not intended to offer a representative sample but rather to hone in on particular phenomena and/or processes.'⁷⁸

Our sample ultimately included 145 book contracts spanning the years 1960–2014 (average 2.8 per year, minimum one, maximum six). Most earlier years had fewer contracts available for selection; where only one or two were available we selected all of them, and included six contracts from 1969 to partly offset the deficit. We increased the number of contracts to four per year from 2008–10 to better examine how the shift to ebooks was reflected in contractual practice. We excluded contracts for movie rights, plays and television shows. We sought to include contracts from a variety of publishers. We excluded

⁷⁶ *Oxford Dictionary of Sports Science & Medicine* (3rd ed, 2006) 'purposive sampling'.

⁷⁷ Rebecca S Robinson, 'Purposive Sampling' in Alex C Michalos (ed), *Encyclopedia of Quality of Life and Well-Being Research* (Springer, 2014) vol 1, 5243, 5244.

⁷⁸ *Ibid.* Cf Michael P Battaglia, 'Purposive Sample' in Paul J Lavrakas (ed), *Encyclopedia of Survey Research Methods* (Sage Publications, 2008) vol 2, 645, 645–7.

contracts with confidentiality clauses. These became more common in later years and meant only one eligible contract was available for 2013. We included an additional 2012 contract to partly offset that lack.

This sampling approach was well suited to the task. As is appropriate for an exploratory study, it enables us to ‘gain initial insights and ideas’ about the terms offered to book authors in Australia, and to ‘identify [in greater detail the] variables associated with those problems.’⁷⁹ The main limitation of our sampling approach is the inability to generalise the findings to a larger population, for which reason we do not conduct statistical significance testing on our results. However, the nature of the archive meant we could not draw inferences from the sampled contracts to book publishing contracts in the archive or in Australia at large in any event. As an additional safeguard, we have provided drafts of this paper to various expert organisations and individuals,⁸⁰ and their feedback confirms that our results do not paint a ‘misleading or untypical picture.’⁸¹ Accordingly, the insights from this study usefully assist us to evaluate the appropriateness of using publishing contracts as the sole repositories of author rights.

While our study is limited to contracts involving authors, our findings have broad relevance throughout the English language world. The above explanation of reversion rights in publishing contracts was international for good reason: the English language publishing industry transcends borders. While there are certainly structural differences between UK- and US-based publishers,⁸² many publishers are multinational. That, combined with the general absence of statutory rights for authors in English language countries, helps promote similar contractual practice to ensure that contractual practice is multinational too. For example, publishing contracts throughout the Anglosphere have out-of-print clauses, and the versions we found in Australia have the same phraseology (and problems) as elsewhere. In our exploratory study, we found examples requiring authors to repay any unearned portion of their advance and half the cost of plant, various of the *Clark’s* formulations (from 1st to 8th edition) and the current *Lindey* formulation.⁸³ Thus, while our study is limited to

⁷⁹ Wing Hong Chui, ‘Quantitative Legal Research’ in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2017) 46, 50.

⁸⁰ For example, the US Authors Guild, the UK Society of Authors and the ASA.

⁸¹ See De Freitas (n 30) 224 [8].

⁸² John B Thompson, *Merchants of Culture: The Publishing Business in the Twenty-First Century* (Polity Press, 2nd ed, 2012).

⁸³ We found variations of the formulations used in the following texts: Charles Clark (ed), *Publishing Agreements: A Book of Precedents* (George Allen & Unwin, 1980) 23; Owen, *Clark’s* 8th ed (n 44) 55; *Lindey* (n 24) § 5:109.

contracts involving Australian authors, our findings have broad relevance throughout the English language world.

2 Data Coding

Following detailed testing we developed a codebook which was used to code the contracts using content analysis.⁸⁴ Questions from the codebook are listed at Table 1.

Table 1: Contract Coding Matrix

Category	Description
Contract year	1 What year was the contract signed? (Or, if unsigned, what year was it dated/provided for advice?)
Rights assigned	1 What were the territories over which the publisher was granted rights to print, publish and/or license the use of the work? 2 What were the languages in which the publisher could print, publish and/or license the use of the work? 3 If the languages in which the publisher could print, publish and/or license the use of the work are not specified, is the publisher granted translation rights? 4 Were the rights assigned or licensed to the publisher? If licensed, what kind of licence was it?
Duration of grant	1 How long was the publisher granted rights to print, publish and/or license the use of the work? 2 Were there any term restrictions on the use of subsidiary or overseas rights?
Reversion clauses	1 Did the contract have an out-of-print clause? 2 If the contract had an out-of-print clause, what was the standard within the clause to determine whether the work was out of print? 3 What category did the standard for determining the work's out-of-print status fall into? (Technical availability, publisher's discretion, objective criteria)

⁸⁴ Joshua Yuvaraj and Rebecca Giblin, *Codebook for Exploratory Study into Contracts from the Australian Society of Authors Archive* (Codebook, 20 February 2020) <<https://doi.org/10.26180/5de4b48e0840f>>.

Category	Description
4	Did the author have to give the publisher notice to reprint once the work was out of print? How long?
5	Did the author have to wait an additional period after the work went out of print before regaining their rights or commencing procedures to regain their rights? How long?
6	Did the author have to wait a period after the book's initial publication before regaining their rights or commencing procedures to regain their rights? How long?
7	Did the author have to terminate the contract and/or regain their rights by giving notice to the publisher once the book met out-of-print criteria? How long?
8	Was the author required to make a financial contribution as a condition of reclaiming their rights? If yes, how was it calculated?
9	Do unused rights revert to the author after a period of time? How long?
10	Was the author allowed to terminate the contract if the publisher went into liquidation or bankruptcy?

3 Reliability Testing

To test the reliability of the coding, an external coder used the codebook to code data from a random sample of 30 contracts (21%).⁸⁵ We used Scott's pi⁸⁶ and Landis and Koch's benchmark to measure inter-coder agreement, using the following result descriptors:

- 1 <0.00 = 'Poor'
- 2 0.00–0.20 = 'Slight'
- 3 0.21–0.40 = 'Fair'

⁸⁵ There is no set rule as to sample size. Hall and Wright recommend choosing 'at least 10% of the sample or thirty, whichever is less': Mark A Hall and Ronald F Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96(1) *California Law Review* 63, 113 n 203. As 10% of the sample would only give us 15 contracts we chose 30 contracts to give us a greater indication of reliability, following Hall and Wright, who coded 32 of their 134 subjects: at 113 n 203.

⁸⁶ William A Scott, 'Reliability of Content Analysis: The Case of Nominal Scale Coding' (1955) 19(3) *Public Opinion Quarterly* 321; Kevin Wombacher, 'Intercoder Reliability Techniques: Scott's Pi' in Mike Allen (ed), *The SAGE Encyclopedia of Communication Research Methods* (Sage Publications, 2017) vol 2, 753, 753.

- 4 0.41–0.60 = ‘Moderate’
- 5 0.61–0.80 = ‘Substantial’
- 6 0.81–1.00 = ‘Almost Perfect’⁸⁷

The results at Table 2 also include the per cent agreement, which is useful because Scott’s pi ‘over corrects for chance agreement ... especially [where] there are few options on a variable and when the [coder] ... choose[s] ... one of those options very frequently’.⁸⁸ That explains why, for example, Q15 had a relatively low score despite the coders agreeing 96.7% of the time. All variables except Q3, Q4, Q7, and Q15 had ‘substantial’ or greater scores. Question 3’s lower score is attributable to five related disagreements at Q2 (eg the coder selected ‘all languages’ in Q2 and therefore automatically selected ‘N/A’ for Q3). Question 4’s score is due to five disagreements about whether a transfer had the nature of ‘assignment’ or ‘exclusive licences’, which makes sense since, as a matter of law, they can be difficult to distinguish.⁸⁹ Question 7’s score can be attributed to the fact that out-of-print clauses came with many tiny variations, which made them difficult to categorise. There were nine differences of opinion between coders. However, there was substantial agreement for the related Q8, which asked coders to categorise out-of-print clauses at a higher degree of abstraction. For Q15, there was only one disagreement, apparently caused by two clauses having very similar wording. Overall, this gives us a strong degree of confidence in the reliability of our results.

Table 2: Reliability Scores

No	Variable	π	%	Reliability
Q1	Territories	0.862	96.7	Almost perfect
Q2	Languages	0.671	80	Substantial
Q3	If the languages were not specified, was the publisher granted translation rights?	0.217	83.3	Fair
Q4	Type of grant	0.475	83.3	Moderate

⁸⁷ J Richard Landis and Gary G Koch, ‘The Measurement of Observer Agreement for Categorical Data’ (1977) 33(1) *Biometrics* 159, 165; Robert T Craig, ‘Generalization of Scott’s Index of Inter-coder Agreement’ (1981) 45(2) *Public Opinion Quarterly* 260, 263.

⁸⁸ W James Potter and Deborah Levine-Donnerstein, ‘Rethinking Validity and Reliability in Content Analysis’ (1999) 27(3) *Journal of Applied Communication Research* 258, 278.

⁸⁹ See *Wilson v Weiss Art Pty Ltd* (1995) 31 IPR 423, 433 (Hill J).

No	Variable	π	%	Reliability
Q5	Duration	0.79	90	Substantial
Q6	Term of subsidiary/overseas rights	1.0	100	Almost perfect
Q7	Specific type of out-of-print clause	0.635	70	Substantial
Q8	Broad category of out-of-print clause (technical availability, publisher's discretion, objective criteria)	0.77	90	Substantial
Q9	Notice period for the publisher to reprint the work	0.88	90	Almost perfect
Q10	Waiting period after the work has gone out of print	0.91	96.7	Almost perfect
Q11	Waiting period after the work is first published	0.901	93.3	Almost perfect
Q12	Did the author have to give notice to terminate the contract once the work met out-of-print criteria?	0.88	93.3	Almost perfect
Q13	Did the notice periods 'stack up'?	0.887	93.3	Almost perfect
Q14	Did the author have to make a financial contribution to regain their rights?	0.785	96.7	Substantial
Q15	Do unused rights revert to the author after a period of time?	0.487	96.7	Fair

We could not test the reliability of the coding of variables which depended on extracting the whole contract (year of contract, book type, publisher type, whether the contract had an out-of-print or liquidation clause). However, the contracts have been reviewed multiple times over three visits to the archive to ensure all pertinent data have been collected.

4 Exclusions

In this article we focus exclusively on the circumstances in which the sampled contracts expressly permit authors to reclaim their rights after the book is published, and where such a right would not necessarily also be implied under the general law. We do not examine the publishing industry norms and

practices that can sometimes result in authors recovering their rights outside the circumstances provided for by the contracts.⁹⁰ Nor do we consider rights authors might have to terminate under the general law of contract, including rights to terminate where the publisher fails to publish the book within a specific time,⁹¹ or fails to pay royalties or provide royalty statements.⁹² Finally, we do not consider any rights to have the contract rescinded (for example, for some impropriety that impacted its formation).

C Results

1 Publishers Took Extremely Broad Rights

Determining the rights that the publishers were granted is critical, because reversion clauses are less important to narrower contracts than broader ones. The contracts we studied overwhelmingly took broad and long-lasting rights, typically covering all languages and all territories worldwide.

(a) Contracts Were Exceptionally Long

As shown in Figure 1, just 7% (n=10) of contracts took rights for less than the entire copyright term.⁹³ Sixty-four per cent (n=92) of the contracts took rights to publish, print and/or license the book for the entire term. An additional 19% (n=27) specifically took rights for any additional term that would exist if the copyright was extended. Such phrasing has paid off for publishers, who have obtained the benefits of copyright in literary works having been extended by 20 years after most of those contracts were signed.⁹⁴ However, it raises questions about whether those future transfers were properly bargained (and paid) for, given the typical disparity of bargaining power between publishers and authors.⁹⁵

⁹⁰ Interview with author association staff member A (7 November 2018).

⁹¹ See, eg, *Perle* (n 49) § 2.08; Jonathan Kirsch, *Kirsch's Guide to the Book Contract: For Authors, Publishers, Editors and Agents* (Acrobat Books, 1999) 173.

⁹² See, eg, *Lindey* (n 24) § 5:83.

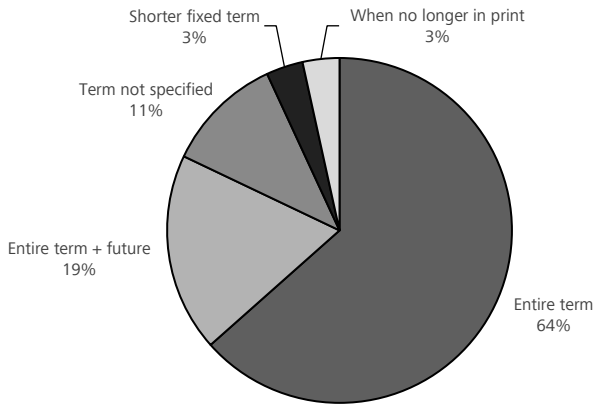
⁹³ These shorter periods, and the dates of the corresponding contract(s), were as follows: one year (1980), three years (2001), 10 years (2014), 15 years (2008), three years from the date the book becomes available in print format — automatically renewed unless the agreement is discontinued (2012), and so long as the book is in print (1986, 2002, 2008, 2010, 2014).

⁹⁴ *Copyright Act 1968* (Cth) s 33(2) ('Copyright Act'), amended by *US Free Trade Agreement Implementation Act 2004* (Cth) s 120.

⁹⁵ See, eg, 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* (Final Report, 2016) 121.

Strikingly, the remaining 11% (n=16) of contracts did not specify any term for printing, publishing and/or licensing rights in a work at all. That omission introduces a substantial element of uncertainty for authors. Under Australian law, where no time is stipulated, the contract will be implied to last a reasonable period.⁹⁶ However, determining what is ‘reasonable’ in these circumstances — where author associations strongly and consistently advocate for shorter terms, publishers usually insist on very long ones, and the contract is silent — may be slow and expensive, and prevent authors from understanding or enforcing their rights. The silence of so many contracts on such a crucial point may also suggest that not all publishers have had the input of expert legal advice in the drafting of their contracts.

Figure 1: How Long Do Publishing Contracts Last?



(b) *Contracts Overwhelmingly Took Exclusive Licences — and Sometimes Even Entire Copyrights*

In publishing contracts, rights are usually granted via licences.⁹⁷ Licences may be exclusive (where only one licensee is entitled to exercise the rights), non-exclusive (where multiple licensees are able to exercise them) or, much less commonly, sole (where one licensee plus the copyright owner are entitled to exercise the rights).⁹⁸ Alternatively, copyrights may be permanently

⁹⁶ Andrew Robertson and Jeannie Paterson, *Principles of Contract Law* (Lawbook, 6th ed, 2020) 499 [23.75].

⁹⁷ Hugh Jones and Christopher Benson, *Publishing Law* (Routledge, 4th ed, 2011) 76.

⁹⁸ See, eg, Nicholas Caddick, Gillian Davies and Gwilym Harbottle, *Copinger & Skone James on Copyright* (Sweet & Maxwell, 17th ed, 2016) vol 1, [5-213].

transferred, either in whole or in part, rather than licensed.⁹⁹ Again, we were interested in assessing the type of rights granted because the broader the transfer or licence, the more important robust reversion rights become.

Seventy-nine per cent of contracts (n=115) granted the publisher exclusive rights to publish and print the work (often with additional subsidiary rights, such as translation rights). Three 1970s-era contracts granted the publisher a non-exclusive licence to publish, enabling competition from other publishers.

Two others (dated 1993 and 2013) granted the publisher the 'sole right' to publish the work. Sole licences are much rarer than exclusive or non-exclusive ones. As noted above, a sole licence entitles both the copyright owner and the licensee to exercise the right. This would allow the author to compete with the publisher. We suspect this was not what the publishers intended, and it may further indicate a lack of legal input in the drafting of their contracts.

The remaining 17% of contracts (n=24) purported to take the entire copyright (including where the publisher's name followed the copyright symbol). Some were for educational and academic books, for which such practice is not uncommon.¹⁰⁰ However, we also found 11 examples of full copyright transfer of children's (n=3), trade non-fiction (n=7) and trade fiction (n=1) titles. This contradicts the belief of some industry insiders in the trade publishing industry that publishers only ever take licences, and not entire copyrights.¹⁰¹ Copyright-extracting contracts spanned almost the entire time span (1964–2012).

Contracts purporting to extract entire copyrights sometimes seemed to lack understanding about the legal effects of doing so. One 1964 contract superfluously gave the publisher both the copyright and the exclusive licence to print, publish and sell the book — superfluous because the latter rights would not be necessary if the publisher already owned the copyright. Another 2002 contract stated that the copyright was the property of the publisher, but the contract then displayed two copyright symbols, one indicating copyright in the text belonged to the author; the other, to the publisher. There was evidence of confusion about how licences worked, too. One 2012 contract granted the publisher an irrevocable, perpetual exclusive licence, but then stated it was

⁹⁹ *Copyright Act* (n 94) s 196.

¹⁰⁰ See Australian Society of Authors, *Educational Publishing in Australia: What's in It for Authors?* (Report, 2008) 2, archived at <<https://perma.cc/2PU9-5WMP>>; *Lindey* (n 24) § 5:163 cl 3; *Stephenson* (n 73).

¹⁰¹ Rebecca Giblin, 'Does Australia Really Need Author Rights? A Response to Industry Pushback', *Overland* (Article, 8 March 2019) <<https://overland.org.au/2019/03/does-australia-really-need-author-rights-a-response-to-industry-pushback/>>, archived at <<https://perma.cc/M55E-YYNG>> ('Does Australia Really Need Author Rights?').

terminable on 10 working days' notice. The licence must either be irrevocable or terminable — it cannot be both. These inconsistencies suggest that some publishers lack understanding about the legal impact of their own contractual terms, and again may indicate a lack of legal assistance in drafting.

(c) Most Contracts Took Rights across All Territories

Territory rights can be granted over anything from a single country to the entire world. As above, the more territories over which rights are granted, the more critical it is to provide mechanisms for returning unexploited rights to authors.

Eighty-three per cent (n=120) of the contracts took worldwide rights to publish, print and/or license the work without requiring the author's further approval. As explained above, contracts in the archive were likely provided by non-'agented' authors. Agents often prefer to sell world rights directly themselves, and so will often seek to withhold them where possible, especially if the publisher does not have a successful track record in the international rights market.¹⁰² We expect that the proportion of contracts taking worldwide rights would have been lower in a sample drawn from a mix of agented and non-agented authors.

Other contracts restricted the licence or grant to the publisher to Australia and NZ (7%; n=10), Australia and NZ alongside an 18-month worldwide licence (0.7%, n=1), Australia, NZ, and the UK (0.7%; n=1), the British Commonwealth at the date of the contract (1.4%; n=2), the world except NZ (0.7%; n=1), and the world except the US (3.5%; n=5). The remaining five contracts failed to specify the territories in which rights to print, publish and/or license the work were granted to the publisher.

(d) Most Contracts Took Rights in All Languages

The more languages that are licensed, the more critical reversion rights become. Nearly half (n=72) of the contracts took rights in all languages. This included where the rights to print, publish and/or license the work were in English, but the publisher was granted the right to sell translation rights without requiring the author's further consent. A further 7% (n=10) granted the publishers rights to print and publish books in all languages but required the author's approval for the sale of translation rights. Thirteen per cent (n=19) took rights in English only. We again expected that the proportion of contracts taking rights in all languages was higher than it would have been if our sample included contracts from agented authors.

¹⁰² Interview with literary agent A (29 May 2019).

We identified numerous ambiguities within the contracts around language rights. Two contracts were too unclear for us to discern the languages in which the publisher had been granted printing, publishing and/or licensing rights. An additional 29% (n=42) did not even attempt to specify the languages in which the publisher could print, publish and/or license the book. However, 60% (n=25) of those then gave the publisher translation rights without requiring the author's approval.

(e) These Broad Grants Stacked Up

All this shows that, for the sampled contracts, publishers took extremely broad and long rights across a wide swathe of territories and languages. These broad grants stacked up. Seventy-nine per cent (n=114) took exclusive rights (including assignments of copyright) for at least the entire copyright term. Sixty-six per cent (n=95) took term-long exclusive rights worldwide. And a total of 44% (n=63) took term-long exclusive rights, worldwide, in all languages.

2 Out-of-Print Rights Were Common — but Slow to Evolve

So how did those contracts then provide for rights to be returned to authors? In the following paragraphs we report on:

- (a) The frequency with which out-of-print reversion rights appeared in the contracts;
- (b) The different varieties of out-of-print clauses (including whether they were based on technical availability or objective criteria), and their evolution over time;
- (c) How long it takes for rights to revert (including any notice periods that have to be served); and
- (d) Other circumstances in which authors can reclaim their rights (eg in the case of unexploited language and territory rights; when the publisher enters liquidation).

(a) Most Contracts Gave Authors Out-of-Print Reversion Rights

Eighty-seven per cent (n=126) of the contracts had some form of out-of-print reversion clause. Six of the 19 contracts without out-of-print clauses were for educational and academic works, and that absence is consistent with known

practice.¹⁰³ Educational works in particular raise different issues than trade books as they can be originated by publishers (rather than authors) and intended to be revised over time, rendering out-of-print rights less appropriate.¹⁰⁴ However, 53% (n=10) of the contracts without out-of-print clauses were for trade non-fiction books. This suggests that out-of-print clauses are less universal than some in the publishing industry believe them to be.¹⁰⁵

(b) Out-of-Print Status (Nearly Always) Determined by Technical Availability Criteria

Despite the efforts of author organisations to resist out-of-print status being determined by technical availability,¹⁰⁶ such standards remained prevalent in our sample of contracts dated 1960–2014 (see Figure 2). Just 7% (n=9) of contracts with out-of-print clauses utilised objective criteria. Eighty-eight per cent of contracts with out-of-print clauses used some form of technical availability criteria. The most common formulations of this standard were ‘out of print and not available in any edition’ (n=54), ‘out of print in all editions’ (n=21), ‘out of print’ (n=18) and ‘out of print or off the market’ (n=10). Additionally, six contracts gave publishers the power to determine when a title was out of print, by, for example, declaring that demand or changed conditions do not justify further publication.

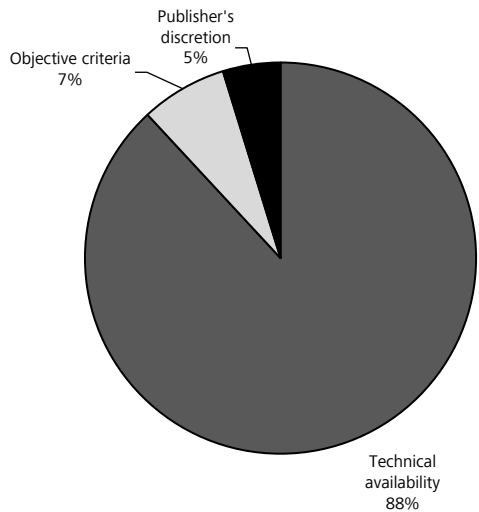
¹⁰³ See, eg, World Intellectual Property Organization, *WIPO Guide on the Licensing of Copyright and Related Rights* (Guide, 2004) 24 (‘WIPO Guide’); Stephenson (n 73).

¹⁰⁴ See, eg, *WIPO Guide* (n 103) 24.

¹⁰⁵ Giblin, ‘Does Australia Really Need Author Rights?’ (n 101).

¹⁰⁶ See above Part II(A)(1)(a).

Figure 2: What Standard Determines whether a Book Was Out of Print?

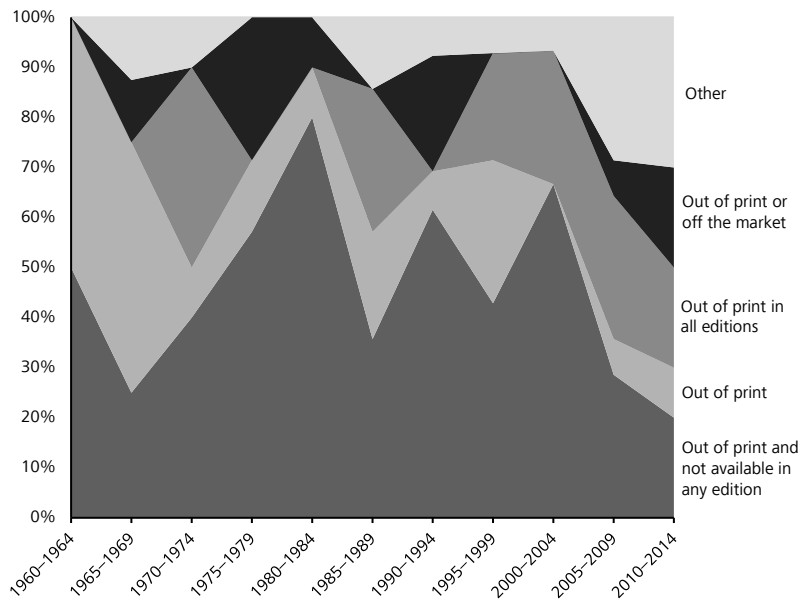


(c) We Observed Reduced Consensus about What ‘Out of Print’ Means

We then traced the evolution of the different forms of words used to determine out of print status. In five-yearly increments from 1960–2014 we tracked each formulation that had three or more instances in our sample that were not ‘objective criteria’ (n=103); the rest are collectively depicted as ‘Other’ (n=14).¹⁰⁷

¹⁰⁷ These categories were: ‘declared by publisher to be out of print’, ‘out of print and it is mutually agreed that the Work’s potential both as a book and with subsidiary rights has been fully exploited’, ‘not for sale in any edition’, ‘not held in stock in saleable quantities’, ‘out of print and off the market’, ‘declared by publisher and not available for purchase including electronically’, ‘off the market and not available in any edition’, ‘publisher can terminate and discontinue at their sole option’, ‘off the market’, and ‘unavailable for sale.’

Figure 3: How the Phrasing of ‘Out of Print’ Has Changed over Time



The results show that, in the contracts we analysed, the ‘out of print and not available in any edition’ formulation gained popularity from the 1980s relative to the other common formulations. *Clark’s* suggests that the shift in wording from ‘out of print’ to ‘available’ may be indicative of the transition to digital media: that is, it was a deliberate shift to capture digital and POD editions.¹⁰⁸ We also see that, in the early 2000s, there was a splintering in the words used to describe the circumstances in which an author can reclaim their rights for lack of exploitation: the most common formulations all became less frequent, and ‘other’ formulations spiked. By 2009–14, there was no clear frontrunner formulation, and ‘other’ formulations had increased to over 25%. This may suggest that publishers are developing their own solutions to the problem of defining ‘out of print’, rather than developing an industry consensus. The variety of formulations, and the lack of clarity as to how they differ from one another, seem likely to cause confusion for authors seeking to understand and exercise their out-of-print rights.

¹⁰⁸ Owen (ed), *Clark’s 10th ed* (n 24) 56.

(d) *Objective Criteria Were Mostly Based on the Number of Copies Sold*

As already explained, the shift to digital forms of publication led to calls to change the way out-of-print status was calculated: from being calculated on mere ‘availability’ to using more objective measures like sales and royalties. We reported above that just 7% (n=9) of the contracts with out-of-print clauses utilised such objective measures. As shown in Table 3, these were mostly based on the number of copies sold.

Table 3: Objective Criteria Used in Out-of-Print Clauses to Determine when a Book Was ‘Out of Print’ or ‘Unavailable’, by Year

Year	Criteria for when a book was considered ‘out of print’ or ‘unavailable’
1987	When the publisher’s stocks were under 200, and when royalties in a six-month accounting period were under \$50.00.
1990	Where royalties for ‘each of two ... successive accounting periods are below the equivalent of ... \$25.00’.
2006	Where at ‘the end of the fifth or any subsequent accounting period after release’, the publisher holds no physical stock of the Work and ‘fewer than 100 copies in all formats have been sold over two consecutive accounting periods’.
2008	Where the publisher’s stocks were under 50 or where fewer than 12 copies were sold in any six-month accounting period.
2009	Where under 50 copies were sold in two accounting periods.
2013	When the royalties paid for ‘gross combined sales of print and ebook’ sales in the preceding 12-month royalty period is under \$100.00.
2014	Where fewer than 12 copies were shown to be sold in any account statement.
2014	Where the title is not for sale in print or electronic editions, or is available but with fewer than 250 ‘royalty generating sales’ across ‘four consecutive royalty periods’.
2014	If a) ‘gross sales in two consecutive accounting periods’ were less than 50 copies; or b) if fewer than 10 copies in book form (as distinct from electronic form) were sold in ‘two consecutive accounting periods’; or c) the ebook in all e-formats sells fewer than 10 copies in ‘two consecutive accounting periods’.

These examples are striking for the variation between the clauses, but also for the early dates at which some of them appear. Notably, the earliest such contract was dated 1987, and five were dated 2009 or earlier. This makes sense, given that authors' societies had been campaigning for the use of objective criteria to determine out-of-print status from at least 1968.¹⁰⁹ That renders particularly stark our finding about how few contracts utilised objective criteria at all. It is striking that the vocally expressed concerns of authors over uncertain and inadequate out-of-print rights were so long and widely ignored.

The low number of out-of-print clauses based on objective criteria may also have been influenced by poor drafting. Four contracts (dated 1991, 1993, 1994, 2007) defined 'out of print' using objective criteria (less than 10 copies in stock) as well as technical availability criteria (requiring titles *also* to be unavailable in any edition). If the title was out of print because it had fewer than 10 copies in stock but *was* available in some edition (such as an ebook), this clause would not operate. This may not have been what the drafters intended — or else why define 'out of print' with objective criteria at all?

(e) *Some Authors Are Still Required to Pay to Reclaim Their Rights*

Consistent with modern practice,¹¹⁰ most out-of-print rights were exercisable at no cost to the author. However, six contracts (dated 1964–1998) required authors to pay to reclaim rights, contributing to the cost of plant used to print the book, repaying any unearned portion of their advance, or both.¹¹¹ Variations of such formulations date back to at least 1744,¹¹² and had been recommended by leading publisher Stanley Unwin until 1960 in regular editions of his *The Truth about Publishing*.¹¹³ Yet the 1976 edition described that advice as of only historic interest, since photolithography had by then so dramatically reduced the costs of production.¹¹⁴ It is striking, then, that we found contracts that still had such superseded formulations. Even if such clauses had been appropriate at the time they were drafted, given the dramatic changes to the economics of publishing in the succeeding decades, they no

¹⁰⁹ See above 9.

¹¹⁰ *Lindey* (n 24) § 5:109.

¹¹¹ In contracts from 1964, 1966, 1973, 1976, 1977 and 1998.

¹¹² 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(3) *Berkeley Technology Law Journal* 1475, 1512–13.

¹¹³ Stanley Unwin, *The Truth about Publishing* (George Allen & Unwin, 2nd ed, 1926) 104–5; Sir Stanley Unwin, *The Truth about Publishing* (George Allen & Unwin, 7th ed, 1960) 93–5, recommending the author arrange for the new publisher to cover those costs.

¹¹⁴ Sir Stanley Unwin, *The Truth about Publishing*, rev Philip Unwin (George Allen & Unwin, 8th ed, 1976) 68.

longer are. Notably, since these contracts lasted the entire term of copyright, they still endure today (unless some reversion clause has been exercised or they have otherwise been terminated).

3 *Authors Typically Face Long Waits before They Can Reclaim Their Rights*

Rights to four out of print titles reverted automatically to authors once they gave notice to publishers to reclaim them. In all other cases, authors had to go through various waiting and notice periods. We identified up to three different delays ‘baked in’ by the contracts: (a) a period after initial publication, (b) a period after the book goes out of print, and (c) a period for the publisher to reprint the book.

Such periods are intended to strike a balance between publishers’ needs for opportunities to recoup and profit from their investments, and authors’ interests in reclaiming rights to works that are no longer meaningfully being exploited. Too short, and they may disincentivise publishers from investing in new titles. Too long, and they may prevent authors taking advantage of emerging opportunities. We examine the extent to which these three waiting periods appear in the sampled contracts, their duration, and how the length of notice to publishers has evolved over time.

(a) Some Contracts Required Authors to Wait after Initial Publication

Twenty-one per cent of contracts with out-of-print clauses (n=27, 1966–2014) required authors to wait a specified period after initial publication before they could begin activating their out-of-print rights. The shortest required delay was one year after publication, and the longest was seven (average 41.3 months, median 36 months). One further contract required the author to wait two years from the date of the book’s most recent (as distinct from first) publication.

(b) Books Must Sometimes Be Long Out of Print before Authors Can Initiate the Reversion Process

Sometimes authors were required to wait a specified period after the book went out of print before they could begin to exercise their out-of-print rights (n=10, 1964–2011). These periods ranged from six months to 36 months (average 14.4 months; median 12 months).

(c) Most Contracts Required Notice to Reprint Books

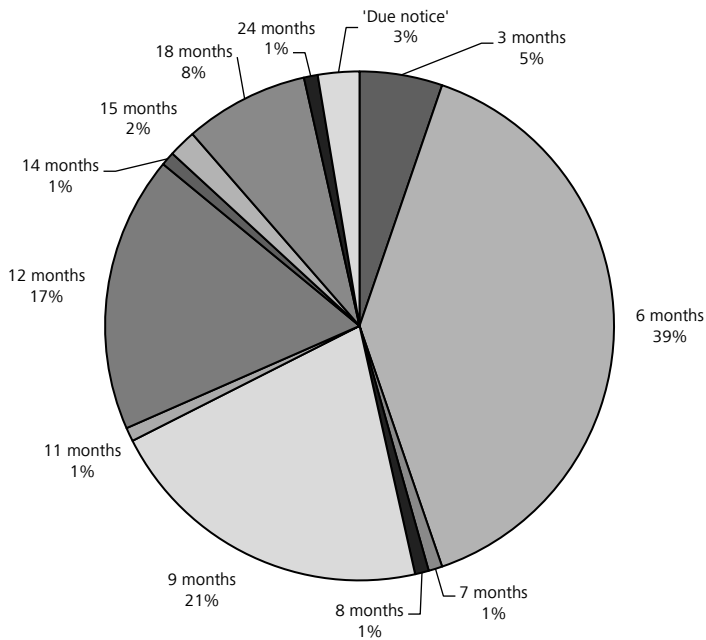
Ninety-three per cent of contracts with out-of-print clauses (n=117) had a requirement for authors to give publishers notice to reprint their book once it went out of print, with the rights reverting to the author only when the publisher failed to do so. These clauses usually stated that publishers must

reprint a new edition of the book before the expiry of the notice period. However, on 19 occasions the contracts indicated that the notice period was for publishers to *commence* the process of republication. To equalise the figures we added six months to the stated notice period in the latter cases, assuming it to be a reasonable time for the publisher to finalise reprinting.

The specified notice periods for reprinting ranged from two to 24 months. Three contracts did not specify a period, but simply required authors to give publishers ‘due notice’. In such cases the Australian common law implies an obligation for the author to give a reasonable amount of notice.¹¹⁵ While this lack of precision is not legally problematic, the absence of clear timelines may hamper authors in understanding their rights.

Figure 4 plots the frequency with which each notice period appears in the sample. We excluded three other contracts specifying notice periods from our analysis (dated 1977, 1987, 2014) because they were too unclear for us to generate single number results from them.

Figure 4: Period of Notice for Publishers to Reprint



¹¹⁵ Robertson and Paterson (n 96) 497 [23.55].

We then tracked the length of notice periods and their evolution over time. Over the past decades, *Clark's* has revised its recommended notice period downwards. In 1980, it gave no specific recommendation but simply noted that publishers generally require at least 12 months' notice.¹¹⁶ In the 1988 edition, it recommended authors be required to give 12 months' notice, then in 2010 reduced that to nine months.¹¹⁷ In the most recent 2017 edition, *Clark's* recommends that authors give the publisher one 'full accounting period' for the publisher to make a specified number of sales.¹¹⁸ Accounting periods in trade publishing are typically six months.¹¹⁹

Nothing in those *Clark's* commentaries explains its reduction in the recommended term of notice. We hypothesise that it is most likely attributable to publishing industry changes. It has become cheaper and faster to print books, including small runs of 50–100 copies that used to be financially infeasible.¹²⁰ Over the same period, BookScan has revolutionised publisher understanding of which books are selling and where. Digital stock management technologies have also made it far easier, faster and cheaper for publishers to determine how many books are held by booksellers.

All this would suggest publishers require less notice to reprint books than has been the case in the past. Notably though, we observed an upward trend in the notice to reprint by an average of almost four months over the 50 years of contracts (see Figure 5).¹²¹ We make no claim that this is representative of Australian publishing contracts as a whole (nor that this is statistically significant), but it is a striking observation which encourages us to examine notice periods closely in our subsequent work.

¹¹⁶ Clark, *Clark's 1st ed* (n 83) 22.

¹¹⁷ Charles Clark (ed), *Publishing Agreements: A Book of Precedents* (Unwin Hyman, 3rd ed, 1988) 36–7 ('*Clark's 3rd ed*'); Owen (ed), *Clark's 8th ed* (n 44) 55, 88.

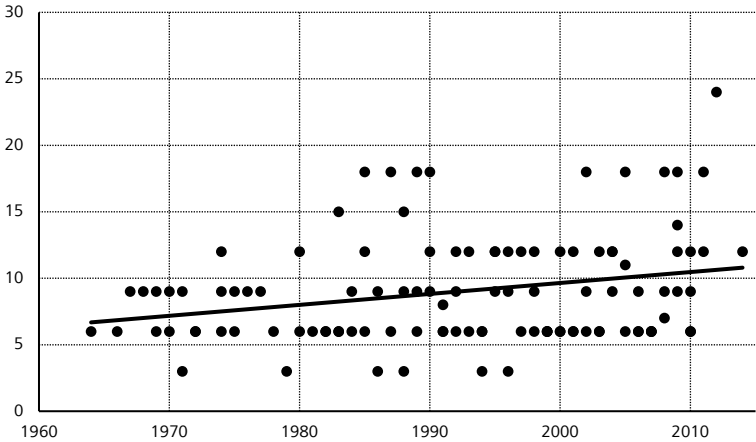
¹¹⁸ Owen (ed), *Clark's 10th ed* (n 24) 57.

¹¹⁹ Text communication from literary agent A to the authors (19 August 2019).

¹²⁰ Patrick Henry, 'Book Production Technology since 1945' in David Paul Nord, Joan Shelley Rubin and Michael Shudson (eds), *A History of the Book in America* (University of North Carolina Press, 2009) vol 5, 55, 70.

¹²¹ This chart contains 111 of the 117 contracts with notice periods for the publisher to reprint. The others required 'due notice' to be given or were too unclear to generate single number results from them.

Figure 5: Notice to Reprint (Period in Months over Time)



(d) *The Different Types of Notice Could Stack Up Too*

Contracts sometimes required two or even all three kinds of notice. Sixteen per cent of contracts with out-of-print clauses (n=20) required the author to wait after the work was first or last published before giving the publisher notice to reprint, and 5% (n=6) did the same with waiting periods after the book went out of print. One 2011 contract imposed all three types of waiting periods: the author needed to wait 12 months after the book was first published, then 12 months after the book went out of print, and then give the publisher 12 months to reprint the work. The rights would revert only once all three periods expired, making it a lengthy and complicated process. If new opportunities emerged for authors to exploit out of print titles, such delays may well make it infeasible for them to take advantage of them.

4 *Other ‘Use-It-or-Lose-It’ Reversion Clauses*

In addition to out-of-print rights, some contracts provided for the return of unexploited language and territory rights (n=8). However, these were rare. Three contracts (dated 1980, 1986, 2008) reverted overseas territory rights if no overseas sales were made within a specified period. A further two (dated 1997, 1998) reverted unsold publishing rights outside of Australia and NZ six months after the Australian publication date. One (dated 2014) reverted subsidiary rights including translation rights and the right to sell the book in English overseas ‘if no sales have been made during the previous three years’. The last two contracts (dated 2000, 2005) provided for unused rights to be reverted, but

also gave the publisher the opportunity to prevent attempted reversion if they were making reasonable progress towards selling those rights.¹²² The widespread absence of use-it-or-lose-it clauses was particularly striking given the emphasis that author associations put on such provisions.¹²³

5 *Reversion in the Event of Liquidation*

As discussed above,¹²⁴ clauses providing for reversion in the event of the publisher's going out of business are a common and important part of publishing contracts. Seventy per cent of the contracts (n=101) provided for rights to return to authors in the event of the publisher going out of business (eg entering liquidation). The 30% of contracts without liquidation clauses (n=44) spanned the entire sample, from 1960 to 2014.

Missing reversion clauses in the event of liquidation are particularly problematic, because liquidators have legal obligations to maintain the value of corporate assets for creditors,¹²⁵ and may not have the ability to return them contrary to the terms of the contract (even if industry norms would be to do so).

IV DISCUSSION

A Publishing Contracts Do Not Adequately Safeguard Author Interests

Outside the time based reversion rights in the US and Canada, the rights of Anglosphere authors are determined entirely by their publishing contracts. Our analysis suggests it is not appropriate to rely so heavily on contracts as repositories of author rights. There are four main reasons why.

First, publishing contracts (and industry practice guides) do not universally incorporate even the most commonly accepted reversion rights. Thirteen per cent of the contracts we reviewed lacked out-of-print clauses. There may sometimes be valid reasons for this (eg in the case of publisher-originated,

¹²² The first, dated 2000, reverted non-exclusive rights outside Australia to the author, only 'if in the reasonable opinion of *both* the Author and Publisher satisfactory progress has not been made on international sales'. The second, dated 2005, reverted publishing, sale, and various other rights 'if they were unexploited after two (2) years from first publication in Australia', but required the author to 'agree ... to extend the periods referred to above if the Publisher provides satisfactory evidence that it is actively pursuing publication of the Work in that territory or that language'.

¹²³ See above nn 19–20.

¹²⁴ See above Part II(A)(3).

¹²⁵ *Corporations Act* (n 55) s 420A(1).

regularly revised educational titles), but they were missing from trade contracts too, and in one instance even from a model trade agreement.¹²⁶ Thirty per cent also lacked a liquidation clause. This absence is particularly difficult to defend, since liquidators may not have discretion to return rights absent a contractual obligation to do so. Further, hardly any contracts (and few practice guides)¹²⁷ incorporated use-it-or-lose-it rights covering unexploited languages and territories, despite author groups holding such rights up as a core plank of fair contracting. This is an especially stark omission given the broad rights taken by publishing contracts in our sample — often for all languages and/or all territories worldwide. Use-it-or-lose-it provisions are especially important in the current era, where, courtesy of ebooks, POD and the Internet, there are more options for exploiting rights, including overseas, than there have ever been before. It may well be that well-informed and well-advised authors are able to negotiate such rights into their contracts, but that begs the question — why then are such protections not simply included by default? These omissions can make it harder for authors to financially benefit from their works, block other publishers from new investment opportunities, and lead to worse access for the public.

Second, our analysis suggests that publishing contracts can be inordinately slow to evolve in response to changing industry norms. We found clauses requiring authors to pay to reclaim rights to out of print titles long after such formulations had been rendered obsolete.¹²⁸ And, despite consistent advocacy by author organisations for the use of objective criteria to determine out-of-print status from as early as the 1960s, nearly all of the contracts we analysed still used outdated formulae based on technical availability criteria.¹²⁹ Various present-day publishing guides also used such formulations,¹³⁰ and author organisations report regularly still seeing such formulations today (despite most larger publishers having finally made the shift to objective criteria).¹³¹ Slowness to adapt to changing circumstances might also explain the paucity of use-it-or-lose-it clauses, which were less important in the pre-digital era when authors had fewer options for exploiting their rights.

Third, contracts can be ambiguous and poorly drafted, making it time-consuming and expensive for authors to ascertain and enforce their rights. We

¹²⁶ *Lindey* (n 24) § 5:118.

¹²⁷ See above n 51 and accompanying text.

¹²⁸ See above Part III(C)(2)(e).

¹²⁹ See above Part III(C)(2)(b).

¹³⁰ See above nn 37–42.

¹³¹ See above n 50 and accompanying text.

found examples of publishers imposing terms apparently without understanding their legal significance, such as when they (superfluously) took a licence after already extracting the author's entire copyright. On many occasions we found it difficult to determine how long an author needed to wait before they could regain their rights. Some contracts appeared to suffer from 'cut-and-paste' syndrome, whereby clauses from different eras were sewn together, betrayed by inconsistent fonts or language. While such updates may well reflect well-intentioned attempts to respond to changing practice, they left some contracts uncertain or unworkable. Other times core terms were omitted altogether, such as the length of the contract or languages taken. No doubt these problems were exacerbated by the fact that some of the contracts we examined came from small presses, who are less likely to have access to expert legal input. Yet the sheer number of such presses make it even more important to ensure authors have certain minimum protections outside the contracts as a safeguard against uninformed or careless drafting.

Finally, even if none of the above deficiencies existed, the sheer length of contracts makes them inappropriate repositories for author rights. Not even the most prescient publisher can write contracts that will adequately deal with the social, technological and industry realities that will exist 50 or 100 years after their execution. Contracts signed by young authors in good health today might endure until 2150 or beyond. By then, those contracts will look as quaint and outdated as late-19th century contracts do to us today. We cannot expect the drafters of today's contracts to predict what tomorrow's world will look like, but by making them the sole source of author rights that is effectively what we are asking them to do. Extremely long terms also increase the likelihood of contracts being misplaced, creating situations where authors seek to reclaim their rights, but their entitlement to do so cannot be ascertained.¹³²

B These Problems Could Be Ameliorated by Introducing Minimum Author Reversion Rights

We would propose new minimum reversion rights for authors to be enshrined in legislation, with contracts able to strengthen (but not detract from) those minimums. A soft law approach such as an industry code of conduct is unlikely to be sufficiently effective, given the number of publishers in existence, their general lack of legal support, and the poor state of so many of the contracts we analysed. In those circumstances, mandating minimum rights that apply

¹³² See, eg, Brianna Schofield, 'Joseph Nye: A Rights Reversion Success Story' *Authors Alliance* (Article, 22 January 2016) <<https://www.authorsalliance.org/2016/01/22/joseph-nye-a-rights-reversion-success-story/>>, archived at <<https://perma.cc/D2YK-Q3RX>>.

regardless of the contract's terms is likely to be the most effective solution, as well as being the most cost efficient for publishers themselves. More than half the world's nations already give authors statutory reversion rights, in a rich variety of forms.¹³³ Some statutes restrict the duration of transfers and licences.¹³⁴ Provisions also exist to allow authors to reclaim rights when their books go out of print,¹³⁵ where their publisher fails to exploit particular language rights¹³⁶ or pay royalties,¹³⁷ or where it enters liquidation.¹³⁸ While Australia currently has no such author protections, they are not unknown in its law. Australia (like the UK and NZ) used to automatically return rights to heirs

¹³³ Yuvaraj (n 17).

¹³⁴ In some countries, time limits apply whether or not the parties agree a longer term: see, eg, *Law on Copyright and Neighbouring Rights* (Bulgaria) 29 June 1993, art 37(2) ['Law on the Copyright and Related Rights', *WIPO Lex* (Web Document) <<https://wipolex.wipo.int/en/text/280106>>]; *Copyright Act*, RSC 1985, c C-42, s 14(1); *Copyright Act 1912* (Eswatini) s 7(2); *Federal Law on Copyright* (Mexico) 15 June 2018, art 33; 17 USC §§ 203, 304 (2020). In some other countries, restrictions apply only where parties have not specified a contractual term in their contracts: see, eg, *Copyright and Neighboring Rights Protection Proclamation* (Ethiopia) No 410/2004, s 24(3) (five or 10 years depending on whether the contract in question involves a lease or assignment, respectively); *Copyright Act 1957* (India) s 19(5) (five years); *Copyright Act BE 2537* (Thailand) 9 December 1994, s 17 (10 years).

¹³⁵ See, eg, *Law No 032-99/AN on the Protection of Literary and Artistic Property* (Burkina Faso) 22 December 1999, art 56 [tr World Intellectual Property Organization, 'Law No 032-99/AN on the Protection of Literary and Artistic Property', *WIPO Lex* (Web Document) <<https://wipolex.wipo.int/en/text/188420>>]; *Act on Copyright in Literary and Artistic Works* (Sweden) No 1960:729, art 34 ['Act on Copyright in Literary and Artistic Works', *WIPO Lex* (Web Document) <<https://www.wipo.int/edocs/lexdocs/laws/en/se/se124en.pdf>>]. In some instances, this depends on the publisher not meeting a pre-existing contractual arrangement to publish a second edition of the book: see, eg, *Copyright Law* (Peru) Legislative Decree No 822, art 102(b) [tr International Bureau of the World Intellectual Property Organization, 'Copyright Law', *WIPO Lex* (Web Document) <<https://wipolex.wipo.int/en/text/129300>>].

¹³⁶ See above n 52.

¹³⁷ See, eg, *Ordinance No 03-05 of 19 Joumada El Oula 1424 Corresponding to 19 July 2003 on Copyright and Neighboring Rights* (Algeria) JO, 23 July 2003, art 97 ['Copyrights and Neighboring Rights Act, July 19, 2003 Algeria', *Saba IP* (Web Document) <<https://www.sabaip.com/wp-content/uploads/2018/04/Algeria-Copyright-Law.pdf>>]; *Law 23 of January 28 1982 on Copyright* (Colombia) art 132 [tr World Intellectual Property Organization, 'Law No 23, of January 28, 1982, on Copyright', *WIPO Lex* (Web Document) <<https://www.wipo.int/edocs/lexdocs/laws/en/co/co012en.pdf>>].

¹³⁸ Or related circumstances: see, eg, *Loi du 18 avril 2001 sur les droits d'auteur, les droits voisins et les bases de données* [Law of April 18 2001 on Copyright, Neighbouring Rights and Databases] (Luxembourg) art 17; *Law No 1328/1998 on Copyright and Related Rights* (Paraguay) art 99 ['Law No 1328/98 on Copyright and Related Rights', *WIPO Lex* (Web Document) <<https://wipolex.wipo.int/en/text/129427>>]; *Law on Copyright* (Venezuela) 14 August 1993, art 85 ['Law on Copyright', *WIPO Lex* (Web Document) <<https://wipolex.wipo.int/en/text/130135>>].

25 years after the author's death.¹³⁹ Some might object to such protections on the basis that they interfere with freedom of contract, but of course countries regularly decide to do this, and the prevalence of such laws elsewhere demonstrates that these are appropriate conditions in which to do so.

Consistent with copyright's aims, the intent of minimum reversion rights should be trifold: to give authors fresh opportunities to financially benefit from and decide the future of their works, to open new investment opportunities up to publishers and other investors, and to promote books' ongoing availability to the public. To effectively achieve all three aims, appropriately scoped reversion rights would need to be developed in consultation with all industry stakeholders. Industry involvement is vital to understand the economic and practical impacts of any new rights, which must be carefully factored in given book publishing's tight financial realities. And, since the publishing industry is in such flux, any baseline author rights should be designed to be regularly updateable to reflect evolving norms and practice. In Australia, for example, that may mean enshrining the entitlement to the rights in the *Copyright Act 1968* (Cth), but placing the rights themselves in more readily updateable regulations.

Further research and consultation with stakeholders is necessary to appropriately scope any new reversion rights, but below we set out some preliminary thoughts about possibilities to explore together with some of the issues that would need to be addressed if modern author protections were to be enacted into law. Variations on everything we propose below can already currently be found in the contracts of knowledgeable and reputable Australian publishers.

1 *Rights to Revert Where a Book Is No Longer Being Meaningfully Exploited*

Our results suggest a need for a clear out-of-print right. Careful consideration would need to be given to the criteria triggering the right to reclaim. There might be more than one: for example, where publishers fail to satisfy demand for copies within a certain period *or* where a minimum threshold of royalties has not been reached, as is the case under French law.¹⁴⁰ Consideration would need to be given to how long after publication the entitlement should arise,¹⁴¹ whether it would be appropriate to require authors to give notice of their intent

¹³⁹ Joshua Yuvaraj and Rebecca Giblin, 'Why Were Commonwealth Reversionary Rights Abolished (and What Can We Learn Where They Remain)?' (2019) 41(4) *European Intellectual Property Review* 232, 233.

¹⁴⁰ *Intellectual Property Code* (n 52) art L132-17-4.

¹⁴¹ See, eg, *EU Directive* (n 15) art 22(3).

to revert, and if so, how long the period should be.¹⁴² Thought must also be given to whether any categories of work should be the subject of exclusions.¹⁴³ For example, it may not be desirable to give authors of publisher-originated works that are intended to be regularly revised (most commonly educational or reference works) the same reversion rights as trade authors.

2 'Use-It-or-Lose-It' Rights

Comprehensive 'use-it-or-lose-it' rights should also be considered given their potential to unlock new investment and revenue opportunities. Inspiration might come from existing laws and practice, covering unexploited languages (eg Spain and Lithuania),¹⁴⁴ territories (as in some of the contracts and publishing guides we analysed)¹⁴⁵ and formats (eg ebooks or audiobooks, as provided by the French law entitling authors to reclaim unused digital rights).¹⁴⁶ Consultation would be necessary to determine how long publishers should have to exploit works before authors can exercise the right, whether authors should be required to give notice of their intention to do so, and if so, how long that should be.

3 A Right to Revert When the Publisher Enters Liquidation

Consistent with standard industry practice, consideration should be given to authors having a right to reclaim rights in the event a publisher enters liquidation. This would need to be made consistent with domestic insolvency laws to fairly balance the interests of authors, publishers and creditors. Thought should be given as to whether any types of book should be excluded (such as books originated by the publisher, eg in the educational context).

4 Reversion for Failure to Pay Royalties or Provide Reasonably Transparent Royalty Statements

We also urge consideration of rights around royalties and royalty statements. None of the reversion rights canvassed above can be particularly effective unless authors also receive adequate information about how their works are being exploited, including all revenue sources and territories. Authors today have no guarantee of this. In recognition of that reality, the EU recently imposed a transparency obligation requiring assignees and licensees to provide

¹⁴² See, eg, *ibid.*

¹⁴³ See, eg, *EU Directive* (n 15) art 22(2)(a).

¹⁴⁴ See above n 52.

¹⁴⁵ See above n 51.

¹⁴⁶ *Intellectual Property Code* (n 52) art L132-17-5.

relevant and comprehensive information on the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights, or their successors in title, in particular as regards modes of exploitation, all revenues generated and remuneration due.¹⁴⁷

We should investigate introducing a similar obligation in Australia, with authors given the ability to reclaim their copyrights if their publisher fails to provide reasonably transparent and timely statements.

We should further consider recognising an express right for authors to terminate their contracts if the publisher fails to pay royalties within a specified period, as is already the case in countries including Colombia and Algeria.¹⁴⁸ Such a term would already be implied into publishing contracts, but the absence of an express time stipulation would make it difficult for authors to exercise the right without risking unlawfully repudiating the contract themselves.¹⁴⁹

5 *Reversion after Time*

Finally, consideration should be given to whether authors should be entitled to reclaim copyrights after a certain period. This is already the case in countries including the US and Canada,¹⁵⁰ and consistent with calls from author advocates concerned that writers are often required to sign away rights for the entire copyright term before anyone knows their worth.¹⁵¹ Such limits would do much to address problems caused by outdated and missing contracts. Nothing would prevent an author from immediately entering into a new contract with the same publisher, and they may choose to do so if that publisher was doing the best job of maximising revenues and reaching audiences. However, the author might alternatively enter into an agreement with a different publisher or take advantage of a new distribution model that does not even exist today, if that promised better remuneration or availability. Time based reversions could be designed to occur only at the instigation of the author (as under the current US law)¹⁵² or automatically (as in Canada).¹⁵³ In the latter

¹⁴⁷ *EU Directive* (n 15) art 19(1).

¹⁴⁸ See above n 137.

¹⁴⁹ *Louinder v Leis* (1982) 149 CLR 509, 526 (Mason J).

¹⁵⁰ See above n 18.

¹⁵¹ 'Ten Principles' (n 20).

¹⁵² 17 USC §§ 203, 304.

¹⁵³ *Copyright Act*, RSC 1985, c C-42, s 14(1). See also the recent recommendations to award a new right that would entitle creators to revert rights 25 years after transfer (in addition to the existing right that applies automatically 25 years after the author's death): *Shifting Paradigms* (n 16) 31; *Statutory Review* (n 16) 4.

case however, steps should be taken to reduce the risk of ‘orphaning’ works in the event their authors do not claim them. Giblin has suggested the possibility of putting a public trust in place to manage such abandoned works, with licence revenues directly supporting new authorship via grants, fellowships and prizes.¹⁵⁴

V CONCLUSION

Our analyses of publishing contracts and industry practice guides suggest there are real reasons to doubt the appropriateness of contracts as such important repositories of author rights. The contracts we analysed took very broad rights while rarely satisfying best practice for returning them to authors in the event they were not being meaningfully exploited. Publishers were slow to update their contracts to reflect evolving practice, and they could be riddled with ambiguities and inconsistencies. These practices combine to make it harder for authors to financially benefit from their books, for publishers to make new investments, and for the public to access our literary heritage. And, even if they had none of these problems, they would still not be appropriate repositories for minimum author rights; since publishing contracts can last a century or longer, even contracts that reflect best practice at time of signing will almost certainly become obsolete before their scheduled end.

Our results suggest there are good reasons for Anglosphere nations to consider developing minimum reversion rights. In a financial environment that is tough for authors and publishers alike, appropriately tailored reversion rights would potentially increase the size of the pie and help copyright more effectively achieve its aims. Rather than asking whether publishers and policymakers should support such reforms, a better question might be — can they afford not to?

¹⁵⁴ Giblin, ‘Copyright Bargain’ (n 6) 401.

V. CONCLUSION

Reversion rights can help reward authors and incentivise ongoing creation of and investment in works for the public good. In countries without statutory reversion rights, publishing contracts are the leading source of rights. Surveys suggest such rights are often present in publishing contracts, and that authors enforce and earn additional income from re-publishing their reverted works. However, the new research presented in this Chapter suggests publishing contracts are not adequate repositories for reversion rights. We found lengthy, broad copyright grants were often not matched by effective reversion clauses particularly in a digital age. These problems were not just in the ASA archive contracts, but also in some leading publishing contract templates from the UK and US.³³⁸ However, even if reversion clauses were of the best standard today, the length of these contracts means their reversion clauses will eventually become outdated. We cannot expect these contracts to adequately cater for technological and industry realities many years after they are first executed.

Having established that protections at general law are likely to be ineffective when it comes to authors seeking to regain their rights, this research suggests we need statutory reversion rights (for book authors in Australia at least, and potentially beyond). Ongoing campaigns for fairer contract terms involving author associations from other common law countries, and law reform initiatives in other countries like Canada and South Africa, suggest this is a need reflected across the Anglosphere, although more research would need to be undertaken in those countries to confirm the extent of general law protections and contractual practice around reversion rights.

Having established there is a case for statutory reversion rights, I next examine in **Chapter IV** whether statutory reversion rights are consistent with the doctrine of contractual freedom that heavily influences the approach to regulating creator-intermediary contracts in common law countries like Australia. I then survey the literature on statutory reversion models to provide a

³³⁸ See also LexisNexis, *Nimmer on Copyright* (online at 27 August 2021) 23 ‘§ 26.03 Book Publishing’ Form 26-1 Trade Publishing Agreement, Book Publishing Agreement:

Author hereby transfers and grants to the Publisher the exclusive right to print, publish, sell, lease and license the Work in the English language in book form, in the United States of America and all areas subject to the copyright laws of the United States, in the Republic of the Philippines, Canada and throughout the world...for the full term of copyright (cl 1).

The Work shall be considered in print if it is on sale under Publisher’s own imprint, or under the imprint of another publisher, or is under contract for publication. (cl 26.1)

sense of what could be applied in Australia and elsewhere (as we began to do in *Are Contracts Enough?*).

IV. STATUTORY REVERSION RIGHTS: CONTRACTUAL FREEDOM AND EXISTING LITERATURE

I. INTRODUCTION

The previous two chapters showed reversion has the potential to address deficiencies in current approaches to copyright. A review of book publishing contracts in Australia and best-practice publishing contract guides in the US and UK in **Chapter III** also suggested that publishing contracts are generally inadequate at providing these important rights for authors. Thus, for book authors at least, there is a strong case for statutory reversion rights, operating independently of publishing contracts.

In the next two chapters, I aim to contribute new knowledge as to the kinds of statutory reversion rights that have the most potential to better achieve copyright's incentive and rewards goals. In Part II of this Chapter, I explain why contractual freedom – an influential philosophy on the laissez-faire approach to regulating author-publisher contracts in common law countries – does not preclude the implementation of statutory reversion rights. I then survey the existing literature on reversion rights models around the world.

II. WHY IT IS APPROPRIATE TO OVERRIDE CONTRACTUAL FREEDOM WITH STATUTORY REVERSION RIGHTS

In this Part, I explain why it is appropriate to override contractual freedom to impose statutory reversion rights on author-publisher agreements. I explore what contractual freedom is in the context of author-publisher agreements, and why a 'free' contract between authors and publishers does not actually fulfil copyright's goals, opening the door for reversion rights.

A. What is contractual freedom?

Contractual freedom is defined as ‘the right to choose one’s contracting partners and to trade with them on whatever terms and conditions one sees fit.’³³⁹ The classic exposition of this concept comes from Jessel MR in 1875:

...if there is one thing which more than another public policy requires it is that men of full and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely shall be held sacred and shall be enforced by Courts of justice. Therefore you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract.³⁴⁰

While freedom of contract has long been a feature of various civilisations like ancient Greece and the Roman Empire,³⁴¹ the ‘golden age’ of freedom of contract was between the 18th and 19th centuries, driven by classical contract theory and a laissez-faire approach to contracts.³⁴²

Even then however, contractual freedom was never absolute.³⁴³ The common law of contract dictates the factors that must be present for a contract to be binding at law: offer, acceptance, consideration.³⁴⁴ Parties must be of a certain age and capacity to enter contracts.³⁴⁵ Moreover, certain contracts will always be prohibited as contrary to public policy, even if they are freely entered. These include:

³³⁹ Richard A Epstein, ‘Contracts Small and Contract Large: Contract Law through the Lens of Laissez-Faire’ in Frank Buckley (ed), *The Fall and Rise of Freedom of Contract* (Duke University Press, 1999), 28.

³⁴⁰ *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462, 465, cited in Tyrone M Carlin, ‘The Rise (And Fall?) of Implied Duties of Good Faith in Contractual Performance in Australia’ (2002) 25(1) *UNSW Law Journal* 99, 99 fn 2; Arthur Chrenkoff, ‘Freedom of Contract: A New Look at the History and Future of the Idea’ (1996) 21 *Australian Journal of Legal Philosophy* 36, 36.

³⁴¹ Chrenkoff 1996 (n 340), 40 – 41.

³⁴² Ibid 47. As Epstein notes, the laissez-faire philosophy ‘stresses that the government should keep its hands off the economy.’: Epstein 1999 (n 339), 29.

³⁴³ See e.g. World Intellectual Property Organization, ‘Working Group on Model Provisions for National Laws on Publishing Contracts for Literary Works (Geneva, June 18 to 22, 1984)’ (1984) 9 *Copyright: Monthly Review of the World Intellectual Property Organization (WIPO)* 307, 315 [12] <https://www.wipo.int/edocs/pubdocs/en/copyright/120/wipo_pub_120_1984_09.pdf> (‘Working Group 1984’):

Legislative regulation of essential aspects of certain types of contract, such as contracts of sale or lease, exist throughout the world and is (sic) considered a natural corollary to the principle of freedom of negotiation.

³⁴⁴ Epstein 1999 (n 339), 35 – 48.

³⁴⁵ See e.g., May Fong Cheong, *Australian Contract Law: Principles and Cases* (Thomson Reuters 2020), 153-168.

a contract to commit a crime, or a contract to give a reward to another to commit a crime...[or] contracts to commit an immoral offence or to give money or reward to another to commit an immoral offence, or to induce another to do something against the general rules of morality...³⁴⁶

Moreover, contracts can be vitiated on various grounds in the common law, as discussed in **Chapter II**.³⁴⁷

Nevertheless, the influence of contractual freedom can be seen in the way that copyright law regulates author-publisher agreements in Australia, New Zealand, and the UK (and other common law countries).³⁴⁸ Both natural rights and utilitarian theories of copyright have been used to justify the need to allow authors and publishers to freely sell their copyrights, which implies a lack of regulation. The labour-desert philosophy views copyright as the author's property.³⁴⁹ Copyright, just like any other property, must be 'fully saleable', because authors mainly gain reward from their creative labour by selling their works to publishers.³⁵⁰ I interpret 'fully saleable', 'free alienability', and 'free transferability',³⁵¹ as used by Netanel to mean complete transfers of copyright, or transfers without any restrictions: the implication is that the author's ability to sell their complete copyright should be unfettered by regulation.

Utilitarianism can also be used to justify a hands-off approach to author-publisher contract regulation. As Netanel argues, the model of granting copyright to incentivise the creation of works for the public interest mandates that copyright be completely alienable: 'the utilitarian model of economic incentive to stimulate author productivity and public dissemination presupposes a private property-based milieu in which authors' and publishers['] rewards are determined in the marketplace.'³⁵² Accordingly, the argument against implementing statutory reversion rights would be that both utilitarian and natural rights grounds necessitate authors and publishers having the unfettered ability to agree the terms of copyright exploitation.

³⁴⁶ *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462, 465 per Jessel MR, cited in Epstein 1999 (n 339), 58.

³⁴⁷ See also David Lindsay, *The law and economics of copyright, contract and mass market licences* (Research Paper prepared for the Centre for Copyright Studies Ltd, May 2002), 66-67 <https://static-copyright-com-au.s3.amazonaws.com/uploads/2015/08/CentreCopyrightStudies_AllenGroup-TheLawandEconomicsofCopyright.pdf>

³⁴⁸ See e.g., Giuseppina D'Agostino, 'Contract lex rex: Towards copyright contract's lex specialis' in Graeme B Dinwoodie (ed), *Intellectual Property and General Legal Principles: Is IP A Lex Specialis?* (Edward Elgar Publishing, 2015), 8.

³⁴⁹ See Afori 2004 (n 35), 503 – 504; see also Neil Netanel, 'Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation' (1993) 24(2) *Rutgers Law Journal* 347, 363. See further above 10-11.

³⁵⁰ Netanel 1993 (n 349), 369.

³⁵¹ Ibid 370 fn 92.

³⁵² Ibid 368.

B. Why statutory intervention is justified in the case of reversion rights

However, **Chapters II** and **III** showed that contracting without substantive restrictions can lead to problems achieving the end points of copyright's incentive and reward goals: the ongoing availability of works to the public good and allowing authors to share in the fruits of their creative labour. Under current approaches, authors are vulnerable to arrangements that may grant publishers a disproportionate share of the rewards from creative works. Lump sum assignments of copyright are one example of this, as seen in the Solomon Linda case discussed in **Chapter I**. However, royalty rates may also be tilted towards publishers, as author associations have routinely criticised ebook royalty percentages in publishing contracts.³⁵³ Additionally, industry practices such as long, expansive grants of copyright do not help achieve the goal of ensuring widespread access when books rapidly go out of print. While publishers may want to hold on to as many rights as possible for as long as possible 'just in case' those works become hits, this type of thinking can lead to losses for authors (in terms of lost opportunities) and the public (in terms of lost access) for most works. And as we saw in **Chapter III**, contractual reversion clauses can be slow to evolve to allow authors to reclaim their rights when their works are no longer being marketed or their rights are no longer being used.

Further, the bargaining power imbalances between many authors and publishers³⁵⁴ may make it difficult for authors to consistently negotiate substantive changes to these terms in their contracts. These imbalances are exacerbated by phenomena like the consolidation of large publishers,³⁵⁵ which means such publishers have more resources and power to require authors to accept these terms. This is not to say that publishers are necessarily ill-intentioned. Small to mid-size publishers may simply lack the resources to review their contracts, especially when many are struggling with the changing realities of the global publishing industry.³⁵⁶ However, the result is still the same: contracts that inconsistently protect author interests, particularly in terms of the reversion rights they provide. As such, many countries around the world impose

³⁵³ See above n 122.

³⁵⁴ See e.g., Cantatore 2013b (n 122), 102: 'inequitable power balance, with writers clamouring for publication opportunities and publishers being able to dictate the terms of their offerings.'; Towse 2019 (n 144), 596: 'Bargaining power is mostly strongly on the publisher's side.'

³⁵⁵ Thompson 2019 (n 18), 249.

³⁵⁶ Thompson 2019 (n 18), 249-250 (on the difficulties facing mid-sized publishers); Throsby et al Australian Book Publishers Survey Method and Results 2018 (n 19), 18, 19 (on the difficulties facing small publishers as they seek to respond to industry changes).

reversion rights of some sort,³⁵⁷ highlighting the widespread acceptance that statutory intervention is necessary and appropriate to address these issues.

For all these reasons, it is appropriate to override contractual freedom by imposing statutory reversion rights that help to better achieve copyright's incentive and reward goals than contracts do.

III. EXISTING LITERATURE ON STATUTORY REVERSION RIGHTS

The research in **Chapter III** strongly suggests publishing contracts are not adequate as the sole repositories of reversion rights. This, together with imbalances in creative industries (specifically the book publishing industry) justifies statutory impositions on contractual freedom, one of which is reversion rights. Below, I begin to examine what kind of statutory reversion rights can help address these concerns by looking at how reversion rights are implemented in copyright legislation around the world.

A. Europe

As explained in **Chapter II**, continental copyright law is driven more by natural rights theories of copyright rather than utilitarianism, although both theories are clearly present.³⁵⁸ As a result, they have a far greater range of author protections in their domestic copyright legislation than countries that have a more utilitarian bent, including reversion laws both for copyright grants generally and specifically for author-publisher contracts. Scholars have widely discussed such provisions.³⁵⁹ However, three reports that most comprehensively survey the different types of reversion mechanisms in continental Europe in the 21st century (in English) are:³⁶⁰

1. A study by Severine Dusollier, Caroline Ker, Maria Iglesias, and Yolanda Smits, commissioned by the European Parliament's Committee on Legal Affairs (2014);
2. A study for the European Commission by Europe Economics, Lucie Guibault and Olivia Salamanca (2016).

³⁵⁷ See generally **Chapter V**.

³⁵⁸ Martin Senftleben, 'More Money for Creators and More Support for Copyright in Society – Fair Remuneration Rights in Germany and the Netherlands' (2018) 41 *Columbia Journal of Law & The Arts* 413, 415.

³⁵⁹ See e.g. Neil Netanel, 'Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law' (1994) 12 *Cardozo Arts & Entertainment Law Review* 1; Jane C Ginsburg and Pierre Sirinelli, 'Private International Law Aspects of Authors' Contracts: The Dutch and French Examples' (2015) 39 *Columbia Journal of Law & The Arts* 171; Agnes Lucas-Schloetter, 'European Copyright Contract Law: A Plea for Harmonisation' (2017) 48 *IIC* 897; Molly Van Houwelling, 'Authors Versus Owners' (2016) 54(2) *Houston Law Review* 371, 387-389; Giuseppina D'Agostino, *Copyright, Contracts, Creators: New Media, New Rules* (Edward Elgar, 2010), 114-129.

³⁶⁰ There is a possibility more comprehensive reviews have been conducted in languages other than English – this is an inherent limitation of my thesis as I am not fluent in languages beyond English.

3. A working paper by Ula Furgal through the UK Copyright and Creative Economy Centre ('CREATe', 2021).³⁶¹

1. Dusollier et al, 'Contractual Arrangements Applicable to Creators' (2014)

The 2014 study by Dusollier et al into *Contractual Arrangements Applicable to Creators* is a good starting point for anyone seeking to understand statutory reversion laws in Europe.³⁶² The report 'assesses the rules and legal provisions applicable in the European Union that purport to protect creators in their contractual dealings.'³⁶³ It focuses on 'exploitation contracts', such as book publishing contracts and music production contracts.³⁶⁴ The authors survey the laws of various Member States, in addition to interviewing industry stakeholders.³⁶⁵ It documents a range of legal rules affecting exploitation contracts, including termination/reversion rights.³⁶⁶

The authors identify a wide range of reversion rights across the EU. These include 'use it or lose it' provisions, whereby authors are able to regain their rights if intermediaries fail to use them at all or adequately.³⁶⁷ Similarly, authors in countries like Germany and Hungary may terminate an intermediary's rights to exploit works if no exploitation has occurred.³⁶⁸ Another variation allows for termination if the intermediary exploits rights 'contrary to the artist's wishes...[such as] sublicensing without the author's consent...or exploitation against the author's "fundamental interests"'.³⁶⁹ Some countries allow reversion where the intermediary goes bankrupt 'or when the relations among shareholders of the legal entity exploiting the

³⁶¹ I note Marcella Favale's review of reversion rights in continental Europe, but have not included it as its material is covered in the other two papers and it is not designed to be as comprehensive as the others: Favale 2019, 341-344. See also Marian Hebb and Warren Sheffer, 'Towards a Fair Deal: Contracts and Canadian Creators' Rights' (Prepared for the Creators' Copyright Coalition and the Creators' Rights/ Alliance pour les droits des Créateurs, October 2006), 23-37 <<https://web.archive.org/web/20160428035614/http://www.creatorscopyright.ca/documents/contracts-study.pdf>>; György Boytha, 'National Legislation on Authors' Contracts in Countries Following Continental European Traditions' (1991) 10 *Copyright: Monthly Review of the World Intellectual Property Organization (WIPO)* 198. Note also an overview of European copyright legislation as it relates to audiovisual works, although this does not specifically focus on reversion rights: Francisco Javier Cabrera Blázquez et al, 'Copyright licensing rules in the European Union' (Publication of the European Audiovisual Observatory, July 2020) <<https://rm.coe.int/iris-plus-2020en1/16809f124b>>. See further Pascal Kamina, *Film Copyright in the European Union* (Cambridge University Press, 2002), 173-207.

³⁶² Dusollier et al 2014 (n 274). See also the summary of these findings in Dusollier 2018 (n 128). The last similar study was in 2002: Lucie Guibault and P Bernt Hugenholtz, 'Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union' (European Commission, Final Report, 2002) <<https://dare.uva.nl/search?identifier=7fe6d8fb-a7f2-45d9-ad8a-c357491928cd>>.

³⁶³ Dusollier et al 2014 (n 274), 6.

³⁶⁴ Ibid 6.

³⁶⁵ Ibid 7.

³⁶⁶ For a list of the types of regulation surveyed, see ibid 8-10.

³⁶⁷ Ibid 77: These laws are present in 'Belgium, Germany... Spain,... Austria, Luxembourg, Nordic Countries and Portugal'.

³⁶⁸ Ibid 77: Germany, Hungary, Sweden.

³⁶⁹ Ibid 77-78: Germany, Poland.

rights have significantly changed.’³⁷⁰ As explained earlier, no such provisions exist in the UK’s copyright legislation (then an EU Member State).³⁷¹ The authors also examine the US termination right, which I will discuss in Part III(B) of this Chapter and **Chapter VI**.³⁷²

2. Europe Economics, Guibault and Salamanca, ‘Remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works’ (2016)

The 2016 paper by Europe Economics, Guibault and Salamanca sought to document author remuneration for various types of text-based works.³⁷³ It employs both legal research methods and surveys of authors to identify author remuneration trends and how various laws affect author remuneration.³⁷⁴ The researchers found that restrictions on what rights authors can transfer had the most positive impact on how authors were positioned and their remuneration from writing.³⁷⁵ They also reviewed various types of reversion laws in the European Union, including the ‘use-it-or-lose-it’ provisions in Germany, France, Italy, Spain, and Hungary.³⁷⁶

The researchers found that *ex post* measures, including reversion rights:

...strengthen[ed] the position of authors in their contractual relationship with publishers [but]...lack[ed] the kind of direct, up-front impact on remuneration that can be observed in a restriction of the scope of transfer.³⁷⁷

A contributing factor to the limited impact the researchers consider *ex post* measures to have is that they require authors to seek judicial intervention, which may disincentivise authors from exercising their rights for fear of damaging existing relationships with publishers.³⁷⁸ As such, the researchers do not recommend implementing statutory reversion rights. Instead, they recommend that contracts specify, on penalty of being deemed void, ‘individual modes of exploitation and respective remuneration’, in addition to ‘Limit[ing] the scope for transferring rights for future modes of exploitation and future works.’³⁷⁹ While this study may seem to be critical of reversion rights, time limits on contracts at the outset (an *ex ante* measure under the Guibault and Salamanca formulation) can function as reversion rights: if an assignment or

³⁷⁰ Ibid 78.

³⁷¹ Ibid 78.

³⁷² Ibid 79 – 80.

³⁷³ Guibault and Salamanca 2016 (n 318).

³⁷⁴ Ibid 3-4.

³⁷⁵ Ibid 6.

³⁷⁶ Ibid 103-106, 115.

³⁷⁷ Ibid 7.

³⁷⁸ Ibid 238, 240.

³⁷⁹ Guibault and Salamanca 2016 (n 318), 244-251. They also make suggest a policy of ‘Explor[ing]...allowing economically dependent freelancers to claim employee status and rights’, (252-254) although this does not appear material to our discussion on reversion rights.

exclusive licence only lasts for a specified period of time that ends before the copyright term, then the rights must return to the author for the remainder of the copyright term (no other entity would have a valid claim to those rights). This study suggests reversion, both by limiting the scope of rights transfers at the outset and allowing rights reversion after a contract has been signed, may benefit authors to varying degrees.

3. Furgal, ‘Reversion Rights in the European Union Member States’ (2021)

As set out in **Chapter II**, the European Union passed the EU Directive on Copyright in the Digital Single Market in 2019. Among the EU Directive’s provisions was a requirement for Member States to implement a reversion right in their domestic copyright legislation, allowing authors to regain their rights if the intermediary failed to exploit them within a reasonable time (which will be explored in more detail in **Chapter VII**).³⁸⁰ In light of this recommendation, Furgal has published a working paper (as part of the Author’s Interest Project and in conjunction with CREATE) entitled *Reversion Rights in the European Union Member States*.³⁸¹ Furgal identifies more than 150 different types of reversion provision across domestic copyright laws in continental Europe³⁸² across various categories.³⁸³

Furgal then explains what happens when one of these ‘triggers’ is activated: the ‘contractual relationship between the parties is rarely automatically terminated or altered in any way.’³⁸⁴ Usually, the author will have to take some action to activate these rights, such as notifying the

³⁸⁰ EU Directive (n 137), art 22.

³⁸¹ Ula Furgal, ‘Reversion rights in the European Union Member States’ (CREATE Working Paper 2020/11, 19 November 2020) <<https://zenodo.org/record/4281035>>. This paper was partly funded by the ARC Future Fellowship supporting my doctoral research. I was aware Dr Furgal was conducting this work and provided her with preliminary data from a worldwide survey of copyright reversion laws pertaining to book authors, discussed in **Chapter V**. My main supervisor and external supervisor are part of CREATE (Fellow, Director respectively).

³⁸² Furgal 2020 (n 381), 1.

³⁸³ Ibid 4:

Exercise of rights or use of a work. This group includes, among others, provisions triggered by the lack of use, insufficient use, interruption in use or inappropriate use of a work, as well as the lack of completion or acceptance of a work.

Author. This group brings together provisions triggered by moral rights and convictions of the author or performer.

Transferee/licensee. This group of provisions is triggered by circumstances linked to a person of a licensee or a transferee, usually concerning her economic condition. Relevant triggers include, among others, bankruptcy, insolvency, liquidation, transfer of an entity to a third party, as well as the lack of a legal successor.

Time. This group... brings together provisions triggered by the lapse of a given period of time, including those provisions which indicate a maximum and a default term of an agreement.

³⁸⁴ Ibid 5.

publisher or reaching an agreement with another publisher.³⁸⁵ Reversion rights can result in the complete ‘dissolution’ of the agreement, or a termination of the exclusivity of the intermediary’s rights.³⁸⁶ Furgal documents each reversion provision in its original language, provides an English translation, and includes a brief explanation.³⁸⁷ The reversion provisions can also be viewed on an interactive visualisation of continental Europe on the CREATE Reversion Rights Resource Page.³⁸⁸ Furgal also summarises her results in an article in the *European Intellectual Property Review*, which she concludes by arguing for more clarity and digital-age-applicability in reversion laws that depend on a work being ‘used’ or ‘not used’ to a particular degree for authors to regain their rights.³⁸⁹

B. United States

As introduced in **Chapter II**, the US provides for authors to unilaterally terminate copyright grants after various time periods by filing a notice with the publisher. This provision has been the subject of considerable academic debate,³⁹⁰ but there has been limited empirical research on how it is being used. Such data is vital to assess the efficacy of the termination-style model, which requires authors to activate it (a factor that may reduce the effectiveness of termination/reversion provisions, according to Guibault and Salamanca³⁹¹). The literature and operation of this mechanism will be examined in more depth in **Chapter VI**.

C. United Kingdom

As set out in **Chapter II**, the United Kingdom used to limit copyright assignments to 25 years after the author’s death, after which rights would automatically revert to an author’s estate.³⁹² While I have not located literature directly addressing the question of whether the UK should implement reversion rights in its copyright legislation today,³⁹³ there is a body of scholarship

³⁸⁵ Ibid 5. However, the provisions rarely address the specific procedures (e.g. notices to publishers) required to enact these laws: Furgal 2020 (n 381), 6.

³⁸⁶ Ibid 5.

³⁸⁷ Ibid 14-235.

³⁸⁸ ‘Reversion Rights Resource Page’, CREATE (Web Page) <<https://www.create.ac.uk/reversion-rights-resource-page/>>.

³⁸⁹ Ula Furgal, ‘Interpreting EU Reversion Rights: Why “Use-it-or-lose-it” Should Be the Guiding Principle’ (2021) 43(5) *European Intellectual Property Review* 283, 291.

³⁹⁰ See above 44.

³⁹¹ See above 63-64.

³⁹² *Copyright Act 1911* (UK), s 5(2). See also s 24 for another type of ‘reversion’ provision discussed below at n 446.

³⁹³ Cf Kenner 2017 (n 274) for NZ and Matulionyte 2019 (n 263) for Australia.

and case law on the previous reversion scheme which I considered in an article co-authored with Dr Giblin in the *European Intellectual Property Review*, summarised below.³⁹⁴

1. Background to the Imperial reversion right and why it was removed

The Imperial reversion right was implemented to provide for the heirs of authors, particularly where authors made poor initial assignments of the copyright in their work.³⁹⁵ However, the provision was removed in the mid-20th century in the UK, because policymakers perceived it to be inconsistent with the Berne Convention.³⁹⁶ New Zealand and Australia followed suit, but the Australian committee reviewing its copyright legislation added that the provision had little benefit for authors' families.³⁹⁷

2. Inconsistency with the Berne convention

The position that the reversion provision was inconsistent with the Berne Convention was without reasonable basis. The relevant UK committee interpreted the provision as being linked to another provision which allowed third parties to reproduce copyrighted works 25 years after an author's death on the payment of a 10% royalty fee.³⁹⁸ Because the committee considered this provision to infringe Berne, it also deemed it necessary to remove the reversion provision because it perceived the latter 'would seem to have been inserted so as to give the royalty under s 3 [the compulsory royalty provision] to the personal representatives of the author.'³⁹⁹ Nevertheless, Parliamentary documents do not clearly indicate a link between these two provisions, and the reversion provision would have operated even if s 3 was removed for inconsistency with Berne. Because of this, we argue the inconsistency of s 3 with Berne did not justify removing the reversion provision as well.

³⁹⁴ Yuvaraj and Giblin 2019 (n 99). The references for the analysis summarised in Part III(C) are available in our paper, except where such analysis is new. For further analysis, see e.g., LexisNexis, *Nimmer on Copyright* (online at 27 August 2021) 17 '§ 17.12 Statutory Termination of Transfers Under British Law'.

³⁹⁵ Yuvaraj and Giblin 2019 (n 99), 233. Following the publication of our article, Cooper published a paper delving further into the background of the Imperial reversion right. She highlights the link between the term extension in the 1911 Act (to 50 years after the author's death):

This article has revealed that the inclusion of reversion rights, in the proviso to s 5(2) of the 1911 Act, was not an isolated measure. Rather, reversion rights were closely related to the debate of one of the most controversial aspects of copyright reform at this time: the increase of the term of copyright to the author's life plus 50 years.

See further Elena Cooper, 'Reverting to reversion rights? Reflections on the Copyright Act 1911' (2021) 43(5) *European Intellectual Property Review* 292, 296.

³⁹⁶ Yuvaraj and Giblin 2019 (n 99), 234-235. For further analysis of why it was considered inconsistent, and why those criticisms are unfounded, please refer to the paper.

³⁹⁷ Yuvaraj and Giblin 2019 (n 99), 234-235.

³⁹⁸ *Copyright Act 1911* (UK), s 3.

³⁹⁹ Yuvaraj and Giblin 2019 (n 99), 234 fn 38.

3. Benefit to authors

(a) *Financial settlements*

Further, the Australian committee's position on the limited benefits of this provision on author estates is not necessarily borne out by case law and other literature. The reversionary provision has been used to secure financial settlements and further commercial exploitation opportunities for author estates, which have led to the enduring availability of works for the public good.⁴⁰⁰ Examples referred to in our paper include the Solomon Linda case and the Redwood litigation. I discussed the former case in **Chapter I**, showing how Mr Linda's heirs successfully used the reversion right to sue Disney and obtain a sizeable settlement for their use of 'Mbube' *after* the rights had reverted to Mr Linda's estate.⁴⁰¹ In the latter case, Redwood Music Ltd was able to secure rulings that songs in respect of which it had been assigned reversionary interests by authors were subject to the Imperial provision: subsequently it reached settlements with other publishers. One author describes the ruling by the House of Lords in the matter as 'a major victory for the authors' estates against the British publishing companies in their attempts to regain rights in the contested works.'⁴⁰² These examples show the potential of the reversion provision to benefit author estates in the form of financial settlements with publishers.

⁴⁰⁰ The remainder of the paragraph summarises Yuvaraj and Giblin 2019 (n 99), 236-237: see the article for relevant citations. See also the following cases on the reversionary provision which are beyond the scope of the research enquiry:

- a) where the assignment at issue was superseded by another assignment made after the 1911 Act was repealed (*Novello & Co Ltd v Keith Prowse Music Publishing Co Ltd* [2004] EWHC 766 Ch); *Novello and Co Ltd v Keith Prowse Music Publishing Co Ltd* [2004] EWCA Civ 1776);
- b) where the issue was the formalities required for the reversionary interest to devolve on a party (*Peer International Corporation and others v Termidor Music Publishers Ltd and others (Editoria Musical de Cuba, Pt 20 defendant)* [2006] EWHC 2883 (Ch));
- c) where a contract governed by foreign law allows the assignment of the reversionary interest (*Peer International Corporation and others v Termidor Music Publishers and another (Editoria Musical De Cuba, Part 20 defendant)* [2002] EWHC 2675);
- d) where the application of the reversionary provision was irrelevant because copyright had already expired in the works at issue (*Jesus Redeems Ministries, Nalumavadi, Tuticorin v The Bible Society of India, Chennai* (Madras High Court, 15 December 2014);
- e) where the issue was whether copyright in a work was exempt from reversion because it had been passed down by will (*Wing v Van Velthuizen (c.o.b. Gratitude Press Canada)* [2000] FCJ No 1940);
- f) where the reversionary interest issue was a mere factual query and not central to the final determination (*Anne of Green Gables Licensing Authority Inc v Avonlea Traditions Inc* [2000] OJ No 740);
- g) where the dispute was about whether the assignment at issue was made after the 1911 Act came into effect (*Coleridge-Taylor v Novello & Co Ltd* [1938] 3 All ER 506).

See further LexisNexis, *Nimmer on Copyright* (online at 27 August 2021) 17 '§ 17.12 Statutory Termination of Transfers Under British Law'.

⁴⁰¹ See above 1-2.

⁴⁰² M William Krasilovsky and Robert S Meloni, 'Copyright Law as a Protection Against Improvidence: Renewals, Reversions, and Terminations' (1983) 5(4) *Communications and the Law* 3, 11.

(b) New exploitation opportunities

Beyond financial settlements, the reversion provision granted author estates new exploitation opportunities which could result in additional financial rewards and the public availability of these books.⁴⁰³ In the Canadian case *Winkler v Roy*,⁴⁰⁴ Ms Winkler was the administrator/executor of the estate of Thomas P Kelley (d. February 1982, author of the books *The Black Donnellys* and *Vengeance of the Black Donnellys*).⁴⁰⁵ In 1968, Mr Kelley assigned film rights in these books to Saroy Film Productions of Canada Limited (‘**Saroy**’).⁴⁰⁶ Some or all of the books were variously published by Pagurian Press Limited, Harlequin Books Limited, and Greywood Publishing Limited.⁴⁰⁷ In 1992, Saroy relicensed rights to a third party, Firefly, to enable the books to be republished.⁴⁰⁸ Ms Roy then notified Firefly of her interest in the books, after which Firefly stopped producing the works until the dispute was resolved.⁴⁰⁹ Ms Roy registered herself as the “owner”...of the copyright in the...[B]ooks’.⁴¹⁰

The court found Mr Kelley’s assignment to Saroy was valid, but only until 14 February 2007 (25 years after Mr Kelley’s death): the rights would then revert to Ms Winkler as executor of Mr Kelley’s estate.⁴¹¹ The reversion may have led to the continued exploitation of the *Donnelly* books (based on the true story of a Canadian family in the 1840s). Darling Terrace Publishing Company – which appears to be run by Ms Winkler’s child and only publishes books by Mr Kelley and Herbert Emerson Wilson – republished Kindle editions of the *Black Donnellys* works in 2019 (available on Amazon Canada as well as Amazon US).⁴¹² The company’s focus

⁴⁰³ The remainder of Part III(C)(3) is new analysis that was not present in Yuvaraj and Giblin 2019 (n 99).

⁴⁰⁴ *Winkler v Roy* 2002 FCT 950.

⁴⁰⁵ Ibid [6]-[7].

⁴⁰⁶ Ibid [14].

⁴⁰⁷ Ibid [11]-[13].

⁴⁰⁸ Ibid 19.

⁴⁰⁹ Ibid [20].

⁴¹⁰ Ibid [21].

⁴¹¹ Ibid [59].

⁴¹² ‘The Black Donnellys: The True Story of Canada’s Most Barbaric Feud’, *Amazon* (Web Page) <https://www.amazon.com/Black-Donnellys-Story-Canadas-Barbaric-ebook/dp/B07BHVPQ6D/ref=sr_1_1?dchild=1&keywords=the+black+donnellys&qid=1630030228&mid=2941120011&s=digital-text&sr=1-1>; ‘Vengeance of the Black Donnellys’, *Amazon* (Web Page) <https://www.amazon.com/Vengeance-Black-Donnellys-Thomas-Kelley-ebook/dp/B07SH9CTKT/ref=sr_1_1?dchild=1&keywords=vengeance+of+the+black+donnellys&qid=1630030287&s=digital-text&sr=1-1>; ‘Vengeance of the Black Donnellys’, *Goodreads* (Web Page) <<https://www.goodreads.com/book/show/52567207-vengeance-of-the-black-donnellys>>; ‘The Black Donnellys: The True Story of Canada’s Most Barbaric Feud’, *Goodreads* (Web Page) <<https://www.goodreads.com/book/show/39461388-the-black-donnellys>>. However, confirmation on whether the initial grant of rights actually included eBook rights can only be obtained by looking at the actual publishing contracts at issue: it may be that the eBook rights did not actually revert by operation of the Imperial provision if they were never assigned. The *Winkler v Roy* judgment did not extract the publishing clauses, but only provided the assignment clause in respect of ‘motion picture rights’: *Winkler v Roy* 2002 FCT 950 [15].

on Mr Kelley's works makes it likelier that it will work to ensure those books remain in print, as opposed to another publisher with a wider range of books to market.⁴¹³ The estate can benefit from sales of the new editions, while the Canadian public also receives the benefit of continued access to literature about a part of Canadian history that continues to spark interest.⁴¹⁴

However, the grant of these new exploitation opportunities via the reversion right does not mean they will be exploited. In the Indian case *Newspapers Ltd v Ratna Shankar Prasad*,⁴¹⁵ the famous writer Jai Shankar Prasad assigned rights in his current and future books to Newspapers Ltd in 1936 (while the reversionary provision still applied in India under the *Copyright Act 1914*).⁴¹⁶ Mr Prasad died in 1937.⁴¹⁷ Some 20 years later (1957), his son sought to prevent Newspapers Ltd from publishing his father's works.⁴¹⁸ Eight years after that (1964), the son tried to register himself as the owner of copyright in Mr Prasad's works.⁴¹⁹ Newspapers Ltd sought a declaration of their exclusive rights over Mr Prasad's works for the copyright term, and that the son's copyright registrations were 'ineffective in exercise of the rights of the plaintiff.'⁴²⁰ Newspapers Ltd also sought to permanently prevent the defendants in their suit from:

...printing, publishing and selling the works of [the] late [Mr]...Prasad and from interfering with the plaintiff's right of printing publishing and selling the works of [the] late [Mr]...Prasad and from infringing the aforesaid rights of the plaintiff in any other manner.⁴²¹

Meanwhile, the son sought an injunction against Newspapers Ltd, an accounting of the 'printing, publishing and sale' of the works, and the return of all 'unsold copies of all the

⁴¹³ For example, the Darling Terrace Publishing website currently lists physical copies of *The Black Donnellys* to be available from a variety of bookshops and the Lucan Area Heritage and Donnelly Museum, although it is not clear whether these are old or reprinted editions: 'The Black Donnellys', *Darling Terrace Publishing* (Web Page) <<https://www.darlingterracepublishing.com/the-black-donnellys-purchase-options.html>>.

⁴¹⁴ See e.g. 'Welcome' *Heaven & Hell on Earth: The Massacre of the "Black" Donnellys* (Web Page) <<http://web.uvic.ca/~mystery1/sites/donnellys/home/indexen.html>>; see also Aron Heller, 'Donnelly clan 'gatekeeper' sees karma at work in loss of artifacts: It was 125 years ago that the Black Donnellys were massacred in one of Canada's most heinous crimes. A descendant kept family mementos in his Ottawa home until they were lost in the ashes of a Christmas Day fire. Aron Heller reports', *Ottawa Citizen* (Ottawa, 5 February 2005); *Winkler v Roy* 2002 FCT 950 [13]: 'Evidence in the public domain, but not before the Court, indicates that the saga of The Black Donnellys whether based on Mr Kelley's book or otherwise, continues to receive popular exposure.'

⁴¹⁵ *Newspapers Ltd v Ratna Shankar Prasad* AIR 1977 All 356, per R Misra and J Sinha (4 April 1977). ('*Newspapers Ltd*').

⁴¹⁶ Ibid [3]-[4].

⁴¹⁷ Ibid [5].

⁴¹⁸ Ibid [5].

⁴¹⁹ Ibid [5].

⁴²⁰ Ibid [6]. The Copyright Board removed the son's registrations: Indira Gandhi National Open University School of Law, 'Administration of Copyright' in *MIP-105 Copyright and Related Rights*, 26-27.

⁴²¹ *Newspapers Ltd*, [6].

publication of [the] late [Mr]...Prasad' and equipment (e.g., 'blocks, pictures, manuscript, negative[s]') related to the publication of the works.⁴²²

The trial court found the reversionary provision still applied to Mr Prasad's assignment to Newspapers Ltd.⁴²³ The court dismissed Newspapers Ltd's lawsuit against the son and granted the son an injunction against Newspapers Ltd (although it dismissed his other claims).⁴²⁴ The Allahabad High Court rejected an appeal by Newspapers Ltd, noting no assignment could deprive the son of his reversionary interest 25 years after Mr Prasad's death.⁴²⁵ The High Court dismissed all the appeals from both parties.⁴²⁶ Accordingly, it appears the rights devolved on Mr Prasad's son in 1962, granting him further opportunities to exploit his father's works for the remainder of the copyright term (until 1987).⁴²⁷

However, there is no evidence that he did so. I was only able to locate data suggesting republication took place on or after the works appeared to enter the public domain in 1988.⁴²⁸ The number of books published after this time (indeed, Books In Print lists one book as being published by Amit Prakashan in January 1988, immediately once it entered the public domain⁴²⁹) and the contemporary public praise for Mr Prasad's works⁴³⁰ suggests his son could have benefited from commercial exploitation of these works during the copyright term.⁴³¹

⁴²² Ibid [10].

⁴²³ Ibid [11](3) (the remainder of the paragraph summarises the trial court's findings).

⁴²⁴ Ibid [12].

⁴²⁵ Ibid [22]. The appeal court did find the son was entitled to royalties, but the basis for this was not clear from the decision. It was also not clear whether the appeal court recognised the son as the owner of the copyrights. This summary focuses only on the reversionary aspect of the judgment. I do not intend for this to be an exhaustive summary of the judgment: those interested in further information should consult the judgment.

⁴²⁶ *Newspapers Ltd*, [24].

⁴²⁷ As copyright lasted 50 years after the author's death: see *Diamond Pocket Books P Ltd v Prasad Nyas and Ors* 1989 (17) DRJ 110, [5] per Mahinder Narain J.

⁴²⁸ A search of the Books In Print database on 24 August 2021 revealed ten works by Mr Prasad (including translations were published between 1988 and 2021. See also *Diamond Pocket Books P Ltd v Prasad Nyas and Ors* 1989 (17) DRJ 110, per Mahinder Narain J, which confirmed the entry of Mr Prasad's works into the public domain.

⁴²⁹ Books In Print, *Kamayani: Racana-Prakriya Ke Pariprekshya Mem* (Database Entry) <<https://www-booksinprint-com.eu1.proxy.openathens.net/TitleDetail/DetailedView?hrciid=|24895811|23421622&mc=IND>>.

⁴³⁰ Vanita Srivastava, 'Jai Shankar Prasad's original poem 'Kamayani' now with National Archives', *Hindustan Times* (online, 21 February 2019) <<https://www.hindustantimes.com/more-lifestyle/jai-shankar-prasad-s-original-poem-kamayani-now-with-national-archives/story-Nm5LgkAcDkGAPlvIj3uXcL.html>>, per Mr Prasad's great-grandson:

All his [Mr Prasad's] works, including Kamayani, is [sic] a national heritage and treasure. I wanted to give this to the country so that the new generation [of] scholars can benefit from them. [The] National Archives is the best place for this treasure to be kept and conserved.

⁴³¹ See also *The Periyar Self Respect Propaganda Institution vs Periyar Dravidar Kazhagam* (Madras High Court, 9 June 2010) per The Honourable Mr Justice F M Ibrahim Kalifulla and The Honourable Mr Justice N Kirubakaran, where one of the reasons the respondents were allowed to republish the author's works was because the court interpreted the reversionary provision as providing for works to enter the public domain following 25

Equally, he may have decided not to arrange further republication because of the higher costs of doing so in the print era, relative to what it would cost in the digital era.⁴³²

This case shows that while reversion can offer new opportunities to authors and estates, it will not necessarily result in those opportunities being taken up, whether because of the costs of doing so or other reasons.

4 Empirical research into the use and operation of the Imperial reversion provision

Despite the various cases and literature thus far discussing the Imperial reversion right, only Heald has attempted to empirically document its impacts.⁴³³ To do so, Heald collected data on the publication of 492 ‘novels and short story collections’ from various famous authors from the UK (n=44) whose works were covered by the provision.⁴³⁴ He found that nine percent of those were re-published by an independent publisher 25 years after the author passed away or longer.⁴³⁵

Heald conducted similar research on Canadian novels/collections of short stories (n=288) from 41 authors, finding that 10.4% were re-published by an independent publisher 25 years after the author passed away or longer.⁴³⁶ Heald suggested the Canadian data may be affected by Canada’s allowance for copyright to revert to authors upon a declaration of bankruptcy of a publisher, but concluded that ‘the current Canadian reversion statute is surely doing some work, although its impact appears, not surprisingly, to be much less than in the US.’⁴³⁷

Last, Heald used data from a previous study to examine the effect of this provision on books in South Africa.⁴³⁸ Heald’s explanation of his analysis is not entirely clear, but it appears that

years from the author’s death (an incorrect interpretation). See also M Sakthivel, ‘Fair Use of Periyar’s Works under Section 52(1)(m) of Copyright Act: How far is it fair?’ (2010) 3 *Manupatra Intellectual Property Reports* 149. The works were republished immediately after this judgment, with the respondents’ comments suggesting they believed the works were in the public domain: Special Correspondent, ‘Periyar’s speeches, writings released’, *The Hindu* (12 June 2010), per Kolathur T S Mani, president of the Periyar Dravidar Kazhagam:

Our intention is to make the works of Periyar available to the present generation. Anyone can publish his work.

See also A R Venkatachalapathy, ‘Periyar bonanza: exhilarating reading’, *The Hindu* (online, 17 August 2010) <<https://www.thehindu.com/books/Periyar-bonanza-exhilarating-reading/article16135223.ece>>.

⁴³² See Towse 2019 (n 144), 599, on the ‘lower costs’ of ebooks.

⁴³³ Paul J Heald, ‘The Impact of Implementing a 25-Year Reversion/Termination Right in Canada (2020) 28(1) *Journal of Intellectual Property Law* 63.

⁴³⁴ *Ibid* 81.

⁴³⁵ *Ibid* 81-82.

⁴³⁶ *Ibid* 82.

⁴³⁷ *Ibid* 82 citing *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 83(1).

⁴³⁸ Paul J Heald, ‘The Effect of Copyright Term Length on South African Book Markets (With Reference to the Google Book Project)’ (2019) 7 *South African Intellectual Property Law Journal* 71, 86.

books which he categorised as ‘reverted’ under this provision were ‘in-print’ at a higher rate (33%) than ‘non-reverted books’ (23%).⁴³⁹ However, Heald notes this is not a statistically significant difference because the sample is small.⁴⁴⁰ He also comments that reversion may be less useful because it only applies to books before 1966, and also that ‘it is...not clear how many heirs of South African authors are aware of their rights.’⁴⁴¹

Heald’s work is, at the time of writing, the only empirical analysis of the Imperial reversion right from any Commonwealth dominion (in the English language). However, a limitation of his research is that it draws a link between rights reverting under the Imperial provision and the print status of the sampled books. This approach fails to account for various other factors which could affect print status in respect of his data from the UK and South Africa, although he indicates Canada’s bankruptcy reversion provision may affect the data. Further, he only measures republication by ‘independent press[es]’⁴⁴² in relation to Canada and the UK, but does not take into account potential situations where major, non-‘independent’ publishers still see value in the works of authors deceased for 25 years and, motivated by pending automatic reversion under the Imperial provision, negotiate new post-reversion licences and keep those works in print.⁴⁴³ Last, the limited information on his preliminary studies do not directly explain how representative his samples are of the book markets in Canada, South Africa, and the UK.⁴⁴⁴

Despite these limitations, Heald’s analysis is a welcome first step in research into the impact of the reversionary provision. Future research should build on Heald’s work by investigating the statistical significance of links between rights reverting and book publication status using both Heald’s data⁴⁴⁵ and by gathering new data.

⁴³⁹ Ibid 86.

⁴⁴⁰ Ibid 86.

⁴⁴¹ Ibid 86, although note Ncube indicates the reversion right applies to assignments before 11 September 1965: Ncube 2017 (n 3), 279.

⁴⁴² Heald 2020 (n 433), 81.

⁴⁴³ The South African study did not specify whether the republication measured was by independent presses or not: Heald 2019 (n 438), 86.

⁴⁴⁴ Although it is possible more detailed explanations of his methodology will follow in subsequent publications. Further, in relation to the UK study Heald states that he ‘Us[ed]...a methodology similar to that used to study U.S. books...[to]...identif[y] 44 prominent U.K. authors...’: Heald 2020 (n 433), 81. The method reported for the U.S. study indicates ‘The sample universes were chosen to create a mix between bestselling and non-bestselling books and between fiction and non-fiction titles’: this may provide some representativeness depending on the degree to which it was applied to books from the UK, Canada, and South Africa.

⁴⁴⁵ Heald 2020 (n 433), 82 fn 49.

D. Canada

While Canada retains the British Imperial reversion provision,⁴⁴⁶ there have been law reform proposals to add to and amend this scheme. In Canada, the Copyright Act must be reviewed every five years.⁴⁴⁷ In 2019, two Parliamentary committees produced reports with various reform proposals for Canada's copyright legislation⁴⁴⁸ I refer to these reports as the *INDU* report and the *Shifting Paradigms* report. It appears that the Standing Committee on Industry, Science and Technology ('**INDU**') initially sought input from the Standing Committee on Canadian Heritage ('**Canadian Heritage**') for the *INDU* review, but that Canadian Heritage bypassed *INDU* and presented its own report to Parliament.⁴⁴⁹ *INDU* appeared to disapprove, regarding itself to have the 'sole responsibility' for 'Reviewing the [Copyright] Act'.⁴⁵⁰ Further analysis of the relationships between these committees and reports is beyond the scope of this thesis, although resources discussing them are available for further reading.⁴⁵¹

The *INDU* report was released as part of the Copyright Act review.⁴⁵² The review began in 2018 and involved comprehensive consultations and submissions.⁴⁵³ One of its

⁴⁴⁶ See also *Copyright Act* RSC 1985, c C-42, s 60(2), providing a reversion right in respect of works in copyright on 1 January 1924 and in respect of which a grant of the copyright or an interest in the copyright 'for the whole term of the right' which appears to revert rights to an author's estate at some point after the author's death: see Nahmias 2020 (n 120), 194 (Nahmias calculates it to be seven years following the death of the author). Nevertheless, s 60(2) enables transferees to exercise an entitlement 'to an assignment of the right or the grant of a similar interest therein for the remainder of the term of the right for such consideration as, failing agreement, may be determined by arbitration' (s 60(2)(a)), and the right in the absence of any further assignment 'to continue to reproduce or perform the work in like manner' with appropriate payments of royalties (no royalties are payable 'where the work is incorporated in a collective work and the owner of the right or interest is the proprietor of that collective work': s 60(2)(b)). This section appears to reflect *Copyright Act 1911* (UK), s 24.

⁴⁴⁷ *Copyright Act* RSC 1985, c C-42, s 92.

⁴⁴⁸ Canada, Parliament, House of Commons, Standing Committee on Canadian Heritage, *Shifting Paradigms: Report of the Standing Committee on Canadian Heritage*, 42nd Parl, 1st Sess (May 2019) (Chair: Julie Dabrusin) ('**Shifting Paradigms**'); Canada, Parliament, House of Commons, Standing Committee on Industry, Science and Technology, *Statutory Review of the Copyright Act: Report of the Standing Committee on Industry, Science and Technology*, 42nd Parl, 1st Sess (June 2019) (Chair: Dan Ruimy) ('**INDU Report**').

⁴⁴⁹ Standing Committee on Industry, Science and Technology, 'On Shifting Paradigms', *INDU Committee News Release* (Press Release, 18 June 2019) <<https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/news-release/10581857>>.

⁴⁵⁰ *Ibid.*

⁴⁵¹ See e.g. Hugh Stephens, 'Copyright Review in Canada: INDU Committee Issues Clumsy and Tone-Deaf "We're In Charge" Press Release', *Hugh Stephens Blog* (Blog Post, 24 June 2019) <<https://hughstephensblog.net/2019/06/24/copyright-review-in-canada-indu-committee-issues-clumsy-and-tone-deaf-were-in-charge-press-release/>>; Quentin Burgess, 'Music Canada statement on the release of the Standing Committee on Industry, Science and Technology Report', *Music Canada: News* (Blog Post, 4 June 2019) <<https://musiccanada.com/news/music-canada-statement-on-the-release-of-the-standing-committee-on-industry-science-and-technology-report/>>.

⁴⁵² Dr Carys J Craig, 'Meanwhile, in Canada ... A Surprisingly Sensible Copyright Review' (2020) 42(3) *European Intellectual Property Review* 184, 184.

⁴⁵³ *INDU Report* (n 448), 1: '52 meetings...263 witnesses...192 briefs...and...more than 6,000 emails and other correspondence'.

recommendations was the introduction of a new right to terminate copyright grants 25 years after transfer:

That the Government of Canada introduce legislation amending the *Copyright Act* to provide creators a non-assignable right to terminate any transfer of an exclusive right no earlier than 25 years after the execution of the transfer, and that this termination right extinguish itself five years after it becomes available, take effect only five years after the creator notifies their intent to exercise the right, and that the notice be subject to registration.⁴⁵⁴

The Committee presented four principles undergirding this proposal.

1. Creators have very limited bargaining power when negotiating with intermediaries, which makes it unlikely that they would be able to negotiate similar arrangements in their contracts;⁴⁵⁵
2. Creators ‘receive little remuneration for their work’ and ‘the effective lifespan of most copyrighted content tends to be short.’⁴⁵⁶
3. If works are profitable after 25 years, then creators should ‘have opportunit[ies] to increase the revenues they draw from it’;⁴⁵⁷
4. Any use of the termination right should be ‘predictable’, necessitating a notification and registration formalities system for creators to exercise the termination right.⁴⁵⁸

The Committee also recommended retaining the existing reversion provision under s 14(1) on the basis that ‘many witnesses supported term extension [of copyright] to increase the revenues of the descendants of the author’.⁴⁵⁹ However, the Committee recommended that the reversion right should be made more ‘predictabl[e]’, proposing:

That the Government of Canada introduce legislation amending the *Copyright Act* to provide that a reversion of copyright under section 14(1) of the Act cannot take effect earlier than 10 years following the registration of a notification to exercise the reversion.⁴⁶⁰

⁴⁵⁴ Ibid 39.

⁴⁵⁵ Ibid 39.

⁴⁵⁶ Ibid 38-39.

⁴⁵⁷ Ibid 39.

⁴⁵⁸ Ibid 39.

⁴⁵⁹ Ibid 38.

⁴⁶⁰ Ibid 38.

Meanwhile, the *Shifting Paradigms* report was handed down in May 2019.⁴⁶¹ This report recommended s 14(1) be altered so reversion would take place 25 years after the assignment rather than the author's death.⁴⁶²

The reversion recommendations from these two reports have been the subject of limited discourse, which generally involves describing them without commentary or supporting them.⁴⁶³ In particular, Heald was commissioned by Canadian Heritage to conduct an impact assessment of implementing a 25-year termination right (in the ways both reports recommended).⁴⁶⁴ Heald was cautiously optimistic about the potential impacts of implementing a termination right in Canada with rules around who could exercise it and the types of works exempt from termination.⁴⁶⁵

However, a 2020 report into the Copyright Act's proposed changes by Emeritus Professor Marcel Boyer (Université de Montréal) is critical of the reversion recommendations.⁴⁶⁶ Boyer criticises reversion on grounds like the purported reduction in initial investments made by publishers/other licensees,⁴⁶⁷ the lower incentives to invest in works by older authors because they will revert sooner,⁴⁶⁸ and the 'prospect [that Canadian assignees/licensees would]...los[e]...key underlying rights'.⁴⁶⁹ Boyer also challenges Heald's analysis of the

⁴⁶¹ *Shifting Paradigms* (n 448), title page.

⁴⁶² Ibid 31. There was no additional termination right recommendation like in the INDU Report.

⁴⁶³ See e.g., Michael Jaworski and Athar K Malik, 'Authorize This! Seeking Copyright Permission 25 Years After an Author's Death', *Clark Wilson*, (Blog Post, 21 May 2020) <<https://www.cwilson.com/authorize-this-seeking-copyright-permission-25-years-after-an-authors-death/>>; David Farrell, 'Reversion Rights Needed in New Copyright Act', *FYI music news* (online, 17 December 2019) <<https://www.fyimusicnews.ca/articles/2019/12/17/reversion-rights-needed-new-copyright-act>>; Craig 2020, 187-188; Aidan Herron, 'Highlights from the Report on the Copyright Act Review', *University of Alberta News*, (Blog Post, 20 June 2019) <<https://www.ualberta.ca/the-quad/2019/06/highlights-from-the-report-on-the-copyright-act-review.html>>. However, see INDU Report (n 448), 36-37 for arguments by Jérôme Payette, 'Executive Director of the Professional Music Publishers Association' (36) and Bob Tarantino, 'Counsel at Dentons Canada' (37) against implementing termination rights in Canada and retaining the existing reversionary system respectively.

⁴⁶⁴ Heald 2020 (n 433), 65.

⁴⁶⁵ Ibid, 91-92:

...this report tentatively recommends the adoption of a right to terminate the transfer of an interest in copyright that could be exercised by the author (or heirs holding 51% of the author's interest). The author could effectuate such a termination right 25 years after the transfer was made, if the claimants provide notice to the transferee and register their interest in the Intellectual Property Office. Furthermore, the exercise of the termination right should have no effect against transferees who obtained a license from the author to create an original derivative work.

⁴⁶⁶ See generally Marcel Boyer, 'The Revision of the Canadian Copyright Act: An Economic Analysis' (Centre for Interuniversity Research and Analysis on Organizations (CIRANO) Working Paper 2020S-68, December 2020 (last revised January 2021)), 18-23 <<https://cirano.qc.ca/files/publications/2020s-68.pdf>>

⁴⁶⁷ Ibid 19.

⁴⁶⁸ Ibid 19-20.

⁴⁶⁹ Ibid 20.

potential for reversion to positively impact the print status of books on the basis that Heald's analysis is incomplete:

In other words, Heald looks only at one tail of the distribution, that is, books that are out-of-print and are reprinted when they fall into the public domain. But to provide a balanced picture of publishers' decisions, it would have been necessary to consider those books-in-print that should have been out-of-print based on their diminished popularity. It is quite likely that the two tails of the distribution are cancelling out.⁴⁷⁰

Beyond Boyer's criticisms, it seems the recommendations to introduce or amend reversion rights in Canada have been positively received. However, at the time of writing, there is no indication as to whether these proposals will be implemented into the Canadian Copyright Act.

E. South Africa

Legislators have also recently attempted to implement a new reversion provision in South Africa's copyright law. Under the *Copyright Act 1978*, authors had no reversion rights (although the British provision in force in Canada applied to assignments before 1966 by virtue of having previously been the law in South Africa).⁴⁷¹ In 2015, drafters of a *Copyright Amendment Bill* included a time limit of 25 years on copyright assignments as follows:

No assignment of copyright and no exclusive licence to do an act which is subject to copyright shall have effect unless it is in writing signed by or on behalf of the assignor, the licensor or, in the case of an exclusive sublicense, the exclusive sublicensor, as stipulated in the Schedule hereto or as the case may be [.]: Provided that such assignment of copyright shall be valid for a period of 25 years from the date of agreement of such assignment.⁴⁷²

⁴⁷⁰ Ibid 22.

⁴⁷¹ Heald 2019 (n 438), 86. See above 1-2 for a discussion of the application of this provision in the Solomon Linda case. See also generally e.g., J C Sonnekus, 'Reversionary Interest in Musical Composition and the Administration of the Estate of a Deceased Composer' (2005) 122(2) *South African Law Journal* 464.

⁴⁷² *Copyright Amendment Bill* (2015), s 26. Section 22 of the Amendment Act provides that an author of a commissioned work can seek a tribunal order granting them a licence to use the work in line with the commissioned purpose, where the commissioning party has not used it for that purpose. Forere argues this is a reversion right but this is not within the conception of reversion rights presented in this thesis: all the author would have is a licence to exploit the work, rather than regaining rights they had granted and being able to resell or reuse those rights. See Malebakeng Agnes Forere, 'Reforming the Right to Remuneration in the South African Copyright Amendment Bill' (PIJIP Working Paper No. 67, May 2021), 10, 17 <<https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1070&context=research>> for Forere's arguments.

The reasoning behind the provision appears to come from a 2011 recommendation of the South African Copyright Review Commission ('CRC'),⁴⁷³ although this is not clearly specified in the Memorandum on the Objects of the Bill.⁴⁷⁴ The CRC recommended that:

...the Copyright Act must be amended to provide for the reversion of assigned rights to royalties 25 years after the assignment of such rights. Such an amendment will help relieve the plight of composers whose works still earn large sums of money, which are going to the assignees of the composers' rights long after the assignees (or their predecessors) have recouped their initial investment and made substantial profits, in excess of those anticipated when the original assignment was taken.⁴⁷⁵

The CRC was concerned that authors were not receiving royalties because they made poor initial assignments without comprehending the impacts of those assignments.⁴⁷⁶ Accordingly, the CRC sought to give artists or their heirs 'opportunities to reduce the level of losses that arise as a result of the disparate circumstances referred to above.'⁴⁷⁷ The termination right proposal has been criticised on various grounds, some of which have been addressed in other parts of this thesis⁴⁷⁸ and some of which are specific to the particular structure of the proposal.⁴⁷⁹

⁴⁷³ See William New, 'South Africa Creators, Access Advocates Rally to Support Copyright Bill and Dispel Myths', *Infojustice*, (Blog Post, 30 April 2019) <<http://infojustice.org/archives/41051>>; Publishers' Association of South Africa, COPYRIGHT AMENDMENT BILL, NO 13 OF 2017 and PERFORMERS PROTECTION AMENDMENT BILL, NO. 24 OF 2016: Submission of Comments by the Publishers Association of South Africa (7 July 2017), 3 <<https://www.publishsa.co.za/file/1532283879zip-pasa-submission-copyright-amendment-bill7jul2017.pdf>>, archived at <<https://perma.cc/9XK9-32EY>>.

⁴⁷⁴ Memorandum on the Objects of the Copyright Amendment Bill, [3.22] <<https://perma.cc/QK27-T3ZD>>.

⁴⁷⁵ Department of Trade and Industry, Republic of South Africa, Copyright Review Commission, *Copyright Review Commission Report* (2011) ('CRC Report'), 5 <https://www.gov.za/sites/default/files/gcis_document/201409/crc-report.pdf>.

⁴⁷⁶ Ibid 80 – 81. See also CRC Report (n 475), 100: the CRC was concerned there was a 'high proportion of musicians and authors who are ignorant about copyright issues and, as a result, there are several cases where the rights are assigned to third parties without a full understanding of the implications.'

⁴⁷⁷ CRC Report (n 475), 81.

⁴⁷⁸ See e.g. Marcus Riby-Smith, 'South African copyright law – the good, the bad and the Copyright Amendment Bill, (2017) 12(3) *Journal of Intellectual Property Law & Practice* 216, 220 (imposition on contractual freedom); Carlo Scollo Lavizzari, 'Copyright Amendment Bill is vital for SA to be part of 21st century', *Business Day* (online, 13 March 2019) <<https://www.businesslive.co.za/bd/opinion/2019-03-13-copyright-amendment-bill-is-vital-for-sa-to-be-part-of-21st-century/>>, archived at <<https://perma.cc/S7JP-XXMR>> (adverse impacts on initial investments by publishers); South African Institute of Intellectual Property Law: Copyright Committee, Submissions on the Copyright Amendment Bill, 2017 (Tabled in Parliament 16 May 2017) [B13-2017] (7 July 2017) [20.4] <https://static.pmg.org.za/170801SAIPL_2.pdf>, archived at <<https://perma.cc/XVL3-GKFP>> (inappropriate application of the reversion to works which should be the property of employers or commissioning parties).

⁴⁷⁹ See e.g. André Myburgh, Advice on the Copyright Amendment Bill, No 13 of 2017, Revised as At 3 September 2018 for the Portfolio Committee on Trade and Industry of the Parliament of the Republic of South Africa, (1 October 2018) 46 [3.4] <https://legalbrief.co.za/media/filestore/2018/10/andre_myburgh.pdf>, archived at <<https://perma.cc/F62H-4H6N>> (criticising the purported retrospectivity of the provision). The arguments and sources in these two footnotes are merely illustrative and are not intended to be exhaustive. Further information on the literature on this provision can be obtained by contacting the author.

South Africa's Parliament had passed the Amendment legislation and sent it to be signed into law by President Cyril Ramaphosa: however, President Ramaphosa sent it back to Parliament on the basis that the Bill may not be congruent with South Africa's constitution.⁴⁸⁰ None of his criticisms expressly related to the 25-year time limit on assignments, but instead focused on issues like the Bill's potential incompatibility with South Africa's international treaty obligations.⁴⁸¹ However, there is no indication of when further analysis of the Bill will be released, or whether the Bill will ever become law in South Africa.⁴⁸² For now, South African authors do not have access to statutory reversion rights for assignments made after 1966⁴⁸³ and remain reliant on exercising contractual reversion rights or negotiating reversion privately, as is the case in Australia, New Zealand, and the UK.

F. WIPO

The last element of this reversion law reform literature review is a 1980s WIPO initiative to draft model publishing contract laws. At the time of writing, this was the most recent WIPO initiative to draft model publishing contract laws that I could locate. Thus, these provisions give us an idea of what types of provisions WIPO considered 'best practice' in the 1980s, based on their own review of national copyright statutes from around the world, and help us assess how such laws have subsequently developed in the digital age (if at all).

1. The WIPO author rights drafting initiative

Together with the United Nations Educational, Scientific and Cultural Organization ('UNESCO'), WIPO:

...convened a Working Group to examine model provisions for national laws on the rights and obligations of authors and publishers under publishing contracts for literary works, with special emphasis on the interests of developing countries.⁴⁸⁴

⁴⁸⁰ Mike Palmedo, 'South Africa's Copyright Amendment Bill Returned to Parliament for Further Consideration', *Infojustice*, (Blog Post, 22 June 2020) <<https://infojustice.org/archives/42426>>.

⁴⁸¹ See e.g. 'South Africa: An opportunity for more balanced copyright law in line with global precedent and commercial realities', *Baker McKenzie* (Blog post, 2 July 2020) <https://insightplus.bakermckenzie.com/bm/technology-media-telecommunications_1/south-africa-an-opportunity-for-more-balanced-copyright-law-in-line-with-global-precedent-and-commercial-realities>.

⁴⁸² Maureen Makoko and Chiraag Maharaj, 'South Africa: Copyright Amendment Bill: Potential Cause for Concern for Trade Between SA and The USA', *Mondaq*, (Blog Post, 10 March 2021) <<https://www.mondaq.com/southafrica/copyright/1044596/copyright-amendment-bill-potential-cause-for-concern-for-trade-between-sa-and-the-usa?type=related>>.

⁴⁸³ See Heald 2019 (n 438), 86.

⁴⁸⁴ Working Group 1984 (n 343), 307.

The process involved seven ‘consultants [from]...Algeria, Brazil, China (People’s Republic of), France, Germany (Federal Republic of) and Poland’.⁴⁸⁵ In 1984, the Working Group considered a set of draft provisions regulating author-publisher contracts.⁴⁸⁶ These included issues discussed in this thesis, namely the scope of the rights granted and reversion rights.⁴⁸⁷ The provisions developed from this meeting were subsequently considered by a ‘Committee of Governmental Experts’ from various countries in December 1985.⁴⁸⁸ The Committee did not appear to reach any conclusions on the draft provisions, deciding only to organise ‘another session...in which the matter would be further considered on the basis of the results of the present session of the Committee.’⁴⁸⁹ However, the meeting report suggests there was both support for and opposition to the provisions.⁴⁹⁰

As Ricketson and Aplin report, this initiative was part of a ‘Guided Development’ program to provide standardised guidance on a variety of copyright law issues.⁴⁹¹ While these consultations were supposed to lead to a ‘Model Law on Copyright’, the document ‘was never formally published’ as WIPO moved on to another policy initiative.⁴⁹² WIPO commentary

⁴⁸⁵ Ibid 307.

⁴⁸⁶ Ibid 307.

⁴⁸⁷ Ibid 310, 312. The record in *Copyright*, the WIPO journal, of these provisions only appears to provide the final draft provisions which incorporated the comments of the Working Group: 310-313. The record also provides *Excerpts from the Preparatory Document Introducing the Subject Matter and containing the Draft Comments on Each Proposed Model Provision*: this does not list the earlier provisions presented to the Working Group, but the commentary on the earlier provisions is nonetheless illuminating as to the initial intentions of the drafters: Working Group 1984 (n 343) 314-320.

⁴⁸⁸ See Working Group 1984 (n 343), 309 [23]; World Intellectual Property Organization, ‘Committee of Governmental Experts on Model Provisions for National Laws on Publishing Contracts for Literary Works (Paris, December 2 to 6, 1985)’ (1986) 2 *Copyright; Monthly Review of the World Intellectual Property Organization (WIPO)* 40, 40-41 <https://www.wipo.int/edocs/pubdocs/en/copyright/120/wipo_pub_120_1986_02.pdf> (‘COGE’).

⁴⁸⁹ COGE (n 488), 40. I was not able to locate records of any other meetings, but this is offset by the fact that the model law on copyright of which these provisions were to be a part does not appear to have been adopted, as I describe in the next paragraph.

⁴⁹⁰ COGE (n 488), 40:

In the general debate, a number of delegations and observers recognized the importance of striking an appropriate balance between the interests of authors and those of publishers and emphasized the importance of some model provisions, first of all for developing countries which had not yet legislated and had but a limited experience in this field. Several delegations said that the draft did not leave enough freedom to the contracting parties, and some of them went as far as saying that all that was needed was legislation limited to a few general, guiding principles.

⁴⁹¹ Sam Ricketson and Tanya Aplin, ‘Copyright and related rights: WIPO’s role in formulating international norms in this area’ in Sam Ricketson (ed), *Research Handbook on the World Intellectual Property Organization: The first 50 years and Beyond* (Edward Elgar 2020), 92-94.

⁴⁹² Ibid 94-95; see also Mihály Ficsor, *Collective Management of Copyright and Related Rights* (Geneva, WIPO, 2002), 31 and Arpad Bogsch, *Brief History of the First 25 Years of the World Intellectual Property Organization* (Geneva, WIPO, 1992), 44 (‘The Model Law, in its definitive form, had not yet been published by July 14, 1992.’). For further commentary on the Model Law, see Miguel Angel Emery, ‘Some Questions Underlying the Draft

suggests reversion rights in the Model Law were strongly contested by rightsholders including publishers.⁴⁹³ To that end, meeting records from 1990 indicate reversion rights were to be removed and ‘replaced by an explanation in the commentary’, although the nature of the ‘explanation’ is unclear.⁴⁹⁴ It appears the draft model copyright law was never finalised.

2. The 1984 WIPO draft provisions on publishing contracts

The only full version of the WIPO draft provisions on publishing contracts I was able to locate was in WIPO’s monthly review from September 1984. The drafters appeared to intend for these provisions to either be adopted into domestic copyright law or act as a starting point for policymakers to develop their own author-publisher contract laws.⁴⁹⁵ I have extracted these provisions below for the benefit of researchers and policymakers. Sections in square brackets appear to indicate parts of the provisions which had not been decided at that point.

- (1) If the contract was concluded for the reproduction and distribution of a specified number of copies of the work or for a specified period of time, it shall terminate on the sale of the last copy of the work reproduced under the contract or on the lapse of the time agreed upon, respectively, without prejudice to the provisions of paragraph (4).
- (2) If the publisher fails to publish the work within the period specified according to Model Provision No. 4, or if he allows the work to go out of print and fails to issue a new edition within six months, provided his rights were not limited to publishing a single edition and limitation as regards duration of the contract did not prevent him from doing so, the author shall set a just and reasonable new term for the publisher to comply with his obligation under the contract. If the publisher refuses to publish the work or fails to publish it within

Model Provisions for Legislation in the Field of Copyright – A Pragmatic Approach’ in *Copyright: Monthly Review of the World Intellectual Property Organization (WIPO)*, No. 9, September 1990, 302-316.

⁴⁹³ WIPO Meetings, ‘Committee of Experts on Model Provisions for Legislation in the Field of Copyright, Third Session (Geneva, July 2 to 13, 1990)’ (1990) 9 *Copyright: Monthly Review of the World Intellectual Property Organization* (WIPO) 241, 274, [261]
https://www.wipo.int/edocs/pubdocs/en/copyright/120/wipo_pub_120_1990_09.pdf (<‘COEMP’>):

Some delegations and observers from international non-governmental organizations stressed that the provisions of the chapter should serve the protection of the interests of the authors who, as a rule, were in a weak position when negotiating contractual conditions with economically much stronger users. *Some other delegations and observers from international non-governmental organizations said that the interests of authors should not be considered in a one-sided manner, and pointed out that publishers, producers and other users also had justified interests that should be taken into account. The latter participants were in favor of a much wider recognition of contractual freedom and expressed the view that such a freedom was not necessarily against the interests of authors. It was also mentioned that one should not necessarily think of authors as isolated individuals because, frequently, important and strong organizations – associations, societies, etc. – represented them* [emphasis added].

⁴⁹⁴ COEMP (n 493), 274 [263]; see also COEMP (n 493), 297 [135]-[137] (showing some diversity on the degree of reversion rights that participants and observers were willing to accept).

⁴⁹⁵ Working Group 1984 (n 343), 316 [18].

the new term set for him to comply with his obligation the author shall have the right to revoke all rights granted to the publisher; this right may not be waived.

- (3) If the publisher sells off the copies published by him in accordance with Model Provision No. 5(3), and in the event of the publisher going into liquidation, the author shall have the right to terminate the contract with the effect that all rights granted to the publisher under that contract shall [cease to exist.] [revert to the author.]
- (4) The termination of the contract according to any of paragraphs (1), (2) and (3) shall not affect existing licences that the publisher was entitled under the contract to grant to third parties, and shall not be prejudicial either to any claims the author may have to shares in the returns from such licenses, or to any other claim to payment of fees or damages that the author or the publisher may have against the other party at the time of the termination of the contract. After the termination of the contract owing to lapse of its agreed duration, the publisher shall have no right to continue to sell copies of the work still in stock, unless the author expressly authorizes him to do so.
- (5) All declarations concerning the termination of the contract shall be made through written notice.[“]
- (6) The contract and any license granted under it by the publisher shall terminate, in any case, after the lapse of [state number] years following their conclusion or grant, respectively; paragraph (4) shall apply *mutatis mutandis*.⁴⁹⁶

The model provisions, though written before the digital era, address similar concerns to those canvassed in this thesis: authors facing ‘excessive, inadequate or incomplete conditions [when]...authorizing [the]...uses’ of their works,⁴⁹⁷ the relatively ‘weaker’ bargaining power of creators relative to intermediaries like publishers,⁴⁹⁸ the use of standard form contracts with expansive grants which leave authors ‘bewildered and unable to argue’,⁴⁹⁹ and the potential for

⁴⁹⁶ Working Group 1984 (n 343), 312. Punctuation around each subsection has been removed due to formatting restrictions in Microsoft Word. The reader should note s 9(6) appears to have square brackets around it for the following reasons:

Paragraph (5) [this appears to be an error] provides (in square brackets, since its adoption is regarded as depending very much on the legal philosophy underlying the copyright law of a given country) for mandatory termination of the contract, in any event, after a certain number of years have elapsed. Such a provision may serve the purpose of making it possible for the parties’ contractual relations to be renegotiated or for a new contract with another party to be concluded by the author. Such a coercive limitation of the life of the contract should apply individually to the actual publishing contract concluded between the author and the publisher and to any licenses the publisher may have been entitled to grant to third parties under that contract. The provisions of paragraph (4) should also apply to licenses granted under the contract that has suffered mandatory termination.

⁴⁹⁷ Working Group 1984 (n 343), 314 [1].

⁴⁹⁸ Ibid 314-315 [8].

⁴⁹⁹ Ibid 315 [9].

time limits to allow renegotiation or the pursuit of new exploitation opportunities upon expiry.⁵⁰⁰

Because these provisions were created in the mid-1980s, they do not address digital-era concerns, such as the need for out-of-print clauses to have sales-based thresholds to prevent books being deemed perpetually ‘available’ as online copies without publishers investing in them. However, they are still useful because they enable us to the importance lawmakers from different countries around the world placed on statutory reversion laws over 30 years ago, particularly in developing countries which have been less-emphasised in the reversion literature.⁵⁰¹ Further, the insights from the draft model provisions and associated commentary are important because they contain input from Algeria, Brazil, and the People’s Republic of China on reversion rights, whose continents (Africa, South America, and Asia) have featured sparsely in reversion literature.⁵⁰² We can thus understand what policymakers from those countries likely considered best practice in terms of reversion rights for book authors at the time.

⁵⁰⁰ Ibid 319 [48].

⁵⁰¹ See further Working Group 1984 (n 343), 315 [11]:

Proper legislative provisions on authors’ contracts are of special importance to developing countries, where the development of a modern national cultural history is given high priority. They help to give more and more effect to national creativity and to stimulate its further growth, at the same time promoting national education and research; they may also contribute to a beneficial growth in the dissemination of cultural values both within the country and across its frontiers.

⁵⁰² For scholarship on reversion in these regions see e.g. JJ Baloyi, ‘Demystifying the role of copyright as a tool for economic development in Africa: Tackling the harsh effects of the transferability principle in copyright law’ (2014) 17(1) *Potchefstroom Electronic Law Journal* 87, 128-132; Hong Xue, ‘Intellectual property licensing in China’ in Jacques de Werra (ed), *Research Handbook on Intellectual Property Licensing* (Edward Elgar, 2013); Nikhil Krishnamurthy, ‘Intellectual property licensing in India’, Jacques de Werra (ed), *Research Handbook on Intellectual Property Licensing* (Edward Elgar, 2013); Poorvi Choothani, ‘Intellectual Property Considerations in the Outsourcing Industry’ (March/April 2008) 80(3) *New York State Bar Association Journal* 1, 32; Shinto Teramoto, ‘Intellectual property licensing in Japan’, in Jacques de Werra (ed), *Research Handbook on Intellectual Property Licensing* (Edward Elgar, 2013). Such surveys have been conducted in the past, but may not be of as much use given the passage of decades: György Boytha, ‘The Development of Legislative Provisions on Authors’ Contracts’ (1987) 12(2) *Columbia-VLA Journal of Law & The Arts* 155, 174; Boytha 1991 (n 3610, 205; Barbara A Ringer, ‘Study No. 31: Renewal of Copyright’ (June 1960) in United States Congress, Committee on the Judiciary, Subcommittee on Patents, Trademarks, and Copyrights, *Copyright Law Revision: Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary: United States Senate Eighty-Sixth Congress, Second Session Pursuant to S. Res. 240: Studies 29-31* (Washington, US Government Printing Office, 1961) 208–212 (**‘Copyright Law Revision Studies 1960’**); Working Group 1984 (n 343), 315 [16], referring to ‘a survey of existing legislation on authors’ contracts, including in particular the special provisions on publishing contracts...to be found in a separate document (UNESCO/WIPO/GC/PC/3)’. This analysis applies to English-speaking resources only, and I acknowledge there may be relevant non-English literature.

G. Gaps in the literature

The literature review above highlighted the following gaps. **First**, the literature exploring statutory reversion rights around the world focuses on continental Europe, the US, the UK, Canada, and South Africa. There is limited discussion in the English-language literature about the presence, use, or effectiveness of reversion models in Africa, Asia, South America, Central America, and Oceania, especially in the digital age (the WIPO model contract law reform initiative having taken place in the mid-1980s).⁵⁰³ Data from less-explored regions may help us to identify reversion models, presently undiscussed in the literature, that usefully inform our understanding of the reversion rights we need to better address copyright's failures in the trade book industry in Australia and other common law countries in the digital era and beyond. I fill this gap with a review of statutory reversion provisions in these less-discussed jurisdictions in **Chapter V**.⁵⁰⁴

Second, there is limited empirical research on the use and effectiveness of reversion provisions.⁵⁰⁵ Such data is vital for developing effective reversion rights, and its importance has been acknowledged across multiple jurisdictions. In 2010, Kretschmer highlighted a gap in research into the effects of rights reversion and noted:

It would be desirable to conduct both doctrinal studies on the implications of term reversion in the current framework of international and European law and historical studies on the empirical effects of past regimes.⁵⁰⁶

⁵⁰³ One example of a wide-ranging survey of copyright laws is by the Mincov Law Corporation. This survey provides brief responses from legal practitioners in copyright law to questions about the nature of each country's copyright law. However, the limited scope of the survey means only a few countries from less-explored continents feature: e.g. Saudi Arabia, Kazakhstan, China, Kenya, and Mexico. See 'International Copyright Law Survey', *Mincov Law Corporation* (Web Page) <<http://mincovlaw.com/copyrightsurvey>>. Note also the Creative Commons *Rights Back Resource*, which seeks to provide a 'resource for authors who want to regain control over their rights' by providing information about reversion laws around the world. At the time of writing the database only comprises references to statutes in the US, Canada, Australia, Poland, South Africa, and the Netherlands. Moreover, the database only includes references to legislation and resources for each jurisdiction. It does not extract reversion provisions or provide explanations of those provisions. See Creative Commons, 'Creative Commons Rights Back Resource', *Creative Commons* (Web Page) <<https://labs.creativecommons.org/reversionary-rights/>>; see e.g. 'South Africa', *Creative Commons* (Web Page) <<https://labs.creativecommons.org/reversionary-rights/country/south-africa/>>.

⁵⁰⁴ Some of these sections have been referred to in Yuvaraj and Giblin 2021 (n 22), 418-423.

⁵⁰⁵ For an example of economic modelling of a German reversion right, see e.g. Michael Karas and Roland Kirstein, 'More Rights, Less Income? An Economic Analysis of the New Copyright Law in Germany' (2019) 175(3) *Journal of Institutional and Theoretical Economics (JITE)* 420.

⁵⁰⁶ Kretschmer 2010 (n 274), 169.

A 2019 white paper by the organisation Public Knowledge heavily criticised the existing US termination right and called for the US Copyright Office to study the termination right on the following terms:

The study could also investigate the negotiation and execution of past and present ownership grants, including an analysis of current trends, to help determine what proactive changes are merited. In addition, the study could research ways to further artist education, raise awareness around the termination right issue, and outline how best to address any power and information imbalances that lead to dysfunction.⁵⁰⁷

Additionally, the Canadian government sought to better understand the impacts of recommendations to introduce a 25-year termination right for authors by commissioning an empirical impact study by Heald.⁵⁰⁸ These sources show that empirical data on the use of termination/reversion rights is recognised as adding great value to the current reversion discourse. It helps policymakers considering new reversion rights by enabling them to assess the extent to which existing ones are achieving their goals. To that end, I present in **Chapter VI** the first comprehensive study of the use of the US termination right, based on publicly available termination notice records from the US Copyright Office's online Catalog.

V. CONCLUSION

In this Chapter, I built on the evidence in this thesis that publishing contracts are inadequate repositories for author reversion rights. I showed how contractual freedom does not preclude implementing such rights: the inadequacies in contracts and the imbalances of bargaining power between authors and publishers amply justify interfering with freedom of contract. I then asked what we need to know about reversion rights to construct provisions that help address the failures of existing approaches to copyright in the trade book industry, particularly in countries like Australia where there are no reversion rights. To do so I reviewed the literature and found that it is predominantly focused on statutory models in the UK, US, and European Union. I identified two main gaps in the literature: a) a lack of research into reversion rights in other jurisdictions around the world; and b) a lack of empirical research on the impacts of existing reversion right models. The former helps expand the possible models which we may wish to apply. The latter helps us to narrow down how reversion laws are performing in light

⁵⁰⁷ Gilbert, Rose and Valentin 2019 (n 291), 32.

⁵⁰⁸ Heald 2020 (n 433), 65.

of the rationales explored earlier in this thesis. I fill these gaps in **Chapters V** and **VI** respectively.

V. STATUTORY REVERSION RIGHTS: A LEGAL MAPPING STUDY OF REVERSION RIGHTS IN AFRICA, SOUTH AMERICA, CENTRAL AMERICA, ASIA, AND OCEANIA

I. INTRODUCTION

Chapter IV revealed there is a significant amount of scholarship on reversion rights in the US, the UK, Canada, the EU, and South Africa, in the English language at least. The US, UK, Canada, and South Africa all currently have or used to have time-based reversion rights, whereas there is a greater range of rights in Europe including both time-based and used-based reversion rights. Variations of time-based and use-based reversion rights are also the subject of law reform discourse in Canada, the EU, and South Africa. It would only be natural for policymakers in Australia, New Zealand, the UK, and other countries without reversion laws to look to these more regularly discussed jurisdictions for guidance when drafting their own reversion laws.

Nevertheless, it is beneficial for policymakers to be aware of the different models in force across other parts of the world for two reasons. **First**, there may be models that are different to those in more commonly discussed jurisdictions which are worth considering for implementation. It's important for policymakers to have as many options as possible to evaluate when thinking about what kinds of reversion laws to implement. **Second**, looking at the models around the world can provide lessons to policymakers about what to follow, and what not to follow, in terms of structuring an effective reversion system. In this Chapter, I seek

to achieve both these goals through a legal mapping study of reversion rights in Africa, South America, Central America, Asia, and Oceania, as applicable to book authors.

II. METHODOLOGY

A. Data scope and collection

The research in this Part is collated from a review I conducted into reversion rights applicable to book authors in copyright legislation in all 193 UN Member States in force as of March 2019.⁵⁰⁹ I chose UN Member States because they are accepted by other member states as sovereign.⁵¹⁰ This is a legal mapping study, which:

...reports the results of research to identify key provisions of law on a particular issue, identifies patterns in the nature and distribution of laws, and defines important questions for evaluation research, legal analysis and policy development.⁵¹¹

I used WIPO Lex as the main source for legislation,⁵¹² supplementing it with external resources where necessary.⁵¹³ To gather data from non-English versions of legislation, I used Google

⁵⁰⁹ See 'Member States', *United Nations* (Web Page) <<https://www.un.org/en/about-us/member-states>>.

⁵¹⁰ *Charter of the United Nations* art 2(1). There are other nations with their own copyright statutes that are not members of the UN. However, these countries may not be completely sovereign or may have their sovereignty disputed. It is not the place of this survey to enter into sovereignty debates. Additionally, some territories may simply apply the laws of the countries to which they are related (e.g., French Guiana). Accordingly, the results could be skewed by duplicate entries from countries using the same statute. Thus, they have been excluded from the survey.

⁵¹¹ Scott Burris, 'How to Write a Legal Mapping Paper' (Temple University Legal Studies Research Paper No. 2018-10, November 2020), 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3133065>.

This study aims to 'survey the legal terrain in a policy domain capturing all the characteristics that vary in ways plausibly related [to statutory reversion rights].' Evan Anderson, Charles Tremper, Sue Thomas, Alexander C Wagenaar, 'Measuring Statutory Law and Regulations for Empirical Research' (A Methods Monograph for the Public Health Law Research Program (PHLR) Temple University Beasley School of Law), 6 <<http://publichealthlawresearch.org/sites/default/files/downloads/resource/MeasuringLawRegulationsforEmpiricalResearch-Monograph-AndersonTremper-March2012.pdf>>.

⁵¹² 'WIPO Lex Database Search', *WIPO Lex* (Web Page) <<https://wipo.lex.wipo.int/en/main/legislation>> Hoffman and Rumsey indicate that WIPO Lex is a first port of call for researching intellectual property laws alongside national government copyright websites: Marci Hoffman and Mary Rumsey, *International and Foreign Legal Research: A Coursebook* (Brill, 2nd ed, 2012), 258. They also list other sources of IP laws if those laws are not available on WIPO Lex. However, I found WIPO Lex to be the most comprehensive and updated for the purposes of this study. For example, UNESCO's 'Collection of National Copyright Laws', website appears not to have been updated since 2010 and no link to this collection is provided on the UNESCO copyright page despite it being listed as one of 'UNESCO's tools'. This indicates that the resource is not currently being updated. See 'Collection of National Copyright Laws', *UNESCO* (Web Page) <http://portal.unesco.org/culture/en/ev.php-URL_ID=14992&URL_DO=DO_TOPIC&URL_SECTION=471.html>; 'Copyright', *UNESCO* (Web Page) <<http://www.unesco.org/new/en/culture/themes/creativity/creative-industries/copyright/>>. Note WIPO Lex does not list a copyright law for Somalia, although there does appear to be a copyright law applicable to the Somali Democratic Republic from 1977: see Somali Democratic Republic Copyright Law 1977 (Web Document) <http://www.somalilandlaw.com/SDR_Copyright_Law_1977_Som_.pdf> (in Somali). Accordingly the law of Somalia would need to be reviewed further for confirmation there is a copyright law and if so, whether it has any reversion laws.

⁵¹³ See e.g., 'Choose a country', *NJQ & Associates* (Web Page) <<http://njq-ip.com/countries/>>.

Translate⁵¹⁴ and sought assistance from native language speakers where possible.⁵¹⁵ I only focused on provisions allowing authors to regain their economic rights in specific works they have contracted to create. Therefore, I do not examine reversion rights in respect of ‘blanket’ assignments of rights in all works authors may create.⁵¹⁶ I also do not examine moral rights to retract or withdraw works from publication, which *could* be construed as reversion rights but can require authors to compensate publishers for doing so (thus creating an incentive not to exercise them).⁵¹⁷

B. Limitations

The purpose of this survey was to understand **how legislators have provided for rights to revert to book authors across the world**. It should be considered an exploratory overview of reversion rights applicable to book publishers in these jurisdictions, with the following limitations:

1. I only used English statutes and translations (using machine translation or via translation assistance), but was not able to obtain professional translation assistance due to resource limitations;⁵¹⁸

⁵¹⁴ For an experiment comparing manual and Google Translate translations of Polish publishing contracts, see Paula Trzaskawka, ‘Selected Clauses of a Copyright Contract in Polish and English in Translation by Google Translate: A Tentative Assessment of Quality’ (2020) 33 *International Journal for the Semiotics of Law* 689. The author found Google Translate useful but noted that it sometimes ‘produces a few unintelligible sentences, as well as sentences whose significance to a smaller or greater extent changes the meaning of the source text.’ As a result, it can ‘significantly accelerate’, but cannot ‘replace human work’: Trzaskawka 2020 (n 514), 703.

⁵¹⁵ I acknowledge and am very grateful for the assistance of the following individuals for their helpful translation assistance throughout the research process: Dr Tanjina Sharmin, Hasan Mohamed, Julien Monnet, Bruno Grosso, Diego Cardona-Escobar, Dr Elena Karataeva, Dr Rheny Pulungan and Professor Eleonora Bottini.

⁵¹⁶ See e.g., Syria, art 12: ‘The assignment of the author’s future intellectual production shall be null and void without prejudice to the provisions of Articles 49 and 50 of this Law’.

⁵¹⁷ See e.g., Van Houweling 2016 (n 359), 387-389.

⁵¹⁸ Translations performed by Google Translate are limited when compared to professional translations: see Frances Sheppard, ‘Medical writing in English: The problem with Google Translate’ (2011) 40(6) *La Presse Medicale* 565, 566. Some statutes are only partially translated due to the lack of a version that could be automatically translated (e.g., the Central African Republic): as such, I was not able to review the full legislation for reversion laws.

2. Where translations of the most recent copyright legislation were not available, I used the latest available English translations.⁵¹⁹ As such, while every attempt has been made to ensure the currency of the laws as of March 2019, this cannot be guaranteed.⁵²⁰
3. Due to the scope, I was not able to conduct in-depth surveys of other sources of domestic or transnational law that may affect author-publisher contracts;⁵²¹
4. My scope of enquiry was restricted to ‘the law as written in [copyright] statutes’, not how the law operates in practice which ‘may differ from law on the books’;⁵²² and
5. Due to the size of the dataset and resource limitations, the data does not include comparisons with third-party coding: instead, the data and category descriptions are made openly available.⁵²³

Accordingly, this survey is not designed to be the definitive source on reversion laws around the world. The size of the dataset and the need for translation assistance means that it is possible not all relevant reversion laws were identified (although the data has been reviewed multiple times for comprehensiveness). Rather, the survey is designed to be a starting point for deeper research into how reversion laws are drafted and applied in different jurisdictions around the world.⁵²⁴ Researchers from these jurisdictions and who are fluent in the languages in which these statutes were drafted may build on this research by conducting more in-depth reviews of their copyright reversion schema to supplement this work, particularly as domestic copyright laws evolve.⁵²⁵ Researchers may also wish to conduct more comprehensive reviews of reversion rights applicable across different creative sectors, as Furgal has done for copyright laws in continental Europe.⁵²⁶

⁵¹⁹ For example, the latest copyright legislation for Panama is only available in Spanish on WIPO Lex in a PDF version: translating a PDF rather than a HTML version is onerous, so I used the prior version from 1994. See ‘Panama’, *WIPO Lex* (Web Page) <<https://wipo.lex.wipo.int/en/legislation/details/15426>>. Likewise, it appears South Sudan has imposed a new Literary and Artistic Works Act of 2001, but as this is a PDF version in Arabic I have used the prior 1996 legislation: see ‘South Sudan’, *WIPO Lex* (Web Page) <<https://wipo.lex.wipo.int/en/legislation/details/11286>>.

⁵²⁰ Prior English versions of reversion laws may also have been used for clarity where it appeared subsequent versions had no substantive changes. Further, WIPO Lex may have updated legislation since it was collected for this survey.

⁵²¹ However, copyright legislation is the likeliest location for laws that affect publishing contracts: see Working Group 1984 (n 343), 315.

⁵²² Burris 2020 (n 511), 13, citing SB Klieger et al, ‘Mapping medical marijuana: state laws regulating patients, product safety, supply chains and dispensaries, 2017’ (2017) 112(12) *Addiction* 2206, 2214.

⁵²³ See e.g., Mark A Hall and Ronald F Wright, ‘Systematic Content Analysis of Judicial Opinions’ (2008) 96(1) *California Law Review* 63, 112, 112 fn 199.

⁵²⁴ It is also designed to complement any similar research that may exist in other languages.

⁵²⁵ **Please note copyright laws may have changed since March 2019: see e.g.** ‘Myanmar Enacts Copyright Law’, *Tilleke & Gibbins* (Blog Post, 5 June 2019) <<https://www.tilleke.com/insights/myanmar-enacts-copyright-law/>>; *Copyright Act 2019* (Act No. 17 of 2019) (Nauru).

⁵²⁶ Furgal 2020 (n 381), 1.

III. RESULTS

In total, 55% of the countries surveyed (n=107) have some form of statutory copyright reversion law applicable to book authors. Here, I report highlights of reversion rights in Africa, Asia, South America, Central America, and Oceania to supplement the scholarship on reversion rights in other regions around as highlighted in **Chapter IV** (e.g., Europe, the UK, Canada, and South Africa). The full dataset is openly available on Bridges, the Monash University data repository.⁵²⁷ Results are as of March 2019, and some laws may have been updated since.

A. Africa

The only country in Africa to impose a mandatory time limit on copyright assignments is Eswatini (formerly Swaziland).⁵²⁸ This is a reproduction of the Imperial reversion right granting automatic reversion of rights to an author's estate 25 years after the author's death.⁵²⁹

A further six countries impose time limits on copyright grants in the absence of an equivalent contractual provision. There are 10-year terms in Cape Verde and Mauritius,⁵³⁰ and 10-year or five-year limits in Ethiopia (depending on whether the grant is an assignment or a licence).⁵³¹ In Kenya and Mozambique, the time limits are even stricter. If a copyright assignment failed to specify a term, it terminates after three years in Kenya.⁵³² If a copyright licence does not specify a term, it was only deemed to last just 12 months in Mozambique.⁵³³

Copyright laws in 20 African countries automatically terminate or allow authors to terminate contracts if publishers fail to publish works initially.⁵³⁴ Copyright laws in 14 countries also state that publishing contracts will end 'when the publisher destroys all the copies' of the work

⁵²⁷ Joshua Yuvaraj, 'Data for Legal Mapping Study into Copyright Reversion Laws Applicable to Book Publishing Contracts (up to March 2019)', *Bridges* (Dataset, 24 August 2021) <<https://doi.org/10.26180/16416747>>. Due to the number of statutes cited, I have put in footnotes the countries and relevant section or article numbers. The names of the relevant statutes are listed in the bibliography to this thesis.

⁵²⁸ Eswatini, s 7(2). However, note Eswatini appears to have updated its copyright legislation in December 2019, with the updated legislation not featuring the reversion provision (although this is inconclusive because I could not locate the full statute): 'Part II Copyright In Original Works', *ARIPO* (Online Document) <<https://www.aripo.org/wp-content/uploads/2019/12/Eswatini-Copyright-Act.pdf>>. Further, WIPO Lex does not appear to have the 2019 legislation on file for Eswatini: 'Wipo Lex Search', *WIPO Lex* (Web Page, search conducted 27 July 2021) <<https://wipo.lex.wipo.int/en/legislation/results?countryOrgs=SZ&last=true>>.

⁵²⁹ Eswatini, s 7(2).

⁵³⁰ Eswatini, s 7(2).

⁵³¹ Ethiopia, art 24(4).

⁵³² Kenya, art 33(7).

⁵³³ Mozambique, s 36(5).

⁵³⁴ Algeria, art 97; Benin, art 44; Burkina Faso, art 56; Burundi, art 52; Cape Verde, art 89; Chad, art 69; Comoros, art 63; Congo, art 56; Democratic Republic of Congo, art 47; Djibouti, art 49(2); Guinea, art 35; Guinea-Bissau, art 100(3); Ivory Coast, art 70; Madagascar, art 89; Mali, art 75; Mauritania, art 96; Morocco, art 49; Sao Tome and Principe, arts 90(2), 106(1); Senegal, art 74(2); Togo, art 56.

(or an equivalent phrase).⁵³⁵ This appears to be a print-era provision, when a publisher destroying all copies of a work would take the book out of print and signify they considered their arrangement with the author to be at an end. These provisions may be difficult to apply in a digital world, as publishers are unlikely to destroy all copies of a digital work (and potentially not even capable of doing so, if they have been subject to backups over time).

Another aspect of rights reversion that does not account well for the digital world is the out-of-print clause. Twenty-one countries in Africa have statutory out of print rights applicable to publishing contracts.⁵³⁶ These clauses enable authors to end publishing contracts and regain their rights if publishers fail to reprint works upon authors requesting them to do so. However, of these, only the laws of Algeria and Mauritania appear to impose objective criteria to determine when books go out of print.⁵³⁷ Both appear to allow reversion if the publisher fails to ‘reissue’ or ‘reproduce’ the work as stipulated in the contract and book stocks are at 3% of the total stocks,⁵³⁸ although legal researchers proficient in French may be able to interpret these provisions more accurately. I found no out-of-print rights adopting a sales threshold for when a book goes out of print.

A broader type of reversion right which may encompass new rights (like eBook and audiobook rights) is the ‘lack of exploitation’ reversion right present in Cape Verde, Ethiopia, Mauritius, and Sao Tome and Principe.⁵³⁹ In Cape Verde, there is a time limit of 10 years on grants but this ends after five years if ‘the work is not used or operated within 5 (five) years.’⁵⁴⁰ A similar provision applies in Sao Tome and Principe after seven years, although the statute is not clear about whether the entire grant ends or whether it is only the exclusive part of the grant that ends, leaving the author and publisher with non-exclusive rights over the work.⁵⁴¹ In Mauritania, non-use ‘one year after the delivery of the work’ entitles the author to terminate the contract.⁵⁴² In addition to this provision, publishers in Mauritania also appear to lose the

⁵³⁵ Benin, art 44; Burkina Faso, art 56; Cameroon, s 47(1); Chad, art 69; Comoros, art 63; Congo, art 56; Democratic Republic of Congo, art 48; Djibouti, art 49(1); Guinea, art 35; Ivory Coast, art 70; Madagascar, art 89; Morocco, art 49; Senegal, art 74(1); Togo, art 56.

⁵³⁶ Algeria, art 97; Benin, art 44; Burkina Faso, art 56; Burundi, art 52; Cameroon, s 47(2); Chad, art 69; Comoros, art 63; Congo, art 56; Democratic Republic of Congo, art 47(a); Djibouti, art 49(2), (3); Eritrea, art 2441(1); Guinea, art 35; Ivory Coast, art 70; Madagascar, art 89; Mali, art 75; Mauritania, art 96; Morocco, art 49; Rwanda, art 237; Sao Tome and Principe, arts 90(2), 105(1), 106(1)(c); Senegal, art 74(2); Togo, art 56.

⁵³⁷ Algeria, s 97; Mauritania, art 96.

⁵³⁸ Algeria, s 97; Mauritania, art 96.

⁵³⁹ See Dagnachew Worku Gashu, ‘Examining the Legal Regime Governing Commercialization of Patents, Copyrights and Trademarks in Ethiopia’ (2018) 8(1) *Developing Country Studies* 32, 35, 37 (describing the Ethiopian provisions).

⁵⁴⁰ Cape Verde, art 40(2).

⁵⁴¹ Sao Tome and Principe, s 5.

⁵⁴² Mauritania, art 68.

exclusivity of their assignments if they fail to ‘communicate the work to the public within the agreed timeframe or cease to operate normally under the conditions provided for in the contract, after a formal notice from the assignor [author] which remained unsuccessful for three (3) month[s].’⁵⁴³ In Sudan, an author can terminate the contract if the publisher has not ‘exploit[ed] the work’, either at the end of a specified time for exploitation in the contract or ‘after expiry [sic] of half the period specified in the contract’.⁵⁴⁴

Ethiopia and Mauritius have provisions most similar to article 22 of the EU Directive which we discussed above: in those countries, authors can revoke assignments or licences after three years if the publishers do not exercise the rights granted to them at all or inadequately, it is not due to ‘circumstances which the author can be expected to remedy’, and it prejudices ‘the author[’s legitimate interest’.⁵⁴⁵ Mersha and Hadush suggest the author’s legitimate interest in Ethiopian law ‘covers anything which may be claimed through the courts of law. It may extend from [the] cultivation of reputation to huge monetary interests.’⁵⁴⁶ Beyond this I have not located any other explanation of this concept in the English language, although further analysis may be available in other languages.

Authors in Algeria and Mauritania are also permitted to terminate their contracts if their publishers fail to pay them due royalties for a year.⁵⁴⁷ In Benin, Djibouti, Guinea, and Togo, contractual clauses purporting to derogate from publisher obligations to provide relevant accounts information to authors would be considered ‘nonexistent’,⁵⁴⁸ ‘deemed not to have been written’, or ‘void’.⁵⁴⁹ While the latter provisions do not entitle authors to end their contracts or regain their rights, they are important protections because they force publishers to continually provide authors with accurate information about the sales of their books. Authors would thus be more well-informed about whether to enforce existing statutory or contractual reversion rights against their publishers, depending on how well they perceive their publishers are exploiting the rights granted to them.

⁵⁴³ Mauritania, art 67.

⁵⁴⁴ Sudan, s 17. This could mean the time period for any licence or assignment as mandated by ss 14-15, although the legislation is not completely clear. Sudanese legal scholars or professionals would be better equipped to interpret these sections.

⁵⁴⁵ Ethiopia, art 25(1); Mauritius, art 14(1).

⁵⁴⁶ Balew Mersha and G/Hiwot Hadush, *Law of Intellectual Property: Teaching Material* (Online Document, 2009), 180 <<https://chilot.me/wp-content/uploads/2011/06/intelectual-property.pdf>>.

⁵⁴⁷ Algeria, art 97; Mauritania, art 96.

⁵⁴⁸ Djibouti, art 45(3); Togo, art 54.

⁵⁴⁹ Benin, art 43.

Authors in Algeria are also granted reversion rights if their contracts fail to specify certain key elements of publishing contracts, like the scope and length of the copyright grant.⁵⁵⁰ Authors simply need to make a ‘request’ and the assignments will be ‘nullified’.⁵⁵¹ In Mauritania, the law simply requires publishing contracts to set out these terms ‘on pain of nullity’.⁵⁵² Provisions like this exist in various European countries surveyed as well. In Romania, failure to specify the rights, ‘the forms of exploitation, the duration and scope of the transfer [and]...the remuneration payable to the copyright owner’ gives the ‘interested party’ the right to ‘apply for cancellation of the contract.’⁵⁵³ Albania has a very similar right.⁵⁵⁴ In Latvia and Lithuania, authors can terminate copyright assignments or licences that fail to specify their length by giving six months and 12 months of notice respectively.⁵⁵⁵ And in Portugal and San Marino, it appears that contracts failing to comply with various form and execution requirements could be deemed ‘null’.⁵⁵⁶

Authors in Algeria, Burkina Faso, and Burundi are also entitled to contest agreements which they believe inequitably remunerate them, with the potential for those agreements to be cancelled.⁵⁵⁷ In Algeria, article 66 suggests that agreements found ‘in violation’ of principles of fair remuneration ‘shall be considered void’.⁵⁵⁸ Authors have 15 years to bring challenges against such agreements.⁵⁵⁹ In Burkina Faso, authors could either ‘demand...the rescission of the contract or review of the price conditions under the contract’ if they could prove they met a particular loss threshold (although the intricacies of calculating this loss are not entirely clear from the translated legislation).⁵⁶⁰ It is not clear whether rescission would be granted, but the statute provides that ‘The burdensome contract shall be assessed, taking into account the overall exploitation by the assignee of the works of the author who claims to have suffered a prejudice.’⁵⁶¹ Meanwhile, in Burundi authors have the right ‘to institute proceedings for rescission of a contract for injury or to demand adequacy of the financial clauses of the transfer if the profit made from the exploitation of the work would be clearly disproportionate to initial

⁵⁵⁰ Algeria, art 64.

⁵⁵¹ Algeria, art 64.

⁵⁵² Mauritania, art 86.

⁵⁵³ Romania, art 41(1). It is not expressly clear whether cancellation will actually take place or who the ‘interested party’ is, but I hypothesise this at least includes the author.

⁵⁵⁴ Albania, art 48(5), (6).

⁵⁵⁵ Latvia, art 44(2); Lithuania, art 40(2).

⁵⁵⁶ Portugal, art 44; San Marino, art 51.

⁵⁵⁷ See also Mauritania, art 65, although the English translation is not clear on this point.

⁵⁵⁸ Algeria, art 66.

⁵⁵⁹ Algeria, art 66.

⁵⁶⁰ Burkina Faso, art 45.

⁵⁶¹ Burkina Faso, art 45.

agreements.’⁵⁶² As in Burkina Faso, it is not clear rescission will be automatically granted, and there may be some form of judicial or other regulatory review to determine the merits of the authors’ claims. Nevertheless, publishers are not permitted to derogate from their obligations under this clause: ‘Any provision having the effect of alienating this right shall be considered null and void.’⁵⁶³

In eleven African countries, rights will revert to authors (either on application or automatically) on the publisher going into liquidation or out of business.⁵⁶⁴ Fifteen countries also allow contracts to end if publishers transfer their business to third parties, and those transfers adversely impact the material interests of authors.⁵⁶⁵ In Rwanda, it appears the first remedy in such a situation was for the author to receive ‘equitable compensation’, and they could only terminate the contract if such compensation is not forthcoming.⁵⁶⁶

B. Asia

In Asia, three countries specify time limits applicable irrespective of what was in a publishing contract: Iran (30 years),⁵⁶⁷ Myanmar (author’s life + 25 years)⁵⁶⁸ and Pakistan (10 years, ‘except where the assignment is made in favour of Government or an educational, charitable, religious or non-profit institution’).⁵⁶⁹ Indonesia is the only country that imposes a time limit on lump sum assignments (where the author assigns all copyright for a lump sum): 25 years.⁵⁷⁰ As Nurani, Citra NH and Budiman write, this provision protects authors from lump sum assignments.⁵⁷¹ This provision has been criticised by the International Intellectual Property

⁵⁶² Burundi, art 41.

⁵⁶³ Burundi, art 41.

⁵⁶⁴ Burkina Faso, art 53; Burundi art 50; Cameroon, s 45(1); Cape Verde, art 89(a), (b); Chad, art 67; Comoros, art 61; Guinea-Bissau, art 100(1); Ivory Coast, art 68; Madagascar, art 87; Mali, art 76; Sao Tome and Principe, art 106(1)(b) (‘if the individual publisher has died and his business is not continued by one or more of his successors’).

⁵⁶⁵ Benin, art 41; Burkina Faso, art 54; Burundi, art 50; Cameroon, s 46(2); Chad, art 68; Comoros, art 62; Democratic Republic of Congo, art 47(b); Djibouti, art 47; Guinea, art 33; Ivory Coast, art 69; Madagascar, art 88; Mali, art 77; Rwanda, art 235; Sao Tome and Principe, art 100(2); Senegal, art 73(2).

⁵⁶⁶ Rwanda, art 235, although it also appears the ‘importance of the infringement’ affects the termination somehow.

⁵⁶⁷ Iran, art 14-15.

⁵⁶⁸ Myanmar, s 5(2).

⁵⁶⁹ Pakistan, art 14(1).

⁵⁷⁰ Indonesia, art 18, 122, Elucidation pg 7. A study appears to evaluate the effect of the rules on ‘sold flat’ (lump sum) agreements in the Indonesian copyright legislation, but the study is in Bahasa Indonesia and the abstract, although in English, is inconclusive as to whether it documents the effects of rights reversion: see Fakultas Hukum, ‘Mekanisme Jual Putus Sebelum dan Sesudah Berlakunya Undang-Undang Tentang Hak Cipta dalam Perspektif Pembangunan Ekonomi Nasional di Era Globalisasi’ (2019) 3(1) *Jurnal Ilum Hukum* 93 <<https://e-jurnal.lppmunsera.org/index.php/ajudikasi/article/view/694/pdf>>.

⁵⁷¹ Nina Nurani, Cherry Citra NH, Idham Budiman, ‘Copyright as a Guarantee of Fidusia in the Efforts to Accelerate Indonesia’s Creative Economic Growth’ (2020) 17(5) *PalArch’s Journal of Archaeology of Egypt/Egyptology* 691, 697.

Alliance ('IIPA'), who recommend that it be removed.⁵⁷² The IIPA suggests this is due to a lack of clarity:

It is unclear how these provisions operate. For example, the provisions do not state explicitly that an author needs to invoke the termination in order for it to be effective, nor do they address what happens to existing contracts at the time of termination.⁵⁷³

However, the IIPA appears to dismiss these provisions for other reasons not specified in the report.⁵⁷⁴ This may be linked to its opposition to the South African termination right,⁵⁷⁵ although this is purely speculation because there is no clear indication in the report.

Time limits applicable in the absence of an equivalent contractual term are more common, from one year (Kazakhstan), five years (Bangladesh, India, Tajikistan, Turkmenistan, Uzbekistan, Kyrgyzstan), and ten years (Lebanon, Thailand).⁵⁷⁶ In Tajikistan, Turkmenistan, Uzbekistan, Kyrgyzstan, and Kazakhstan, authors can terminate their grants at the end of the statutorily specified period if there is no contractual provision, but need to give notice between three and six months prior to termination taking effect.⁵⁷⁷ In Kyrgyzstan, any contract longer than 10 years in length entitles an author to terminate rights every ten years.⁵⁷⁸ In Japan, publishing contracts are limited to three years if the time limits are not specified.⁵⁷⁹

As in Africa, some countries have adopted EU Directive-like provisions enabling termination for non-exploitation. In Bangladesh and India, a grant will lapse if the rights are not used within one year (except where otherwise specified in the assignment).⁵⁸⁰ The provisions are unclear as to whether this applies only to unused rights or the entire copyright grant. Moreover, in India an author can apply to the Copyright Board to revoke a licence for insufficient use.⁵⁸¹ In

⁵⁷² International Intellectual Property Alliance, 'IIPA 2020 Special 301 Report on Copyright Protection and Enforcement' (6 February 2020), 43 <<https://www.iipa.org/files/uploads/2020/02/2020SPEC301REPORT.pdf>> ('IIPA 2020 Report').

⁵⁷³ Ibid 48.

⁵⁷⁴ Ibid 43, 48.

⁵⁷⁵ See e.g. IIPA 2020 Report (n 572), 77.

⁵⁷⁶ Kazakhstan, art 32(2); Bangladesh, s 19(5); India, art 19(5); Tajikistan, art 26; Turkmenistan, art 28(1); Uzbekistan, art 39; Kyrgyzstan, art 31(4); Lebanon, art 17; Thailand, s 17. See *Bharati Dutta v Dr Saradindu Basu & Anr* 2008 (37) PTC 178 (CB) for an example of the Copyright Board applying the time limit to a publishing contract: Manisha Singh, 'India: Assignment' Looked Into By Copyright Board', *Mondaq* (Blog Post, 1 July 2008) <<https://www.mondaq.com/india/copyright/62750/assignment-looked-into-by-copyright-board>>.

⁵⁷⁷ Tajikistan, art 26; Turkmenistan, art 28(1); Uzbekistan, art 39; Kyrgyzstan, art 31(4), Kazakhstan, art 32(2).

⁵⁷⁸ Kyrgyzstan, art 31(4).

⁵⁷⁹ Japan, art 83(1).

⁵⁸⁰ Bangladesh, s 19(4); India, s 19(4); Milan Hossain, 'Present Situation of Copyright Protection in Bangladesh' (2012) 2(7) *Bangladesh Research Publications Journal* 99, 103-104; Muhammad Farhad Hosen, 'An Overview of the Copyright Protection Laws in Bangladesh – A Critical Analysis of the Copyright Act, 2000 with Its Loopholes and Recommendations' (2017) 8 *Beijing Law Review* 191, 197-198.

⁵⁸¹ India, s 19A, although this now only appears to apply to licences: Krishnamurthy 2013 (n 502), 405.

Pakistan, an author automatically regains their rights three years after assigning them if it was an unpublished work and is not published by that time.⁵⁸²

Nevertheless, the presence of such reversion rights does not necessarily mean they are effective. The Indian right only applies if the contract does not specify otherwise, and ‘it is common for the licensor or assignor to be required to waive the reversionary right.’⁵⁸³ Publishers, production companies and other intermediaries in India are advised to procure waivers of the reversion right in their publishing contracts.⁵⁸⁴ Intermediaries may then simply ‘sit...on copyright works without making any attempt to actively publish [them]’,⁵⁸⁵ which leaves authors in exactly the same situation as they would have been in without any statutory reversion rights: reliant on their contracts to allow them to reclaim rights in unexploited or out-of-print works.

In Syria, authors are empowered to terminate contracts if ‘the contractor does not invest the work without justification for two calendar years [sic].’⁵⁸⁶ The statute does not provide further clarification on the circumstances justifying non-investment.

Asia has fewer countries with dedicated out-of-print provisions (Japan, People’s Republic of China) than Africa. In Japan, an author can ‘extinguish the print rights’ if the publisher breaches

⁵⁸² Pakistan, art 14(2).

⁵⁸³ Krishnamurthy 2013 (n 502), 404.

⁵⁸⁴ Suchita Ambadipudi and Sheetal Srikanth, ‘Transfer of Intellectual Property – A Primer’, *Mondaq* (Blog Post, 6 July 2020) <<https://www.mondaq.com/india/trademark/961790/transfer-of-intellectual-property--a-primer>>:

It is pertinent to remember that Section 19(4) of the Copyright Act entails a right of reversion in favour of the assignor. If the rights assigned under a duly executed agreement are not exercised by the assignee within a year from the date of the assignment (or the effective date in case of future works) such assignment will revert to the assignor. These rights will no longer remain the assignee’s rights to exercise.

Once the rights revert in this manner, the assignment must be re-executed in a separate agreement. For practical ease, it is prudent to include a clause in the agreement whereby parties agree that Section 19(4) of the Copyright Act will not apply to their agreement. However, it might be in the interest of the assignor to allow the operation of Section 19(4) since that would deter an assignee from squatting on the rights in a work without publicly using it.

See also Nishith Desai Associates, ‘Indian Film Industry: Tackling Litigations’ (February 2020), 9, 11 <http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Indian-Film-Industry-Tackling-Litigations.pdf>; see the sample deed at Alliance Law Associates, *Deed of Assignment of Copyright* (Web Page) <<https://alassociates.in/deed-of-assignment-of-copyright/>>:

It is further agreed between the parties that notwithstanding the provisions of Sections 19(4) of the Copyright Act, 1957, the Assignment shall not lapse or the right transferred therein revert to the assignor, even if the Assignee does not exercise the rights under assignment within a period of one year from the date of this assignment.

⁵⁸⁵ Krishnamurthy 2013 (n 502), 404; see also Ambadipudi and Srikanth 2020 (n 584).

⁵⁸⁶ Syria, art 11.

an obligation ‘to continually conduct public transmission acts for the work in conformity with business practices’, and the author has given the publisher a minimum notice of three months to remedy that breach.⁵⁸⁷ In the PRC, an author can terminate their contract ‘if the publisher refuses to reprint or republish the work when stocks of the book are exhausted.’⁵⁸⁸ As in the African domestic copyright laws, a consistent theme we see is the lack of clarity around when book stocks are ‘exhausted’ in a digital age.

Unlike in Africa, no Asian countries provide for rights to revert to authors in the event of liquidation or the transfer of the publisher’s business.

C. South America

In South America, Colombia and Uruguay impose time limits on copyright grants irrespective of contractual provisions. In Colombia, grants appear to be limited to three years, although it also appears parties are permitted to extend grants by three year periods.⁵⁸⁹ Colombia’s copyright legislation also provide that *inter vivos* transfers of copyright will move to the author’s heirs 25 years after the author’s death until the end of the copyright term, irrespective of what is in the contract between the author and the publisher.⁵⁹⁰ This provision has been in effect in Colombia’s copyright legislation since at least 1946.⁵⁹¹ In Uruguay, ‘right[s] to economic exploitation’ last for 15 years after the author’s death, after which they revert to the author’s heirs.⁵⁹² The US Congress found similar laws in effect in El Salvador, Costa Rica, and Haiti during its 1960 law reform processes,⁵⁹³ although such laws appear to have been repealed in the former two countries.⁵⁹⁴

Brazil and Ecuador impose time limits in the absence of contractual stipulation: five years in Brazil⁵⁹⁵ and 10 years in Ecuador.⁵⁹⁶ Argentina,⁵⁹⁷ Colombia,⁵⁹⁸ and Ecuador⁵⁹⁹ also appear to

⁵⁸⁷ Japan, arts 81, 84(2).

⁵⁸⁸ People’s Republic of China, art 32.

⁵⁸⁹ Colombia, art 75.

⁵⁹⁰ Colombia, art 23.

⁵⁹¹ Copyright Law Revision Studies 1960 (n 502), 208 fn B62, citing the Colombian ‘Law of Dec 26, 1946, art 91’.

⁵⁹² Uruguay, art 33.

⁵⁹³ Copyright Law Revision Studies 1960 (n 502), 208.

⁵⁹⁴ I was only able to obtain a limited translation of the most recent Haitian French copyright legislation at the time of analysis.

⁵⁹⁵ Brazil, art 49(iii).

⁵⁹⁶ Ecuador, art 167.

⁵⁹⁷ Argentina, art 44.

⁵⁹⁸ Colombia, art 121.

⁵⁹⁹ Ecuador, art 180.

provide that publishing contracts would end when all copies agreed between the publisher and author for sale have been sold out.

Uruguay specifies a right to revoke a contract for non-exploitation: there, rights will be revoked automatically once the author has given a year's notice and the publisher fails to honour that request.⁶⁰⁰ However, other countries specify a range of reversion rights based on the use of the work. In Chile, an author can 'leave the contract without effect if, five years after publication, the audience has not acquired at least 20% of the copies'.⁶⁰¹ If they do so they are required to purchase all unsold copies from the publisher 'at cost price'.⁶⁰² Brazil, Peru, and Venezuela also have out-of-print rights applicable to publishing contracts.⁶⁰³ In Venezuela, the failure to reprint entitles an author to terminate the contract where the publisher had not responded to two or more requests by the author, within six months.⁶⁰⁴ In Brazil, the out-of-print right is activated 'when there are fewer than ten percent of the total edition remaining in stock, in the publisher's possession'.⁶⁰⁵ Similarly, in Peru an author can terminate the contract if they have agreed for more than one print run and the publisher failed to reprint the work once 95% of the first set of copies was sold.⁶⁰⁶ Brazil, Chile, Peru, and Venezuela also allow authors to terminate their contracts if the publisher failed to initially publish the work.⁶⁰⁷

Finally, Ecuador entitles authors to withdraw a work from publication prior to printing, if they want to make modifications 'involv[ing] fundamental changes in the content or form of the work and these are not accepted by the publisher'.⁶⁰⁸ The author appears to be required to 'indemnify [the publisher] for the damages caused' by any such decision,⁶⁰⁹ but it is another variation of reversion right that operates as long as the work has not yet been printed. Similar provisions exist in Slovakia and the Czech Republic,⁶¹⁰ although in Slovakia it appears the reversion right can be exercised after the work is printed:

⁶⁰⁰ Uruguay, art 32.

⁶⁰¹ Chile, art 52 (translation by Diego Cardona-Escobar).

⁶⁰² Ibid.

⁶⁰³ Brazil, art 65; Peru, art 102; Venezuela, s 82. See also Chile, art 51(b), although the wording is ambiguous:

The author has the right to rescind the publishing contract in the following cases...if authorized the publisher to publish more than one edition and copies having been sold out for sale, it is unnecessary to publish a new, within a year from the judicial notice to be done at the request of the author.

⁶⁰⁴ Venezuela, s 82.

⁶⁰⁵ Brazil, art 63(2).

⁶⁰⁶ Peru, art 102(b).

⁶⁰⁷ Brazil, art 62; Chile, art 51; Peru, art 102; Venezuela, s 82.

⁶⁰⁸ Ecuador, art 177.

⁶⁰⁹ Ecuador, art 177.

⁶¹⁰ Czech Republic, art 56(4).

[The] Author may withdraw from an agreement for publishing of a work and may request [the] returning of original of the work or its copies or may request destroying of copies of the work, in case the licensee refused to enable him to perform author's revisal of the work or in case the licensee used the work in a manner decreasing its value.⁶¹¹

Unlike in Asia, four South American countries enable rights to revert to authors if publishers go into liquidation or out of business: Colombia, Ecuador, Paraguay, and Venezuela. In Colombia, a publisher's bankruptcy results in contract termination if printing had not begun: if printing has begun it appears the contract could be upheld by the court if requested by the publisher or their receiver, although the court retains discretion over this.⁶¹² Ecuador simply allows termination for a publisher's bankruptcy where printing had not begun, but not when printing had begun.⁶¹³ In Venezuela, authors can 'request' the contract be terminated if the publisher's receiver has not transferred the business to a third party or 'does not continue to operate the publisher's business' within three months: it is not clear whether termination would follow, but given the similarities between this and other provisions surveyed I hypothesise the 'request' is simply a formality.⁶¹⁴ Paraguay has the broadest reversion right for a publisher going out of business: it simply provided contracts will be 'rescinded' when publishers go bankrupt or are wound up, and specifies that after this 'the author may dispose freely of his rights.'⁶¹⁵ Venezuela is the only South American country appearing to allow termination of a contract if the publisher transfers it to a third party and the transfer adversely affected the author's material interests (although it is not clear whether the author was permitted to rescind the initial contract with the publisher or the subsequent contract with the third party).⁶¹⁶

D. Central America

In Central America, only Mexico limits the length of copyright grants: grants can only be for 15 years, except where 'the nature of the work or the magnitude of the investment required so justifies' (this is not further explained in the legislation).⁶¹⁷ However, Mexico,⁶¹⁸ along with

⁶¹¹ Slovakia, s 75(4).

⁶¹² Colombia, art 134.

⁶¹³ Ecuador, art 184.

⁶¹⁴ Venezuela, s 85.

⁶¹⁵ Paraguay, s 99.

⁶¹⁶ Venezuela, s 57.

⁶¹⁷ Mexico, art 33.

⁶¹⁸ Mexico, art 33.

three other countries, imposes a five-year term on copyright grants if their contracts do not specify the term: the others were Guatemala,⁶¹⁹ Honduras,⁶²⁰ and Nicaragua.⁶²¹

Honduras is the only country to implement a reversion right for non-exploitation generally: authors appear to be able to terminate contracts if rights were not used within 12 months of being granted and the author's 'legitimate interests' were detrimentally affected.⁶²² Various countries also provide out of print rights for authors. In Costa Rica, if a work is not reissued within 18 months then the author can 'request' termination of the contract (although it was not clear whether 'request' entails a unilateral termination right).⁶²³ In the Dominican Republic, if multiple editions are agreed and the publisher 'delays publication of any of [these]...editions without just cause...the author...may exercise the right to rescind the contract' in addition to receiving compensation from the publisher.⁶²⁴ Honduras has similar protections.⁶²⁵

Nicaragua is the only country which specifies a stock threshold for a book being out of print: an author can terminate the contract if multiple editions were agreed, one is 'exhausted' and the publisher does not reprint the next edition ('exhausted' being defined as 'when the number of copies in existence [is] less than one hundred').⁶²⁶ Haiti permits authors to terminate publishing agreements for failure to publish and failure to republish out-of-print works, the latter of which is defined as a situation where the publisher fails to meet two requests for 'delivery of copies [of the work] within three months.'⁶²⁷ Haiti is also the only country in Central America that reflects provisions from Africa to the effect that publishing contracts will be terminated, irrespective of what they say, if all copies of the works at issue are destroyed.⁶²⁸ This similarity may be due to Haiti's French colonial background and the imposition of French law and legal principles.⁶²⁹

Six Central American countries permit contracts to be terminated or rescinded if publishers go out of business. In the Dominican Republic, El Salvador, Honduras, and Panama, bankruptcy

⁶¹⁹ Guatemala, art 73.

⁶²⁰ Honduras, art 63.

⁶²¹ Nicaragua, art 45(2).

⁶²² Honduras, art 66.

⁶²³ Costa Rica, art 22.

⁶²⁴ Dominican Republic, art 90(2).

⁶²⁵ Honduras, art 83.

⁶²⁶ Nicaragua, art 63.

⁶²⁷ Haiti, s 36(I)(f), (g).

⁶²⁸ Haiti, s 36(I)(f).

⁶²⁹ Marisol Florén-Romero, 'UPDATE: Researching Haitian Law', *GlobaLex*, (Web Page, March 2018), <<https://www.nyulawglobal.org/globalex/Haiti1.html>>.

will result in contracts being terminated if the works at issue have not been printed yet.⁶³⁰ Courts in those countries have the discretion to continue upholding contracts if printing has begun.⁶³¹ In Haiti, the contract can be terminated by the author if the trustee does not operate the publishing business or transfer it to a third party within a year.⁶³² And in Nicaragua, authors can terminate their contracts if bankruptcy/liquidation proceedings are brought against publishers, printing is suspended, and does not resume within the court-appointed time.⁶³³

I could not identify any statutory reversion rights in Caribbean countries.⁶³⁴ Cuba also does not appear to have reversion laws, although as mentioned above it had some in the past.⁶³⁵

E. Oceania

Beyond Australia and New Zealand, Oceania features 12 UN Member States: the Marshall Islands, Samoa, Tuvalu, Fiji, Micronesia, Palau, the Solomon Islands, Vanuatu, Kiribati, Nauru, Papua New Guinea, and Tonga. None of these states had statutory reversion rights in their copyright legislation. As with former British Caribbean countries, I hypothesise the British influence on copyright statutes in the region influenced the lack of author protections.

However, recent developments show this may not always be the case. Since the cut-off date for the survey (March 2019) Nauru has implemented new copyright legislation with reversion laws. Under the *Copyright Act 2019*, any assignment or licence which does not specify a duration ‘shall terminate 5 years from the date of assignment or licence’.⁶³⁶ Authors can also revoke their assignments or exclusive licenses if the rights holder ‘does not exercise [their]... right or does so only inadequately and the author’s legitimate interests are prejudiced by such failure’.⁶³⁷

IV. DISCUSSION

The survey above provided policymakers with new **information**: different types of reversion models. It is hoped that reading the results and accompanying data will provide new ideas for how reversion can be implemented in domestic copyright laws. The dataset is designed to

⁶³⁰ Dominican Republic, art 107; El Salvador, art 66; Honduras, art 93; Panama, s 72.

⁶³¹ Dominican Republic, art 107; El Salvador, art 66; Honduras, art 93.

⁶³² Haiti, s 36(I)(f).

⁶³³ Nicaragua, art 63(6).

⁶³⁴ Antigua and Barbuda, the Bahamas, Barbados, Belize, Grenada, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and Trinidad and Tobago.

⁶³⁵ Copyright Law Revision Studies 1960 (n 502), 208.

⁶³⁶ *Copyright Act 2019* (Nauru), s 20(6)(a).

⁶³⁷ *Ibid* s 22(1).

complement existing research into statutory reversion laws both in English (e.g. Furgal’s 2020 overview of European reversion laws) and in other languages.

Equally, the results of the survey highlight important lessons in terms of **how** policymakers can draft effective reversion laws:

1. Reversion laws should reflect the realities of changes in technology and creative markets;
2. Reversion laws should generally be inalienable; and
3. A combination of reversion laws is needed to address the different issues highlighted in this thesis.

These lessons are based on the rationale for reversion rights articulated elsewhere in this thesis: namely, the fulfilment of copyright’s incentive (access) and reward goals by allowing creators to explore new opportunities (particularly in light of new technologies) to make previously dormant or unexploited works available to the public, which may result in additional revenue and recognition. These lessons also provide the backdrop for the normative recommendations explored in **Chapters VII** and **VIII**.

A. Reversion laws should reflect changes in technology and creative markets

The above review showed many of the laws reflect pre-digital-era realities. Few countries employed objective criteria to determine when a book went out of print. Even ‘stock’-based reversion laws - e.g. a book is considered out-of-print when fewer than 200 copies are in stock – may not be consistent with digital-era technologies like print-on-demand or the fact that there only needs to be one digital file of a book, from which an infinite number of copies could be produced.⁶³⁸ Several countries also provided that publishing contracts would end when all copies of a work were destroyed: again, how do we determine when a digital copy of a work has been destroyed? These provisions show the need for reversion laws to continually reflect the realities of changes in technology and creative markets. Without such changes, authors are left with the same problems as with the contracts (as shown in *Are Contracts Enough*): they

⁶³⁸ See also Furgal 2021 (n 389), 289:

The consideration of digital exploitation of works is also missing in the out-of-print and the lack of subsequent publication provisions [in the EU Member States]. When the national law specifies what an “out-of-print” or “exhausted edition” is, it refers to a number of copies of books. For example, Romania, Slovenia and Spain deem a work to be out of print when the number of unsold copies is less than 5% of copies in an edition, and in any case, if fewer than 100 copies are available. The digital distribution of works is not reflected in those clauses.

may not be able to effectively regain their rights because it's not clear they can meet the thresholds for doing so under statute.

A failure to address digital realities affects reversion laws in EU Member States as well.⁶³⁹ However, one example of a copyright law that *has* adapted to reflect changes in technology is the French Intellectual Property Code, which sets out mechanisms by which authors can regain digital exploitation rights in books if those rights are unused after a period of time.⁶⁴⁰ This law preserves the intention of this type of reversion right in the context of new technological changes: allowing authors to regain their rights when they are no longer being used. However, even sales-based out-of-print rights – e.g., a book is considered out of print if it has generated less than \$200.00 in sales over the last 12-month royalty period – would help authors by giving them a clear and reasonable threshold at which they can seek to regain their rights, and which is not rendered ineffective by the development of digital technology.

It's also not enough for legislation to be amended to reflect present-day realities: lawmakers must ensure there are mechanisms for reversion rights to be reviewed regularly and efficiently. This helps to ensure that reversion rights continue to achieve the goals policymakers intend for them to achieve.

B. Reversion laws should generally be inalienable

The review above also highlighted the importance of ensuring reversion rights are generally inalienable. Several copyright statutes provided for reversion laws that applied in the absence of contrary provisions in publishing contracts (e.g., time limits). Such provisions *can* have a role to play in filling gaps in contracts, particularly around crucial questions like the term – we saw in *Are Contracts Enough?* that not all contracts specify those issues.

However, such clauses do not address situations in which contracts *do* specify those issues but in ways that run counter to the incentive and reward goals of copyright. As we saw in **Chapters II and III**, such problems can include unduly expansive grants of copyright and unsuitable mechanisms for returning rights to authors when they are no longer being reasonably exploited. In such situations, authors are not granted any protection by statutory reversion provisions. They have to rely on what is in their contracts. In such situations, it may become standard for publishers to contract out of those provisions.⁶⁴¹ If authors are not able to negotiate the removal

⁶³⁹ Ibid 289.

⁶⁴⁰ France, art L137-17-2(III).

⁶⁴¹ See above n 584.

of contracting out clauses, they would be in the same position they would be if those reversion provisions were not in force. However, if those reversion laws applied irrespective of what contracts set out, or operated as minimum ‘floors’ below which contracts could not go, authors *and* rightsholders would have more certainty about the boundaries of their contractual relationships.

Accordingly, the presence of ‘backup’ reversion laws – those that only apply in the event a contract does not specify an alternative – in the survey above highlights the importance of reversion rights generally being made inalienable. As we will see in **Chapter VIII**, it’s important that certain types of works be made exempt from reversion rights. However, allowing rightsholders to contract out of reversion rights renders them ineffective: they might as well not be there.

C. A combination of reversion laws is needed to address different issues

Third, the results above show us the importance of having a combination of reversion laws to address different issues. We saw a rich variety of reversion clauses across the various continents. These ranged from use-it-or-lose-it clauses (e.g. out-of-print clauses, inadequate exploitation clauses), time limits, and rights to end contracts when publishers went into liquidation. These rights all address different issues which are vital to authors and publishers. For example, out-of-print clauses deal with situations when books are no longer being sold or available to the public: at those points it is important for authors to be able to reclaim their rights to try and take advantage of new exploitation opportunities.

On the other hand, time limits provide a second opportunity for authors and their estates to reassess the value of works and renegotiate copyright grants where appropriate. This is especially important in the case of lump sum copyright grants, to ensure we don’t have a Solomon Linda-type situation (where an artist sells rights for very little and has little or no claim to a share in the subsequent revenues of the work). For example, Indonesian lawmakers have seen fit to address lump sum assignments with a 25-year limit.⁶⁴² And the data showed a range of time limits lawmakers felt were reasonable to impose (both mandatory and optional, the latter of which suggests what lawmakers consider ‘best practice’ in contracts). This indicates that the length of those time limits may vary as policymakers seek to appropriately

⁶⁴² Indonesia, ss 18, 122.

balance rightsholders' needs to hold rights long enough to profit from their investments and for authors to be able to regain those rights after that.

This data indicates that a *combination* of reversion laws is needed to address the deficiencies in existing approaches to copyright as identified earlier in this thesis. There's no reason to stick to *one* reversion law, like in the UK, US, and Canada. In fact, the INDU Committee recently recommended there be *two* reversion systems in Canada: a new 25-year termination right based on the US system, and the existing system of reversion 25 years after the author's death.⁶⁴³ And in Nauru, policymakers have very recently introduced both a time limit in the absence of a contractual stipulation *and* a use-it-or-lose-it right for inadequate exploitation. Both initiatives suggest an awareness that different reversion rights serve different needs, and there is no need to only have one law. There is no need for undue complexity, but policymakers should consider implementing multiple reversion provisions to respond to the different problems facing authors and publishers more comprehensively in the book industry and beyond.

V. CONCLUSION

In this Chapter I reported results from a study into reversion rights around the world applicable to book authors. This study has both **informational** and **normative** uses. It is **informational** in that it provides policymakers with a range of different reversion models to consider beyond those commonly discussed in the English-language literature (the EU, Canada, the UK, US, and South Africa). Knowing how other countries have adopted reversion rights gives policymakers more examples to learn from, both in terms of successes and failures. A secondary benefit of the data is that it provides researchers with a starting point from which to conduct further, more in-depth research into how these laws operate in their different jurisdictions. Such research can help policymakers better assess how various models might fare if implemented in Australia or other common law countries.

The study also has **normative** value because it highlights three lessons for policymakers to consider when drafting reversion laws. First, reversion laws must reflect the changing realities of creative markets, especially given the rapid advancement of technology. If reversion laws no longer apply effectively, authors are not protected as well as they could be and the problems highlighted earlier in this thesis (not being able to take advantage of new opportunities, books staying out of print) are only perpetuated. Similarly, reversion laws should generally be inalienable. While a range of countries apply 'backup' reversion laws like time limits in the

⁶⁴³ See above 73-74.

event contracts don't provide for them, publishers are allowed to contract out of them which means the problems with contracts identified in **Chapter III** are not being addressed. Last, policymakers should consider implementing a combination of reversion laws to address different issues facing authors and publishers. A one-law system may not cover the wide range of issues identified in this survey (e.g. books going out of print, authors getting a second chance to reappraise the value of their works). I explore these lessons in more detail in **Chapters VII** and **VIII**, together with lessons learned from the empirical study into the US termination right set out in **Chapter VI**.

VI. STATUTORY REVERSION RIGHTS: NEW EMPIRICAL RESEARCH INTO THE OPERATION OF THE US TERMINATION RIGHT

I. INTRODUCTION

This Chapter begins to fill the second gap I identified in **Chapter IV**: the limited empirical research on the use and impacts of existing statutory reversion systems. As previously mentioned, such research is vital to establish the efficacy of these provisions in light of their stated goals, and more broadly the incentive and rewards goals of copyright. This is particularly true when existing systems like the US termination right are recommended for adoption elsewhere (like in Canada). The absence of empirical data on such models makes it difficult for policymakers to assess their likely effects in domestic creative markets.

To begin filling this gap, I present the first comprehensive study of termination notice records from the US Copyright Office, co-authored with Associate Professor Rebecca Giblin, Dr Daniel Russo-Batterham at the Melbourne Data Analytics Platform (University of Melbourne) and Associate Professor Genevieve Grant. At the time of submitting this thesis for examination, the paper has been accepted for publication by the *Journal of Empirical Legal Studies* and meets Monash University's threshold for inclusion in a thesis as a published work.⁶⁴⁴

Associate Professor Giblin and I collaborated with Dr Russo-Batterham (with assistance from MDAP employee Mr Geordie Zhang) to extract data from the online US Copyright Office Catalog. We developed a search method by reviewing the Catalog and relevant literature and

⁶⁴⁴ The version of the paper included in this thesis is the final post-peer-review version sent to the *Journal of Empirical Legal Studies* for production on 23 August 2021. It includes various changes made since initial submission for peer review, including formatting changes required by the Journal. Further minor changes may be present in the published version.

corresponding with the Copyright Office. Over many months, we developed and refined code written in the Python programming language to scrape the Catalog for relevant records and clean the data for analysis. This involved rigorous quality control processes to ensure we had captured as many relevant records as possible. We then developed code to analyse the data, generating results in the form of numerical data, graphs, and charts. Associate Professor Giblin and I co-wrote the article with contributions from Dr Russo-Batterham (focusing on the method and results) and Associate Professor Grant (focusing on the method, results, and discussion).

**II. JOSHUA YUVARAJ, REBECCA GIBLIN, DANIEL RUSSO-
BATTERHAM, AND GENEVIEVE GRANT, ‘US COPYRIGHT
TERMINATION NOTICES FROM 1977 – 2020: INTRODUCING NEW
DATASETS’ (FORTHCOMING IN THE *JOURNAL OF EMPIRICAL LEGAL
STUDIES*, 2021)**

U.S. Copyright Termination Notices 1977-2020: Introducing New Datasets

*Joshua Yuvaraj, Rebecca Giblin, Daniel Russo-Batterham, and Genevieve Grant**

Introduction

Of all the core intellectual property rights - copyright, patent, trademark and designs - copyright is the most empirically elusive, because it is the only one not subject to registration. International treaties prohibit formalities being imposed as a condition of the copyright's use and enjoyment (Berne Convention, TRIPS) and, while voluntary registration is permissible, few countries have set up the infrastructure for this to occur. The primary exception is the United States, which has long offered a registration process via its Copyright Office, and which encourages registration by streamlining litigation and offering more favourable remedies where registered works are infringed (Copyright Act of 1976, §§ 411, 412).

Increasingly sophisticated datasets now exist to enable researchers to analyse what is being patented, trademarked and design-protected (and by whom, where, and how that's evolving over time). But copyright lags well behind. There have been some notable researcher efforts to construct workable databases from the limited copyright registration data that are available (e.g. Oliar & Matich 2013; Oliar, Pattinson & Powell, 2014), but the Copyright Office's database is elderly and frail, making it difficult to extract, arrange and analyse the data it contains. As a result, it has long been challenging to address empirical research questions about copyright's operation.

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This work was undertaken in collaboration with the Melbourne Data Analytics Platform (specifically Mr Geordie Zhang and Dr Daniel Russo-Batterham) and has been supported by funding from the Australian Research Council (FT170100011), an Australian Government Research Training Program Scholarship, and Monash University. Research into termination notice records has been approved by the Monash University Human Research Ethics Committee (Project ID: 23026). The authors acknowledge the assistance of the following individuals with this paper: Professor Robert Brauneis (The George Washington University Law School) and Professor Dotan Oliar (University of Virginia School of Law) for providing their data from a previous paper and feedback, Sue Finch from the University of Melbourne's Statistical Consulting Centre for her input on an earlier draft of the method and results, Brianna Schofield (Authors Alliance) and Regan Smith (General Counsel and Associate Register of Copyrights, U.S. Copyright Office) for their input on copyright registrations and the Copyright Office Catalog respectively, and John Jacob and Brad Williams for assisting with early coding of some data. We also acknowledge Professor R. Anthony Reese's (as yet unpublished) analysis of full termination notices obtained from the Copyright Office in Washington DC, and anticipate that our research will complement that analysis when it is published. Further, we wish to thank the anonymous peer reviewers for their helpful comments.

Data around copyright reversion is particularly elusive. Reversion rights - mechanisms for returning those copyrights to their progenitors - are well established, predating modern copyright law itself (e.g. Yuvaraj & Giblin, 2021 p. 384). Reversion clauses are commonly negotiated into contracts between creators and investors, and on top of that, more than half the world's nations grant creators statutory reversion rights in one form or another (Yuvaraj, 2019). That includes the United States, which, since 1978, has entitled creators to reclaim their rights by terminating transfers after a set time (Copyright Act of 1976, §§ 203, 304). Unfortunately, while reversion rights are widespread, many reflect industry realities from a pre-digital world, and few take advantage of the opportunities to enliven older works offered by digital technologies and the internet. In some countries that have them on their statute books, there's virtually no awareness they even exist (e.g. Kazakevich, 2020; Jaworski & Malik, 2020).

Recently however, there has been a notable surge of interest in reversion rights, with creator advocates, user groups (including the gallery, library, archive and museum sectors) and policymakers all beginning to recognize their potential. Creators are regularly obliged to transfer all or most of their rights for the entirety of the copyright as a condition of getting their work produced and distributed, typically before anyone knows what they're worth. Rights return mechanisms promise to help creators secure a fairer share of the fruits of their labor. For those interested in preserving and accessing culture, reversion has intriguing potential too. Rightsholders (such as book and music publishers and record labels) typically lose interest in works at the end of their commercial life, which can be many decades before the copyright expires. As a result, they become unavailable to cultural institutions and the broader public. Appropriately-drafted reversion mechanisms could free up rights to creators and investors who want to make them accessible again, beneficially reclaiming lost culture for society at large. This puts reversion rights in the slim group of copyright interests shared by both 'creator' and 'user' interests, who are usually in opposition during reform debates. That polarisation has made it very difficult to pass copyright reforms in recent years, so the unusual unity provides a rare opportunity to create meaningful change.

Policymakers are beginning to jump at the chance. In 2019, the European Union mandated that member states implement reversion rights to benefit creators whose rights are controlled by a rightsholder who no longer exploits them (E.U. Directive, art. 22). Its 27 member states are now in the process of implementing that requirement (C.R.E.A.T.e., n.d.). Also in 2019 the South African Parliament passed a new Copyright Act with a provision to automatically revert rights to authors 25 years after transfer, though they have now been forced back to the drawing board after the President refused to sign it into law (Nicholson, 2020a; Ramaphosa, 2020, cited in Nicholson, 2020b). Canadian lawmakers have also recommended introducing a new time-based reversion right entitling creators to terminate 25 years after transfer, with preliminary proposals analogous to existing US law (Statutory Review, 2019).

In formulating all these new laws, however, stakeholders and policymakers are largely flying blind. Empirical evaluation of existing reversion rights is scant and difficult. Many reversion rights are contained within private contracts, making them difficult to systematically find, collate and analyse. Where statutory reversion rights do exist, they rarely have registration requirements, making them difficult to empirically evaluate. To our knowledge, the U.S. termination rights are the only ones that have both a registration element and make the relevant notices publicly available.

The growing importance of rights reversion and momentum around reform make the unique US termination data an important resource, not only for analysing how that law is working, but

for drawing broader conclusions about how those findings should influence the development of reversion laws elsewhere. This paper introduces two new datasets that make available virtually complete data on termination notices filed in the US between its institution in 1978 and 2020. Links to the datasets and supporting files may be found in the reference section under Yuvaraj, et al. (2021a; 2021b; 2021c). The paper also sets out findings from our preliminary analysis of these data, and suggests how they might be put to further use by scholars, policymakers and industry.

The U.S. Termination Law

US law contains two statutory termination rights. For works assigned or licensed from 1 January 1978, 17 U.S. Code § 203 entitles creators to terminate those transfers 35 years later (for rights to publish works, the earlier of 35 years from publication or 40 years from the dates of the assignments or licences: Copyright Act of 1976, § 203(a)(3)). For works assigned or licensed before 1 January 1978, § 304 grants them or other parties that made the grants a five-year period to terminate those transfers, which begins the later of 56 years from when ‘copyright was originally secured’, or 1 January 1978 (Copyright Act of 1976, § 304(c)(1), (3)). If creators do not exercise the right within time, it is lost forever (Copyright Act of 1976, §§ 203(a)(3), 304(c)(3)).¹ The stated intention of both provisions was to improve creator remuneration, recognising that creators are very often obliged to transfer all or most of their rights before their work’s value becomes known (*Mills Music v Snyder*, 1985, cited in Loren, 2010).

As alluded to above, there are far more opportunities to actually achieve this today than when the legislation was enacted, since digital technologies make it possible to distribute most works instantaneously, globally, at remarkably little cost. Those developments also make it possible for the law to further another of copyright’s primary aims: to incentivise investments in making works available on an ongoing basis, so society can benefit from widespread access to knowledge and culture.

Termination rights do not apply to works made for hire or grants of copyright made by will (Copyright Act of 1976, §§ 203(a), 304(c)). Derivative works based on terminated works can continue to be used as long as they were created before termination (Copyright Act of 1976, §§ 203(b)(1), 304(c)(6)(A)). Termination may be effected by the author or, if deceased, their

¹ Note however that under § 203(a)(3), if ‘the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier.’ Further, when the U.S. copyright term was extended by 20 years in 1998, authors and their estates were granted a further ability to terminate pre-1978 grants that hadn’t already been terminated by 1998. This termination could be exercised ‘at any time during a period of 5 years beginning at the end of 75 years from the date copyright was originally secured’ (Copyright Act of 1976, § 304(d)(2)).

statutory successor.² Except in cases of works made for hire, parties cannot contract out of the right (Copyright Act of 1976, § 203(a)(5)).

To effect termination, a notice of intention must be served on the grantee and recorded with the Copyright Office, stating the date on which termination will take effect (Copyright Act of 1976, §§ 203(a)(4), 304(c)(4)).³ Strict compliance with the statutory requirements is essential: failing to include key information can render the notice invalid, meaning that the rights would stay with the party against whom the notice was filed (Compendium, 2021, p. 44, para 2310.1).⁴ In the case of properly-filed, non-contested notices, rights automatically revert to the author or their statutory heirs once the effective date of termination is reached - no further documents need be filed.

Once filed, the Copyright Office posts records of termination notices to its online Catalog, a searchable database containing data about all documents filed with the Copyright Office since 1978 (Brauneis, 2014).⁵ The full notices can be hundreds of pages in length (*Siegel v Warner Bros Entertainment*, 2009, cited in Goldstein, 2020),⁶ but the abbreviated online records contain a wealth of data, including the names of parties filing the notices, the names of parties receiving the notices, the dates on which notices are recorded with the Copyright Office, the registration number of the works in the notices (if provided by the filing party), and the type of work to which the notices relate. The Copyright Office also posts records of any counter-notices or revocation notices filed by the parties. The Catalog is the only publicly available source in the world that contains such information about the exercise of statutory copyright termination/reversion rights by creators and investors.

Existing Empirical Evidence on Reversion

As introduced above, reversion laws have been little studied - creating an evidence gap that is becoming problematic as new enthusiasm for reversion's potential is reflected in law reform around the globe (e.g. *Shifting Paradigms*, 2019; *Statutory Review*, 2019; Copyright Review Commission, 2011). Globally, statutory reversion rights apply in a variety of circumstances, including after passage of time, where the publisher fails to publish the work, where the work is out of print, or where the publisher goes into liquidation (Yuvaraj & Giblin, 2021). While

² These individuals include the author's widow or widower, their surviving children, or an executor, administrator, trustee, or personal representative if there are no surviving family members (Copyright Act, 17 U.S.C. § 203(a)(2), 304(c)(2)).

³ Notices cannot be served less than two or more than ten years before the operative termination date: Copyright Act, 17 U.S.C. §§ 203(a)(4)(A); 304(c)(4)(A).

⁴ Errors which do 'not materially affect the adequacy of the information required' don't render notices invalid (Compendium, 2021, p. 67, para 2310.12). However, they must be legible, complete, signed, and accompanied by the filing fee (Compendium, 2021, pp. 62-64).

⁵ The full documents are accessible only by visiting the Copyright Public Reading Room at the Copyright Office (Brauneis, 2014, p. 28).

⁶ For further examples of termination notices see e.g. *Johansen et. al. v. Sony Music Entertainment Inc. et. al.*, 2020.

various reports and studies have ascertained the scope of these provisions (Dusollier, Ker, Iglesias, & Smits, 2014; Dusollier, 2018; Guibault & Hugenholtz, 2002; Furgal, 2020), there have been few attempts to empirically analyse their use or effects.

In Europe, where such laws are widespread, the most notable is a 2016 study by Europe Economics and Guibault and Salamanca investigating the main European author-protective mechanisms (Europe Economics, Guibault, & Salamanca, 2016). Their analysis found that *ex post* measures to address contractual imbalances (including some reversion rights and rights to seek the alteration of remuneration in some circumstances) did not impact author remuneration as strongly as *ex ante* measures, such as legislation limiting the scope of copyright assignments and licences. A factor limiting the positive impact of *ex post* measures was the requirement, in most cases, for the author to commence legal proceedings against a publisher (as authors may not wish to exercise these provisions for fear of damaging their relationships with publishers). Of course, time limits themselves can effectively operate as reversion rights, because they restrict how long publishers can hold rights (after which they return to authors). Effectively then, this study suggests reversion may benefit author remuneration both by applying limits to contracts *and* by enabling authors to regain their rights outside contractual mechanisms.

Canada also has a time-based reversion right, which automatically returns rights to an author's estate 25 years after the author's death (Copyright Act, 1985, s 14(1)). As part of a study on the potential implementation of a proposed new time-based reversion right in Canada, Heald analysed the effect of that existing right on book availability (Heald, 2021). He looked at 288 books and collections of short stories by 41 Canadian authors who had died between 1977 and 1982, finding that approximately 10% of those were back in print after 25 years or more from the death of the author, and had been brought back into print by independent presses. Heald has also conducted similar research into the operation of this provision in South Africa and the UK (Heald, 2021; Heald, 2019). However, there have been no other empirical studies on the potential effect of this reversion right in Canada. Other common law countries such as Australia and New Zealand used to have the reversion right in force in Canada, but repealed their laws before any empirical evaluation took place (Yuvaraj & Giblin, 2019).

In the US, we identify just three studies empirically evaluating the use of the termination provisions to date. In 2016, Given analysed termination notices filed under § 304 for pre-1978 grants in the year 2000, using data provided by R Anthony Reese.⁷ He found that termination notices were mainly being filed by 'heirs of single author songwriters... terminating grants made to music publishers as soon as they possibly can.' (Given, 2016, p. 831)

In the same year, Bogdan reported searching the U.S. Copyright Office Catalog to identify the number of authors who have filed to terminate under § 203 as of mid-2015, finding that fewer than 300 creators had done so (Bogdan, 2016). This study was highly scope-limited, focused only on identifying the number of terminating authors. While acknowledging that some had

⁷ At the time of writing, Professor Reese's research does not appear to be published.

issued multiple notices over multiple works, the study did not quantify the number of works affected or analyse them by type.

Most recently, Heald analysed the impact of the U.S. termination right on book availability (Heald, 2018). From a sample of 1,909 titles, Heald compared the availability of books terminable under §§ 203 and 304 with closely equivalent books that were not. He also considered the impact on book availability of a US court decision (the *Rosetta* case) which effected a reversion of ebook rights to authors in 2002. Ultimately, he found ‘an estimated 20% to 23% of the titles are currently in print due to statutory reversion/termination statutes or the *Rosetta* case.’ (Heald, 2018, p. 47)

Professor R Anthony Reese (University of California, Irvine) has also been conducting research into the use of the termination provisions since the mid 2000s (Center for Technology, Innovation and Competition, 2010-11; Rub, 2013, p. 61, fn. 40). His investigations focus on the full notices (rather than their online Catalog records) and, at time of writing, his data and analysis have not yet been published (Given, 2016, p. 830, fn. 44). We hope our datasets and analysis will complement Professor Reese’s work once it is.

This review shows that, while there is growing support for adopting new statutory reversion rights for authors, there is little empirical research on the effects of reversion laws that are currently in force. This evidence gap is particularly notable in the US, the only country that has a mandatory recordation requirement and makes termination records publicly available (via the online Catalog or by visiting the Library of Congress).

The paucity of empirical research on the U.S. termination right may be a product of the difficulty of accessing and analysing the data. The Catalog is contained within an ageing system which can be difficult to use to locate relevant information (Brauneis, 2014). Moreover, the Catalog search page does not permit users to download multiple records at once. As Brauneis and Oliar noted, in a study of copyright registration (rather than termination) records, the Catalog search page itself ‘is suitable for researching rights in a particular title but not for conducting statistical analyses of millions of records.’ (Brauneis & Oliar, 2018, p. 107)

Collecting, cleaning and converting data from the Catalog into a format suitable for meaningful analysis requires considerable time and skill (e.g. Oliar & Matich, 2013; Oliar, Pattinson, & Powell, 2014). Opportunities for research beyond the online Catalog are limited: researchers can visit the Copyright Office in Washington DC to find and copy the physical documents, but this would be costly, and they would then still have to invest enormous resources into converting them to a manipulable form. They could alternatively seek to obtain the data directly from the Copyright Office. We initially took this route, enquiring about accessing the data on a fee-for-service basis, but were advised that the Office lacked the resources to provide it on any terms (email from Records Research & Certification Section of the Copyright Office, 2018).

We are aware of only one study in which the Copyright Office directly provided its Catalog data to researchers for analysis (Brauneis & Oliar, 2018; cf. Brauneis, 2014, pp. 9-10). This

involved a formal collaboration between the Copyright Office and the authors' institutions, and over 27 million records (Brauneis & Oliar, 2018; U.S. Copyright Office, *Academic Partnerships*, n.d.). Even with the Copyright Office's assistance however, the authors describe the process of cleaning and converting the data - necessary to enable statistical analysis - as 'laborious and time-consuming' (Brauneis & Oliar, 2018, p. 107). Other studies using Catalog registration data report similar difficulties (Oliar & Matich, 2013, pp. 1132-1133, Oliar, Pattinson & Powell, 2014, pp. 2248-2250). However, the end products of such efforts represent important contributions to the literature: now that these data are publicly available, they can be used to shine a welcome light on copyright's use and operation (e.g. Brauneis & Oliar, 2020).⁸

Constructing the Datasets

To fill this gap we have created two new datasets of copyright termination notice records under §§ 203 and 304 spanning their full histories - 1977 to 2020. As noted above, we initially sought to access records from the Copyright Office upon payment of a search fee, but the Office advised that it did not have the resources to provide them (email from Records Research & Certification Section of the Copyright Office, 2018). That made the Catalog the only feasible source of these data. These datasets will provide a valuable new tool for evaluating the use and effects of the U.S. termination right, which will contribute to fierce ongoing debates about how to adequately safeguard creator rights both in the US and globally.⁹

⁸ For examples of how registration data are used to support legal analysis, see e.g. Landes & Posner (2003); Rosen & Schwinn (2020).

⁹ We note that as part of the Copyright Modernization initiative, the Copyright Office has launched a new Public Records System Pilot alongside the Catalog. While searches on the new system can be conducted and it has far more features than the Catalog (e.g. the ability to filter search results for types of records and types of work by registration number), the following disclaimer appears whenever the page is visited:

PLEASE NOTE: This pilot is a demonstration and is not the final version of the Copyright Public Records System (CPRS).

The purpose of the CPRS pilot is to develop a single, easy to navigate, highly searchable database of U.S. Copyright Office public records. The CPRS offers both a simple search interface and an advanced search interface with a query builder and filters to more easily discover U. S. Copyright public records. This system will eventually display public records from all current publicly-accessible systems and, in the future, paper-based records that are being converted to digital formats. During the pilot, the Office will be updating and improving the overall functionality with future software releases. As part of this process, your feedback on the system's functionality and features is essential to improving the system.

This pilot release does not replace or supersede the online public catalog or existing search practices established by the Copyright Office. Any results obtained during the course of your search are not reliable for legal matters. For information on searching copyright records, please refer to Circular 22 ["How to Investigate the Copyright Status of a Work."](#) For information regarding requests to remove personal information from Copyright Office public records, please refer to Circular 18 ["Privacy: Copyright Public Records."](#)

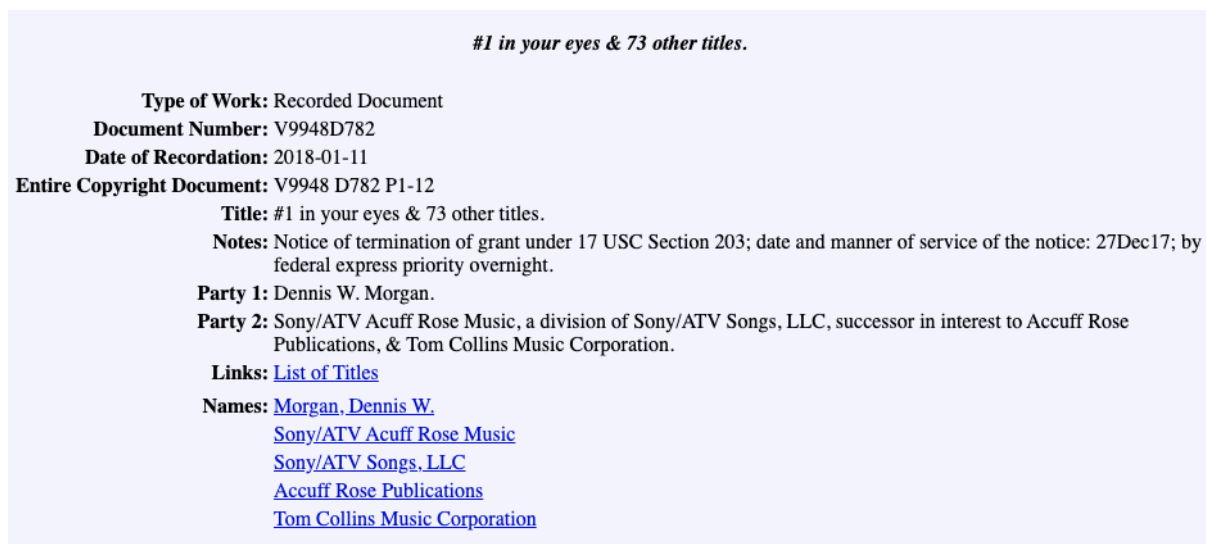
Below, we explain how we constructed our datasets, their key features and their limitations. To illustrate the data’s potential use and value, we present findings from analyses addressing a number of initial research questions which have until now remained unanswered in the literature. These include how many works are subject to termination notices over time; the different types of works being subject to termination notices over time; and who is filing for termination.

Last, we highlight some of the policy implications of the initial trends we found and the potential future uses of this dataset for research relevant to this hotly-debated issue.

Scraping and filtering the data

We used a web scraping program written in Python to search the Catalog for and collect data from records of termination notices. After consulting with the Copyright Office, we constructed search strings intended to extract all records related to §§ 203 and 304 termination notices.¹⁰ An example of a termination notice record as it appears in the Catalog is shown below (**Image 1**).

Image 1: Example of a copyright termination notice record on the Copyright Office Catalog



Records often relate to multiple works. For example, a musician might file one termination notice in relation to all 12 songs on a particular album. If so, the record of that termination

There is no indication as to when the new search system will replace the existing Catalog, although the Copyright Office will ‘continue iterative development of internal and external search functionality’ throughout 2021 (U.S. Copyright Office, *Modernization*, n.d.; U.S. Copyright Office, *Public Records System*, n.d.).

¹⁰ However, the Copyright Office is not able to ‘provide specific research assistance or guarantee comprehensivity’: email from Regan Smith, General Counsel and Associate Register of Copyrights, U.S. Copyright Office (Jan. 7, 2019), (on file with the authors).

notice will link to a ‘List of Titles’. For the record at **Image 1**, an extract from the ‘List of Titles’ is shown below (**Image 2**).¹¹

Image 2: Example of a list of titles linked to a copyright termination notice record on the Catalog

This list contains titles in document **V9948D782**

Document title: #1 in your eyes & 73 other titles.

The complete document is: **V9948 D782 P1-12**

List of titles:

- 001 #1 in your eyes : a.k.a. Number 1 in your eyes, a.k.a. Number one in your eyes / Reg. PA325482 (1987); Termination date provided: 20Mar22.
- 002 Baby you're gone / Reg. PA328847 (1986); Termination date provided: 8Jul21.
- 003 Baton Rouge / Termination date provided: 16Jul24.
- 004 Blue umbrella / Termination date provided: 2Mar24.
- 005 Call home / Termination date provided: 4Oct24.
- 006 Can't get enough of you / Termination date provided: 1Nov23.
- 007 Carolina's calling me : a.k.a. Carolina's callin' me / Reg. PA343638 (1987); Termination date provided: 2Jun22.
- 008 Dangerous / Termination date provided: 1Nov23.
- 009 Don't love me if your heart isn't in it / Termination date provided: 16May24.
- 010 Emotional persuasion / Termination date provided: 13Jan24.
- 011 Everything's wrong all right (since I lost you) / Termination date provided: 1May24.
- 012 Give it to the wind / Termination date provided: 8Dec23.

Each Catalog search result record has a URL comprising its position relative to other results and the search terms and parameters used. Our scraping program ran the searches to identify the total number of results. It then constructed URLs for the results of these searches based on the number of results, our search phrases and parameters.¹² This enabled us to go directly to those records rather than rely on the Catalog search (which could be unreliable and had a limit of 10,000 results per search). **Image 3** shows an example of the search phrases we used (under ‘SAB1’ and ‘SAB2’) and the Boolean parameters (eg ‘as a phrase’) to populate the URLs.

Image 3: Screenshot of search phrases table

¹¹ This list contains titles in document **V9948D782**, Copyright Office Catalog, <https://cocatalog.loc.gov/cgi-bin/doctitles.cgi?V9948D782>.

¹² E.g., <https://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?v1=107&SAB1=Notice+of+termination+of+grant+under+17USC+Section+203&BOOL1=as+a+phrase&FLD1=Keyword+Anywhere+%28GKEY%29+%28GKEY%29&GRP1=AND+with+next+set&SAB2=&BOOL2=as+a+phrase&FLD2=Keyword+Anywhere+%28GKEY%29+%28GKEY%29&CNT=100&DATE=>. For more information, see Consortium of Academic and Research Libraries in Illinois, 2015.

	sequential_id	search_id		SAB1	SAB2	date1	date2	BOOL1	BOOL2	GRP1
0	1	1	notice of termination of grant under 17 USC 203					as a phrase	as a phrase	AND with next set
1	2	2	notice of termination of grant under 17 USC Se...					as a phrase	as a phrase	AND with next set
2	3	3	notice of termination of grant under 17USC203					as a phrase	as a phrase	AND with next set
3	4	4	Notice of termination of grant under 17USC Sec...					as a phrase	as a phrase	AND with next set
4	5	5	Notice of termination of grant 17 USC Section 203					as a phrase	as a phrase	AND with next set
5	6	6		203	termination	1900	2011	as a phrase	as a phrase	AND with next set
6	7	6		203	termination	2011	2011	as a phrase	as a phrase	AND with next set
7	8	6		203	termination	2012	2012	as a phrase	as a phrase	AND with next set
8	9	6		203	termination	2013	2013	as a phrase	as a phrase	AND with next set
9	10	6		203	termination	2014	2014	as a phrase	as a phrase	AND with next set
10	11	6		203	termination	2015	2015	as a phrase	as a phrase	AND with next set

Our scraper extracted the data from these records and their corresponding lists of titles, compiling the results in a table (n=74,756). Many of these appeared to be duplicates due to the way in which the online Catalog is constructed and the overlap in results across different search phrases, and we removed 60,967 duplicate records as part of the cleaning process. We also filtered out records which did not relate to either recorded termination notices under §§ 203 or 304, or counter-notices to, withdrawals or revocations of those notices (0.7%, n=498, corresponding to 2,478 titles).¹³ The excluded data is available on request. In total, we were left with 13,291 unique records, corresponding to 109,899 titles.¹⁴

Advice from the Copyright Office indicated they were uploading records about three months behind receipt (email from General Counsel and Associate Register of Copyrights, 2018; U.S. Copyright Office, Document Recordation, 2020). Accordingly, we estimate that our data cover up to June 2020 (approximately the first seven and a half years of § 203’s operation, and the first forty-one and a half years of § 304’s operation).

Key features

From the remaining data, we produced two datasets: titles_203 and titles_304. Both datasets include titles subject to withdrawal/revocation and counter-notices in response to termination

¹³ E.g. notices which may have been filed as termination notices but which the Copyright Office filed under another section of the Copyright Act (e.g. § 205), notices relating to the termination and release of security interests in copyright, or notices with termination dates (likely indicating they were intended to be termination notices) but which did not specify whether they were applicable to §§ 203 or 304. Note that counter-notices or withdrawal notices *can* be filed as notices under § 205 of the Copyright Act (Compendium, 2021, pp. 64-65). However, none of the excluded records were for such documents.

¹⁴ For this study we used the document number of a record to determine whether it was unique, removing records with duplicate document numbers (‘When a document is recorded, the Office will assign a unique identifying number to the document.’) (Compendium, 2021, p. 11). Note some document numbers may be unique because the Copyright Office may have split records with large numbers of titles into multiple records with different document numbers (Brauneis, 2014). Subsequent references in this paper to ‘termination notices’ from the Catalog should be read to mean termination notice *records* from the Catalog, accounting for the possibility that some notices could be split across multiple distinct document numbers, appearing multiple times in our datasets, if they had too many titles (an inherent limitation of the Catalog and the Copyright Office’s recordation processes).

notices under the relevant sections. **Table 1** sets out the number of titles and records in each dataset by type of notice:

Table 1: Number of Records and Titles in each Dataset

<i>Description/dataset</i>	<i>Titles_203</i>	<i>Titles_304</i>
Termination notice records	3,306	9,808
Counter-notice records	134	13
Withdrawal notice records	29	1
Total number of records	3,469	9,822
Termination notice titles	42,280	65,457
Counter-notice titles	1,720	65
Withdrawal notice titles	376	1
Total number of titles	44,376	65,523

Each dataset has 24 variables (**Table 2**). Variables 1-3 and 5-9 contain data directly extracted from the Catalog records.¹⁵ Variables 10-19 contain the string patterns scraped from columns 2 and 7-9 which we used to identify the type of work subject to a termination notice.¹⁶ Variables 20-23 contain True/False values based on the category to which we have assigned that title: performing arts, literary works, sound recordings, or works of art.¹⁷ Variable 24 specifies whether the data is from a termination notice, a counter-notice, or a revocation notice.

Table 2: Variables in the Termination Datasets

<i>Number</i>	<i>Column name</i>	<i>Description</i>	<i>Source</i>
1	document_number	'When a document is recorded, the Office will assign a unique identifying number to the document, such as V9920 D781 [sic]. The letters 'V' and 'D' refer to the volume and document numbers that have been assigned to the document.' (Compendium, 2021, p. 11)	Catalog
2	registration_number_not_verified	The registration number listed in the document recorded with the Copyright Office (however, registration numbers were often	Catalog

¹⁵ For more information about the headings used by the Copyright Office, see Compendium (2021), pp. 13 (titles), 13-15 (registration numbers), 15-16 (parties). There is no description of the 'notes' category in the Compendium.

¹⁶ See discussion at pp. 12-14.

¹⁷ See discussion at pp. 12-14.

		recorded elsewhere in the record)	
3	date_of_recordation	The date on which the document was recorded with the Copyright Office and the filing party paid the appropriate filing fee	Catalog
4	year_of_recordation	The year on which the document was recorded with the Copyright Office	Extracted from date_of_recordation using Python code
5	party_1	The party/parties filing the document	Catalog
6	party_2	The party/parties against whom the document is being filed	Catalog
7	title	The title of the work referred to in the document, or the first work if multiple works are referred to	Catalog
8	notes	Information about the termination such as when the document was filed, the manner of service, and when the termination is scheduled to take place	Catalog
9	titles	Each specific title referred to in a record	Catalog
10	music_reg_304	String patterns indicating a registration number	Generated using string matching
11	dramatic_reg_304	String patterns indicating a registration number	Generated using string matching
12	literary_reg_304	String patterns indicating a registration number	Generated using string matching
13	sound_recording_reg_304	String patterns indicating a registration number	Generated using string matching
14	art_reg_304	String patterns indicating a registration number	Generated using string matching
15	descriptors	String patterns specifying the type of work	Generated using string matching
16	pa_reg_203	String patterns indicating a registration number	Generated using string matching
17	tx_reg_203	String patterns indicating a registration number	Generated using string matching
18	sr_reg_203	String patterns indicating a registration number	Generated using string

			matching
19	va_reg_203	String patterns indicating a registration number	Generated using string matching
20	is_performing_art	Category to which the title has been mapped	Generated using string matching
21	is_literary	Category to which the title has been mapped	Generated using string matching
22	is_sound_recording	Category to which the title has been mapped	Generated using string matching
23	is_art	Category to which the title has been mapped	Generated using string matching
24	notice_type	Whether the notice is a termination notice, counter-notice, or revocation notice	Generated using string matching

Classifying the data

For these data to be useful, it's important for users to be able to identify the different types of work at issue. In previous research on copyright registrations using Catalog data, researchers were able to categorise works because registration records list the 'Type of Work' and their class (literary work, sound recording, etc) (Oliar, Pattinson & Powell, 2014). Termination records also contain this field, but it was never populated.¹⁸ We were able to enrich the dataset by gleaning the work type for most records from elsewhere, but were challenged by inconsistencies in recordation methods and poor metadata hygiene.

§ 203 termination notice records

Our scraper captured 3,306 § 203 termination notice records, corresponding to 42,280 distinct titles. To classify them by type of work, we began by looking for registration numbers, which are type-specific and identifiable by prefix. For § 203 notices (applicable to post-1978 grants of copyright in creative works), these are determined by the Copyright Office's administrative

¹⁸ In our data, the only string in this column was 'Entry Not Found'. Manually searching the Catalog for termination notice records suggests this string is populated by the phrase 'Recorded Document'. This difference does not materially affect our research because neither string signifies the type of works covered by the termination notice. We hypothesise the difference arises due to our approach of constructing standalone URLs for records rather than having our code use the Catalog's infrastructure (which can be unreliable), although there is no explanation for the difference in Copyright Office literature. Searches of the Copyright Office using the phrases '203' and 'termination', and '304' and 'termination', filtering out any records which were categorised as 'Recorded Document[s]' in the 'Type of Work' field, revealed no termination notice records.

classification framework, which designates four different categories of work (U.S. Copyright Office, *Administrative Classifications*, n.d.):¹⁹

1. **TX:** nondramatic literary works, including books, periodicals, poetry and catalogs.
2. **PA:** works of the Performing Arts, including music and lyrics, dramatic works, choreographic works and films.
3. **VA:** works of the visual arts, including drawings, graphics, sculptures, paintings, and maps.
4. **SR:** sound recordings. Notably, when an individual copyright claimant is seeking to register both the sound recording as well as any musical, dramatic or literary works embodied within it, it may have a single SR number rather than a separate PA designation (Copyright Office, *Administrative Classifications*, n.d.).

Unfortunately, records for just eight per cent (n=3,358) of titles subject to § 203 termination notices contained data in the ‘registration_number_not_verified’ field.²⁰ However, registration numbers could additionally be found within the ‘title’, ‘notes’, and ‘titles’ columns. Using string pattern matching, we were able to confidently classify 73% (n=30,638) of titles subject to § 203 termination notices,²¹ via post-1978 registration numbers (n=26,310), pre-1978 registration numbers (n=3,581),²² or other identifiers (‘screenplay’, ‘literary work’, ‘sound recording’, ‘composition’, ‘musical score’, ‘musical work’, ‘musical play’, ‘artwork’, and ‘dramatic work’) (n=3,810).²³

§ 304 termination notice records

Our scraper captured 9,808 records of § 304 termination notices, corresponding to 65,457 titles. Again using string pattern matching, we were able to confidently classify 89% of these titles (n=58,321) based on whether they had a pre-1978 registration number (n=56,636), a post-1978

¹⁹ We relied on classifications in this document to guide our classification process.

²⁰ These corresponded to 38% of the § 203 termination notice records (n=1,240).

²¹ Of these, 792 titles appeared in one or more categories.

²² The Copyright Office used various complex schema in their registration number prefixes before 1978.

Different schema applied during different time periods: see generally U.S. Copyright Office, *Administrative Classifications*, n.d. For consistency, we categorised works with pre-1978 registration numbers using the Copyright Office’s classification typology in operation from 1909 onwards, and then mapped them to their post-1978 counterparts. We also mapped works with an ‘EO’ prefixed registration number (not listed in the classification document) to the performing art category, as they appeared to relate to musical works.

²³ There will necessarily be some identifiers which are not included (e.g. ‘book’, ‘novel’, ‘short story’) due to the potential for them to be part of a work’s title rather than as a description of the type of work. Furthermore, the size of the dataset means there may be some identifiers that were not captured, although this group contains the phrases we have identified over many reviews of the data.

registration number (n=1,041),²⁴ or self-identifier (n=9,521).²⁵ In the dataset we included their original categorisation (under the pre-1978 typology) and additionally mapped them to the post-1978 equivalents to facilitate comparison across the two termination schemes. For example, a work with a registration number EU12345 was listed as a musical work under the pre-1978 typology, and also mapped to performing arts under the post-1978 typology.

Unclassified titles that were subject to termination notices

We were unable to classify 28% of § 203 titles (n=11,642) and 11% (n=7,136) of § 304 titles subject to termination notices because they either lacked the identifiers as to the type of work listed above or a registration number indicating the type of work. Unclassified titles can be identified by filtering both titles_203 and titles_304 for 'False' values across variables 20-23 after filtering variable 24 to only return termination notices.

To compare the proportions of work types in the classified titles with the proportions we might expect to see across the entirety of the two datasets, we manually coded two random samples of all titles in titles_203 (sample size=381) and titles_304 (sample size=382). The sample sizes needed for achieving a given level of precision, measured in terms of the width of a 95% confidence interval, were determined using the Australian Bureau of Statistics' Sample Size Calculator.²⁶ Using these sample sizes means that for an estimate of a proportion based on a random sample, the width of the uncertainty margin will be at most 0.05. We manually categorised the titles using content analysis: reading the data and then coding it using the registration number schema and identifiers/descriptors referred to above.²⁷ Where neither were present, we used the names of the authors/estates and the publishers/record labels/film companies to identify the work type, including by conducting additional research where the

²⁴ We note an apparent inconsistency in the Catalog's data here. Section 304 notices correspond to copyright grants made before 1978: as such, any registrations of works subject to these notices should have been prior to 1978. However, we identified 1,041 titles with post-1978 registration numbers using our string matching code. These were mainly from notices filed by the heirs of *Superman* creator Jerome Siegel in respect of *Superman*-related comics (n=897, 86%). We have retained this data for completeness in our analysis, but note that § 304 termination notices cannot generally be filed in respect of works registered after 1978: those should instead be filed under § 203. The Copyright Office Compendium suggests such an error may prevent the notice from taking effect. This may be an 'untimely' notice which could invalidate it (Compendium, 2021, p. 66, para 2310.9) Similarly, 'harmless errors' do not invalidate a notice, but an error in the date of execution that means the notice should have been filed under another section may not be harmless: (Compendium, 2021, p. 67, para 2310.12).

²⁵ Twenty-four titles had both pre-1978 and post-1978 registration numbers. These were *Superman-related* comics (n=16) and songs by musician and composer David Porter (n=8). Four titles had both post-1978 registration numbers and self-identifiers: comic artwork for the *Superboy* character, the song 'What'll we do for dough?' by Ben Gordon, the English lyrics for the song 'Delicado' (written by Jack Lawrence), and the 'vocal score' for the musical play 'On borrowed time' by playwright Paul Osborn. Another 8,849 titles had pre-1978 registration numbers and self-identifiers.

²⁶ The samples were generated in Python without replacement. We thank Sue Finch at the University of Melbourne's Statistical Consulting Centre for contributing to the wording of this paragraph.

²⁷ Drisko and Maschi define content analysis as 'a family of research techniques for making systematic, credible, or valid and replicable inferences from texts and other forms of communication' (Drisko & Maschi, 2015, p. 7).

answers weren't clear in the data. We refer to the results of the manual coding below as we report on our analyses of the classified titles.

Classifying counter-notices and withdrawal notices

We used the same classification process to classify works subject to counter-notices and withdrawal notices. Due to the relatively low numbers of both types of notices, we set out the results of this process below.²⁸

Limitations

These datasets make it newly possible to understand how US termination rights are being used, when, and by whom. However, they have some limitations for future users to be aware of.

First, a termination does not necessarily take place just because a termination notice is issued. Recipients may file a counter-notice to challenge the notice's sufficiency. Applicants are also permitted to revoke their notices, and might choose to do so, for example, where their notice enables them to satisfactorily renegotiate their deal. It is not mandatory for such notices to be filed with the Office, although applicants can opt to do so (Compendium, 2021). Thus, these datasets tell researchers and policymakers a great deal about the types of works that are subject to the termination process (and when, and by whom) but users should not assume that just because a termination notice has been issued that termination has actually occurred.

Second, recordation on the Catalog does not make a termination notice legally binding (Compendium, 2021). The filing parties may have made critical errors in the notices that render them unenforceable. For example, a person may file a termination notice before they are legally permitted to do so. Courts have struck down such attempts (*Archie Comics Publications v. DeCarlo*, 2001). In such instances notices will not result in termination even if they are not withdrawn, and this may not be ascertainable from document records in our datasets.

Third, Catalog records contain flaws and inconsistencies (Brauneis, 2014). We observed records with typographical and grammatical errors in the names of parties, dates of recordation, termination dates, titles, and other variables. We have also observed inconsistencies in the data itself, such as when a title has a registration number that does not appear to correspond to the parties or the type of title. String pattern matching relies on consistent patterns: it is limited by errors in the data itself. Accordingly, there will necessarily be some unique variations whose nuances were not captured by the string matching process we used. The size of the dataset also

²⁸ This includes analysis of titles we were not able to categorise using string matching.

means there is a possibility the string matching code categorised some works incorrectly,²⁹ although we ameliorated this risk by reviewing the data multiple times.

Fourth, while we followed the search advice provided by the Copyright Office, our program may not have captured every single relevant record or filtered out every irrelevant record. We believe these datasets to be virtually whole-of-universe until the cut-off date but cannot guarantee them to be.

Finally, we note the Catalog only documents situations in which termination notices have been filed. It casts no light on how creators are using the *existence* of termination rights to unofficially negotiate return of their rights or a better deal from existing rightsholders. As documented by the Authors' Alliance, such negotiations are certainly taking place (Authors' Alliance, *Rights Reversion Success Stories*, n.d.).³⁰ Given the expense and complexity of a formal termination, we hypothesize that most of those who file to terminate transfers via the § 203 or 304 processes did so because attempts to do so informally were rebuffed.

Despite these limitations, the dataset enables us to garner valuable new insights into how the termination rights in §§ 203 and 304 are being used so far, when, and by whom. Below, we document some of the trends we identified from the dataset. We then discuss the potential uses of the dataset in future research, and some policy implications.

Results of Preliminary Analysis

In this section we present findings from our preliminary descriptive analyses of the §§ 203 and 304 data. We report on the following characteristics and features of the datasets:

1. The number of notices filed, and how that has evolved over time;
2. The different types of works being subject to termination notices over time; and
3. Characteristics of the creators or heirs filing for termination.

In all time series analyses we limit the datasets to notices filed by the end of 2019. This is to facilitate year-on-year comparison given that the complete datasets reflect data to mid-2020.

Number of notices and time trends

In **Figure 1** we present the annual number of termination notices recorded with the Copyright Office under each termination provision between 1977 and 2019. Since most notices list multiple titles, in **Figure 2** we display the total number of works subject to these records each year. These data appear to show spikes in filings of § 203 termination notices (and the number of works affected) in 1978, 1988, and 2000. For § 203 notices and works, we observe a gradual

²⁹ See e.g. Document No.V9967D271, 'M-16' (which is a string pattern we used to search for dramatic work registration numbers registered before 1978). This was eventually classified as a work of performing art, as it should have been, and does not materially alter our results.

³⁰ Although these accounts do not specify whether the termination right was indirectly used as a negotiating tool.

increase per year from 2003 (the first year in which those notices could be validly filed) until they began increasing much more rapidly in 2010.

Interestingly, we observe a substantial dropoff in the number of both § 203 notices issued, and the number of titles subject to them, from 2016-2019. Further interrogation of the dataset would be helpful to understand the explanations for these developments.

Figure 1: Number of termination notices recorded per year: 1977-2019

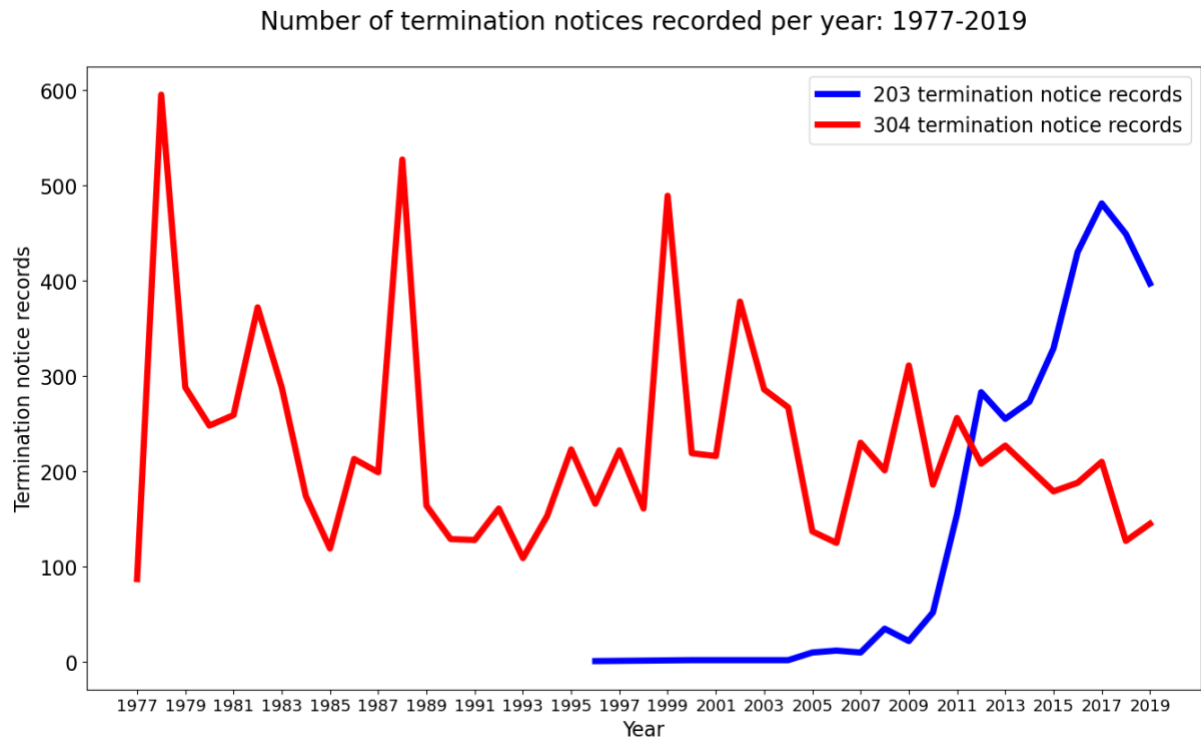
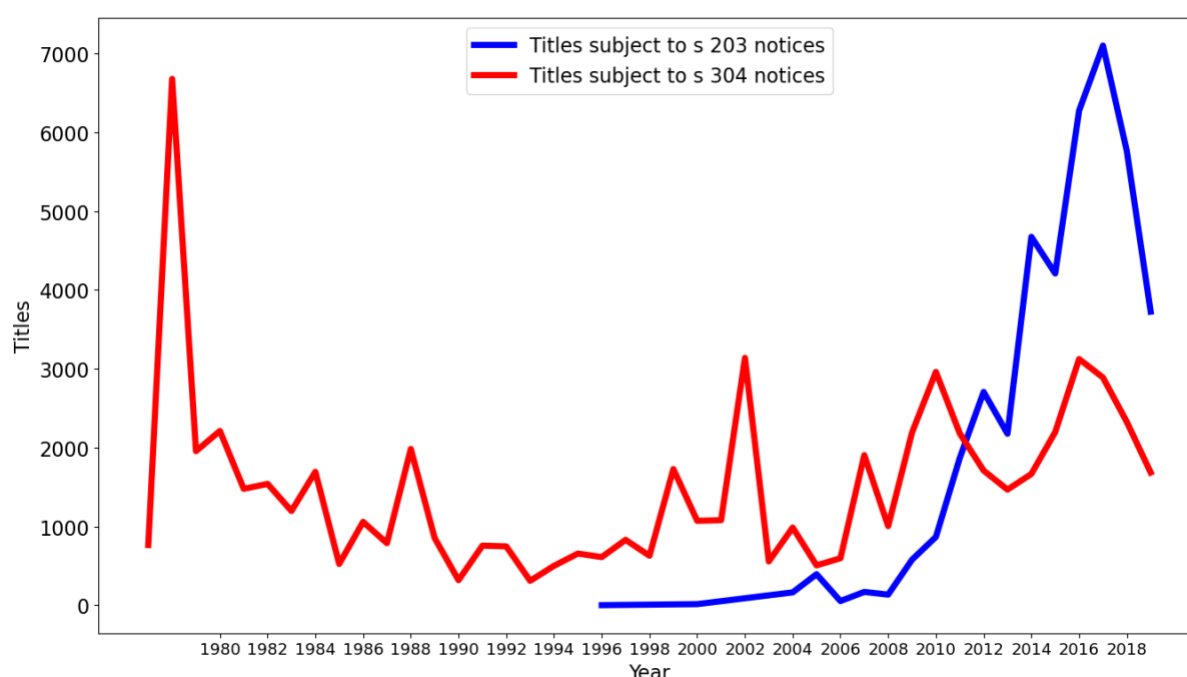


Figure 2: Number of titles subject to termination notices per year: 1977 - 2019

Number of titles subject to termination notices recorded per year: 1977-2019



We identified 3,306 distinct termination notices affecting 42,280 titles under § 203. Under § 203, notices of termination must be served between two and ten years prior to the effective termination date (notices can be recorded before the effective termination date: Compendium, 2021). Our data, reflecting notices filed until mid-2020, thus contains **all** notices for transfers intended to be terminated between 2013 and mid-2020. Additionally, it contains **at least some** notices of intention to terminate beyond mid-2020 (but not all of them, because they don't have to be served and recorded yet - for all 2030 termination notices to be included we would need to wait until 2030, i.e. the latest they can be validly recorded).

To put these figures in context, we note that for the eight years between 1978 and 1985, there were 2,570,908 copyright registrations, an average of 321,364 per year.³¹ Copyright registration is optional in the US, but there are robust incentives to do so: it's a prerequisite to filing an infringement claim, and, done early enough, can entitle the rightsholder to statutory damages and attorney's fees (Landes & Posner, 2003). Thus, book and music publishers, movie studios and record labels routinely register their works.

We were able to identify that 13% of the titles subject to notices (n=5,299) likely had an effective termination date from 1 January 2021 onwards, which means a maximum of 36,981 titles were affected by termination notices for the whole period of 2013 to mid-2020, i.e. 7.5 years. This translates to a maximum of 4,931 works being the subject of a termination notice

³¹ Robert Brauneis and Dotan Oliar kindly provided this data to us based on the dataset available at Brauneis & Oliar (2020). We used a 35-year period for corresponding years of registration data as the termination data did not appear to specify the dates of grants, nor whether the grants included rights of publication (in which case termination could take effect at the earlier of 35 years from publication or 40 years from when the grants were executed: Copyright Act of 1976, § 203(a)(3)). See also note 34 for the use of registrations. To achieve a proxy figure for comparison to the 7.5 years of termination data, we divided the registration data from the eighth year (1985, n=371,915) in half. That data may not have been normally distributed across the year, but it enables us to reasonably compare the proportions of works subject to termination notices with registrations.

each year, barely 1.6% of the works we estimate were registered in the period corresponding to 35 years prior.

We also discovered that, for at least 24 titles (corresponding to nine records), the effective dates of termination were stated to occur *before* 1 January 2013, which is not legally valid. We hypothesise that this may be due to errors by the filing parties or recordation mistakes by the Copyright Office. If author error, this may be indicative of filing parties struggling to navigate the complexity of the law. This hypothesis is supported by a US district court ruling against the filers of some of these notices on the grounds that they were premature (*Archie Comic Publications v. DeCarlo*, 2001). Researchers may wish to use this dataset to identify faulty notices and explore the reasons for those deficiencies in future analyses.

While we were always able to successfully identify the recordation date for notices, so far we have only been able to identify likely termination dates for 40% of the titles subject to termination notices under § 203 (n=16,872). The remaining 60% either did not list an effective termination date - a mistake that can render the termination notice invalid (Compendium, 2021) - or had too many phrase variations for us to reliably identify and filter using string matching techniques. This is not injurious to the data quality because, as explained above, we can deduce that at the very least we have every notice affecting works that could be terminated up until mid-2020. Future researchers wishing to drill further into termination dates could use other methods to extract additional dates and further enrich these datasets.

What type of works are subject to termination notices?

In this section we break down the titles subject to termination notices under each of §§ 203 (30,638, 73%) and 304 (n=58,321, 89%), based on our string pattern categorisation process. We also draw on a complementary registration dataset to develop a profile of the relative proportions of registered works across different types that are subject to termination notices under §§ 203 and 304.

Types of works subject to termination notices under § 203

We were able to classify 73% of § 203 titles based on patterns in the data (n=30,638). As 792 titles appeared in both categories, adding the titles in each category provides a total of 31,430 (Table 3).³²

Table 3: Termination Notices under § 203 by Number of Titles³³

<i>Category</i>	<i>Number of titles</i>	<i>Percentage of titles</i>
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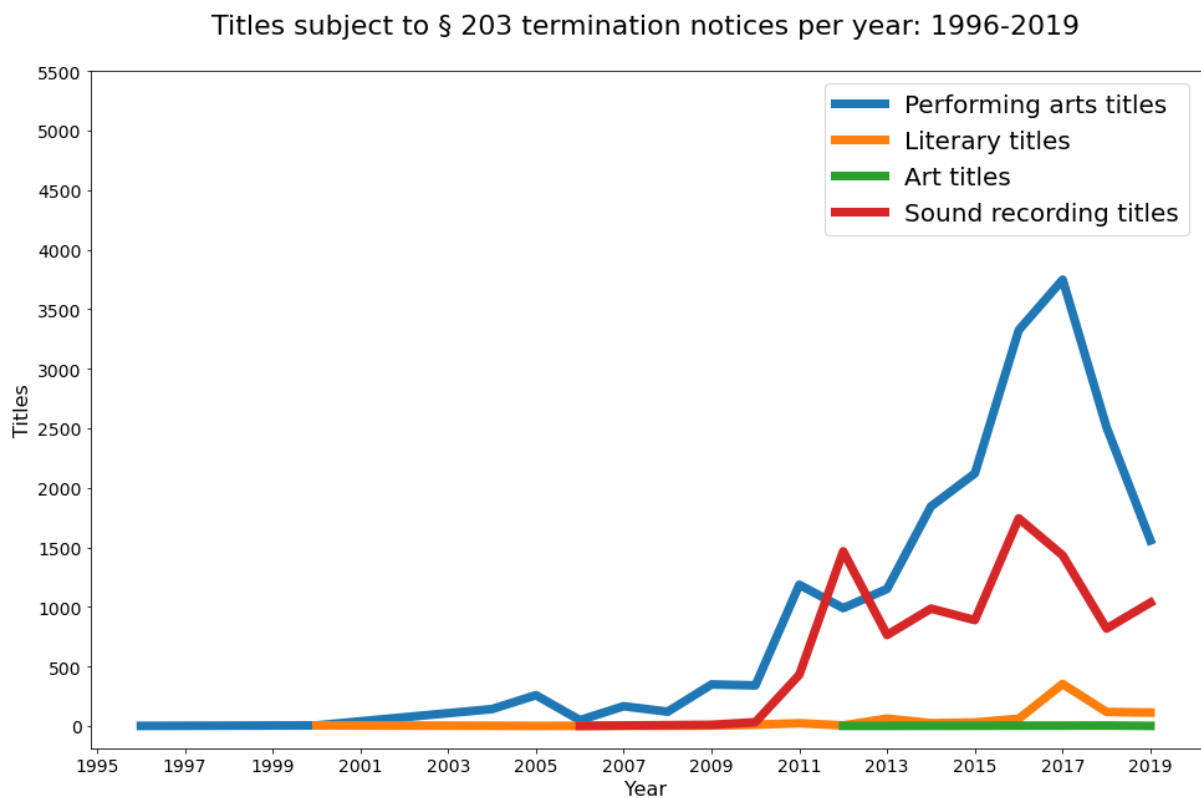
³² The vast majority (n=788) appeared in both the performing arts and sound recording categories. Two titles appeared in the literary and performing art categories (*Reid Fleming: World's toughest milkman*, comic by David Boswell, and *The Bonfire of the Vanities* by Thomas K Wolfe), and two appeared in the performing art and art categories (songs by the artist Jerry Chesnut which had 'musical compositions' in the 'title' field but had visual art registration numbers: VA46311 and VA57194).

³³ These figures generally follow results from a manually categorised random sample of works subject to § 203 termination notices: Performing art: 78% (n=296); Sound recording: 18% (n=68); Literary work: 3% (n=10); Performing art and sound recording: 2% (n=7).

PA - Works of the Performing Arts	20,745	66.0%
SR - Sound Recordings	9,832	31.3%
TX - Nondramatic Literary Works	840	2.7%
VA - Works of Visual Art	13	0.04%
TOTAL	31,430	100%

In **Figure 3**, we graph the number of titles subject to § 203 termination notices per year.

Figure 3: Titles subject to § 203 termination notices per year: 1996-2019



To better understand the works subject to termination notices as a proportion of all copyright registrations, we drew on a recent dataset of copyright registration constructed by Brauneis and Oliar (2020).³⁴ We then calculated the annual number of registrations for each of the four

³⁴ Robert Brauneis and Dotan Oliar kindly provided this data to us based on the dataset available at Brauneis & Oliar (2020). Registrations are a useful proxy for the number of creative works, although they do not account for creative works that have not been registered outside of copyright law (Ku, Sun, & Fan, 2009). See also Oliar, Pattinson, & Powell (2014) for the limitations of using registration numbers as a proxy for the number of

categories of work for the 10 years from 1978 as a proxy for the relative proportions of each type of work created.³⁵ Works of Performing Arts (mostly musical works) and texts accounted for the greatest share of registered works in the registration database. We then compared those proportions to those in the termination data. These results show that there is little correlation between the proportion of registrations and termination notices for each kind of work. Sound recordings made up less than 5% of registrations, but more than 31% of the total works subject to termination notices. Works of performing arts were also over-represented (42% of registrations; 66% of works subject to § 203 termination notices). In the other direction, text works made up almost 40% of registrations but less than 3% of works subject to termination notices. Works of visual arts accounted for 13% of registered works (13%) but almost never subject to termination notices (0.04%).

Table 4: Comparison of 1978 - 1987 Registrations with Works Subject to § 203 Termination Notices

<i>Category</i>	<i>Registrations 1978 - 1987</i>	<i>Percentage of total registrations</i>	<i>Titles subject to § 203 termination notices</i>	<i>Percentage of titles subject to § 203 termination notices</i>
PA (Performing Art)	1,418,893	42.14%	20,745	66.00%
SR (Sound Recordings)	153,486	4.56%	9,832	31.28%
TX (Nondramatic Literary Works)	1,323,608	39.31%	840	2.67%
VA (Visual Art)	452,734	13.44%	13	0.04%
Multimedia	18,640	0.55%	0	0.00%
TOTAL	3,367,361	100%	31,430	100%

The sound recording and visual art categories are relatively well-defined in terms of the works they cover. However, the performing arts and literary works categories are very broad, and do not inform us about the different types or genres of work within them (e.g. whether works are

creative works. Note we grouped Brauneis & Olliar's data according to the four post-1978 registration prefix categories using information in their accompanying paper and further information provided by email.

³⁵ Not all works subject to § 203 termination notices listed a post-1978 registration number, and some listed a pre-1978 registration number, indicating they were registered before 1978. However, comparing the numbers of titles subject to § 203 termination notices to post-1978 registration data provides a reasonable sense of how works subject to termination compare to works that have been registered.

fictional or non-fictional). To better understand the types of works subject to termination notices within these categories, we manually categorised a random sample of titles from both categories of the dataset, based on registration numbers, identifiers, and the parties against whom notices were filed.³⁶ The entire performing arts sample consisted of musical works. Meanwhile, the vast majority of works in the literary work category (n=750, 89%) appeared to be books, which we manually categorised into the following genres:

Table 5: Genres of Books Subject to § 203 Termination Notices

<i>Genre</i>	<i>Number of books subject to § 203 termination notices</i>
Young Adult fiction	305
Adult fiction	248
Children's	82
Educational/academic	68
Non-fiction	44
Poetry	2
Unknown	1
Grand Total	750

Young Adult had the highest number of books, though they were all by a single author, Francine Pascal, who wrote the *Sweet Valley High* series (n=305). Adult fiction had a much broader mix of authors, including Nora Roberts and Linda Howard (general adult fiction including romance and suspense), Stephen King (horror/science fiction/fantasy etc), and George R R Martin and David Eddings (fantasy). Children's books (including books from the *Babysitters Club* series by Ann M Martin and picture books by Leo Lionni) were the next most common, followed by educational and academic texts (e.g management and calculus textbooks) and other non-fiction books like collections of essays by Isaac Asimov, religious books and a cookbook. Two poetry collections also featured.³⁷ Below, we conduct further analysis on the authors filing § 203 termination notices for books.³⁸

Termination notices for a further 57 titles (7%) were filed against audiovisual production companies. The authors of these works likely granted adaptation rights in respect of books to these companies, and sought to terminate them later. Nearly half the works were by Stephen King (n=26), including *The Running Man* (premiere: 1987), *Children of the Corn* (premiere: 1984, further instalments from 1992-2011), and *Firestarter* (premiere: 1984). Others included a book series by writer Sara Paretsky (which inspired the movie *VI Warshawski* in 1991),³⁹

³⁶ See p. 14 for a description of the sample size calculation method. Where the data was inconclusive we consulted Catalog registration records.

³⁷ The only book for which we could not determine the genre was *The Kingdom of L* by Suzanne Dennis. A Google search for the title and author (each in quotation marks) only brings up one relevant result: an Amazon page for the book but without sufficient detail to determine what it is about (Amazon, *The Kingdom of L*, n.d.) A search on the Copyright Office Catalog on May 4, 2021, using the provided registration number also does not provide further information about the book's genre.

³⁸ See pp. 29-30.

³⁹ Four books within the series were in this subset: *Indemnity Only*, *Deadlock*, *Killing Orders*, and *Bitter medicine*.

Gorky Park by Martin Cruz Smith (premiere: 1983), and *The Bonfire of the Vanities* by Thomas K Wolfe (premiere: 1990).

Beyond these there was a range of non-book titles. Data for ten titles represented various types of text-based works: plays (n=4), comics (n=2), articles (n=2) a script, and a lecture. We note three plays by August Wilson, *Fences*, *Ma Rainey's Black Bottom*, and *Joe Turner's Come and Gone*, were subject to a termination notice recorded in July 2017. This may have been motivated by a desire to capitalise on the commercial success of the Denzel Washington-directed and produced adaptation of *Fences* in 2016, and the December 2020 release of *Ma Rainey's Black Bottom* on Netflix (directed by Denzel Washington and starring Viola Davis and Chadwick Boseman) (IMDB, *Fences*, n.d.; IMDB, *Ma Rainey's Black Bottom*, n.d.).

Data for another 21 titles was inconclusive as to the type of work: they could have been the actual literary works or audiovisual adaptations, or in one case, either a book or a play.⁴⁰ Last, there were two songs in this dataset: *Together: Reprise* by the band The Ohio Players, and *Sensitive Heart* by Benny Hester. The former had a text-based registration number according to the pre-1978 registration schema while there was a typological error in the latter record.⁴¹

These results suggest that few text-based works beyond books and in some instances movie/TV adaptations of books have enough enduring value for authors and estates to pursue recovering their rights. However, a contributing factor could be authors regaining their rights by private renegotiation or through the exercise of contractual reversion rights. Further qualitative research (e.g. interviews with authors) would enable more in-depth investigations of the reasons why so few book authors have been filing to terminate under § 203.

Types of works subject to termination notices under § 304

Table 6 shows the breakdown of works subject to s termination notices into four categories: works of the performing arts, literary works, works of art, and sound recordings. As with the § 203 results, these data combine works registered under a pre-1978 registration number, works with descriptors allowing us to clearly identify the work, and works with post-1978 registration numbers.

Table 6: Titles Subject to § 304 Termination Notices, by Type of Work⁴²

<i>Category</i>	<i>Number of titles</i>	<i>Percentage of titles</i>
Works of the Performing Arts	54,096	92.6%
Literary works	4,244	7.3%

⁴⁰ *The Disenchanted* by Budd Schulberg (A48955).

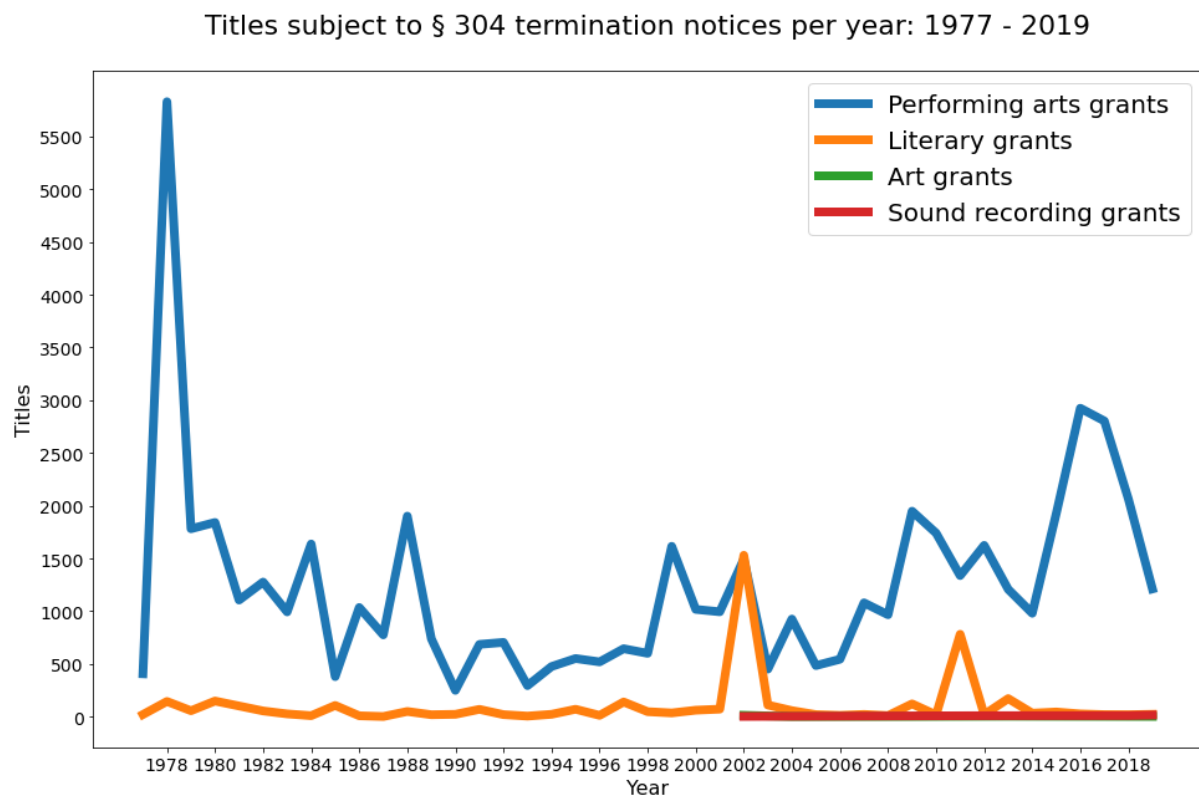
⁴¹ C31431; A190059. In the case of the latter, we note there appears to be an error in the data whereby there is a ‘{’ character before the ‘A’. A review of the titles suggests this was meant to be a ‘P’ such that the registration number would in fact be ‘PA190059’: see *This list contains titles in document V9929D275*, Copyright Office Catalog, <https://cocatalog.loc.gov/cgi-bin/doctitles.cgi?V9929D275>. This indicates the limitations of the string matching process when faced with incorrectly recorded data.

⁴² These figures generally follow results from a manually categorised random sample of works subject to § 304 termination notices: Performing arts: 90% (n=345); Literary work: 9% (n=34); Performing art and literary work; Audiovisual/literary work/Art: 1% (n=3).

Sound recordings	37	0.1%
Art	22	0.04%
TOTAL	58,399	100%

Figure 4 shows the number of titles subject to § 304 termination notices, per category of work from 1977 to 2019.

Figure 4: Titles subject to § 304 termination notices per year: 1977-2019



For works of performing arts, the data show a surge of titles being subject to termination notices filed soon after § 304 came into effect in 1978 - 5,830 in total. Termination notices for 86 per cent of those works (n=5,007) were filed by the American Guild of Authors and Composers ('AGAC', now the Songwriters Guild of America) on behalf of various claimants. This suggests that the AGAC may have prepared its members to file for termination as soon as it became possible to do so, resulting in a high initial number of termination notices being issued. This is unsurprising, given the role of the AGAC/Songwriters Guild in agitating for the termination right to be introduced.⁴³ Creators don't necessarily have the resources or expertise to exercise these complex rights, so the involvement of guilds or unions may be an important piece in facilitating their use.

⁴³ See the description of the Songwriters Guild (Songwriters Guild, *Copyright Termination*, n.d.).

Termination notices for literary works were filed at far lower levels than works of performing arts. However, there were spikes in 2002 (n=1,530) and 2011 (n=781). The 2002 spike can be explained by a large number of works (n=1,395, 91%) subject to notices filed by the heirs of Jerome Siegel, co-creator of *Superman*.⁴⁴ The 2011 spike can similarly be explained by a large number of works (n=756, 97%) subject to notices filed by the heirs of renowned musicologists Alan and John Lomax.⁴⁵

Before 1978, there were specific registration numbers for music and other numbers for dramatic works. However, after 1978 these were all given the 'PA' prefix. Using the pre-1978 numbers alone, we determined the vast majority of works subject to § 304 termination notices in the performing art category were musical works (n=52,667, 97%). This is consistent with our findings from the PA sample of works subject to § 203 termination notices, and suggests musical compositions remain the most popular type of work to be the subject of a termination notice under either §§ 203 or 304.

As with literary works under § 203, we sought to better understand the different types of literary works subject to § 304 termination notices by manually categorising a random sample of those titles. We also sought to understand the different types of literary work subject to § 304 termination notices using a random sample (n=353, **Table 7**).⁴⁶

Table 7: Sample of Titles in the Literary Category Subject to § 304 Termination Notices, by Category

<i>Category of works</i>	<i>Titles in sample</i>	<i>Percentage of titles in sample</i>
Comic	113	32.0%
Adult Fiction	88	24.9%
Sheet Music	68	19.3%
Song	33	9.3%
Poetry	9	2.5%
Painting	8	2.3%
Article	8	2.3%
Non-Fiction	6	1.7%
Magazine	4	1.1%
Play	3	0.8%
Children's	3	0.8%
Verses	2	0.6%
Unknown	2	0.6%
Letter	2	0.6%
Young Adult Fiction	1	0.3%
Speech	1	0.3%
Quote	1	0.3%
Artwork	1	0.3%
Grand Total	353	100%

⁴⁴ For more information, see Reynolds (2013).

⁴⁵ For more details about the works of Alan and John Lomax, see The American Folklife Center (n.d.)

⁴⁶ See above at p. 14 for a description of the sample size calculation method.

We found 33 songs/song lyrics in the sample (9.3%). These data all included registration numbers with an ‘A’ or ‘C’ prefix, which we matched to the literary category using the Copyright Office’s guidance for post-1909 registrations (Copyright Office, *Administrative Classifications*, n.d.).⁴⁷ Some songs with a ‘C’ registration number appeared to be registered prior to 1909, when ‘C’ prefixes were given to songs: this is a necessary limitation on our research given the complexity of the Copyright Office’s pre-1978 schema. However, it is not clear why other songs were registered with an ‘A’ prefix: the Copyright Office has consistently used an ‘A’ prefix for books since 1901 (Copyright Office, *Administrative Classifications*, n.d., p. 4).

There were also eight paintings by artist Norman Rockwell (2.3%). While we might expect these works to be mapped to the art category, they all included registration numbers for literary works rather than artworks (periodicals, designated by a ‘B’ prefix). Another work, the jacket for the book *East of Eden* (John Steinbeck), was classified as ‘artwork’ because the corresponding termination notice was filed by the estate of artist Elmer Hader. This work also used a registration number for a book, rather than artwork (books, designated by an ‘A’ prefix). The inclusion of songs and artwork in this sample highlights the difficulty of using pre-1978 registration number categories, which varied across time periods, to identify the type of work in a termination notice record. This was far less of an issue with the § 203 titles, due to the simpler four-category system used for most titles in the § 203 dataset.

Beyond songs and paintings, the rest of the sample was populated by works including written works, quotes, speeches, verses, poetry, letters, and sheet music, the notices for which were filed against a variety of parties including book publishers and movie companies.⁴⁸ The most common works in the § 304 sample were comics (n=113), almost all of which were filed by the heirs or estates of *Superman* creators Jerome Siegel and Joe Shuster (n=112) Siegel assigned his share of the copyright in *Superman* to Disney in 1938 for \$130 with co-creator Joe Shuster: the termination right gave his estate leverage to eventually renegotiate a new deal with DC Comics that gave them a fairer share of its value (Kratzer, 2013).

With the exception of sound recordings (most likely due to copyright protection only commencing in 1972), we see a similar trend in works subject to termination notices under §§ 203 and 304: musical compositions dominate, with literary works lagging far behind.

Who is filing termination notices?

One interesting avenue of exploration made possible by the data concerns *who* is filing termination notices. What kind of creators are taking advantage of these laws? Are they being used by a wide variety of stakeholders, or are most terminations being issued by relatively few?

To begin investigating these questions, we present the top 10 creators by number of titles affected by termination notices under each of §§ 203 (**Table 8**) and 304 (**Table 9**).⁴⁹

⁴⁷ See description of method above at pp. 12-14.

⁴⁸ Data for two works were inconclusive as to their type: ‘Only lonely little me’ (C202962) and ‘Consolation’ (C180105). Searches of the Catalog did not reveal further data about the type of works these titles were.

⁴⁹ George Clinton appeared twice in the Top 10 for § 203 due to a typographical inconsistency. We consolidated the two entries and included the 11th artist, Don Schlitz, as number 10.

Table 8: Top 10 Creators Whose Works Are Subject To Termination Notices under § 203, by Number of Titles Affected

<i>Creators whose works are subject to termination notices under § 203</i>	<i>Description</i>	<i>Titles subject to § 203 termination notices</i>	<i>Percentage of all titles subject to § 203 termination notices</i>
George Clinton	Musician (funk)	1,413	2.49%
Kenneth Gamble & Leon Huff	Production and songwriting team and founders of Philadelphia International Records	1,136	2.69%
Harlan Perry Howard	Songwriter (country)	669	1.58%
Daryl Hall & John Oates	Members of Hall & Oates (pop rock band)	433	1.02%
Sid Tepper	Songwriter (rock 'n roll)	388	0.92%
Gary Burr	Musician/songwriter/record producer (country)	346	0.82%
George Byron Hill/Byron Hill	Songwriter/producer (pop, country)	320	0.76%
Francine Pascal	Author of the <i>Sweet Valley High</i> series of young adult books	290	0.69%
Frederick Knight	Singer (R&B)	288	0.68%
Don Schlitz	Songwriter (country)	286	0.68%
	TOTAL	5,569	12.32%

Table 9: Top 10 Creators Whose Works Are Subject To Termination Notices under § 304, by Number of Titles Affected

<i>Creators whose works are subject to termination notices under § 304</i>	<i>Description</i>	<i>Titles subject to § 304 termination notices</i>	<i>Percentage of all titles subject to § 304 termination notices</i>
Jerome Siegel	Creator of <i>Superman</i> comic book character	1,613	2.46%
Albert B Fedstein	Writer/artist (EC Comics, editor of <i>Mad</i> magazine)	801	1.22%
Pat Boone	Singer/composer (pop) Also appeared on television	643	0.98%

Buddy DeSylva	Songwriter/executive of a record company/movie producer	609	0.93%
Grace LeBoy Kahn (filed with Donald G. Kahn & Irene Kahn Atkins)	Composer	558	0.85%
Mack David	Songwriter/lyricist (pop)	481	0.73%
Jerome Kern	Composer (pop, musical theatre)	455	0.70%
Lew Brown	Lyricist	448	0.68%
Dallas Frazier	Musician/songwriter (country)	417	0.64%
Barry Mann & Cynthia Weil	Songwriters (pop/country)	390	0.60%
	TOTAL	6,415	9.80%

These results suggest musicians and songwriters (or their heirs/representatives) file termination notices in respect of the largest number of works. The exceptions are Francine Pascal (the *Sweet Valley High* books), Jerome Siegel (*Superman*) and Albert Fedstein (a writer and artist, and editor of *Mad* magazine).

Preliminary analysis of book authors filing § 203 termination notices

These data can also be used for further analysis by comparing them with external data. Below, we present a preliminary analysis of the profile of authors filing § 203 termination notices in relation to books as an example of the kinds of deeper research that these datasets could facilitate.

Just 840 text-based works were subject to § 203 termination notices, the vast majority of which appeared to be books (n=750, 89%). To put this number into context, we identified 2,344,908 registrations of literary works between 1978 and 1994.⁵⁰ This means works subject to termination notices in the literary category (n=840) accounted for approximately 0.04% of corresponding copyright registrations, which reduces to 0.03% when we only consider books (n=750). If we assume authors and estates will take action to regain their rights where possible

⁵⁰ This number was the number of copyright registrations in the ‘literary’ category in the data provided by Brauneis & Oliar. Note these correspond to the years of the latest effective termination date in the literary dataset, rather than the months: the registration data could not be divided further. 1978 was the earliest year in which termination under § 203 could take effect. 1994 is 35 years before 2029, the latest year in which termination was stated to take effect in the literary dataset. Notices recorded in 2019 and 2020 listed termination effective dates in 2029. Termination can take place between two and ten years after a notice is served: therefore, notices recorded in 2018 or earlier could not validly list an effective termination date beyond 2028. See note 34, regarding the use and limitations of registrations. See also note 31, regarding the use of a 35-year period to identify a range of corresponding copyright registrations. While grants of copyright in respect of literary works may convey rights to publish, we used a 35-year period from registration for comparison given the termination data does not always appear clear on the dates of the grants or the dates of publication.

as a means of protecting their copyright, this suggests most books have little value to authors and estates 35 years after the rights are granted.⁵¹ This may again suggest that a reversionary period of 35 years is too long (although it is possible more reversion is taking place informally or by contractual negotiation, which this study does not examine).

Our analysis identified 120 unique authors in the literary works category, including 93 unique authors of books. As **Table 10** shows, the top 10 parties account for over 65% of literary works (and over 70% of books) subject to § 203 termination notices.

Table 10: Top 10 Creators Whose Works Are Subject To Termination Notices Under § 203 (books) by Number of Titles

<i>Creators whose works are subject to termination notices under § 203</i>	<i>Description</i>	<i>Titles subject to § 203 termination notices</i>	<i>Percentage of literary works subject to § 203 termination notices</i>
Francine Pascal	Author (young adult fiction, <i>Sweet Valley High</i>)	305	36.3%
Debbie Macomber	Author (romance, women's fiction)	48	5.7%
Stephen King	Author (horror, science fiction, fantasy)	38	4.5%
Nora Roberts	Author (romance)	36	4.3%
Soo Tang Tan	Author (mathematics textbooks)	33	3.9%
Ann M Martin	Author (children's fiction, <i>Baby-Sitters Club</i>)	30	3.6%
Ralph Henley and Karyn Henley	Karyn Henley: Author (children's fiction, children's non-fiction, children's educational) Ralph Henley: Collaborator with Karyn Henley, book producer and publisher)	16	1.9%
Piers Anthony	Author (science fiction, fantasy)	16	1.9%
Linda Howard	Author (romance, suspense)	16	1.9%
Jayne Krentz	Author (romance)	15	1.8%
	TOTAL	553	65.8%

As **Table 10** shows, many of the parties filing notices for the most number of books were household names. These spanned romance/adult fiction (Nora Roberts, Debbie Macomber, Linda Howard, Jayne Krentz), children's/young adult (Francine Pascal and Ann M Martin), and science fiction/fantasy (Piers Anthony). Strikingly, over 40% of all books subject to

⁵¹ However, authors may not act rationally in an economic sense: see e.g Hickey (2017), pp. 432-434.

termination notices in this category were authored by a single person, Francine Pascal (n=305). Outside the top 10 authors, some of the most notable writers filing termination notices included Anne Rice,⁵² Ken Follett,⁵³ George R R Martin,⁵⁴ and Stephen King.⁵⁵ Other bestselling authors (or their heirs/representatives) to have issued termination notices include Philip Roth,⁵⁶ Isaac Asimov,⁵⁷ and Truman Capote.⁵⁸

These findings suggest that the law has been put to remarkably little use in relation to books. They also suggest that the termination laws, in their current form, disproportionately benefit only a small handful of the most commercially successful writers.⁵⁹ Future interrogation of this dataset can help determine whether this pattern holds for other forms of creative work, such as songs.

This data can also help us understand what is happening to works after the effective termination date has passed: whether they go out of print, are republished by the same or a different publisher, or whether there are new adaptations. Below, we examine works by Stephen King and Nora Roberts (who featured prominently in the § 203 literary works dataset) as an example of this type of deeper analysis.

The dataset contained five entries related to Stephen King's novel *The Stand*. Three were filed against the book publishers (Knopf Doubleday, Doubleday & Company) and CBS Films jointly. The other two were filed against Knopf Doubleday and CBS Films respectively. This indicates that Mr King sought to terminate both the book publishing and audiovisual adaptation rights for *The Stand*, with termination scheduled to take effect between 17 May 2015 and 1 May 2025. The most recent paperback version of *The Stand* was published by Anchor (an imprint of Knopf Doubleday) in December 2020 as a tie-in to the new CBS TV series adaptation (premiering December 2020) (Goodreads, *The Stand*, n.d.; IMDB, *The Stand*, n.d.). As Mr King's notices were recorded between 2015 and 2018, we hypothesise the termination notices encouraged the publishers and film production company to negotiate new distribution agreements with him, enabling King to share more fully in the proceeds of *The Stand*.⁶⁰

Similarly, Nora Roberts issued a termination notice for her novel *Storm Warning* against Harlequin Books with an effective termination date of 1 February 2019.⁶¹ A new ebook edition of the text, published by St Martin's Paperbacks, was published on 3 March 2020. We hypothesise that Ms Roberts successfully regained her rights by operation of the termination provision on 1 February 2019, which she then relicensed to St Martin's.⁶² If this is the case, it

⁵² Over 100 million copies sold (Brockes, 2010).

⁵³ Over 170 million copies sold (Chandler, 2021).

⁵⁴ Over 70 million copies of *A Song of Ice and Fire* novels (Flood, 2016).

⁵⁵ Approximately 350 million copies (South China Morning Post, 2019).

⁵⁶ For more information, see Homberger (2018).

⁵⁷ For more information, see Leslie (2020).

⁵⁸ For more information, see Heitman (2017).

⁵⁹ For more on the ongoing success of book backlists, see Gapper (2019) and Gapper (2020).

⁶⁰ Mr King has also filed termination notices in relation to some of his most famous works, including *The Dead Zone*, *Children of the Corn*, and *Cat's Eye*: see Zerner (2017), Miska (2017), and Salemmé (2017).

⁶¹ Document Number: V9939D648. Registration Number: TX1363413.

⁶² Although we note the possibility that her original agreement did not include eBook rights. In *Random House v Rosetta Books*, the Second Circuit Court found that an agreement for the grant of rights 'in book form' did not likely include eBooks: Heald (2018), p. 22. As Heald writes:

shows termination operating as it was designed to: an author regaining their rights and then negotiating another distribution deal at a time when the value of the work is better known.

These are just two examples of how the termination provision may grant new exploitation opportunities for authors after 35 years. Future research could compare the re-exploitation (or lack thereof) of these and other works to gain a clearer understanding of the effects of the termination provisions on new investment in knowledge and culture.

When are counter-notices and withdrawals being filed, and by whom?

Lastly, we explore what happens *after* a termination notice is filed. The recipient might choose to file a counter-notice contesting the termination notice. The filing party might also file a withdrawal/revocation notice, suggesting they have subsequently renegotiated a new agreement with the recipient. These notices do not need to be filed with the Copyright Office, so our data does not tell us how many termination notices are contested or withdrawn. However, it gives us an understanding of the types of works that termination notice recipients consider valuable enough to contest the termination of. It may also suggest how common it is for creators to revoke a termination notice and renegotiate a deal with their publisher.

Counter-notices under §§ 203 and 304

Under § 203, 134 counter-notice records were filed, corresponding to 1,720 titles. Using the same categorisation process as we did for termination notice records, we were able to confidently categorise 74% of these records (n=1,277) as shown in **Table 11**. 122 titles appeared in both the sound recording and performing arts categories, suggesting the termination notices applied to both the musical compositions and sound recordings.

Table 11: Categories of Titles Subject to Counter-Notices filed in response to § 203 Termination Notices

<i>Category</i>	<i>Number of titles subject to counter-notices filed in response to § 203 termination notices</i>
Sound recording	1249
Performing art	149
Literary	1
Art	0
TOTAL	1399

Rosetta was likely a surprise and shock to the market, and the case worked a functional reversion of rights to authors, a chance for them to renegotiate, switch publishers, self-publish, or revive their back catalogs, exactly as predicted by advocates of aggressive statutory reversion schemes.

Notices for the remaining 443 titles which we could not categorise using string matching were all filed by record companies (predominantly UMG and Capitol Records), suggesting those works were also likely sound recordings. Even if they weren't, however, sound recordings still dominated every other type of work when it came to counter-notices under § 203.

This is not surprising. Record companies have long argued that sound recordings should be considered 'works for hire' under the Copyright Act, because enumerated classes of works for hire are exempt from the termination provisions (e.g. Starshak, 2001; Masnick, 2011, cited in Johnson, 2013; Holland, 2000b; Holland, 2001; Law Journal Newsletters, 2008; Henslee & Henslee, 2011; Mags, 2020). One of those classes is 'compilations', and record companies routinely argue that albums fall within this category. The RIAA has also lobbied for 'sound recordings' to be more broadly listed as a category of work for hire, going so far as to surreptitiously procure an illegitimate 'technical amendment' to the law to achieve this after their formal efforts failed to bear fruit (Starshak, 2001; Holland 2000a). This was embarrassingly rolled back in 2000 after artists mobilized to protest the theft of their rights (e.g. Hall, 2002). An interesting avenue for future researchers to investigate via our new § 203 dataset is whether labels are confining their counter-notices to albums affected by termination notices, which may at least arguably be valid,⁶³ or whether they are also objecting to the recovery of rights over singles (which is on much shakier legal ground).

By contrast, relatively few counter-notices are issued in relation to musical compositions, which we hypothesize to be because there's less scope for 'work for hire' arguments to be made.

Just 13 counter-notice records were issued under § 304, corresponding to 65 titles. Sixty-three were works of performing arts (which appear to be musical compositions). The remaining two were literary works. We hypothesise the low numbers of counter-notices under § 304 is because sound recordings did not receive federal copyright protection until 1972, and the application of the statutory termination rights to other works is not as contested as in the case of sound recordings (because of the work-for-hire issue discussed above).

Revocation notices under §§ 203 and 304

Revocation notices were less common than counter-notices under both §§ 203 and 304. We identified 29 revocation notices under § 203, corresponding to 376 works. We categorised the vast majority (n=334, 89%) as sound recordings. Eleven literary works were also subject to revocation notices (3%). The revocation notices corresponding to the remaining 31 works which we could not categorise using string matching were filed by musicians or their heirs.⁶⁴ For 12 works, the revocation notices were filed together with record and music companies,⁶⁵ suggesting the revocations were filed in relation to sound recordings (or if not, musical compositions). This suggests that record labels and music publishing companies are actively seeking to renegotiate copyright grants even after receiving termination notices from artists,

⁶³ On the basis that albums can be considered works for hire because they 'are specially ordered or commissioned by record labels for use as contributions to a collective work [Copyright Act, 17 U.S.C. § 101]' (Johnson, 2013, p. 664); see also Gould (2007) and LaFrance (2002).

⁶⁴ David Coverdale, Robert E. Bell, Ronald Bell, Dennis Ronald Thomas, George Melvin Brown & August Smith Williams (heir of Claydes Charles Smith) (members of the band Kool & the Gang), Tom Petty, Jill Croston (known as Lacy J. Dalton), Anita Ward, and Pat Travers.

⁶⁵ E.g. Geffen Records and Capitol Records.

highlighting the importance they place on retaining the rights in sound recordings and songs well after 35 years. There was only one revocation record under § 304, in respect of a termination notice for the comic *Casper the Friendly Ghost*.⁶⁶ Given the relatively small numbers involved, future researchers may find it fruitful to investigate what happened to these works after the termination process was initiated and revoked, in order to further explore the law's operation.

Discussion

Future analyses and lessons for dataset development

Our preliminary descriptive analyses merely scratch the surface of what is possible with these datasets. Future analyses will be of interest to researchers not only in law, but also economics, cultural studies, communications and other disciplines. Researchers could use this dataset in a number of ways, including:

1. Comparing sales of works that are the subject of termination notices against those that are not, to assess causal effects on new investment, creator remuneration and availability (this may involve deeper analysis of effective termination dates, building on our existing work to identify them);
2. Examining the sales and publication status of works subject to a revocation of termination notices;
3. Examining litigation and/or settlements arising from counter-notices issued in response to termination notices (particularly by record companies, given the live issue of whether sound recordings are 'works-for-hire' under the Copyright Act);
4. Determining whether record companies are contesting termination notices over albums or singles;
5. Identifying trends in the parties filing termination notices for non-literary works, to see whether they are predominantly the most successful creators (building a fuller picture of who benefits under the law, and who does not);
6. Investigating potential reasons for spikes and drop-offs in termination notice filings; and
7. Identifying notices that may have been filed incorrectly, e.g. before the statutory 2-10 year termination window, to help understand the rates at which claimants struggle to navigate the law's technical requirements.

Additionally, the datasets and the research they make possible may also be beneficial to investors, such as book and music publishers and record labels, who are interested in understanding which works may be coming onto the market – information that is very difficult to ascertain using the existing Copyright Office Catalog. And, as we have demonstrated, there is further value in linking and comparing the data we have assembled with other datasets to achieve deeper insight.

⁶⁶ The termination notice was filed by the heirs of illustrator Joseph Oriolo, although the actual story was written by Seymour V Reit: Nash (2001).

Our account of the methods we used to construct the datasets also provide a practical, worked example of the use of computational techniques for exploiting digitally-held administrative data in empirical legal research. The Copyright Office Catalog records are administrative data: ‘found data’ in the form of information and records routinely collected in the course of the administration of systems, programs or services, as distinct from ‘made data’ generated for a specific research purpose (Connelly, Playford, Gayle, & Dibben, 2016, p. 3). Through the application of common computational techniques – a custom web scraping program written in Python and classifications based on string pattern matching – we have transformed a large volume of data that was otherwise inaccessible for research into a reusable resource (Whalen, 2020; Frankenreiter & Livermore, 2020). Through the field of computational legal studies is growing, there is a mismatch between the skills required in this kind of research and the capabilities and disciplinary backgrounds of most legal scholars (Frankenreiter & Livermore, 2020). Examples such as ours can help provide guidance for legal scholars engaging with other administrative data sources about the kinds of computational techniques that can facilitate and expedite their research.

The benefits of using administrative data for research in the way we have demonstrated include its low cost, speed, efficiency and longitudinal qualities (Connelly et al., 2016; see also Jones, Keys, Tingay, Jackson, & Dibben, 2019). There are, however, challenges with this kind of data: in particular, it is limited to the scope and quality of the routinely-collected information. A range of data quality issues may compromise effective use of administrative data, such as data entry errors, incomplete records and inconsistencies over time (Connelly et al., 2016; Jones et al., 2019). In our development of the termination datasets we have clearly articulated the way the data was collected, collated, classified and tested, enabling other researchers to understand and evaluate the quality and accuracy of the data when using it in their own analyses.

The U.S. termination laws are of limited use to creators

The Copyright Office had initially proposed that the U.S. termination law should operate automatically 25 years after transfer (Copyright Law Revision, 1964, pp. 15-16, 278).⁶⁷ After determined lobbying from record labels, movie studios and book and music publishers, the draft law was substantially amended in ways that made it far less useful to creators: operating only after 35 years, requiring complex and costly procedures to be followed, and the risk that creators would lose their entitlements if they got it wrong (Bently & Ginsburg, 2010; Reese, 2016). Rightsholders also managed to secure substantial carve-outs preventing the creators of ‘works for hire’ from terminating them at all, and even though sound recordings are not included in that category, compilations are. Record labels argue that albums are ‘compilations’ and therefore excluded from the law’s operation as works made for hire.⁶⁸

Now that these laws have been in operation for some time, we can start to understand the effect of those regulatory compromises.

The black letter literature has widely criticised these laws for being difficult for creators to navigate, raising costs by forcing them to hire lawyers to deal with the complexity (e.g. Van Houweling, 2016; Bartow, 2020). Though our analysis did not expressly set out to identify

⁶⁷ See also a preliminary proposal for a 20-year limitation on lump sum copyright transfers (that ‘do not provide for continuing royalties’): Copyright Law Revision (1961).

⁶⁸ See discussion at pp. 31-32.

deficiencies in termination notices, we identified enough obvious problems while studying other questions to suggest that these concerns are valid.

Our data also suggest a problematic lack of clarity. Though rights have been terminable under § 203 for years now, it remains unclear whether record labels can lawfully exclude albums from the termination provisions on the grounds that they fall within the ‘compilation’ category of ‘works for hire’. Until this is definitively resolved, recording artists face uncertainty about their rights, and potentially astronomical costs if they seek to enforce them.

The datasets we have constructed suggest that these laws have been subject to remarkably little use, with our preliminary analysis suggesting that in relation to books, § 203 is primarily benefiting a small handful of successful and wealthy creators and estates.

More research is needed into the extent to which the existence of these rights facilitates informal rights reversions or renegotiated deals without claimants needing to formally exercise their rights. Regardless of that however, it’s clear that such arrangements are not wholly successful in linking copyrights to those who wish to exploit them. Most termination-eligible books are out of print and unavailable in digital form.⁶⁹ Many are ‘orphaned’: schools, universities, libraries, galleries, archives or others regularly desire to use them, but cannot make contact with the copyright owner to negotiate access.⁷⁰ Orphaning also plagues other forms of creation, including sound recordings and songs.⁷¹ These realities, combined with the paucity of attempted terminations of books under the statutory provisions, suggest that adoption of a US-style termination right may do little to facilitate rights recapture. Policymakers keen to take advantage of reversion’s potential to help creators better share in the fruits of their labor, and to ensure that society can benefit from widespread access to knowledge and culture, should consider alternatives to this ‘one size fits all’ approach.

Potential reforms

One reform option is to reduce the amount of time after transfer before termination can occur. The proposed Canadian law, which would permit reversion after 25 years, would still maintain the necessary incentives for investment while making rights available again while they still have some value to creators.

Serious consideration should also be given to streamlining the reversion process and clarifying the scope of the law in order to encourage additional claimants.

⁶⁹ Due to most works going out of print before 35 years from publication: see e.g. Falgoust (2014), citing Boyle (2008).

⁷⁰ For an overview of the difficulties experienced by individuals and institutions seeking to use orphaned works, see e.g. Pallante (2015), Hansen, Hashimoto, Hinze, Samuelson, & Urban (2013), and Meeks (2013).

⁷¹ For an overview of the orphan works problem as it pertains to sound recordings and musical compositions, see e.g. Dahlberg (2011), Brooks (2009), Baker (2006), Bradrick (2012), Seidenberg (2011), and McBride (2006).

The orphan works may affect musical works less because under the recent Musical Works Modernization Act, users of orphan musical works may be entitled to a ‘blanket license’ by which royalties are collected and held by the Mechanical Licensing Collective ‘in hopes that the copyright owners will surface and claim their ownership interests.’ (Loren, 2019, pp. 2546-2547).

A more radical possibility is to mandate *automatic* reversion after an initial fixed term (say 25 years), with rights that are not reclaimed by creators then being licensed by an independent cultural steward and revenues put towards directly supporting creators via grants, fellowship and prizes (Giblin, 2018). Such proposals should be considered as a way of better furthering copyright’s twin aims of recognising and rewarding creators and promoting widespread access to works than the US law is achieving.

Finally, the US law’s deficiencies and lack of use to date suggest that ‘use-it-or-lose-it’ rights of the type currently being implemented in the European Union as a result of the 2019 Digital Single Market Directive, are well worth considering as a supplement to any time-based right. By focusing on whether the work is being exploited, rather than time since transfer, such rights have the potential to generate new revenues for creators and return works to the public much earlier. As always, however, their efficacy will depend on the way that they’re drafted. If creator interests end up being as compromised as they were in the case of the US time-based rights, it may be that reversion’s potential will never be fully realized.

Conclusion

This Paper introduces two new datasets of copyright termination notice records under 17 USC §§ 203 and 304 from 1977-2020. These open datasets show who has filed termination notices, how recipients like publishers have responded to those notices, and the different types of works subject to termination notices. The US has long been the only country to record formal uses of its copyright termination provisions and make those records publicly available: however, research using these records has been difficult because of the infrastructure undergirding the online database. Using computational methods to extract data from the Catalog and categorise them for the purpose of deeper analysis, we have provided researchers and policymakers with valuable new data to enable them to assess the efficacy of the termination rights. Our preliminary analysis also highlights usage trends and proposes potential reforms and areas of further investigation using this data. The data and our analysis is especially relevant given ongoing, heated debates about how similar provisions might be implemented elsewhere in order to address declining creator incomes.

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III. CONCLUSION AND IMPLICATIONS FOR THE TRADE BOOK INDUSTRY IN AUSTRALIA AND OTHER COMMON LAW COUNTRIES

In this Chapter I presented new empirical research into the use of the US termination right. The new termination datasets grant researchers access to the full range of termination notice records on the US Copyright Office Catalog from 1977 to mid-2020, in a format that allows detailed statistical analysis. This data provides vital new insights into how termination is used in the US, with broader implications for reversion law reform discussions in other jurisdictions. Future researchers and policymakers are now able to better evaluate the use of the termination right. Canadian policymakers are particularly likely to benefit from the datasets and analysis, as they are considering implementing a very similar termination provision into their copyright legislation.⁶⁴⁵

The data also helps us see how reversion has been used in the US book industry. Very few book authors have filed to terminate copyright assignments and licences under § 203; the ones that do tend to be extremely successful authors like Francine Pascal and Stephen King. We highlighted this could be explained by the fact that reversion occurs either informally or by the application of contractual reversion clauses, which were beyond the scope of the paper to examine. However, the following may also be contributory factors: a) the fact that few books retain value after 35 years or so, meaning many authors will not consider it worthwhile to file to terminate their rights; and b) the complexity of the provisions means authors may be put off filing to terminate, waiting for somebody else to be the ‘test’ case⁶⁴⁶ or simply being unwilling to pay for legal assistance with the filing process.

The complexity of the provisions is exacerbated by the evidence of low author incomes in the US:⁶⁴⁷ if most authors make very little from their writing, they may be less inclined to file to terminate their rights, because it is difficult to do so without legal or other assistance. The perceived value publishers put on established authors and backlists may further entrench the position of these successful authors and may incentivise them to reclaim their rights so they can renegotiate better rights deals. While termination may benefit them, it may not be achieving

⁶⁴⁵ See generally Karas and Kirstein 2018 (n 297).

⁶⁴⁶ Joe Bogdan, ‘The Little Law that Could (and Probably Will): Section 203 Copyright Recapture Terminations in America’, 2016, 13, 18
<http://www.artsmangementjournal.com/resources/January_2016/The%20Little%20Law%20That%20Could.p df> (the Ebscohost listing for the American Journal of Arts Management does not list the article).

⁶⁴⁷ See generally **Chapter II(III)(D)(1)(c)**.

Congress' goals for other book authors in the US: enabling them to have a 'second bite' at the rewards for their work, particularly where they made poorly bargained initial assignments of their copyright.

To that end, the termination data may suggest that either a statutory use-it-or-lose-it right (allowing authors to reclaim rights in works when publishers are no longer using them or have failed to do so after a reasonable period), and/or a shorter time limit may work better than the present system at encouraging book authors to regain their rights. Why must authors wait approximately 35-40 years to regain their rights if their books are no longer being actively exploited by their publishers well after most of them lose commercial value (e.g., five years)? If a book goes out of print when it stops generating revenue five years after publication, and the author cannot regain the rights to publish that book for a further 30-40 years, those years represent lost opportunities for reward, both in potential earnings for the author and the intangible satisfaction the author may derive from knowing their book is available and being read.⁶⁴⁸ There is also a potential loss of cultural value from the book not being available to the public for those 30-40 years, namely its contribution to the development of ideas and the public discourse. To that end, a use-it-or-lose-it provision, taking effect once it is clear the book is no longer being effectively exploited or selling well on the market, and/or a shorter time limit on publishing contracts (e.g., 15 or 25 years) could reduce the period between books going out of print and the rights returning to authors for re-exploitation. I explore these potential reforms further in **Chapters VII and VIII**.

⁶⁴⁸ See further Rub 2013 (n 143), 106, on the little rewards left to authors after 35 years: 'If termination is exercised thirty-five years after publication, then, using three percent as a discount rate, only eight percent of the total value of an average musical work and little more than one percent of the value of an average book will be in the post-termination revenue stream.'

VII. IMPLEMENTING USE-IT-OR-LOSE-IT PROVISIONS AND TIME LIMITS

I. INTRODUCTION

In **Chapters IV, V, and VI**, I presented new evidence about the different types of reversion law in force around the world, and the use and operation of the US termination right. This data will help policymakers in Australia and other common law countries considering whether to implement reversion rights. They can assess the different models in force around the world for implementation in their domestic copyright legislation. They can also get a better understanding of how implementing a termination-style provision, like Canada is considering, may impact their various creative markets.

In this Chapter I use the data from **Chapters V and VI** as a basis for lessons on drafting effective reversion rights. I argue that:

1. Use-it-or-lose-it clauses should be implemented with sector-specific regulations;
2. Time limits should be implemented alongside use-it-or-lose-it clauses.

As in the rest of this thesis I base my analysis on reversion for the trade book industry, acknowledging that in some instances it may be more broadly applicable to other industries.

II. USE-IT-OR-LOSE-IT CLAUSES SHOULD BE IMPLEMENTED WITH SECTOR-SPECIFIC REGULATIONS

A. Why use-it-or-lose-it clauses are beneficial

One of the main types of clauses Giblin and I recommended in *Are Contracts Enough?* and which exist throughout the world are ‘use-it-or-lose-it’ clauses. These clauses allow authors to regain their rights (whether by filing a notice/letter or automatically) if rightsholders have not used those rights at all or have used them inadequately. These clauses can help to achieve the access (incentive) and rewards goals of copyright because they allow reversion once publishers are not willing or able to begin or continue exploiting rights, despite having a reasonable time

to do so. Thus, authors are given the rights back to exploit new opportunities, whether by negotiating deals with new publishers or self-publishing. These can lead to greater availability of works and potential additional remuneration for authors, depending on the subsequent performance of the works in the market.

Use-it-or-lose-it rights also operate as investment incentives to publishers: if they know they can lose rights for non-exploitation, they may be more inclined to do all they can to exploit them. Last, use-it-or-lose-it rights benefit other publishers (especially small and mid-list publishers) by increasing the pool of potential works in which they can invest, leading to greater availability of works for the public and more potential revenues for the publishers. For these reasons, and in light of the issues identified in **Chapters I-III**, there is a strong argument for implementing use-it-or-lose-it reversion clauses in Australia and other common law countries – at least in relation to the trade book publishing industry, and potentially others too.⁶⁴⁹

Use-it-or-lose-it clauses exist in a variety of forms. In *Are Contracts Enough?* and in **Chapter V** I presented a selection including out-of-print clauses and inadequate exploitation clauses. In this Chapter I argue that an overarching statutory use-it-or-lose-it provision, accompanied by sector-specific regulations as to when it can be enforced, should be implemented in Australia and other common law countries. As a case study of such a use-it-or-lose-it right, I examine Article 22 of the EU Directive, which mandates Member States to implement a revocation right in their copyright legislation. I chose this provision because a) it is the beginning of the most recent law reform initiative in copyright law implementing use-it-or-lose-it clauses; b) it highlights the importance of specifying when these clauses can be enforced; and c) it reflects formulations of inadequate exploitation clauses currently in force around the world. Further, prominent copyright academics across Europe have signed an open letter to the European Commission to ‘include [article 22]...explicitly in their consultations about implementing the Directive on Copyright in the Digital Single Market’,⁶⁵⁰ highlighting the importance of this particular reversion initiative to leaders in the copyright field.

Below, I examine Article 22, demonstrate how its motivations cohere with copyright’s goals, highlight problems in its formulation and how these problems are reflected in similar existing

⁶⁴⁹ See further Furgal 2021 (n 389), 283, who also argues for ‘use-it-or-lose-it’ to be an ‘overarching principle’ for reversion rights in the EU.

⁶⁵⁰ Martin Kretschmer, Ula Furgal and Rebecca Giblin, *Open letter to the European Commission and the relevant authorities of Member States of the European Union* (Online Document, 11 December 2020), 2 <<https://www.create.ac.uk/wp-content/uploads/2020/12/Art-22-CDSM-open-letter-with-signatories.pdf>>.

provisions and the implementation process in current EU Member States, and explain how these problems can be addressed in the context of the trade book industry.

B. Article 22 of the EU Directive

To contextualise this analysis, it is important to understand what the Directive mandates Member States to do. It is therefore beneficial to extract Article 22 in its entirety:

1. Member States shall ensure that where an author or a performer has licensed or transferred his or her rights in a work or other protected subject matter on an exclusive basis, the author or performer may revoke in whole or in part the licence or the transfer of rights where there is a lack of exploitation of that work or other protected subject matter.
2. Specific provisions for the revocation mechanism provided for in paragraph 1 may be provided for in national law, taking into account the following:
 - (a) the specificities of the different sectors and the different types of works and performances; and
 - (b) where a work or other subject matter contains the contribution of more than one author or performer, the relative importance of the individual contributions, and the legitimate interests of all authors and performers affected by the application of the revocation mechanism by an individual author or performer.

Member States may exclude works or other subject matter from the application of the revocation mechanism if such works or other subject matter usually contain contributions of a plurality of authors or performers.

Member States may provide that the revocation mechanism can only apply within a specific time frame, where such restriction is duly justified by the specificities of the sector or of the type of work or other subject matter concerned.

Member States may provide that authors or performers can choose to terminate the exclusivity of the contract instead of revoking the licence or transfer of the rights.

3. Member States shall provide that the revocation provided for in paragraph 1 may only be exercised after a reasonable time following the conclusion of the licence or the transfer of the rights. The author or performer shall notify the person to whom the rights have been licensed or transferred and set an appropriate deadline by which the exploitation of the licensed or transferred rights is to take place. After the expiry of that deadline, the author or performer may choose to terminate the exclusivity of the contract instead of revoking the licence or the transfer of the rights.

4. Paragraph 1 shall not apply if the lack of exploitation is predominantly due to circumstances that the author or the performer can reasonably be expected to remedy.

5. Member States may provide that any contractual provision derogating from the revocation mechanism provided for in paragraph 1 is enforceable only if it is based on a collective bargaining agreement.

Article 22 is one of various author-protective provisions in the Directive. The other provisions are: a requirement for Member States to ‘ensure authors and performers...receive appropriate and proportional remuneration’ for granting rights in works;⁶⁵¹ a requirement for rightsholders to provide yearly information to authors about the performance of their works, including financial performance;⁶⁵² a requirement for authors to be able to alter their contracts to ensure they receive fair remuneration for their work, ‘when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances’;⁶⁵³ and a requirement for a ‘voluntary, alternative dispute resolution procedure’ for disputes relating to the information and contractual alteration provisions.⁶⁵⁴

The recitals to the Directive shed further light on motivations behind its author-protective provisions. Recitals are important because they are the main source of identifying the reasons for adopting EU legislation.⁶⁵⁵ As Humphreys et al argue, recitals are ‘an essential component in legal interpretation’.⁶⁵⁶ They can also be important in interpreting...ambiguous provision[s].⁶⁵⁷ It is beyond the scope of this thesis to critically evaluate the various arguments

⁶⁵¹ EU Directive (n 137), art 18.

⁶⁵² EU Directive (n 137), art 19.

⁶⁵³ EU Directive (n 137), art 20(1). Note this does not apply where collective bargaining agreements provide equivalent mechanisms (art 20(1)) or to ‘agreements concluded by entities defined in Article 3(a) and (b) of Directive 2014/26/EU or by entities that are already subject to the national rules implementing that Directive’ (EU Directive (n 137), art 20(2)).

⁶⁵⁴ EU Directive (n 137), art 21.

⁶⁵⁵ Maarten den Heijer, Teun van Os van den Abeelen, and Antanina Maslyka, ‘On the Use and Misuse of Recitals in European Union Law’, Amsterdam Law School Legal Studies Research Paper No. 2019-31, Amsterdam Center for International Law No. 2019-15 (2019), 4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3445372>.

⁶⁵⁶ Llio Humphreys et al, ‘Mapping Recitals to Normative Provisions in EU Legislation to Assist Legal Interpretation’, in Antonino Rotolo (ed), *Legal Knowledge and Information Systems: JURIX 2015: The Twenty-Eighth Annual Conference* (IOS Press, 2015), 41.

⁶⁵⁷ ‘Recital (EU)’, *Thomson Reuters Practical Law* (Web Page) <[115](https://uk.practicallaw.thomsonreuters.com/w-009-6368?transitionType=Default&contextData=(sc.Default)&firstPage=true#:~:text=Text%20at%20the%20start%20of,normative%20language%20and%20political%20argumentation.&text=However%2C%20where%20an%20EU%20law,in%20interpreting%20the%20ambiguous%20provision.>https://uk.practicallaw.thomsonreuters.com/w-009-6368?transitionType=Default&contextData=(sc.Default)&firstPage=true#:~:text=Text%20at%20the%20start%20of,normative%20language%20and%20political%20argumentation.&text=However%2C%20where%20an%20EU%20law,in%20interpreting%20the%20ambiguous%20provision.>”. For further information about recitals, see generally e.g., Tadas Klimas and Jūratė Vaičiukaitė, ‘The Law of Recitals in European Community Legislation’ (2008) 15(1) <i>ILSA Journal of International & Comparative Law</i> 61; Humphreys et al 2015, 41-49; cf. den Heijer, van Os van den Abeelen, and Maslyka 2019.</p></div><div data-bbox=)

about the legal impacts of recitals,⁶⁵⁸ but it is adequate to note they help us identify what the purpose of various provisions are in the Directive.

According to the recitals, the author-protective provisions were instituted because ‘authors and performers tend to be in the weaker contractual position when they grant a licence or transfer their rights’.⁶⁵⁹ Thus, the Directive’s drafters consider these protections necessary for authors ‘to be able to fully benefit from the rights harmonised under Union law.’⁶⁶⁰ The motivation for Article 22 is to allow rights to revert to authors once ‘a reasonable period of time has elapsed’, because authors ‘expect their work...to be exploited’.⁶⁶¹ The reversion is stated to occur to ‘allow...[authors] to transfer or license their rights to another person.’⁶⁶² This suggests the drafters have natural rights goals of copyright in mind: authors should be rewarded for their creative labour, but also are entitled to expect it will be exploited if they grant rights in it, which reflects a view of copyright as an extension of authors’ personalities.⁶⁶³ It could also be argued Article 22 reflects incentive (access) goals: if the intention of the reversion right is to enable authors to assign or license rights to other publishers, drafters may be seeking to prevent the possibility of the public not having access to culturally valuable works because the rights in those works have not been exploited.

For these reasons, use-it-or-lose-it rights can help better achieve copyright’s incentive and rewards goals if applied to the trade publishing industry in Australia and other common law countries.⁶⁶⁴ Below, I examine areas that need to be clarified if such rights are to be successfully implemented for the trade book industry in Australia and other common law countries.⁶⁶⁵

C. Clarifying what ‘lack of exploitation’ means

The Directive does not further define the phrase ‘lack of exploitation’ in Article 22, except to specify that the reversion/revocation right ‘shall not apply if the lack of exploitation is predominantly due to circumstances that the author or the performer can reasonably be

⁶⁵⁸ See e.g. Humphreys et al 2015 (n 656), 43.

⁶⁵⁹ EU Directive (n 137), Recital 72.

⁶⁶⁰ EU Directive (n 137), Recital 72.

⁶⁶¹ EU Directive (n 137), Recital 80.

⁶⁶² EU Directive (n 137), Recital 80.

⁶⁶³ See further the discussion above at 11 on ‘personhood’ justifications for copyright.

⁶⁶⁴ These failures may be present in other creative sectors as well, which means inadequate exploitation clauses could also help better achieve copyright’s goals in those settings. However, they are not the focus of this thesis.

⁶⁶⁵ Note that **Chapter VII** deals with appropriate exceptions to reversion rights, as referred to in art 22(2): ‘Member States may exclude works or other subject matter from the application of the revocation mechanism if such works or other subject matter usually contain contributions of a plurality of authors and performers.’

expected to remedy.’⁶⁶⁶ As we will see, it is important for any lawmakers seeking to create a use-it-or-lose-it provision like Article 22 to clarify what constitutes a lack of exploitation.

1. Does ‘lack of exploitation’ mean no exploitation or minimal exploitation?

The recitals to the Directive indicate the reversion right under Article 22 is to be exercised only when publishers have not ‘exploited [rights] at all’.⁶⁶⁷ Of course, the Directive only prescribes the minimum standards to which Member States must adhere in their domestic copyright laws. They are permitted to go further than what is mandated in the Directive by specifying that revocation will be allowed where exploitation does not meet a minimum threshold (e.g. failing to adequately market a work).⁶⁶⁸ To that end, the European Copyright Society considers the lack of a definition of ‘lack of exploitation’ an opportunity for:

Member States [to]...determine, in concertation [consultation] with each sector, what would be a satisfactory level of reasonable exploitation (e.g. the threshold of published copies, the lack of a reprint despite some demand, the lack of merchandising, the refusal to engage in some modes of exploitation).⁶⁶⁹

2. Influence of the no exploitation approach

However, it appears the ‘no exploitation’ approach will be adopted in at least two EU Member States. To identify how countries are implementing the EU Directive, CREATE, together with reCreating Europe, has developed an online resource tracking relevant Directive implementation documents (including draft bills and consultation papers) in various Member States.⁶⁷⁰ As many of the draft laws tabled by Member States to implement the Directive are not in English (and due to their size and file formats are difficult to apply machine translation to), my ability to analyse the implementation of Article 22, and whether further clarity on ‘lack of exploitation’ is provided, is limited to documents in English.

⁶⁶⁶ Art 22(4).

⁶⁶⁷ Recital 80.

⁶⁶⁸ See e.g. Austria s 29(1), Croatia art 45, Czech Republic s 53(1), Germany s 41(1), Netherlands s 25e(1), Romania s 47(1), Slovenia s 83(1), where the laws already provide for revocation in the case of inadequate exploitation *or* no exploitation at all.

⁶⁶⁹ European Copyright Society, ‘Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 18 to 22 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market’ (2020) 11(2) *JIPITEC* 132, 146 [73] (**‘ECS Comment 2020’**).

⁶⁷⁰ ‘Copyright in the Digital Single Market Directive – Implementation: An EU Copyright Reform Resource’, CREATE (Web Page) <<https://www.create.ac.uk/cdsm-implementation-resource-page/>>.

The Republic of Ireland’s consultation paper on Articles 18-22 suggests they are adopting the ‘no exploitation’ rather than the ‘minimal exploitation’ interpretation. The consultation paper interpreted Article 22 as follows:

Article 22 (Recital 80) recognises the potential risk that rightsholders face when signing an exclusivity contract. The article addresses the “lack of exploitation” of works by providing a mechanism that will allow authors or performers, after a reasonable time and upon appropriate notices and deadlines, revoke in whole or part the license or transfer of rights when their works are not being exploited. When a rightsholder transfers their rights there is an expectation that their work or performance will be exploited, in the event that this does not occur this article will allow for the revocation of rights thus allowing rightsholders to transfer or license their rights to another person.⁶⁷¹

The use of the phrase ‘their works are not being exploited’ and ‘in the event that this [exploitation] does not occur’ indicates Ireland assumes the provision is to take effect where there is no exploitation at all. Further, the policy documents did not seek public input on the circumstances in which exploitation will be considered inadequate, which suggests they do not intend to follow a ‘minimum’ exploitation model that requires determining what is and is not reasonable exploitation.⁶⁷² It also appears that Malta will simply adopt the EU Directive verbatim,⁶⁷³ which would lead to a ‘no exploitation’ interpretation given the Directive’s explanatory notes (discussed above).⁶⁷⁴ As I argue below, this approach does not help achieve copyright’s incentive and rewards goals as well as it could.

3. A minimal exploitation approach should be adopted in use-it-or-lose-it provisions

A ‘minimal exploitation’ approach is more consistent with copyright’s incentives and rewards goals and should be adopted as opposed to a ‘no exploitation at all’ approach.⁶⁷⁵ In the trade book industry, for example, a ‘no exploitation’ approach may allow publishers to hold on to

⁶⁷¹ Department of Business, Enterprise and Innovation, *Consultation on the transposition of Directive (EU) 2019/790 of the European Parliament and of the Council on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC: Articles 18 – 23 Consultation Paper No. 4*, (Online Document, 25 November 2019) 6 <<https://enterprise.gov.ie/en/Consultations/Consultations-files/Consultation-Copyright-Directive-EU-2019-790-Articles-18-23.pdf>> (‘DBEI Consultation’).

⁶⁷² See *ibid* 11.

⁶⁷³ Government of Malta, Government response to the Consultation on the Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (10 November 2020), 7 <https://meae.gov.mt/en/Public_Consultations/MEIB/Documents/Public%20Consultation%20outcome%20report.pdf>.

⁶⁷⁴ See further Furgal 2021 (n 389), whose review of use-based reversion rights in the EU suggests most apply a “yes-no” approach to exploitation, rather than assessing the ‘quality’ of such exploitation: 289.

⁶⁷⁵ See e.g., ECS Comment 2020 (n 669), 146 [74].

rights in books without actually marketing them. Publishers would simply need to show there was some minimal exploitation – e.g. by making the book available online for purchase or via print-on-demand – to avoid authors exercising their reversion rights. This is inconsistent with the bargain originally struck by out-of-print clauses in pre-digital times: if it was clear publishers were not willing to provide the substantial investment necessary for a new print run, authors would be able to regain their rights. However, in the digital era publishers can still hold on to the rights even if they are not willing to invest in making works newly available. As we showed in *Are Contracts Enough?*, this approach can lead to authors missing out on new exploitation opportunities and books being kept dormant after their initial print runs. It could also reduce the incentives new publishers may have to exploit reverted rights, if rights will only revert in the few situations in which there has been no exploitation at all.

On the other hand, if the reversion right operates where there is *minimal* exploitation (evidenced by failing to meet a sales threshold or other criteria), authors could have far more opportunities to regain their rights, in pursuit of copyright's incentives and rewards goals. Authors could argue that publisher actions – e.g., failing to publish books on particularly large online bookselling platforms, like Kobo or Amazon – constitute inadequate exploitation of the rights granted to them. In particular, authors of midlist books (for which publishers do not often allocate large marketing budgets)⁶⁷⁶ may benefit from a minimal exploitation approach because they can take their books to publishers for whom those books form a more central part of their portfolio.

4. Determining 'reasonable exploitation' under a minimal exploitation approach

We have established that a 'minimum exploitation' approach coheres better with copyright's incentives and rewards goals than a 'no exploitation' approach as it appears will be adopted in at least some EU member states. However, there remains a lack of clarity on what constitutes 'reasonable exploitation' from a 'minimal exploitation' perspective. The literature is inconclusive about the meaning of 'lack of exploitation', and commentators have raised concerns about this lack of clarity:⁶⁷⁷

⁶⁷⁶ See e.g. Alison Flood, 'There's no safety net': the plight of the midlist author', *The Guardian* (online, 20 June 2019) <<https://www.theguardian.com/books/2019/jun/19/midlist-author-kerry-hudson-louise-candlish>>: for further information on midlist authors see Mel Campbell, 'Stuck in the Midlist with You: on Being a Midlist Author', *The Wheeler Centre* (Blog Post, 21 August 2014) <<https://www.wheelercentre.com/notes/0de824917488>>.

⁶⁷⁷ See commentary that fails to elaborate on the definition of 'lack of exploitation' or highlights its ambiguities: e.g. Sarah Blair, 'Q&A: The impact of the new Copyright Directive in the digital single market', *Bristows*, (Blog Post, 8 May 2019, first published at *Lexis PSL*) <<https://www.bristows.com/viewpoint/articles/qa-the-impact-of->

The revocation can only apply after a reasonable period of time, to leave time for the contractant [sic] to undertake the exploitation. The “lack of exploitation” that triggers the possible application of the revocation right is not fully defined in the Directive. What would be a satisfactory level of exploitation? Is the publishing of a few copies of a book sufficient, despite the refusal of the publisher to proceed to a reprint? Is the publishing of a novel in hard copies enough, while the publisher does not engage in the publication in e-book format? Does the lack of exploitation of a novel in a movie adaptation or in merchandising, where there is a demand, amount to a lack of exploitation? *Those questions are illustrative of the precisions the Member States might need to add to the principle of revocation, namely by determining a threshold of a reasonable exploitation, in quantity and in different modes of exploitation, to be achieved by the transferee or licensee.* [emphasis added]⁶⁷⁸

Some countries with similar provisions already in force provide that this type of reversion clause can only be exercised if non-exploitation adversely affects authors’ interests.⁶⁷⁹ However, this can create more uncertainty if the author must show how their interests have been adversely affected: does this purely refer to financial interests? If not, how can authors quantify their loss? To that end, lawmakers should add specific exploitation thresholds to use-it-or-lose-it rights, as argued by Dusollier.⁶⁸⁰ Otherwise, authors might be reticent to exercise their rights if they are not certain they will be able to reclaim them, or will have to engage in lengthy, expensive litigation to defend their enforcement of those rights.

In light of the ambiguity around the definition of ‘lack of exploitation’ in Article 22 and copyright’s incentive and rewards goals, lawmakers in Australia and other common law

[the-new-copyright-directive-in-the-digital-single-market/](#); Aurelija Lukoseviciene, ‘The contractual protection of authors in Copyright in the Digital Single Market Directive – does the reality live up to the expectations?’, *Nordiskt Immateriellt Rättsskydd* (Blog Post, 29 October 2019) <<https://www.nir.nu/notis/NIR2019W16>>; ‘DSM Directive and fair remuneration for authors and performers’, *Arthur Cox* (Blog Post, 18 June 2020) <<https://www.arthurcox.com/knowledge/dsm-directive-and-fair-remuneration-for-authors-and-performers/>>; European Composer and Songwriter Alliance, European Writers’ Council, Federation of European Film Directors, Federation of Screenwriters in Europe, *Directive 2019/790 on Copyright in the Digital Single Market: Authors’ Group first recommendations on the transposition of Articles 18 to 23* (Online Document), 6 <<https://vs.verdi.de/++file++5e2ff7f626259583bd031128/download/Authors%27%20Group%20first%20%20recommendations%20on%20the%20transposition%20of%20Articles%2018%20to%202023.pdf>>. However, note a forthcoming work that may bring more clarity to Article 22: Eleonora Rosati, *Copyright in the Digital Single Market: Article-by-Article Commentary to the Provisions of Directive 2019/790* (Oxford University Press, estimated publication 26 August 2021) <<https://global.oup.com/academic/product/copyright-in-the-digital-single-market-9780198858591?view=Grid&sortField=8&resultsPerPage=20&start=0&lang=en&cc=it>>.

⁶⁷⁸ Severine Dusollier, ‘The 2019 Directive on Copyright in the Digital Single Market: Some Progress, A Few Bad Choices, And An Overall Failed Ambition’ (2020) 57 *Common Market Law Review* 979, 1026.

⁶⁷⁹ See e.g., Romania art 47(1); Slovenia art 83(1); Turkey art 58; Montenegro art 84; Austria s 29(1); Croatia art 45 (laws current as at March 2019).

⁶⁸⁰ Dusollier 2020 (n 678), 1026.

countries should adopt a minimum exploitation formulation of an Article 22-type right *and* provide sector-specific regulations on when this right can be enforced.

D. Sector-specific guidance on inadequate exploitation

I have argued that implementing an Article 22-type clause will help better achieve copyright's incentive and rewards goals. Nevertheless, a lack of clarity on when such provisions are exercisable by authors may hamper their effectiveness. To ensure clauses like this help to better achieve copyright's goals, lawmakers should provide clear regulations on determining whether a publisher's exploitation meets reasonable thresholds.⁶⁸¹

Regulations should be specific to different creative sectors so authors are not empowered to revert rights where exploitation is reasonable in particular contexts. Regulations on inadequate exploitation should also be developed in consultation with all industry stakeholders to ensure there are no consequences from the exercise of use-it-or-lose-it clauses that are inconsistent with copyright's incentive and rewards goals.⁶⁸² Below, I explore what these regulations might look like for the trade book publishing industry by reviewing existing material on reasonable exploitation from around the world, including laws and industry codes.

1. Guidance on reasonable exploitation thresholds for the trade book publishing industry

As there are no statutory use-it-or-lose-it clauses in Australia and other Anglosphere countries, there are no codes or collective agreements about how they could be enforced. Nor have I located collective agreements between author and publisher associations in these jurisdictions on contract terms in the trade publishing industry that could be used as guidance.⁶⁸³ We must

⁶⁸¹ Furgal makes a similar argument in her article summarising a review of reversion rights in the EU:

The implementation of the new revocation right calls for sufficient clarity and flexibility in determining what “use” is, so that the provision remains applicable to the relevant subject matter, but parties to an agreement are clear on when the creators’ rights are triggered. Considering that the creative and cultural industries are highly diversified, it seems impossible for the law to explicitly address all non-use situations. It is possible, however, building on already existing work and agreement-specific provisions, to formulate guidelines. One way would be for Member States to provide a list of factors which should be taken under consideration when assessing whether a work is being used, such as the lack of remuneration, or promotion and findability of work, which could then be adjusted to particular sectors.

Furgal 2021 (n 389), 291.

⁶⁸² It may also be appropriate for certain works to be exempt from a use-it-or-lose-it clause, e.g. commissioned textbooks, copyright in which is likely to remain with the employer in the first instance: see e.g. World Intellectual Property Organization, *Managing Intellectual Property in the Book Publishing Industry; A business-oriented information booklet: Creative industries – Booklet No. 1*, 15.

⁶⁸³ Author and publisher associations in the Anglosphere tend to diverge on what they consider appropriate terms to include in publishing contracts: see e.g. Australian Society of Authors, *Australian Book Contracts* (2009 Keesing Press, 4th ed), 3; Society of Authors, *Guidance on Publishing Contracts* (September 2018, v 5.1), 4; ‘Writer’s Bill of Rights for the Digital Age 1.0’, *The Writers’ Union of Canada* (Webpage), cl 6-7

thus look elsewhere for examples of effective guidance on ‘inadequate exploitation’ to effectively implement use-it-or-lose-it clauses in Australia and other common law countries.

In France, there are two guides on inadequate exploitation, applying to books and musical works respectively.⁶⁸⁴ *The Agreement Between the Permanent Council of Writers and the National Publishing Union on the Publishing Contract in the Book Sector* applies, by an order under art L-132-17-8 on 10 December 2014, on ‘all authors and publishers in the book sector.’⁶⁸⁵ Under the Agreement, publishers must publish any digital editions ‘within fifteen months from the delivery by the author of the object of the edition in a form that allows publication, or in the absence of evidence [in relation to that date], within three years of the signing of the publishing contract.’⁶⁸⁶ Failure to do so allows the author to give a three-month notice period, and ‘digital exploitation rights’ are automatically terminated on failure to comply with this notice.⁶⁸⁷ Nevertheless, only ‘simple notification’ is required for automatic termination if there has been no ‘digital publication’ within either 27 months from delivery ‘in a form that allows publication’, or four years after the contract was signed if there is no evidence of the date of delivery.⁶⁸⁸

The Agreement also specifies what publishers must do to adequately exploit books. For printed books, the publisher must:⁶⁸⁹

Present the book on its paper and digital catalogues.

Present the book as available in at least one of the main interprofessional databases listing commercially available works.

<<https://www.writersunion.ca/writers-bill-rights-digital-age-10>>; see also Authors Guild, *A Publishing Contract Should Not Be Forever* 2015 (n 257); cf ‘PA Code of Practice on Author Contracts’, *The Publishers Association* (Online Document, 2010), cl 17. <<https://www.publishers.org.uk/wp-content/uploads/2020/02/Code-of-Practice-on-Author-Contracts-2010.pdf>>; Peter Dowling, President, Publishers Association of New Zealand (PANZ), Submission on review of the Copyright Act 1994: Issues Paper, 9 <<https://www.mbie.govt.nz/dmsdocument/6753-publishers-association-of-new-zealand-review-of-copyright-act-1994-issues-paper-submission-pdf>>. However, see also Hebb and Sheffer 2006 (n 361), 33-34, describing collective agreements between publisher and author organisations in Denmark, Sweden, Finland, and Norway. However, Hebb and Sheffer note these agreements were reached in 1947 and 1948: Hebb and Sheffer 2006 (n 361), 33.

⁶⁸⁴ Légifrance, *Arrête du 10 décembre 2014 pris en application de l'article L. 132-17-8 du code de la propriété intellectuelle et portant extension de l'accord du 1er décembre 2014 entre le Conseil permanent des écrivains et le Syndicat national de l'édition sur le contrat d'édition dans le secteur du livre* (Webpage)

<<https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000029966188>> [tr Google Translate]. I am grateful to the examiner who pointed out this Agreement during my thesis examination. There may be more such codes and orders, but analysis of these two is adequate for the purposes of this thesis.

⁶⁸⁵ Ibid, art 2.

⁶⁸⁶ Ibid, Annex, s 2.

⁶⁸⁷ Ibid, Annex, s 3.

⁶⁸⁸ Ibid, Annex, s 3.

⁶⁸⁹ Ibid, Annex, s 4.1.

Make the work available in a quality respectful of the work and in accordance with the rules of the art whatever the distribution circuit.

Satisfy as soon as possible the orders of the work.

For electronic works, the publisher must:⁶⁹⁰

Exploit the work in its entirety in a digital form.

Present it to its digital catalogue.

Make it accessible in a technical format that can be used taking into account the usual formats of the market and their evolution, and in at least one non-proprietary format.

Make it available for sale, in a non-proprietary digital format, on one or more online sites, according to the business model in force in the editorial sector in question.

The Agreement also provides for how remuneration is calculated ‘where there is no single selling price’,⁶⁹¹ requires publishing contracts to stipulate ‘automatic review of the economic conditions for the transfer of digital exploitation rights’,⁶⁹² and imposes a reporting obligation on publishers in relation to sales,⁶⁹³ among other provisions.

Another useful guide on inadequate exploitation is arguably the 2017 *Code of Good Practices for the Publication of Musical Works* in France.⁶⁹⁴ The Code has been agreed to by various organisations ‘representing music publishers and music authors’,⁶⁹⁵ seeking to clarify references in the publishing contract sections of France’s intellectual property legislation to customary industry practice,⁶⁹⁶ including obligations to ensure ‘continuous and sustained

⁶⁹⁰ Ibid, Annex, s 4.2.

⁶⁹¹ Ibid, Annex, s 5.

⁶⁹² Ibid, Annex, s 6.

⁶⁹³ Ibid, Annex, s 7.

⁶⁹⁴ *Code of Good Practices for the Publication of Musical Works*, 4 October 2017 (‘*Code of Good Practices*’). See also, ‘Guidelines for fair translation contracts’, *Conseil Européen des Associations de Traducteurs Littéraires* (European Council of Literary Translators’ Associations) (Web Page) <<https://www.ceatl.eu/translators-rights/guidelines-for-fair-translation-contracts>>; Don E Tomlinson, ‘Everything That Glitters Is Not Gold: Songwriter-Music Publisher Agreements and Disagreements’ (1995) 18(1) *Hastings Communications and Entertainment Law Journal* 85, 147-176; ‘ANFASA-PASA Agreement on Contract Terms’ (Online Document, 26 February 2016) <<https://www.publishsa.co.za/file/14722025351lj-apactdocument.pdf>>. See further ‘The Code of Fair Practice Agreed Between Composers, Publishers and Users of Printed Music’, *Music Publishers Association* (Online Document, April 2016) <https://www.mpaonline.org.uk/wp-content/uploads/2017/09/The_Code_of_Fair_Practice_Revised_Apr_2016.pdf> although this *Code* does not address fair exploitation thresholds or reversion rights.

⁶⁹⁵ *Code of Good Practices* (n 694), 1; see ‘French Music Creators and Publishers Co-Sign “Code of Good Practice” to Forge Significant New Relationship’, *CIAM* (Blog Post, 24 October 2017) <<https://ciamcreators.org/Newsroom/council-news/french-music-creators-and-publishers-co-sign-code-good-practice-forge>>.

⁶⁹⁶ *Code of Good Practices* (n 694), 1.

exploitation and commercial dissemination of the work.’⁶⁹⁷ The Code provides comprehensive, specific guidance on the factors in music publishing that will meet the threshold of ‘permanent and sustained exploitation’.⁶⁹⁸ The lists of activities meeting this threshold are even divided into the types of music: ‘library music’, ‘classical music’, and other works that do not fit those categories.⁶⁹⁹ The Code also contains other guidance on how the publishing contract provisions apply to the music industry, such as the formalities publishers need to comply with when providing account statements to authors.⁷⁰⁰ The Code is subject to review every five years ‘to ensure the joint revision of those provisions that prove to be unsuitable or obsolete as a result of changes in the music creation and music publishing sectors.’⁷⁰¹ The Code also appears to bind all members of the signatory organisations in respect of contracts executed from 2 July 2018.⁷⁰²

We should also consider the European Copyright Society’s commentary on Article 22, which complements the *Code of Good Practices* by providing examples of conduct that could be considered ‘inadequate exploitation’ in the context of the book industry:

...the national laws, directly or by reference to sectoral collective agreements or codes of practice, need to establish the criteria to assess the inadequacy of the exploitation. Some consideration of digital context would be particularly relevant. *Authors of literary works could consider that the publisher to whom they have transferred their copyright for all types of exploitation, does not comply with her obligation if she declines to offer the works in an e-book format. In a similar way, where some licensed or transferred rights (e.g. the translation rights) are not exploited, this also justifies the revocation of that part of the transfer* [emphasis added].⁷⁰³

⁶⁹⁷ France, art L132-12.

⁶⁹⁸ See the overarching guidance at *Code of Good Practices* (n 694), 5:

Permanent and sustained exploitation and commercial dissemination imply, whatever the music genre:...that the work is made and then kept available to the public and professionals, and thus disseminated, for the entire duration of the assignment of rights in a quality that is respectful of the work whatever the dissemination channel;...that, at the same time, various methods of exploitation, which may vary depending on the nature of the work in order to optimise them, are implemented by the publisher itself or through the intermediary of a third party authorised to do so.

This is shortly followed by a specific list of activities that will constitute ‘permanent and sustained exploitation’ at [3.4.1], [3.4.2], [3.4.3].

⁶⁹⁹ Ibid [3.4.1]-[3.4.2].

⁷⁰⁰ Ibid [3.6].

⁷⁰¹ Ibid [10].

⁷⁰² Ibid [8].

⁷⁰³ ECS Comment 2020 (n 669), 146 [74].

In these examples, it is the non-use of rights assigned or licensed to publishers that enlivens the revocation right. As discussed throughout this thesis, once publishers have had a reasonable opportunity to maximally exploit the rights granted to them and have not done so (whether due to their own actions or a general lack of demand in the market), it is consistent with copyright's goals to return the rights to authors to enable them to explore new marketing avenues, rather than for those rights to remain unused. Provisions reverting unused language rights after five years already exist in Spain and Lithuania.⁷⁰⁴ *Prima facie*, they balance the interests of publishers (to hold rights for a reasonable time for them to recoup their investments), authors (to reclaim unused rights for exploitation) and the public (to have access to creative works for the ongoing development of culture and knowledge).

Another example of a statutory use-it-or-lose-it provision which could inform the development of an equivalent in Australia and other common law countries is the French Intellectual Property Code's article L132-17-2. It requires the publisher 'to ensure permanent and continuous use of the edited book in printed or digital form', and automatically reverts these rights to authors if, after sending a 'formal notice by registered letter with acknowledgment of receipt', the publisher does not uphold its obligations within six months.⁷⁰⁵ Reversion of rights under this clause would only cover the print and digital publication rights in the book and would not apply to 'audiovisual adaptation contracts'.⁷⁰⁶ As with the prior examples, this provision allows the reversion of rights that have been assigned or licensed to publishers but which have not been used. The reversion of digital rights takes on added significance given the various new opportunities arising from new technological developments.⁷⁰⁷

Sources like the French publishing contract Agreement, the *Code of Good Practices*, the European Copyright Society's commentary on Article 22, the Spanish and Lithuanian use-it-or-lose-it provisions and the French equivalents (discussed above) should influence the development of regulations on thresholds at which use-it-or-lose-it clauses come into effect for the trade book industry in Australia and other common law countries.

⁷⁰⁴ Spain, art 62(3), Lithuania, art 45(3). I have not found analysis of these provisions in English, but it is possible such research exists in other languages. To that end, a review of the non-English literature on these provisions and/or further analysis of their impacts would benefit lawmakers seeking to implement them.

⁷⁰⁵ Article L132-17-2(II), (III).

⁷⁰⁶ Article L132-17-2(III), (IV).

⁷⁰⁷ See e.g., the discussion above at 34-35.

2. Developing regulations on reasonable exploitation

Regulations on inadequate exploitation are more easily updateable than legislation. They can be reviewed every few years like the French publishing contract Agreement and *Code of Good Practices* to ensure they continue to address industry norms and technological developments.⁷⁰⁸ This also allows for more comprehensive, industry-specific regulations.⁷⁰⁹

To show what such regulations could look like in the trade book industry, I have developed a sample set, based on the various models and codes examined in *Are Contracts Enough?*, **Chapter IV** and **Chapter V** (**Table 1**). It is not designed to be exhaustive but gives policymakers an idea of the types of issues they will need to address in the context of the trade book industry.⁷¹⁰ Such regulations will benefit authors seeking to enforce use-it-or-lose-it clauses against publishers by giving them a clear authority to which they can link the publisher's alleged non-exploitation.

Table 1. Sample list of the types of conduct/situations classed as ‘inadequate exploitation’ by publishers and the corresponding entitlements of authors

Publisher conduct/situation	Effect of author exercising statutory ‘inadequate exploitation clause’
Failing to publish the book within X years of the author providing the final manuscript to the publisher.	Entire contract terminated and rights revert to the author.
Not publishing the book in languages or territories in respect of which the author has granted exclusive publishing rights	Grant revoked in respect of unused rights, which revert to the author.

⁷⁰⁸ See e.g., ‘Overview’, *NSW Government Commissioner for Productivity* (Web Page) <<https://www.productivity.nsw.gov.au/green-paper/regulation>>.

Regulation should be regularly reviewed and updated to make sure it is relevant, understandable and easy to comply with. Technology can make interacting with regulation more convenient for citizens and regulatory requirements should be updated periodically to keep up with technological change.

See also National Transport Commission, ‘Regulatory reforms for automated road vehicles’, (Policy Paper, November 2016), 22 <<https://www.ntc.gov.au/sites/default/files/assets/files/NTC%20Policy%20Paper%20-%20Regulatory%20reforms%20for%20automated%20road%20vehicles.pdf>>.

⁷⁰⁹ For example, there could be one code for trade book publishing and one for educational publishing, in light of the different issues in those two industries.

⁷¹⁰ This is why specific thresholds are listed as ‘X’, as the particular thresholds will need to reflect specific industry realities.

within X years of the author providing the final manuscript to the publisher.	
Not publishing the book in formats in respect of which the author has granted exclusive publishing rights within X years of the author providing the final manuscript to the publisher.	Grant revoked in respect of unused rights, which revert to the author.
Not publishing the book on all of the Amazon Kindle Store, Apple Books, Kobo, or Google Play Books, where the author has granted exclusive electronic publishing rights to the publisher, within three years of the author providing the final manuscript to the publisher.	Grant revoked in respect of unused rights, which revert to the author.
Not licensing the book in either print or electronic format to libraries, where the author has granted exclusive library licensing rights to the publisher, within three years of the author providing the final manuscript to the publisher.	Grant revoked in respect of unused rights, which revert to the author.
Where royalties of the book are below \$ X in any calendar year. ⁷¹¹	Entire contract terminated and rights revert to the author.

It should be noted that lawmakers would have the flexibility to include other reversion rights in legislation if they wish alongside a use-it-or-lose-it provision. Nevertheless, a use-it-or-lose-

⁷¹¹ Different sales thresholds may be needed for different categories of trade book, as a low sales threshold for one type of book might be a regular sales figure for another type of book: see e.g. Xindi Wang et al, ‘Success in books: predicting book sales before publication’ (2019) 31 *EPJ Data Science* 8 (exploring the different factors behind book sales); Alison Flood, ‘Book sales hit record highs in 2019, but publishers ‘now need help’’, *The Guardian* (online, 21 July 2020) <<https://www.theguardian.com/books/2020/jul/22/book-sales-record-highs-2019-publishers-need-help-government>> (referring to a growth in nonfiction book sales but a drop in fiction book sales). See also Charles Boundy, *Business Contracts Handbook* (Gower Publishing Limited, 2010), 267 (explaining how sales thresholds are the subject of negotiation ‘to achieve a fair balance between publishers’ often substantial) investment in the author’s advance and publishing costs, and the ability to recover this over ‘long-tail’ sales, and authors’ wish not to have their work ‘locked up’ for many years.’).

it right with updateable regulations (i.e. via subordinate legislation) is beneficial because it makes the reversion system more easily updateable. Regulations can be regularly reviewed, amended or reissued as necessary to continue achieving copyright's goals in light of changing industry norms. Again, not having to go through the process of amending legislation may allow changes to be made more quickly than otherwise might be the case. Statutory reviews can be lengthy: in Canada, a statutory committee noted that a five-year review period was inadequate to evaluate changes implemented in previous copyright legislation.⁷¹² On the other hand, regulations are likely to be more easily updateable, especially if they can be issued at any time by the Governor-General (or the equivalent figure) as in Australia, New Zealand, and Canada.⁷¹³

It should be noted that authors may face reputational and other consequences from enforcing reversion provisions against publishers, like being 'blacklist[ed]' by other members of the publishing industry, or other professional consequences.⁷¹⁴ Policymakers should do what they can to ameliorate such risks, and in doing so inspiration might be drawn from other areas of law. For example, under Australian employment law employees are protected under the *Fair Work Act 2009* (Cth) from 'adverse action' when they 'exercise...workplace right[s]'.⁷¹⁵ Adverse actions may be taken by employers or prospective employers, including 'threaten[ing] to or tak[ing] action by...refusing to employ the prospective employee, or...discriminating against the prospective employee in the terms or conditions on which the prospective employer offers to employ the prospective employee.'⁷¹⁶ It is beyond the scope of this thesis to explore what such options might look like in the trade publishing industry, as authors and publishers do not tend to have employment relationships.⁷¹⁷ However, publishers will be less incentivised

⁷¹² *INDU Report* (n 448), 24.

⁷¹³ *Copyright Act 1968* (Cth), s 249(1); *Copyright Act 1994* (NZ), s 234; Copyright Act, RSC 1985, c C-42, s 62(1). Such broad powers to make regulations do not appear to exist under the *Copyright, Designs, & Patents Act 1988* (UK).

⁷¹⁴ Towse 2018 (n 111), 473; Nikolaus Reber, 'The "further fair participation" provision in Art 32a(2) German Copyright Act – Claims against a third-party exploiter of a work' (2016) 11(5) *Journal of Intellectual Property Law & Practice* 382, 383, cited in Kenner 2017 (n 274), 586; Guibault and Salamanca 2016 (n 318), 122, cited in Matulionyte 2019 (n 263), 713. See also on the threat of being blacklisted: D'Agostino 2005 (n 279), 167: 'Freelancers have no bargaining power because if they do not capitulate and assign rights to such [publishing] conglomerates they risk being blacklisted.'

⁷¹⁵ *Fair Work Act 2009* (Cth), s 340(1)(a)(ii).

⁷¹⁶ Fair Work Commission (Australia), 'What is adverse action?' in *General protections handbook* (Web Page, last updated 15 June 2018) <<https://www.fwc.gov.au/general-protections-benchbook/adverse-action>>.

⁷¹⁷ As the relationship between authors and publishers is contractual, 'adverse actions' could be inserted into unfair contracts legislation to prohibit publishers from taking retributive action when authors enforce statutory reversion rights. Such provisions could also be added to the reversion rights themselves.

to take retributive action if they are consulted on appropriate thresholds for reasonable exploitation and the eventual thresholds reflect their concerns as well as those of authors.

E. Summary of arguments on use-it-or-lose-it clauses

Use-it-or-lose-it clauses can help better achieve copyright's incentive goals. They can incentivise publishers to maximally exploit rights for fear of losing them. They can also operate as positive incentives to other publishers to use reverted rights, thereby resulting in more works being available for public access. Further, they allow authors to explore new opportunities for reward.

While various use-it-or-lose-it reversion law models exist around the model, a revocation right like those mandated by Article 22 of the EU Directive (and like some of those already in force elsewhere in the world) should be implemented as an overarching use-it-or-lose-it right, accompanied by sector-specific regulations on when it can be enforced. Rather than being enforceable when no exploitation at all has occurred, a 'minimum exploitation' approach should be adopted to ensure authors can regain their rights when it is clear publishers are no longer willing or able to exploit them. Sector-specific regulations should accompany this provision, to be developed in consultation with industry and placed in readily updateable regulations. For the trade book industry, regulations can be influenced by various sources like existing use-it-or-lose-it provisions and interpretive codes like the publishing contract collective Agreement and the *Code of Good Practices* for musical publication contracts in France. This type of use-it-or-lose-it provision can replace existing use-based reversion rights like out-of-print clauses because it enables authors to regain rights when books are out of print, reducing the amount that needs to be added to already lengthy and complex copyright legislation in Australia.

III. TIME LIMITS SHOULD BE IMPLEMENTED ALONGSIDE USE-IT-OR-LOSE-IT CLAUSES

A. Why time limits should be implemented

Sector-specific time limits should also be implemented alongside use-it-or-lose-it clauses. Time limits on copyright assignments and licences apply independently of how publishers use the rights granted to them. They count as reversion rights because when the limits expire, rights will return to authors either on application or automatically. These have been the dominant

form of reversion right in the Anglosphere, in the form of a) the US termination right and b) the British Imperial reversion right, which I surveyed in **Chapters IV** and **VI**.

1. Justifying time limits

Time limits are justified because neither copyright's incentives nor rewards aims require rightsholders to retain rights for the entire term of copyright. As Giblin shows, rightsholders generally do not need the prospect of holding rights beyond 25 years to invest in the production of creative works.⁷¹⁸ Thus, 'the remainder of the [copyright] term [is] overwhelmingly justified as an additional reward for authors.'⁷¹⁹ Whether they choose to reassign or relicense the copyright after the time limit is their prerogative, but it should not be the prerogative of the publisher/record label/film company when they do not need those post-limit rights to incentivise their investments in creative labour. To that end, time limits fulfil different functions to use-it-or-lose-it clauses. Use-it-or-lose-it clauses condition the reversion of rights upon the performance of works in the market, which can at least be indirectly linked to the ways in which rightsholders exploit the rights granted to them. They do not address the fact that even if rightsholders were exploiting the rights adequately, there is no justification from an incentive or reward perspective for them to hold rights for longer than approximately 25 years in the first instance. Thus, time limits give authors the remainder of the copyright term to exploit additional opportunities for reward.

Time limits have a further benefit for authors: enabling them to renegotiate copyright assignments and licences or pursue further opportunities at a time when they better know the value of their work than when they negotiated their initial copyright grants. This is particularly beneficial in the case of successful works.⁷²⁰ As I have previously discussed, one of the recurring themes in scholarship on creative labour markets is the concern that authors are in unequal bargaining positions relative to rightsholders. There are a variety of potential causes of this imbalance in different creative industries. First, authors are uncertain of how well their works will perform and are thus unable to negotiate the terms of exploitation from a position of strength. Furthermore, creative industries often operate as 'winner-takes-all' markets, which means there will be more supply from authors than there will be demand from rightsholders for creative works, placing rightsholders in better positions to negotiate contractual terms. For

⁷¹⁸ Giblin 2018 (n 34), 374-376.

⁷¹⁹ Ibid 396.

⁷²⁰ See e.g., Yuvaraj et al 2021 (n 298), 29-32, showing the list of book authors exercising their termination rights under 17 USC § 203 tended to feature successful, famous authors.

example, publishers in the trade book industry have exhibited a tendency to preference established authors and backlists as they represent more reliable indicators of return, rather than books by unknown authors.⁷²¹ Lastly, as authors may not always obtain independent advice on or feel confident in negotiating changes to standard form contracts they are offered.

These dynamics can shift once the value of creative works is established through observation of market performance. Once this is established, authors can be in better bargaining positions to negotiate more favourable terms, whether in relation to retaining rights, the duration of rights grants, reversion rights, or royalty rates. Thus, time limits offer authors a second chance to negotiate these terms at a time when they are better placed to do so, so they can better profit from their works (furthering copyright's reward goal). Time limits can also result in renewed availability of these works to the public: if existing publishers want to retain rights following the time limits, they will likely need to satisfy authors that those works will be marketed. And if they are not able to do so, authors are empowered to seek alternative distribution methods (whether by self-publishing, direct licensing, or by going to other publishers) for greater availability to the public.

2. How time limits are different to use-it-or-lose-it clauses

Time limits fulfil different functions to use-it-or-lose-it clauses because they operate independently of how publishers use the rights granted to them or how works perform. To see how they may work in the trade book industry, consider the following example.

Margot Leticia is a struggling author from Glen Waverley and Publishing House is a large publisher in Australia. Ms Leticia pitches Publishing House an idea for a thriller novel called Kaya: Killer In Plain Sight. Publishing House advises they are interested in publishing the book and sends Ms Leticia their standard publishing contract (which provides for exclusive publishing rights, including rights in all languages, in all formats and across the whole world, to be licensed to Publishing House for the entire term of copyright). Delighted, Ms Leticia signs the contract and receives an advance of \$5,000. The book sells extremely well over the next twenty-four years (over 110,000 copies in Australia, including 25,000 copies in eBook format). Ms Leticia receives royalties but is unhappy with the royalty percentage in her contract, feeling she should receive more given the success of the book. She is also aware her friend, Henry Neilson, has recently signed a publishing deal with Tundra Publishing, a company with a great reputation for marketing thriller and suspense books in electronic formats.

⁷²¹ See above n 265.

Imposing a statutory time limit in this situation of (for example) 25 years would give Ms Leticia multiple options. First, she could renegotiate her contract with Publishing House for the post-twenty-five-year period. She would be in a much better bargaining position than when she signed the initial contract due to the subsequent success of the book, enabling her to potentially negotiate better royalty rates and a dedicated reversion clause for audiobook and other ‘new format’ rights after two years. Alternatively, she could regain the rights to *Kaya: Killer in Plain Sight* and negotiate a new deal with Tundra Publishing, again demanding higher royalty rates than she had with Publishing House. She could also decide she wants to stop using a publisher entirely and publish *Kaya: Killer In Plain Sight* using Kindle Direct Publishing, where her royalty rates could be up to 70%.⁷²²

An ancillary benefit of time limits is that they can open up new opportunities for works which may not be as successful (e.g. most mid-list books which are not allocated a large marketing budget).⁷²³ These works may be selling enough to not activate a use-it-or-lose-it threshold, but authors may still benefit in being able to regain the rights to pursue new opportunities if market demand is just not there for them. Time limits also give publishers opportunities to evaluate whether they want to continue holding rights: if so, they will need to renegotiate with the authors, which they may be unwilling to do if they do not consider it profitable to do so.

For these reasons, time limits should be implemented alongside use-it-or-lose-it reversion clauses in copyright legislation in Australia and other common law countries.

B. Determining effective time limits

Having established that time limits can help better achieve copyright’s incentive and rewards goals, we can explore how they should be implemented. First, we must distinguish between overarching time limits and sector-specific time limits. Overarching time limits are applicable to all copyright assignments and licences. Examples discussed in this thesis include the US termination right, the British Imperial reversion right, and the proposed 25-year South African time limit.

Because the focus of this thesis is the trade book publishing industry, it is beyond scope to assess a) whether an overarching time limit is appropriate for Australia and other common law countries; and b) what that time limit should be. While academics like Kretschmer, Litman,

⁷²² ‘eBook Royalty Options’, Kindle Direct Publishing (Web Page) <https://kdp.amazon.com/en_US/help/topic/G200644210>.

⁷²³ See above n 676.

and Giblin have recommended overarching time limits of ten, fifteen, and twenty-five years respectively,⁷²⁴ further research needs to be done into the implications of such time limits across different creative industries. Failing to do so may result in time limits that have negligible or negative impacts on specific creative industries.⁷²⁵ For example, our US termination right study suggested that a one-size-fits-all approach may not benefit all industries equally, given very few literary authors exercised their termination rights formally.⁷²⁶

I am, however, able to comment on imposing time limits in relation to trade publishing contracts in Australia. For the trade book industry, most books end their commercial life within just a few years. As referred to earlier, the Australian Bureau of Statistics' have found that 'literary works provide returns for between 1.4 and 5 years on average.'⁷²⁷ Economic research suggests publishers are not generally incentivised to invest in works by the prospect of holding rights beyond 25 years.⁷²⁸ On this basis, we can hypothesise a time limit of between five years and 25 years would be appropriate for the trade book industry in Australia in light of copyright's incentive goals, after which rights should return to authors for further use by renegotiating publishing agreements, self-publishing, or direct licensing to libraries.

Economic modelling of an optimal time period in the trade book industry is also beyond the scope of this thesis, but evidence from elsewhere in the world is worth investigating for adoption in Australia and other common law countries. Several countries impose time limits on publishing contracts where those contracts fail to do so. However, Spain imposes mandatory time limits on publishing contracts of ten years for lump sum contracts and 15 years 'after the author has placed the publisher in a position to perform the reproduction of the work.'⁷²⁹ (for all other contracts). Italy also limits publishing contracts to a maximum of twenty years, although this does not apply to a range of works like 'encyclopedias, dictionaries; sketches, drawings, cartoons, illustrations, photographs and the like, for industrial use; cartographical works; dramatic-musical and symphonic works.'⁷³⁰ Spain and Italy are the only countries I located with mandatory time limits specifically on publishing contracts (as of March 2019). The fifteen or twenty-year periods would appear to give authors adequate time to determine

⁷²⁴ Kretschmer 2012 (n 141), 46-48; Litman 2010 (n 108), 48 (reducing the termination right period in the US); Giblin 2018 (n 34), 396-398.

⁷²⁵ A time limit may be too short to adequately reflect the effort and resources put into preparing and marketing creative works, thus disincentivising publishers from making those investments.

⁷²⁶ See **Chapter V**.

⁷²⁷ See above n 249.

⁷²⁸ Giblin 2018 (n 34), 374-377.

⁷²⁹ Spain, art 69(3), (4).

⁷³⁰ Italy, art 122(5).

the value of their books to the market. It would be beneficial for scholars familiar with the copyright regimes in these countries to undertake further research into the use and impacts of this provision on their respective publishing industries, so that policymakers in Australia and other common law countries can assess whether these are measures worth implementing.

Under the Spanish and Italian models, it appears rights automatically revert to authors at the conclusion of the time limits if the contracts do not specify an earlier time.⁷³¹ This is beneficial because it can bypass the issues that arise when authors have to file to terminate after a time limit, like the fear of being blacklisted by other members of the publishing industry⁷³² or the difficulty of complying with complicated statutory formalities.⁷³³ It would be important to ensure authors and publishers are aware of automatic reversion to prevent situations where publishers are using rights without a licence (intentionally or otherwise) or works stay dormant because authors do not know the rights have reverted to them. To counteract this, there should be widespread dissemination of information about author rights through popular communication channels and membership lists of author associations. Legislative requirements for copyright transfers to be registered would also enable authors and publishers to know when rights are scheduled to revert.⁷³⁴ Where works remain unexploited due to a lack of knowledge by authors, or the refusal of estates to re-publish them, the works may remain unavailable, which restricts the public's access to culture. To address this issue, Giblin suggests instituting an 'author's domain' whereby 'abandoned works' would come under the control of a 'cultural steward' responsible for exploiting works and directing income to 'support authorship through the provision of prizes, grants and fellowships.'⁷³⁵

As with use-it-or-lose-it rights, time limits should be developed in consultation with industry stakeholders to ensure they are appropriate for the industries and jurisdictions to which they apply.

⁷³¹ Furgal notes that in the EU, only the Spanish time limit on 'publishing contracts results in termination': Furgal 2021, 287. The Spanish provision indicates the contract will *end* after 15 years, while the Italian provision only stipulates a time limit of 20 years: Italy, art 122(5). My interpretation of both is that following these periods, rights will revert to the authors, as these are the maximum periods for which the rightsholders will retain the rights and no other parties will have them. However, I acknowledge Italian legal scholars are better placed to interpret the legislation.

⁷³² See above n 279.

⁷³³ See e.g., Yuvaraj et al 2021 (n 298), 35.

⁷³⁴ See e.g., Giblin 2018 (n 34), 400.

⁷³⁵ Giblin 2018 (n 34), 401-403.

C. Conclusion on time limits

Time limits play a distinct role in helping to achieve copyright's incentive and reward goals relative to use-it-or-lose-it clauses. Time limits enable renegotiation, or the pursuit of new exploitation models, when authors can better assess the value of their work. They also give publishers opportunities to evaluate whether they want to retain rights by requiring them to renegotiate to hold rights beyond the relevant time limits. Developing overarching time limits applicable to all copyright assignments and licences is possible but requires further research and consultation that is beyond the scope of this thesis. For the trade book industry in Australia and other common law countries, the Spanish and Italian models of 15 and 20-year time limits on publishing contracts appear to be reasonable models that can better further copyright's goals. Further investigation into the use and impacts of these time limits is warranted.

IV. REVERSION IN OTHER SITUATIONS

This Chapter did not focus on situations in which publishers have gone out of business or transferred their business/contracts to third parties, even though reversion is also called-for in those situations. In this Chapter, I was predominantly concerned with situations in which authors engage with publishers only to regain their rights, rather than receivers/administrators or purchasers of a publisher's business.

However, further research into the application of reversion in those types of situations (different models of which have been highlighted in *Are Contracts Enough?* and **Chapter IV-V**), are warranted because these rights are important. Without such legal entitlements, authors may not be able to regain their rights in situations where publishers purchase other publishers and continue selling the books of those authors without paying them royalties. This can be seen in the US, where novelist Alan Dean Foster – author of novelisations of *Star Wars* and the *Alien* movie series – claimed that he had not been paid royalties ‘despite the books still being in print’.⁷³⁶ In Foster's case, the Science Fiction Writers Association ‘claimed that Disney had argued that it had purchased the rights, but not the obligations of the contract’.⁷³⁷ Foster appears to have settled his dispute with Disney.⁷³⁸ However, the dispute has been followed by the

⁷³⁶ Alison Flood, ‘DisneyMustPay: authors form task force to fight for missing payments’, *The Guardian* (online, 29 April 2021) <<https://www.theguardian.com/books/2021/apr/28/disneymustpay-authors-form-task-force-missing-payments-star-wars-alien-buffy>>.

⁷³⁷ Ibid.

⁷³⁸ Ibid. For information about the purported settlement see e.g. Michael East, ‘Disney and Star Wars author Alan Dean Foster appear to settle royalty dispute’, *Fansided* (Blog Post, 24 April 2021) <<https://winteriscoming.net/2021/04/23/disney-star-wars-author-alan-dean-foster-settle-royalty-dispute/>>.

formation of the ‘DisneyMustPay Joint Task Force’, comprising authors and various author organisations claiming unpaid royalties from Disney.⁷³⁹ The works affected to date include *Indiana Jones*, *Buffy*, and *SpiderMan*.⁷⁴⁰ At least one other situation, involving a comic about *Buffy*, allegedly involved Disney not paying royalties following the purchase of a company: Disney bought 20th Century Fox, took the rights away from the initial licensee (Dark Horse) and gave them to another licensee (Boom! Comics).⁷⁴¹ According to the author, the latter advised them “‘royalties don’t transfer’”.⁷⁴²

Disney has begun settling with various authors including Foster,⁷⁴³ which is a positive sign. However, if there was a transfer-related statutory reversion right enabling authors to rescind or terminate their contracts, authors like Foster may have been able to regain their rights and resell them upon sale of their publishers (or their contracts) to Disney, without having to go through the stress of public appeals and settlement negotiations.⁷⁴⁴ In the case of novelisations of enduring series like *Star Wars*, Foster could have resold the rights to capitalise on projected new interest in the series from the sequel movie trilogy⁷⁴⁵ and ongoing television series.⁷⁴⁶ However, developing transfer and liquidation reversion provisions requires in-depth engagement with the laws regulating bankruptcy and business sales and purchases in each domestic jurisdiction, which is beyond the scope of this thesis.

This Chapter also does not focus on reversion in the event of a royalty-related infraction, like failing to provide adequate royalty statements. These are also important because they ensure authors are provided with sufficient information about the performance of their books that will enable them to assess whether they should exercise statutory or contractual reversion rights. The Disney dispute also involves authors accusing Disney of failing to provide them with royalty statements, which such provisions would address.⁷⁴⁷ Again, however, this is outside the scope of the thesis.

⁷³⁹ Flood 2021 (n 736); ‘Are You Owed Money?’, *WritersMustBePaid.org* (Web Page) <<https://www.writersmustbepaid.org/>>.

⁷⁴⁰ ‘Are You Owed Money?’, *WritersMustBePaid.org*? <<https://www.writersmustbepaid.org/>>.

⁷⁴¹ Flood 2021 (n 736).

⁷⁴² *Ibid*.

⁷⁴³ Graeme McMillan, ‘Star Wars’ Authors Claim Disney Royalties “Fall Through the Cracks”, *The Hollywood Reporter* (online, 11 May 2021) <<https://www.hollywoodreporter.com/business/business-news/star-wars-author-royalties-disney-1234951422/>>.

⁷⁴⁴ See McMillan 2021 (n 743) for extracts from Foster’s open letter to Disney.

⁷⁴⁵ *Star Wars: The Force Awakens* (Walt Disney Studios Motion Pictures, 2015); *Star Wars: The Last Jedi* (Walt Disney Studios Motion Pictures, 2017); *Star Wars: The Rise of Skywalker* (Walt Disney Studios Motion Pictures, 2019).

⁷⁴⁶ ‘Season 7’, *Star Wars: The Clone Wars* (Disney+, 2020); *The Mandalorian* (Disney+, 2019-present).

⁷⁴⁷ Flood 2021 (n 736); McMillan 2021 (n 743).

V. CONCLUSION

Both use-it-or-lose-it rights and time limits can help better achieve copyright's incentive and rewards goals. Use-it-or-lose-it rights address situations in which it is clear rightsholders are no longer able or willing to exploit the rights granted to them. They should be accompanied by regulations on inadequate exploitation (in the trade book industry, these may be books going out of print or language rights not being used).

Meanwhile, time limits fulfil different functions to use-it-or-lose-it rights and bestseller clauses. They enable authors to renegotiate their copyright grants, or pursue new exploitation opportunities, when the value of their work is better-known, independently of how their publishers have used the rights or how their work has performed in the market. Developing overarching time limits is difficult: sector-specific time limits better address copyright's goals in light of the specific features of creative markets. The Spanish and Italian time limits may be reasonable models to consider applying to trade publishing contracts in light of present knowledge about the value of books and copyright's incentive and reward goals. However, further evidence is needed about how these limits have worked in practice.

For both use-it-or-lose-it rights and time limits, policymakers should consult with industry stakeholders like publishers, authors, and representative organisations to ensure these provisions and their accompanying regulations address the interests of all parties in the best way possible, given the important roles they all play in different creative ecosystems.

VIII. CONTRACTING OUT AND EXCEPTIONS TO REVERSION RIGHTS

I. INTRODUCTION

In **Chapter VII**, I set out how use-it-or-lose-it rights and time limits can help better achieve copyright's incentive and rewards goals, with specific applications in the trade book industry in Australia and other common law countries. Foundational to the achievement of those goals is that these rights are inalienable: that is, publishers and other rightsholders should not generally be permitted to contract out of or around reversion rights except in limited circumstances.

In this Chapter I examine how allowing rightsholders to contract out of the application of statutory reversion rights stymies the public policy behind these rights. I do so first by exploring what happens when rightsholders have been permitted to contract out of the application of statutory reversion rights in the UK and US. I then refer to Australia's approach to contractual provisions that contravene public policy as a justification for not upholding provisions that derogate from statutory reversion rights.⁷⁴⁸ I then identify situations in which it may be appropriate for reversion rights not to apply.

⁷⁴⁸ Cf. the debate about whether parties can contract out of provisions that allow copyright infringement for the public good, e.g. fair dealing or study exceptions: see e.g. Lindsay 2002 (n 347), 40-41; Adrian Aronsson-Storrier, Submission to the Australian Department of Communication and the Arts, *Copyright Modernisation Consultation: Contracting Out Of Copyright Exceptions* (3 July 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3211946>; Matulionyte 2019 (n 263), 693; Estelle Derclaye and Marcella Favale, 'Copyright and Contract Law: Regulating User Contracts: The State of the Art and a Research Agenda' (2010) 18(1) *Journal of Intellectual Property Law* 65, 68-71.

II. CASE STUDIES: WHAT HAPPENS WHEN CONTRACTING OUT IS ALLOWED

A. Case Study #1: statutory reversion rights in the UK

Under s 11 of the original copyright statute in Britain, the *Statute of Anne* (1710), copyright lasted for two 14-year terms.⁷⁴⁹ Under this system, authors would have a second term of exclusive rights in their works if they were alive to capitalise on it. It is not expressly clear why this system was introduced, but Bently and Ginsburg's review of the literature and historical sources concludes the second term was introduced to protect authors.⁷⁵⁰ While most of the sources Bently and Ginsburg survey are not clear on the precise benefit intended for authors to receive, Harry Ransom noted the two-term system would give enough time for the value of works to be determined, after which the author could decide to 'improve its usefulness by revision...quietly forget it...[or] If its value had grown meanwhile...sell the copyright a second time.'⁷⁵¹ Thus, authors would be granted a second opportunity to renegotiate the publication rights for their works 'in the event of a work selling well' and procuring 'additional remuneration beyond the lump sum paid by the bookseller for the right to publish the work'.⁷⁵² This coheres with the intended benefits of time limits as outlined in **Chapter VII**.⁷⁵³

Bently and Ginsburg then examined both the development of case law and contractual practice between authors and publishers from the years after the implementation of the Statute of Anne to determine whether the second term of 14 years was assignable by authors in the first instance. If so, this would mean publishers could essentially bypass the author-protective intention of the second term.

1. Case law on whether the Statute of Anne's second term was assignable

Bently and Ginsburg found judges preferred to consider the second term assignable by contract, although determining this from the judgments was not a straightforward exercise. The initial judgment on the assignability of the second term, *Millar & Dodsley v Taylor* (involving a poem by Edward Young, *The Complaint or Night-Thoughts on Life, Death and Immortality*) concerned attempts by the publishers to stop the defendants, Donaldson and Taylor (a publisher

⁷⁴⁹ *Statute of Anne*, s 11.

⁷⁵⁰ Bently and Ginsburg 2010 (n 23), 1482-1487.

⁷⁵¹ Ibid 1486, citing Harry Hunt Ransom, *The first copyright statute; an essay on An act for the encouragement of learning*, 1710 (Austin, University of Texas Press, 1956), 97, 104.

⁷⁵² Bently and Ginsburg 2010 (n 23), 1492.

⁷⁵³ See generally **Chapter VII**(III)(A).

and bookseller respectively) from continuing to ‘reprint...[and] sell...the book.’⁷⁵⁴ Taylor sought to argue that the publishers did not have ‘the right...to object’, but that it would have to be the author who brought any such action as the first 14-year term had expired and rights reverted to the author after that term.⁷⁵⁵ However, the Court granted an injunction in favour of the publishers Millar and Dodsley on the basis that Dodsley earlier bought ‘the sole right of Printing’ and Millar ‘all that the said Edward Young’s sole right and property in and to’ a ‘second volume of the work “forever”’.⁷⁵⁶ To that end, it appears the Court considered the second term could be assigned by contract before the 14-year mark expired.⁷⁵⁷

The second, and final, substantive judgment on this issue was *Carnan v Bowles* in 1786 (involving Daniel Paterson’s compilation *A New and Accurate Description of All the Direct and Principal Cross-roads in Great Britain*).⁷⁵⁸ The initial grant of copyright involved an outright assignment of ‘copy title interests and Property’ in the work and ‘the sole right of printing publishing and vending the same’.⁷⁵⁹ Before the end of the first 14-year term, Paterson agreed a publishing deal with Carrington Bowles, which subsequently led to the republication of a second edition of the book.⁷⁶⁰ Carnan sued on the basis that Bowles’ publication of the book ‘infringed Carnan’s right’, but Paterson and Bowles argued the assignment to Carnan was only for the first 14 years.⁷⁶¹ The Court appeared to find in favour of Carnan, on the basis that the wording indicated Paterson meant to transfer the whole right: ‘if he had meant to convey his first term only, he should have said so.’⁷⁶² Bently and Ginsburg note there does not appear to have been a ‘final injunction’, following uncertainty about the extent to which the books published by Carnan and Bowles were different works or the same work.⁷⁶³ Various interpretations of the Court’s opinion on assignability of reversion under s 11 of the Statute of Anne are possible, but in any case it appears the case law tended to allow assignments of the second term in cases of overarching assignments of copyright.⁷⁶⁴

⁷⁵⁴ Bently and Ginsburg 2010 (n 23), 1518.

⁷⁵⁵ Ibid 1519-1520.

⁷⁵⁶ Ibid 1520.

⁷⁵⁷ Ibid 1520-1521.

⁷⁵⁸ Ibid 1527. At 1527, Bently and Ginsburg (n 23) also discuss less influential decisions.

⁷⁵⁹ Bently and Ginsburg 2010 (n 23), 1527-1528.

⁷⁶⁰ Ibid 1528.

⁷⁶¹ Ibid 1528-1529.

⁷⁶² Ibid 1531, quoting Lord Kenyon.

⁷⁶³ Ibid 1531.

⁷⁶⁴ Ibid 1532-1535.

2. Contractual practice regarding the second term under the Statute of Anne

Bently and Ginsburg also reviewed various historical documents, including author-publisher contracts, to assess (among other things) how authors and publishers dealt with the second term under the Statute of Anne. They found various different words were used to assign copyright, including ‘title’, ‘interest’, ‘right’, and ‘property’: it was not clear which words courts would have accepted as indicating an overarching assignment of copyright that was effective to assign the second term.⁷⁶⁵ Contracts also involved grants ‘for ever’ or failed to specify their duration.⁷⁶⁶ Bently and Ginsburg do not comment on whether this would have been effective to assign the second term, but based on the two cases above it appears they would have if the words clearly indicated it was a one-time sale of copyright. One-time sales appeared common: ‘while the contingent reversion was designed to protect authors, many authors of the time expressed a preference for outright assignments over other forms of exploitation.’⁷⁶⁷

More specifically, some contracts expressly attempted to derogate from ‘any statutory provision to the contrary’.⁷⁶⁸ This would have likely been a direct response to the reversionary effect of the second term. As Bently and Ginsburg noted in relation to one example, ‘the only law that might have been conceived as “to the Contrary” was section 11 of the Statute of Anne.’⁷⁶⁹ Such provisions do not appear to have been tested in court, so it is not clear whether they would have been enforceable.⁷⁷⁰

Another method of attempting to bypass the reversion of rights to authors after 14 years was to expressly assign both the initial and subsequent terms to the publisher in the same contract.⁷⁷¹ Bently and Ginsburg found this in only three contracts prior to 1774, and in some post-1780 contracts.⁷⁷² They note these clauses ‘recognized that there were doubts over an author’s ability to convey the reversionary term and included language that attempted nevertheless to secure such assignment.’⁷⁷³

⁷⁶⁵ Bently and Ginsburg 2010 (n 23), 1502-1504.

⁷⁶⁶ Ibid 1504.

⁷⁶⁷ Ibid 1541.

⁷⁶⁸ Ibid 1505-1506.

⁷⁶⁹ Ibid 1506.

⁷⁷⁰ Ibid 1506.

⁷⁷¹ Ibid 1506-1508.

⁷⁷² Ibid 1508.

⁷⁷³ Ibid 1508.

Overall, the court cases testing the assignability of the reversion right and author-publisher contracts from the 18th century both suggest publishers were aware of, and in some cases sought to negate, the author-protective intentions of s 11 of the Statute of Anne.⁷⁷⁴

3. Arguments about contracting out persisted into the Imperial reversion provision era

The British Parliament may have been influenced by the need to protect authors from contracting out of reversion rights when drafting the 1911 Imperial Copyright Act. Under that Act, reversion of rights to the author's estate takes place automatically 25 years after their death, with the legislation expressly specifying this was the case 'notwithstanding any agreement to the contrary'.⁷⁷⁵ It even specifies 'any agreement entered into by [the author]...as to the disposition of such reversionary interest shall be null and void'.⁷⁷⁶ This suggests Parliament was concerned that an author may be pressured to unwittingly assign the reversionary term to a publisher (in light of concerns about unequal bargaining power), thus depriving their estate (the author's heirs) of the intended benefits of the reversion.

However, when the Imperial reversion provision was removed in the UK and New Zealand, transitional provisions preserving its application to pre-repeal assignments (before 1957 and 1963 respectively) failed to include similar protections against contracting out. In those countries, authors *are* permitted to assign the reversionary period (occurring 25 years after their death) during their lifetimes.⁷⁷⁷ This means the legacy application of the reversion provision, like in the *Solomon Linda* or *Redwood* cases, may be thwarted if publishers could show the author assigned the reversionary interest during their lifetime. As an example of this kind of situation, the High Court of Justice in *Novello & Co Ltd v Keith Prowse Music Publishing Company Limited* found a 1973 assignment of the reversionary interest by the author to be valid.⁷⁷⁸ This situation would not have occurred in Australia or Canada, where assignments of the reversionary interest by authors during their lifetimes are not permitted.⁷⁷⁹

⁷⁷⁴ Note it is not clear whether all attempts to contract out of the second term reversion (by assigning the second term to publishers) would have been effective: Bently and Ginsburg 2010 (n 23), 1535.

⁷⁷⁵ *Copyright Act 1911* (UK), s 5(2).

⁷⁷⁶ *Ibid.*

⁷⁷⁷ *Copyright, Designs, and Patents Act 1988* (UK), Schedule 1, s 27(2); *Copyright Act 1994* (NZ), Schedule 1, Part 1, s 38(1)(3).

⁷⁷⁸ *Novello & Co Ltd v Keith Prowse Music Publishing Company Limited* [2004] EWHC 766 (Ch), [12], [23]-[26], in relation to the UK law. The decision was upheld in *Novello and Co Ltd v Keith Prowse Music Publishing Co Ltd* [2004] EWCA Civ 1776.

⁷⁷⁹ *Copyright Act 1968* (Australia), s 239(4)(c): 'any agreement entered into by the author as to the disposition of that reversionary interest is of no force or effect'; *Copyright Act 1985 RSC c C-42*, s 14(1) 'any agreement entered into by the author as to the disposition of such reversionary interest is void.' A full analysis of the parliamentary documents leading up to the implementation of the relevant copyright legislation in Australia, NZ, Canada, and the UK would be needed to establish why there were two approaches taken. Though beyond the scope of this

B. Case Study #2: the US Copyright system

1. Contracting out of the two-term system under the *Copyright Act of 1909*

Rightsholders in the US have also sought to derogate from reversion rights via contracts. Under the *Copyright Act of 1909* in the US (**‘1909 Act’**),⁷⁸⁰ copyright lasted for one 28-year term which authors could then renew for a further 28 years.⁷⁸¹ The renewal term vested in ‘the author, if living, or a set of statutorily designated beneficiaries.’⁷⁸² This was intended to counter the situation where:

...an author sells his copyright outright to a publisher for a comparatively small sum...If the work proves to be a great success and lives beyond the term of twenty-eight years, [the] committee felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right.⁷⁸³

In other words, the intention was for creators or their estates to have the chance of additional benefit from the copyright’s second term, something that would be especially useful if they had sold the copyright initially for very little and/or if the work subsequently sold very well. Creators or estates would be in a better bargaining position to exploit this success 28 years after their initial assignments, because the value of the works would be much better-known at that point. This is consistent with our understanding of the intentions behind the two-term system in s 11 of the Statute of Anne.

However, the 1909 Act did not specify whether authors could alienate the renewal term.⁷⁸⁴ In 1943, the US Supreme Court found it was valid for authors to assign the second 28-year term during the first term (by extension, this covers agreements made to assign both terms at the initial stage).⁷⁸⁵ Justice Frankfurter dismissed the notion that creators should be legislatively protected from doing so because they could not be trusted to negotiate appropriate publishing arrangements for themselves:

We are asked to recognize that authors are congenitally irresponsible, that frequently they are so sorely pressed for funds that they are willing to sell their work for a mere pittance, and

thesis, such research would be a welcome addition to the research conducted in this thesis. My hypothesis is that the Canadian and Australian legislatures sought to protect author estates by ensuring rights would revert to them, however the authors tried to assign their reversionary interests during their lifetimes.

⁷⁸⁰ (Pub L 60-349, 35 Stat 1075).

⁷⁸¹ *Copyright Act of 1909*, § 23; see also Bently and Ginsburg 2010 (n 23), 1560.

⁷⁸² Loren 2010 (n 291), 1343.

⁷⁸³ Ibid 1344, referring to HR Rep No 2222, 60th Cong, 2d Sess. 14 (1909).

⁷⁸⁴ Bently and Ginsburg 2010 (n 23), 1560.

⁷⁸⁵ *Fred Fisher Music Co Inc, et al v M Witmark & Sons* 318 US 643 (1943) [4], [20]-[22].

therefore assignments made by them should not be upheld We cannot draw a principle of law from the familiar stories of garret poverty of some men of literary genius We do not have such assured knowledge about authorship ... or the psychology of gifted writers and composers, as to justify us as judges in importing into Congressional legislation a denial to authors of the freedom to dispose of their property possessed by others. While authors may have habits making for intermittent want, they may have no less a spirit of independence which would resent treatment of them as wards under guardianship of the law.⁷⁸⁶

This decision ‘validated’ situations where publishers would insist that authors sign over both the initial and renewal terms when negotiating initial rights deals.⁷⁸⁷ Thus, the Court thwarted the creator-protective intentions of the two-term renewal system by sanctioning the ability of rightsholders to seek assignments, at the initial stage of their negotiations with authors, of both the initial *and* renewal terms.⁷⁸⁸ As the Copyright Office commented in 1961, ‘the primary purpose of the reversionary interest would seem to require that the renewal interest be made unassignable in advance.’⁷⁸⁹ However, the court’s decision negated the ability of creators to negotiate a better deal when the renewal term came into effect.⁷⁹⁰ Justice Frankfurter mischaracterised the problem faced by authors which Congress sought to address through the second term: it is that authors are often in unequal bargaining positions relative to publishers or other rightsholders, and that they lack information about the value of the work, not that they are ‘congenitally irresponsible’. In fact, the ‘responsible’ decision for many authors may be to sell their copyright for very little because they are in precarious financial circumstances and the value of their works is unknown at the time of initial assignment. However, the *Fred Fisher* court wrongly saw it as an excessive adjustment in response to irrational behaviour by authors, without considering the market circumstances leading authors to make such assignments. In

⁷⁸⁶ Bently and Ginsburg 2010 (n 23), 1562, citing *Fred Fisher Music Co v M Witmark & Sons* (1943) 318 US 643, 656.

⁷⁸⁷ Bently and Ginsburg 2010 (n 23), 1563.

⁷⁸⁸ Loren 2010 (n 291), 1344; Patrick Murray, ‘Heroes-for-Hire: The Kryptonite to Termination Rights under the Copyright Act of 1976’ (2013) 23(2) *Seton Hall Journal of Sports and Entertainment Law* 411, 420; see also Virginia E Lohmann, ‘The Errant Evolution of Termination of Transfer Rights and the Derivative Works Exception’ (1987) 48 *Ohio State Law Journal* 897, 900-901.

⁷⁸⁹ STAFF OF H. COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 53-54 (Comm. Print 1961), cited in Peter S Menell and David Nimmer, ‘Judicial Resistance to Copyright Law’s Inalienable Right to Terminate Transfers’ (2010) 33(2) *Columbia Journal of Law & The Arts* 227, 229 (**‘Menell and Nimmer 2010a’**).

⁷⁹⁰ Adam R Blankenheimer, ‘Of Rights and Men: The Re-Alienability of Termination of Transfer Rights in *Penguin Group v. Steinbeck*’ (2009) 24 *Berkeley Technology Law Journal* 321, 325-326.

fact, the *Fred Fisher* decision allowed situations in which both terms were assigned at the same time and ‘no separate consideration [was given by the publisher] for the latter [term]’.⁷⁹¹

2. Inalienability of the termination rights under the *Copyright Act of 1976*, 17 USC §§ 203 and 304

Congress sought to address this issue in the 1976 Act by making the termination rights under §§ 203 and 304 inalienable.⁷⁹² These sections prohibit ‘agreement[s] to the contrary’:

Termination of the grant may be effected *notwithstanding any agreement to the contrary*, including an agreement to make a will or to make any future grant [emphasis added].⁷⁹³

Unlike the Imperial reversion right’s prohibition on contracting out, however, there is still some confusion in US law about what constitutes an ‘agreement to the contrary’ under these provisions. Circuit courts are split on this point.⁷⁹⁴ In some cases, publishers have, with court approval, effectively stymied attempts by authors to exercise termination rights under § 304 by referring to subsequent agreements they arranged with the authors, which they argue prevent authors from exercising the termination right (because the initial agreements they seek to terminate have been replaced).⁷⁹⁵ However, some courts may consider these to be ‘agreements to the contrary’.⁷⁹⁶ There is no clear consensus on this point, which may be detrimental to authors if they have to factor in the potential their termination notices may be challenged. This ‘make[s] the challenges at hand immeasurably and unnecessarily more difficult and hence more costly for all stakeholders.’⁷⁹⁷

Scholars are generally critical of court decisions that allow this form of contracting out, although there are exceptions. Blankenheimer and Menell and Nimmer have argued that decisions upholding the contracting out effect of subsequent agreements disinherit statutory

⁷⁹¹ Bently and Ginsburg 2010 (n 23), 1563.

⁷⁹² Menell and Nimmer 2010a (n 789), 229.

⁷⁹³ *Copyright Act of 1976*, 17 USC §§ 203(a)(5), 304(c)(5).

⁷⁹⁴ See generally Allison M Scott, ‘Oh Bother: Milne, Steinbeck, and an Emerging Circuit Split Over the Alienability of Copyright Termination Rights’ (2007) 14(2) *Journal of Intellectual Property Law* 357, 368-369, 380-382.

⁷⁹⁵ See e.g. *Penguin Group (USA) Inc. v. Steinbeck* 537 F 3d 193 (2d Cir, 2008); *Milne v Stephen Slesinger, Inc.* 430 F 3d 1036 (9th Cir, 2005).

⁷⁹⁶ See e.g. *Classic Media Inc v Mewborn* 532 F 3d 978 (9th Cir, 2008); see also *Marvel Characters Inc. v. Simon* 310 F 3d 280 (2d Cir, 2002).

⁷⁹⁷ Roxanne E Christ, ‘*Milne v Slesinger*: The Supreme Court Refuses to Review the Ninth Circuit’s Limits on the Rights of Authors and their Heirs to Reclaim Transferred Copyrights’ (2007) 14(1) *UCLA Law Review* 33, 45.

heirs of termination rights that would otherwise be theirs.⁷⁹⁸ Menell and Nimmer also argue that the reasoning in one case ‘directly negates the plain language and intent of the statute’.⁷⁹⁹

The Milne and Steinbeck decisions undermine the provisions of the Copyright Act that guarantee the right of reversion to authors and statutorily designated successors. In so doing, they disrupt the overall statutory scheme, block authors' statutory successors from realizing their congressionally mandated interests, and cast clouds of uncertainty and confusion over the ownership of many valuable copyrights. Congress could not have more clearly manifested its intent that authors and their families should enjoy inalienable rights to terminate transfer and reclaim augmented terms of copyright protection; the Ninth and Second Circuit's interpretations could not have more patently undermined those guarantees.⁸⁰⁰

On the other hand, Michael Bales (then Notes Editor at the *Cardozo Arts & Entertainment Law Journal*) suggests courts could uphold subsequent agreements which effectively bypass termination rights if they could be satisfied that the authors/heirs executing the subsequent agreements received as consideration the equivalent ‘market value of the termination right’ as a result of those agreements.⁸⁰¹ To ensure this does not result in a situation where authors are forced to lose their termination rights, as with the 1909 Act’s renewal periods, Bales proposes a ‘four-prong balancing test to assist in determining whether an agreement by the author or heirs, which purports to extinguish a termination right, effectively acts as an exercise of the termination right.’⁸⁰²

1. ‘Intent’: did the parties intend for the termination right to be extinguished? If not, the agreement would not be valid;⁸⁰³
2. ‘Vesting’: had ‘the termination right...vested at the time of [the] agreement which claims to eliminate the right’?⁸⁰⁴ If it has not vested yet then the parties cannot agree for it to be extinguished; but if it has vested, ‘the person holding that right is in a better position to use it as a bargaining chip.’⁸⁰⁵

⁷⁹⁸ Blankenheimer 2009 (n 790), 338; Menell and Nimmer 2010a (n 789), 233.

⁷⁹⁹ Menell and Nimmer 2010a (n 789), 233; see also Loren 2010 (n 291), 1371; Scott 2007 (n 794), 388.

⁸⁰⁰ Peter S Menell and David Nimmer, ‘Pooh-Poohing Copyright Law’s ‘Inalienable’ Termination Rights’ (2010) 57 *Journal of the Copyright Society* 799, 857 (‘**Menell and Nimmer 2010b**’).

⁸⁰¹ Michael J Bales, ‘The Grapes of Wrathful Heirs: Terminations of Transfers of Copyright and “Agreements to the Contrary”’ (2010) 27 *Cardozo Arts & Entertainment Law Journal* 663, 679.

⁸⁰² Ibid 680.

⁸⁰³ Ibid 681.

⁸⁰⁴ Ibid 681-682.

⁸⁰⁵ Ibid 682; see also generally Michael A DeLisa, ‘The Right of Termination in Copyright Law: The Second Circuit’s Decision in *Penguin Group (USA) Inc. v. Steinbeck Bodes Well for Authors*’ (2009) 43 *Loyola of Los Angeles Law Review* 273.

3. ‘Sophistication’: was there negotiation and legal advice prior to the agreement being prepared or executed?⁸⁰⁶ In other words, courts should scrutinise agreements where it appears the negotiations, resources and available information were weighted in favour of the assignee;
4. ‘Results’: was there adequate compensation for the author or their heirs?⁸⁰⁷ More lucrative agreements for authors are less likely to be invalidated as agreements to the contrary, the key being whether ‘the termination right has been effectively leveraged.’⁸⁰⁸

However, this approach requires a case-by-case analysis at court level, which requires authors to be willing to take their disputes to litigation (which they may be reticent to do because they do not have adequate financial resources to sustain litigation or they fear the reputational damage of being associated with a legal challenge against a publisher). Thus, I consider arguments against agreements that bypass the termination right to be more consistent with the plain meaning of ‘agreement to the contrary’ and the public policy intentions of the termination rights, in line with *Blankenheimer*, *Menell* and *Nimmer*. Despite this, there will be uncertainty on the effect of these agreements until either the Supreme Court rules on the matter or Congress passes a clarifying amendment to the Copyright Act.

D. Contracting out of reversion rights from another jurisdiction: the limits of domestic policymaking

1. The *Duran Duran* case: preventing authors in one jurisdiction from exercising termination rights in another

Controversies related to contracting out can also be seen in the *Duran Duran* case from 2016, where a rightsholder sued the members of the popular music group Duran Duran in the UK to stop them exercising their US termination rights in respect of the US copyright they assigned to the rightsholder. A full discussion of how copyright interacts with the conflict of laws and reversion rights is beyond the scope of this thesis.⁸⁰⁹ Given the increasing consolidation of book publishers and the propensity for contracts to involve grants of rights across many

⁸⁰⁶ Bales (n 801), 683.

⁸⁰⁷ Ibid 684.

⁸⁰⁸ Ibid 685.

⁸⁰⁹ For further information, see Richard Arnold and Jane C Ginsburg, ‘Foreign Contracts and U.S. Copyright Termination Rights: What Law Applies?’ (2020) 43 *Columbia Journal of Law & The Arts* 437, 446-452; see also LexisNexis, *Nimmer on Copyright* (online at 27 August 2021) 17 ‘§ 17.05 Conflicts of Copyright Law: Domestic Considerations’).

territories, further research in this area would be beneficial.⁸¹⁰ However, it is pertinent to address the main issues here, as they relate to a rightsholder attempting to bypass a reversion right.

In *Duran Duran*, the band members initially assigned their worldwide copyright to Gloucester Place (**‘Gloucester’**), then known as Tritec Music, in 1980.⁸¹¹ In 2014, the band members sought to exercise their US termination right in respect of songs they had written during the term of their contracts with Tritec.⁸¹² Gloucester subsequently filed proceedings in the High Court. It sought a declaration that ‘the exercise of such termination rights was a breach of the Duran Duran music publishing agreements by derogating from the agreements’ otherwise broad grant of copyrights for the full terms thereof.’⁸¹³ Those agreements specified that English law applied.⁸¹⁴

The Court found for Gloucester. It held the choice of law provision in the agreements restricted Duran Duran from terminating its rights under US law.⁸¹⁵ Doing so would be a ‘breach of contract’, because ‘Duran Duran contracted away its termination rights through the contract’s choice of law clause.’⁸¹⁶ It is worth noting neither party presented evidence by experts on the operation of § 203, which meant the judge could only decide the case on the application of English contract law. The only evidence Duran Duran’s counsel sought to admit in relation to how § 203 operates to preclude actions for breach of contract was a statement from their instructing solicitors that:

...a US court would not allow a claim for damages for breach of a contractual agreement because the statutory termination right supersedes any contractual right. This applies whether that contract was governed under English or US law.⁸¹⁷

The court refused to admit this statement into evidence for a number of reasons: the proceedings were based on ‘there [being]...no dispute as to fact’, but ‘foreign law is a question

⁸¹⁰ See e.g., Austin 2017 (n 294), 425-429 (whether reversion rights should be considered ‘mandatory overriding provisions’ under international treaties on contracts).

⁸¹¹ *Gloucester Place Limited v Le Bon* [2016] EWHC 3091 (Ch) [2] (**‘Duran Duran’**).

⁸¹² *Duran Duran* (n 811) [4].

⁸¹³ Kenneth D Freundlich and Michael J Kaiser, ‘A View From Across the Pond: Duran Duran’s Termination Rights Under The U.S. Copyright Act Come Undone By British High Court Ruling’ (2017) 33(2) *Entertainment and Sports Lawyer* 1, 1.

⁸¹⁴ *Duran Duran* (n 811) [10]; see also Daniel Chozick, ‘Help: Fixing the Problem of Copyright Termination Inconsistencies through Public and Private International Law’ (2018) 49(4) *Georgetown Journal of International Law* 1461, 1464.

⁸¹⁵ Chozick 2018 (n 814), 1464.

⁸¹⁶ *Ibid* 1478.

⁸¹⁷ *Duran Duran* (n 811) [20], citing a statement by Brian Howard, from the group’s solicitors.

of fact’; Duran Duran did not ask or receive the court’s permission to cite evidence from experts on American law; the instructing solicitor ‘claim[ed]...no expertise in US law’; the statement had no supporting authority; and the statement reflected the position of US law at the time it was made rather than during the time the relevant agreements were executed.⁸¹⁸ Had Duran Duran’s counsel sought permission to cite evidence on the operation of US law, and cited authority as to the application of the termination right in the US irrespective of contractual stipulations, the court could potentially have reached a different decision.⁸¹⁹

Duran Duran was granted leave to appeal in 2017,⁸²⁰ and an appeal hearing appeared to have been listed for 8 or 9 May 2018.⁸²¹ However, at the time of writing there has been no update on the progress of this appeal.

The Duran Duran decision leaves uncertain the question about how the reversion rights of authors in one jurisdiction will be dealt with under the law of another jurisdiction.⁸²² If an appeal takes place and the decision is upheld, it would suggest the US termination right and other inalienable reversion rights can be stymied by publishers filing lawsuits in other jurisdictions. While this does not involve an alternative agreement like in the ‘agreement to the contrary’ debates above or a clause purporting to derogate from the application of a reversion right like in relation to the Statute of Anne, it is similar to these approaches because it involves a rightsholder attempting to deny the operation of an author’s statutory reversion rights. If an appeal is heard, it is hoped that Duran Duran’s counsel raises more extensive evidence on the nature of the US termination right than they did in the first instance: as discussed below, doing so could lead to a favourable outcome for Duran Duran and other artists seeking to enforce the US termination right despite having made worldwide copyright grants governed by foreign law.

⁸¹⁸ *Duran Duran* (n 811) [21]; see also Chozick 2018 (n 814), 1477.

⁸¹⁹ As Ginsburg notes, ‘Unfortunately, the case was not terribly well litigated; the judge even complained that he was not adequately instructed on the nature and operation of the U.S. termination right.’ Jane C Ginsburg, ‘Foreign Authors’ Enforcement of U.S. Reversion Rights’ (2018) 41(3) *Columbia Journal of Law & The Arts* 459, 465.

⁸²⁰ Chris Cooke, ‘Duran Duran given all clear to appeal reversion right ruling’, *Complete Music Update* (online, 7 February 2017) <<https://completemusicupdate.com/article/duran-duran-given-all-clear-to-appeal-reversion-right-ruling/>>.

⁸²¹ Alex Woolgar, ‘Duran some Interesting Arguments with a View to Reclaim, but Le Bon et al Come Undone in an Ordinary World: No Rio-version of US Copyright’ (2018) 40 *European Intellectual Property Review* 134, 138.

⁸²² For further discussions about the approaches that could be taken to protect the application of the US termination right in foreign jurisdictions, see e.g., Ginsburg 2018 (n 819), 466. See also Woolgar 2018 (n 821), 137 – 138; Helene Freeman, ‘Duran Duran Case Shouldn’t Affect Paul McCartney Contracts’, *Law 360* (online, 30 January 2017) <<https://www.law360.com/articles/882786/duran-duran-case-shouldn-t-affect-paul-mccartney-contracts>> accessed 14 September 2020; Austin 2017 (n 810), 425-429.

2. Overcoming *Duran Duran*

Creators would be better protected if courts conceptualised reversion rights as part of the copyright granted in any one jurisdiction. Writing about the *Duran Duran* decision, Ginsburg indicated the judge in *Duran Duran* suggested that ‘if one were to conceive of the inalienability of the U.S. termination right as part and parcel of the right itself, then the outcome might have been [different to the Court’s decision].’⁸²³ In other words, *Duran Duran*’s grant of all rights in its music in all territories would have been subject to each territory’s restrictions on copyright:

...any grant of U.S. grants is inherently bounded and conditioned by the author’s inalienable termination right...what *Duran Duran* granted to the British publisher should be conceptualized as the US exploitation rights, subject to the ...inalienable possibility...of the authors to get their rights back.⁸²⁴

Ginsburg’s reasoning was followed in a recent decision of the United States Second Circuit Court of Appeals, *Ennio Morricone Music Inc v Bixio Music Group Ltd* (*‘Bixio’*), in which Ginsburg was also counsel.⁸²⁵ In this case, Mr Morricone had executed agreements with an Italian publisher, Bixio, to provide film scores. He had agreed to:

...grant and transfer to [Bixio]...exclusively, for the maximum total duration permitted by the laws in force in each country in the world, and at the conditions established here below, all the rights of economic use, in any country in the world, with regard to the works.⁸²⁶

Around thirty years later, Mr Morricone sought to terminate the grant in respect of his US rights in the works using the US termination right.⁸²⁷

(a) *The Bixio first instance decision*

At first instance, the District Court for the Southern District of New York issued a summary judgment in favour of Bixio.⁸²⁸ This judgment was based on the fact that the contract was governed by Italian law and that the film scores Mr Morricone sought to exercise § 203 over were ‘works for hire’ under Italian law (works for hire being an exception to termination under § 203). Having heard from various experts in Italian law, the court concluded that the concept of ‘commissioned work’ had an equivalent effect at law as the US ‘work for hire’ concept.⁸²⁹

⁸²³ Ginsburg 2018 (n 819), 465.

⁸²⁴ Ibid 466.

⁸²⁵ *Ennio Morricone Music Inc v Bixio Music Group Ltd*, 936 F 3d 69 (2d Cir, 2019) (*‘Bixio Appeals’*).

⁸²⁶ Ibid 70.

⁸²⁷ Ibid 71.

⁸²⁸ *Ennio Morricone Music Inc v Bixio Music Group Ltd*, (D SDNY, Civ No 16-cf-8475 (KBF), 6 October 2017) (*‘Bixio District’*).

⁸²⁹ Ibid 5.

In light of this, the court considered the following factors to lead to a conclusion that the scores were works for hire and exempt from termination under § 203. First, Bixio was ‘confer[red] ownership of the score and the role of music producer role’ by ‘the initial contracts’;⁸³⁰ second, ‘the contract between Morricone and Bixio commissions a score to match an existing film, and it lists instructions and deadlines that Morricone was to abide by’;⁸³¹ third, Mr Morricone had to abide by various “procedures and time limits” for producing the score’;⁸³² and fourth, that Bixio and the producer of the film had, by implication, the right in the contract ‘not to use the score...without incurring liability.’⁸³³

(b) The Bixio appeal

Mr Morricone appealed this summary judgment to the United States Court of Appeals for the Second Circuit.⁸³⁴ The Appeals Court did not consider the concept of ‘work for hire’ under US law to have an equivalent in Italian law. First, ‘U.S. and Italian law allocate authorship status differently.’⁸³⁵ The US Copyright Act provides that the party commissioning the creation of a work for hire, whether an employer or otherwise, is considered the author of the work and owns the copyright.⁸³⁶ However, Italian law provides the composer ‘retains sole authorship in the score itself.’⁸³⁷ Second, the US Copyright Act requires ‘writing, signed by *both* parties, specifying that the work is “made for hire”’.⁸³⁸ This makes it more ‘straightforward’ to identify works as works for hire and ensures not all works that are commissioned are automatically included in this category.⁸³⁹ However, Italian law does not have this qualification, which ‘could result in an overbroad application of the “work made for hire” doctrine.’⁸⁴⁰

Bixio also argued that the nature of the copyright grant (transferring all rights, etc.) suggested the parties intended to ‘allocate rights as if the scores were “works made for hire” under U.S. law’.⁸⁴¹ The Court rejected this argument on two grounds. First, the transfer in this case was still subject to § 203 because under US law, copyright lasts for a ‘maximum total duration...[of]

⁸³⁰ Ibid 5

⁸³¹ Ibid 5.

⁸³² Ibid 6.

⁸³³ Ibid, 6.

⁸³⁴ See generally *Bixio Appeals* (n 825).

⁸³⁵ Ibid 72.

⁸³⁶ Ibid 72, citing 17 USC § 201(b) (the hiring party is deemed the author unless there is an agreement to the contrary in writing) and *Marvel Characters Inc v Kirby* 726 F 3d 119, 137 (2d Cir, 2013).

⁸³⁷ *Bixio Appeals* (n 825), 72.

⁸³⁸ Ibid 72, citing 17 USC § 101.

⁸³⁹ *Bixio Appeals* (n 825), 72-73.

⁸⁴⁰ Ibid 73.

⁸⁴¹ Ibid 73.

thirty-five years] plus such additional period as the assignor allows until the exercise of the option to terminate.’⁸⁴² An overarching assignment of all rights like in this case would not preclude the exercise of the termination right, ‘no matter how expansively phrased.’⁸⁴³ Second, US law states the author of a work made for hire is the commissioning party: however, Italian law ‘does not recognize a comparable allocation of authorship *ab initio* by statute, even if a contract between the parties grants all economic rights of exploitation to the commissioner’.⁸⁴⁴ Because of this, the author can still exercise their termination rights under § 203 as the author, in a way that an author who was commissioned to create a work in the US could not (because they would not be the ‘author’ under the Act – the commissioning party would be the ‘author’).⁸⁴⁵

(c) Applying Bixio to Duran Duran

There is no indication that Bixio will appeal the Appeals Court’s decision to a higher court. However, Ginsburg and Arnold suggest that taking a *Bixio*-type approach could have led to a different outcome in *Duran Duran*.⁸⁴⁶ The High Court of Justice may not have upheld Gloucester’s claim of breach of contract for exercising the termination right, because the similarly broad assignment of copyright from the band members to Gloucester would only have been interpreted as covering ‘the maximum total duration permitted by the laws of the United States...[being] thirty-five years plus such additional period as the assignor allows until the exercise of the option to terminate.’⁸⁴⁷ If the band members were to appeal, it would be beneficial to raise this argument and *Morriconi* so that Gloucester and other rightsholders are not able to effectively stymie the exercise of rights in one jurisdiction by filing for breach of contract in another.⁸⁴⁸

C. Takeaways from the case studies

The literature in relation to statutory reversion systems from the UK and US suggests that where possible, rightsholders will attempt to contract out of these rights. The *Duran Duran* example shows that rightsholders can even go so far as to file proceedings in one jurisdiction

⁸⁴² Ibid 73.

⁸⁴³ Ibid 73.

⁸⁴⁴ Ibid 73.

⁸⁴⁵ See *Bixio Appeals* (n 825), 73.

⁸⁴⁶ Arnold and Ginsburg 2020 (n 809), 449.

⁸⁴⁷ *Bixio Appeals*, 73; Arnold and Ginsburg 2020 (n 809), 449-450.

⁸⁴⁸ For contracts executed after 17 December 2009, an alternate argument is that termination rights are ‘overriding mandatory provisions’ under the Rome Regulation: Arnold and Ginsburg 2020 (n 809), 450; Chozick 2018 (n 814), 1479-1483.

against the exercise of a statutory reversion right in another, negating the author-protective intentions of those provisions.

Both the 1976 US Act and the 1911 Imperial Act prohibited agreements purporting to derogate from their respective reversion rights. However, the US provision has continued to cause controversy with divergent opinions on the types of agreements that will be considered ‘agreements to the contrary’. The court decision in *Duran Duran* also shows it can be overcome in certain situations where foreign law applies (although *Morricone* was a beneficial decision for authors and should be followed by future courts considering similar disputes). Transitional provisions allowing authors to assign the reversionary interest in the UK and New Zealand have also opened the door to publishers contracting out of its application, as has been shown in at least one court decision.

III. CONTRACTING OUT UNDERMINES THE PUBLIC POLICY BEHIND STATUTORY REVERSION RIGHTS

The analysis in Part II suggests that where it is possible to contract out of reversion rights, rightsholders will attempt to do so. This does not apply to all rightsholders, but it does present the risk of widespread contracting out, especially if it becomes industry practice for rightsholders to insert contracting out clauses in their standard form publishing contracts. In this Part, I argue that contracting out, no matter how widespread, reduces the effectiveness of reversion provisions in a manner likely to be contrary to public policy (using Australian law as a focus). To that end, expressly preventing any agreements by which authors derogate from reversion rights or assign their post-time limit reversionary interests is an appropriate imposition on contractual freedom (subject to reasonable exceptions as outlined in Part IV).⁸⁴⁹

A. Contracting out and Australian copyright law

In Australian copyright law, contracting out has predominantly been discussed in the context of agreements between rightsholders and copyright users (e.g. readers, listeners) which purport

⁸⁴⁹ See the discussion on contractual freedom at **Chapter IV(II)**. For potential wording of a clause against contracting out see e.g., *Copyright Act 1968* (Cth), s 47H:

An agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of subsection 47B(3), or section 47C, 47D, 47E, or 47F [provisions allowing the reproduction of computer programs], has no effect.

to derogate from the application of exceptions to copyright.⁸⁵⁰ Examples include ‘agreements with online publishing companies [with]...clauses that prevent libraries and archives from reproducing and communicating extracts of works, which would otherwise be permitted by the library and archives exceptions.’⁸⁵¹ Evidence compiled by the Australian Law Reform Commission (‘ALRC’) suggests this is a common practice in Australia.⁸⁵² The *Copyright Act 1968* (Cth) prohibits contracting out in relation to statutory exceptions to copyright for computer program reproduction, but does not expressly do so for other agreements.⁸⁵³ Nevertheless, Australian case law establishes as a general principle that contracting out provisions will not be permitted where they contravene ‘statutory purpose or policy’.⁸⁵⁴ Academics Carter, Peden and Stammer have applied this principle to argue for the unenforceability of contractual terms bypassing fair dealing and library/archive use exceptions in the *Copyright Act 1968* (Cth).⁸⁵⁵ They also support the view that:

...most contractual provisions which purport to exclude or restrict a licensee’s rights under the [Copyright] Act are ineffective to do so [footnote omitted]. They are likely to be void or unenforceable on public policy grounds.⁸⁵⁶

Thus far, scholars have not discussed contracting out of author-protective statutory rights in Australia (which is likely because none have been in force since 1967). However, the principles enumerated in Australian case law and applied to copyright exceptions by Carter, Peden and Stammer can equally be applied to reversion rights. As with these copyright exceptions, statutory reversion rights ‘reflect public policy’, provide a ‘public benefit,’⁸⁵⁷ and should be protected against attempted contracting out by publishers. A summary of the public policy

⁸⁵⁰ ALRC 2014 (n 275), 435 [20.1]. For how similar issues are dealt with in New Zealand, see e.g. Regulatory and Competition Policy Branch, Ministry of Economic Development, ‘The Commissioning Rule, Contracts and the Copyright Act 1994: A Discussion Paper’ (Discussion Paper, March 2006) [86]-[95] <<https://nzipp.org.nz/nzipp/uploads/2018/05/copyrightpaper.pdf>>. For more information about copyright exceptions in Australia, see generally e.g., Patricia Aufderheide, Kylie Pappalardo, Nicolas Suzor, and Jessica Stevens, ‘Calculating the consequences of narrow Australian copyright exceptions: Measurable, hidden and incalculable costs to creators’ (2018) 69 *Poetics* 15.

⁸⁵¹ ALRC 2014 (n 275), 436 [20.12], referring to Copyright Law Review Committee, *Copyright and Contract* (2002), Chapter 4.

⁸⁵² ALRC 2014 (n 275), 436 [20.11].

⁸⁵³ *Copyright Act 1968* (Cth), s 47H; ALRC 2014 (n 275), 439-440.

⁸⁵⁴ *Caltex Oil (Aust) Pty Ltd v Best* (1990) 170 CLR 516, 522, cited in J W Carter, Elisabeth Peden and Kristin Stammer, ‘Contractual Restrictions and Rights Under Copyright Legislation’ (2007) 23(1) *Journal of Contract Law* 32, 41, cited in ALRC 2014, 442; see also *Encyclopaedic Australian Legal Dictionary* (online at 27 August 2021) (‘EALD’), ‘public policy’, which specifies that ‘a court will not enforce a contract that infringes public policy’, citing *A v Hayden [No 2]* (1984) 156 CLR 532. See further Carter, Peden and Stammer 2007 (n 854), 41-42.

⁸⁵⁵ Carter, Peden and Stammer 2007 (n 854), 46, 47.

⁸⁵⁶ *Ibid* 33.

⁸⁵⁷ ALRC 2014 (n 275), 449 [20.71], 450 [20.80].

behind reversion rights (focusing on the trade book industry), built on my analysis in **Chapters I and II**, is below.⁸⁵⁸

B. The public policy behind statutory reversion rights

As set out previously in this thesis, reversion rights can create new opportunities for authors to exploit works that might otherwise have stayed inaccessible to the public. In the trade book industry, most books will exhaust their commercial value after a few years. As trade publishing contracts tend to last for the duration of copyright, books can go out of print and be lost to the public: the cumulative loss of cultural value can be significant. However, publishers are not incentivised to balance their interests with those of authors and the public: rather, they are incentivised to take as many rights as they can for as long as they can, on the off-chance that some of the works they invest in will be successful sometime during those lengthy terms.

Contractual reversion rights are designed to allow authors to reclaim copyright once it is clear publishers are no longer able or willing to exploit them. This allows authors to explore new publication opportunities for dormant works, making them more available to the public. However, in *Are Contracts Enough?* we found contracts are generally inadequate when it comes to providing these crucial rights for authors. Even if their reversion rights were effective for today's market, they cannot be expected to forecast the different technological and industry changes that might take place over a century, which is how long many contracts last for. As I have shown in this thesis, statutory reversion rights with readily updateable thresholds and time limits could address this by giving authors clear mechanisms to reclaim their rights after publishers have had reasonable opportunities to exploit them. In the digital world, statutory reversion rights take on greater significance because there are more opportunities for exploitation than in a print-only world.

Statutory reversion rights would also help address perceived imbalances in bargaining power between authors and publishers, particularly where lawmakers consider authors are prone to make poor initial assignments of copyright. This includes situations in which authors feel obliged to sign away rights before anyone knows what they are worth. The Imperial reversion system was instituted for this reason: it appears Parliament sought to ensure that an author's

⁸⁵⁸ According to the *Encyclopaedic Australian Legal Dictionary*, 'public policy' is:

The interests of the community in general; a definite and governing principle which the community as a whole has already adopted, either formally by law or tacitly by its general course of public life [see entry for case law citations and further commentary].

heirs would share in sales of copyrighted works, counteracting situations in which they had made poor initial assignments.⁸⁵⁹ Reversion would enable the author's heirs to renegotiate assignments from a better bargaining position. Author-protective motivations also undergird the introduction of the US termination right and the EU Directive.⁸⁶⁰

C. Contracting out undermines the public policy behind statutory reversion rights

Permitting publishers to contract out of reversion rights would 'circumvent... the statutory purpose or policy' behind reversion rights.⁸⁶¹ Contracting out would 'render [reversion provisions]...inoperative'.⁸⁶² This is particularly important when we consider concerns about publishers being in much stronger bargaining positions than authors, especially at the initial contract stage: as may be the case in the context of copyright exceptions, publishers 'may overreach and circumvent the provisions of the Act, so that 'private ordering' leads to a different balancing of parties' rights than is contemplated in [reversion rights].'⁸⁶³ As Austin argues, there is also an argument against contracting out based on the dignity of authors from a human rights perspective:

Significantly unequal bargaining compromises the dignity of a creator, but that indignity is reinforced if authors cannot invoke provisions that are designed to address the imbalances of the publishing market. The human rights jurisprudence emphasizes measures necessary to address the inferior bargaining position of authors, the connection between the protection of authors' material interests and the ability to earn a living from one's work.⁸⁶⁴

Thus, to uphold the public policy reasons behind statutory reversion rights, policymakers should ensure rightsholders are not able to derogate from them.

⁸⁵⁹ Yuvaraj and Giblin 2019 (n 99), 233.

⁸⁶⁰ Yuvaraj et al 2021 (n 298), 3; see above 116.

⁸⁶¹ *Caltex Oil (Aust) Pty Ltd v Best* (1990) 170 CLR 516, 522, cited in Carter, Peden and Stammer 2007 (n 854), 41, cited in ALRC 2014 (n 275), 442. See further explanations of why rightsholders should not be able to contract out of reversion rights, see e.g., recital 80 of the EU Directive (n 137):

The provisions regarding transparency, contract adjustment mechanisms and alternative dispute resolution procedures laid down in this Directive *should be of a mandatory nature, and parties should not be able to derogate from those provisions, whether in contracts between authors, performers and their contractual counterparts, or in agreements between those counterparts and third parties, such as non-disclosure agreements* (emphasis added).

See also Kretschmer 2012 (n 141), 47.

⁸⁶² ALRC 2014 (n 275), 450 [20.76].

⁸⁶³ Ibid 450 [20.77].

⁸⁶⁴ Austin 2017 (n 810), 428-429.

IV. SITUATIONS IN WHICH REVERSION RIGHTS MAY NEED TO BE EXEMPT

While I have argued for reversion rights to generally be inalienable, it may be appropriate for reversion not to apply to certain works. I will examine three exceptions to the Canadian (Imperial) and US reversion systems: collective works, works made for hire, and derivative works.

A. Collective works

Certain types of works to which multiple authors have contributed may need to be exempt from reversion rights. Below, I outline what these types of works are and whether all or some of them should be exempt.

1. Understanding collective works and works of joint authorship

In Australia, there is no definition of ‘collective work’: the Copyright Act only provides for a ‘work of joint authorship’, which is ‘a work that has been produced by the collaboration of two or more authors and in which the contribution of each author is not separate from the contribution of the other author or the contributions of the other authors.’⁸⁶⁵ The UK and New Zealand adopt a broader approach. While they define jointly-authored works in broadly similar terms to the Australian legislation,⁸⁶⁶ they go further and define ‘collective work’ as ‘a work of joint authorship; or...a work in which there are distinct contributions by different authors or in which works, or parts of works, of different authors are incorporated.’⁸⁶⁷

In Canada, the definition of ‘collective work’ is different because it replicates the approach in the Imperial Copyright Act of 1911 (consistent with its retention of the 1911 provision). It provides that a collective work is:

...an encyclopaedia, dictionary, year book or similar work,...a newspaper, review, magazine or similar periodical, and...any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated.⁸⁶⁸

The Act also defines a ‘work of joint authorship’ similarly to Australia, the UK, and New Zealand.⁸⁶⁹

⁸⁶⁵ *Copyright Act 1968* (Cth), 10(1).

⁸⁶⁶ *Copyright Act 1994* (NZ), s 6(1); *Copyright, Designs & Patents Act 1988* (UK), s 10(1).

⁸⁶⁷ *Copyright Act 1994* (NZ), s 2(1); *Copyright, Designs & Patents Act 1988* (UK), s 178.

⁸⁶⁸ *Copyright Act RSC 1985*, c C-42, s 2.

⁸⁶⁹ *Ibid* s 2.

The US' approach to defining these terms is similar in substance to the joint work-collective work dichotomy. The US Copyright Act defines 'collective work' as:

...a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.⁸⁷⁰

Meanwhile, it defines a joint work as 'a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.'⁸⁷¹

The laws of these five countries show that joint works/works of joint authorship tend to be understood as works in respect of which two or more authors make contributions that are indistinct in the final product. The legislation does not provide examples of joint works. However, based on these definitions an example would be the *Mass Effect*TM videogame tie-in book *Nexus Uprising* by Jason M Hough and K C Alexander.⁸⁷² As the book is written by two authors but their contributions are not distinct in the final product, it would be considered a work of joint authorship.

By contrast, it appears collective works will at least include those where distinct contributions by multiple authors are combined into a separate work. Examples set out in the legislation surveyed above include dictionaries, anthologies, and encyclopaedias. An example not set out in the legislation would be a children's book with illustrations, like *The Enormous Crocodile* by Roald Dahl (words) and Quentin Blake (illustrations):⁸⁷³ the book is a combination of distinct literary and artistic works by two authors and would thus likely be considered a collective work under the framework set out above.

2. Reversion rights may not be appropriate for some collective or jointly-authored works

Having understood the different types of jointly-authored works envisaged in copyright legislation in Australia and other common law countries, we can more clearly see the types of works in respect of which reversion may be inappropriate (and therefore, where it may be appropriate to permit the contracting out of reversion rights).

It may be appropriate for publishers to contract out of reversion rights in respect of contributions to collective works where it would make it difficult for publishers to continue to

⁸⁷⁰ *Copyright Act of 1976*, 17 USC § 101.

⁸⁷¹ *Ibid* § 101.

⁸⁷² Jason M Hough and K C Alexander, *Mass Effect*TM *Andromeda: Nexus Uprising* (Titan Books, 2017).

⁸⁷³ Roald Dahl, illustrations by Quentin Blake, *The Enormous Crocodile* (London, Jonathan Cape, 1978).

publish new editions of those collections. Where new editions of collective works are being regularly released (e.g. textbooks and educational loose-leaf services used in university libraries and by professional firms), it is beneficial for publishers not to be subject to reversion rights in respect of specific contributions to those collective works, so they can keep updating and releasing those materials to the public (fulfilling copyright's incentive goals).⁸⁷⁴

Further, publishers may be disincentivised from investing in the creation of such collective works if they are aware that authors can seek to regain their rights over specific contributions after a period of time. This is especially true if the collective work comprises contributions from many authors: if one author seeks to revert rights, this may jeopardise the entire project,⁸⁷⁵ and publishers may not consider the investment necessary to bring these works together into a collective whole to be worth the risk that one of the authors might veto the project by reverting their rights to their individual contribution.⁸⁷⁶ Another disincentive for publishers would be the difficulty of disentangling individual contributions from collective works should individual authors seek to reclaim their rights. Again, publishers might just consider the initial investments not worth the hassle of dealing with attempted reversions from one or more of the authors of collective works. This would be counter to the goal of granting the public access to creative works, especially in respect of key knowledge resources like encyclopaedias, dictionaries, and textbooks. It would also negatively impact authors if their works are not invested in, because authors 'have a strong interest in seeing their works brought to success, marketed, and widely shared.'⁸⁷⁷

For jointly-authored works, where the respective authorial contributions are indistinct in final form, reversion is still appropriate where a majority of authors agree to exercise those reversion rights.⁸⁷⁸ This approach is to be preferred because the alternative is less desirable. One alternative is to require unilateral agreement between all authors as to the exercise of reversion, but this opens up the possibility of one author preventing the rest from exercising their rights. This is undesirable when the majority wishes to regain their rights, which I have shown in this

⁸⁷⁴ See Anne Marie Hill, 'Work for Hire Definition in the Copyright Act of 1976: Conflict Over Specially Ordered or Commissioned Works' (1989) 74(3) *Cornell Law Review* 559, 568.

⁸⁷⁵ See Darling 2015 (n 143), 174 fn 144, citing Rub 2013 (n 143) at 77, 130.

⁸⁷⁶ Darling 2015 (n 143), 175.

⁸⁷⁷ *Ibid.*

⁸⁷⁸ This refers to use-it-or-lose-it rights, as the time limits recommended in **Chapter VII** would apply to revert rights to the joint authors automatically at the expiry of the relevant periods. After this, publishers would need to renegotiate collectively with the joint authors to republish those works: as their contributions are indistinct in the final form, it is insufficient for publishers cannot negotiate with individual authors.

thesis opens up further opportunities for exploitation that can benefit authors, publishers, and the public.

Of course, the majority approach allows the majority to override the minority's decision. This could be considered inconsistent with copyright's natural rights goals, as authors are denied the opportunity to deal with their part of copyright as they see fit. The majority approach also does not mitigate the problem with the unilateral approach in some situations involving even splits between joint authors, as there is no clear majority with both sides deadlocked. There is no straightforward solution to these problems, but the majority approach (adopted in the US) at least allows most authors to exercise their rights.⁸⁷⁹ The majority approach is to be preferred to a blanket exclusion on collective works as art 22 of the EU Directive allows Member States to implement: as Aguilar notes, such an exclusion could be adverse for those who create songs because 'the large majority of songs are created by a plurality of contributors.'⁸⁸⁰

B. Works made in the course of employment/commissioned works

Works made in the course of employment or commissioned works⁸⁸¹ may also need to be exempt from the operation of statutory reversion rights.

1. Works made in the course of employment

The copyright laws of Australia and Canada provide that where works are made in the course of employment, pursuant to 'a contract of service or apprenticeship', the employers are the first owners of those works.⁸⁸² In the UK and New Zealand, copyright statutes simply designate employers as first owners of any work their employees make 'in the course of [their]...employment'.⁸⁸³ Meanwhile, the US uses a 'work made for hire' definition, including 'a work prepared by an employee within the scope of his or her employment', in respect of which the employer owns all copyright and is deemed the author.⁸⁸⁴ Accordingly, where an employment relationship exists – as defined by the laws of the particular country – any work

⁸⁷⁹ An equivalent system applies to owners' corporations/body corporate rules for property ownership in apartments and unit titles: see e.g., generally *Owners Corporations Act 2006* (Vic).

⁸⁸⁰ Ananay Aguilar, 'The New Copyright Directive: Fair remuneration in exploitation contracts of authors and performers – Part II, Articles 20-23', *Kluwer Copyright Blog* (Blog Post, 1 August 2019) <<http://copyrightblog.kluweriplaw.com/2019/08/01/the-new-copyright-directive-fair-remuneration-in-exploitation-contracts-of-authors-and-performers-part-ii-articles-20-23/>>.

⁸⁸¹ See e.g., *Copyright Act 1968* (Cth), ss 35 (5), (6), 98; *Copyright Act RSC 1985 c C-42*, s 13(3) (only providing that the employer owns the copyright, without saying anything about independent contractors); *Copyright Act 1994* (NZ), s 21(2) (providing employers are first owners), 21(3) (providing commissioning parties are first owners for *certain kinds of works*, not literary or musical works).

⁸⁸² *Copyright Act 1968* (Cth), s 35(6), cf s 35 generally; *Copyright Act RSC 1985 c C-42*, s 13(3);

⁸⁸³ *Copyright, Designs & Patents Act 1988* (UK), s 11(2);

⁸⁸⁴ *Copyright Act of 1976*, 17 USC §§ 101, 201(b).

created in the course of, in pursuit of, or within the scope of that employment will be considered to be owned by the employer, rather than the employee.⁸⁸⁵

It is appropriate that employees are not permitted to revert rights in works created during the course of their employment. Employees are likely provided with resources they would not otherwise have to create the work. For example, employees at law firms who are asked to write summaries of court decisions or new legislation are often granted access to legal databases like Lexis Advance and Westlaw which have significant access costs borne by their employers. Other resources provided by employers can include office space, work equipment (computers, printers) and online services (e.g. secure cloud storage). Employers also pay authors for the time they spend creating works in the course of their employment, and employment law is designed to ensure employees are appropriately remunerated for work done in the course of their employment. Given these special characteristics, it would be appropriate for there to be a statutory presumption that reversion rights do not apply to works genuinely created in the course of employment.

2. Commissioned works

The situation with works created on commission is more complex. In Australia, copyrights in photographs, paintings, and engravings not made under employment but under agreements for ‘valuable consideration’ are owned by the commissioning party (unless there is an agreement to the contrary).⁸⁸⁶ The same applies to sound recordings and films, but this can be altered by contract.⁸⁸⁷ Similar provisions exist in New Zealand,⁸⁸⁸ but not in Canada or the UK.⁸⁸⁹ In the US, termination rights cannot be exercised in respect of works made for hire, which are either works made in the course of employment or:

...a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be

⁸⁸⁵ See World Intellectual Property Organization, *Managing Intellectual Property in the Book Publishing Industry: A business-oriented information booklet: Creative industries – Booklet No. 1*, 15.

⁸⁸⁶ *Copyright Act 1968* (Cth), s 35(3), (5); *Copyright Act 1994* (NZ), s 21(2), (4).

⁸⁸⁷ *Copyright Act 1968* (Cth), ss 97(3), 98(3).

⁸⁸⁸ *Copyright Act 1994* (NZ), s 21(3)-(4).

⁸⁸⁹ *Copyright Act RSC 1985 c C-42*, ss 13(3), 18, 24, 2 (definition of ‘maker’); *Copyright, Designs & Patents Act 1988* (UK), s 11(2). The UK Act only addresses ownership in the case of employment, with limited provisions specifying who the ‘author’ is taken to be in respect of sound recordings, films, broadcasts, ‘the typographical arrangement of a published edition’, and ‘literary, dramatic, musical or artistic work[s] which [are]...computer-generated.’ (s 9(2), (3)).

considered a work made for hire. For the purpose of the foregoing sentence, a “supplementary work” is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an “instructional text” is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.⁸⁹⁰

The meaning of ‘works-made-for-hire’ under the 1976 Copyright Act was the subject of significant debate during the law reform processes leading up to the Act,⁸⁹¹ and one of the elements of this discussion was the meaning of commissioned works. According to Litman:

Authors’ representatives worried that freelance authors lacked the bargaining power to reject contractual clauses designating works as made for hire. Publishers and motion picture studios, on the other hand, were concerned about the multiple obstacles that the [proposed] reversion provisions could pose to the exploitation of a particular class of works that were normally created by independent contractors paid a flat fee, but that common industry practice had long deemed works for hire.⁸⁹²

The outcome of these debates was that only works in these nine categories would be considered works for hire, and only if the parties had agreed in writing to characterise those works as works for hire.⁸⁹³ The literature does not provide a clearly defined rationale for why these commissioned works and not others are to be considered works for hire, beyond the fact that Congress sought to balance the interests of various creative industries whose representatives made submissions in the law reform process.⁸⁹⁴

There are different approaches in how the US and other common law countries treat commissioned works for the purpose of first ownership (and therefore whether they are exempt from reversion rights). In developing statutory reversion rights, policymakers should consider the rationale behind exempting commissioned works to ensure that reversion’s purposes are upheld. To that end, I consider the degree of control exercised by the rightsholder is a useful factor in deciding what works should and should not be considered works for hire in respect of

⁸⁹⁰ *Copyright Act of 1976*, 17 USC § 101.

⁸⁹¹ I Trotter Hardy, ‘Copyright Law’s Concept of Employment – What Congress Really Intended’ (1988) *Journal, Copyright Society of the USA* 210, 251, citing HR Rep No 94-1476, 94th Cong, 2d Sess, 121.

⁸⁹² Jessica D Litman, ‘Copyright, Compromise and Legislative History’ (1987) 72 *Cornell Law Review* 857, 890.

⁸⁹³ Hardy 1988 (n 891), 251, citing HR Rep No 94-1476, 94th Cong, 2d Sess, 121.

⁸⁹⁴ For more information about the debates, see Supplementary Register’s Report on the General Revision of the US Copyright Law (89th Cong, 1st Sess, 1965), 66-67 (**‘Supplementary Register 1965’**).

which publishers may contract out of reversion rights. This is analogous to the employment relationship: as an employer provides resources and direction on how the work is to be created, so too may a commissioning party instigate, direct, and assume risk when commissioning the creation of a work.⁸⁹⁵ Thus, it is consistent to exempt collective works like those referred to above (e.g. encyclopaedias, dictionaries, loose-leaf services and regularly commissioned textbooks) from reversion rights, where the content is directed and regularly reviewed by the publishers, and those publishers expend significant time and resources to update and make available those works to the public. This is because they assume a larger role over the creation of the content than in a traditional author-publisher relationship (in which the direction and substance of the work mostly comes from authors), and require rights for a longer period of time if they are continually updating the work for public dissemination.⁸⁹⁶ On the contrary, works should not be regarded as commissioned works where none of those factors exist.⁸⁹⁷

C. Derivative works

There should also be an exception to reversion rights in respect of the ongoing commercialisation of derivative works, which are separate works based on other works. Allowing authors to reclaim rights in works without providing for the continuing use of derivative works would mean those derivative works can no longer be used without new approval from those authors or estates. This may result in those derivative works – culturally valuable in and of themselves – being inaccessible to the public because authors or estates refuse to let them be used on reasonable terms (or at all).⁸⁹⁸

As discussed earlier in this thesis, one of copyright's goals is to incentivise the creation of and investment in works for society's benefit.⁸⁹⁹ To achieve this, it is important to allow those derivative works created *before* reversion takes place to keep being used: otherwise, they may become inaccessible if authors or estates refuse to let them be used, or publishers are

⁸⁹⁵ Supplementary Register 1965 (n 894), 67.

⁸⁹⁶ Similar arguments could be made about works in other industries (e.g., the film industry), but those are beyond the scope of my thesis, which focuses on the trade book industry.

⁸⁹⁷ E.g., sound recordings (see further at **Chapter VIII**(IV)(D)(2)(a)) if record labels do not have a similar level of control over the recordings (e.g., paying for the studio, hiring the backing musicians, providing their own mix engineers, amending the lengths of songs, adding instrumentation, etc.) as with publishers commissioning regularly updated textbooks or dictionaries.

⁸⁹⁸ This is a variation of the 'holdup' problem: the author or estate could refuse to allow derivative work makers to continue commercialising those works, despite the derivative work makers having invested in making those works. The derivative work makers would thus be at the mercy of the authors/estates, who 'gain...considerable leverage over the [derivative work makers]...who made the fixed investment.': Tun-Jen Chiang, 'Trolls and Orphans' (2016) 96(3) *Boston University Law Review* 691, 695. See generally 694-696. See also Heald 2020 (n 433), 88-89 for how this problem can manifest in relation to reversion rights.

⁸⁹⁹ See generally **Chapter II**(II)(A).

disincentivised to invest in their ongoing availability because of the excessively high costs of such investment. Further, allowing those works to be used can be consistent with copyright's rewards goals. First, it can reward the investments made by derivative work makers: while the base works (e.g. *The Lord of the Rings*)⁹⁰⁰ undoubtedly play a large part in the derivative works, significant effort is still expended creating separate derivative works⁹⁰¹ (e.g. the efforts of director Peter Jackson and others in producing the film adaptations⁹⁰²). It is appropriate that those distinct contributions to new creative works be rewarded. However, it is also important for the contributions of the creators of base works to the success of the derivative works to continue being recognised.

Thus, exceptions for the ongoing commercialisation of derivative works created before reversion should be accompanied by robust fair remuneration provisions in statute,⁹⁰³ ensuring that authors continue receiving fair royalties from the ongoing sales of derivative works.⁹⁰⁴ This would prevent situations like the lump sum sale of *Superman* by Joe Schuster and Jerome Siegel for US\$130 in 1938, following which Schuster and Siegel received very little relative by way of royalties and pensions relative to the income DC Comics generated from the comic book character.⁹⁰⁵ It should be noted the development of effective fair remuneration provisions is beyond the scope of this thesis to analyse: future research on this concept and how it interacts with reversion rights would be welcome.

A derivative works exception like that outlined above – allowing the ongoing commercialisation of derivative works created before rights revert to authors – exists in the US. Under the US termination right, such works:

⁹⁰⁰ J R R Tolkien, *The Lord Of The Rings* (Allen & Unwin, 1968)

⁹⁰¹ Kathleen M Bragg, 'The Termination of Transfers Provision of the 1976 Copyright Act: Is It Time to Alienate it or Amend it?' (2000) 27(4) *Pepperdine Law Review* 769, 778-779, referring to *Rohauer v Killiam Shows, Inc* 551 F 2d 484 (2d Cir, 1977), 493 (fn 107: the judgment 'cit[ed] Professor Donald Engel in 12 Bulletin of the Copyright Society 83, 119-20 & n. 126 (1964)').

⁹⁰² *The Lord of the Rings: The Fellowship of the Ring* (New Line Cinema, Wingnut Films, 2001); *The Lord of the Rings: The Two Towers* (New Line Cinema, Wingnut Films, 2002); *The Lord of the Rings: The Return of the King* (New Line Cinema, Wingnut Films, 2003).

⁹⁰³ See e.g. EU Directive (n 137), arts 18-21 (requiring authors to be paid 'appropriate and proportionate remuneration' (art 18) imposing obligations for authors to receive annual statements (art 19), allowing authors to seek to adjust their remuneration if it is low relative to the earnings of their works (art 20), and allowing authors to pursue a 'voluntary, alternative dispute resolution procedure' in relation to disputes arising from any of the preceding three articles (art 21)).

⁹⁰⁴ See also Heald 2020 (n 433), 89, where Heald suggests a 'compulsory royalty' scheme which was present in a prior iteration of Canada's copyright law 'by denying relief to the beneficiaries of reversion in situations where the owner of the derivative work gave notice of intent to continue using the work and paid a 10% royalty.' A related provision in the Imperial Copyright Act of 1911 was, however, found to be inconsistent with the Berne Convention: Yuvaraj and Giblin 2019 (n 99), 234.

⁹⁰⁵ See Jeet Heer, 'The injustice of Superman', *The Guardian* (online, 6 April 2008) <<https://www.theguardian.com/commentisfree/2008/apr/05/theinjusticeofsuperman>>.

...prepared under the authority of the grant [being terminated] before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.⁹⁰⁶

This exception appears to have been designed to benefit those who created such works, so they would not be adversely affected by a termination under the Act.⁹⁰⁷ That is, they would be protected from a situation in which ‘the author or his or her heirs might veto a continued performance of a lawfully created derivative work prior to the termination.’⁹⁰⁸ Essentially, various parties (e.g. film production companies) were concerned they would expend resources purchasing the rights in a particular creative work, ‘only to pay exorbitant sums later, because the story’s author could terminate the copyright transfer and hold out during renegotiations.’⁹⁰⁹ However, there is no such equivalent in the Imperial reversion right, either in its original 1911 form,⁹¹⁰ in its legacy forms in Australia, New Zealand, and the UK,⁹¹¹ or in its present form in Canada.⁹¹²

There is a wealth of literature on the US derivative works exception. Much of the debate has developed around how the derivative works exception relates to music and sound recordings. Arguably the most prominent court case to deal with the derivative works exception is *Mills Music v Snyder*.⁹¹³ In this case, the heirs of musician Ted Snyder terminated Snyder’s assignment of copyright in ‘Who’s Sorry Now’ (one of Snyder’s songs), but sought to claim ‘all of the royalty income from the mechanical licenses issued by [the publisher] Mills [Music] prior to termination.’⁹¹⁴ These licenses had been issued by Mills in relation to different recordings of ‘Who’s Sorry Now’ (which would have been derivative works as they were based on the original song) to various record companies: they had to render royalty payments to Mills

⁹⁰⁶ *Copyright Act of 1976*, 17 USC §§ 203(b)(1); 304(c)(6)(A).

⁹⁰⁷ See e.g., Lohmann 1987 (n 788), 911, 913.

⁹⁰⁸ Lohmann 1987 (n 788), 913.

⁹⁰⁹ Jill I Prater, ‘When Museums Act like Gift Shops: The Discordant Derivative Works Exception to the Termination Clause’ (1996) 17(1) *Loyola of Los Angeles Entertainment Law Review* 97, 106; for further background on the rationale behind the derivative works exception, see e.g. Litman 1987 (n 892), 893; Chase A Brennick, ‘Termination Rights in the Music Industry: Revolutionary or Ripe for Reform?’ (2018) 93 *New York University Law Review* 786, 801.

⁹¹⁰ *Copyright Act 1911* (UK), s 5(2).

⁹¹¹ *Copyright Act 1968* (Cth), s 239(4); *Copyright Act 1994* (NZ), s 38; *Copyright, Designs and Patents Act 1988* (UK), Schedule 1, s 27.

⁹¹² *Copyright Act*, RSC 1985, c C-42, s 14(1).

⁹¹³ *Mills Music v Snyder* 469 US 153 (1985).

⁹¹⁴ Robert S Meitus, ‘Commentary: Revisiting the Derivative Works Exception of the Copyright Act Thirty Years after *Mills Music*’ (2015) 5(1) *IP Theory* 60, 67.

Music, and Mills Music had to render half of those payments to Snyder.⁹¹⁵ Eventually, the Supreme Court found Mills Music was entitled to a half share of the royalties from those mechanical licences, because termination did not stop those payment obligations from continuing.⁹¹⁶ The derivative works exception has been further considered in decisions like *Fred Ahlert Music Corp v Warner/Chappell Music Inc*⁹¹⁷ and *Woods v Bourne Co.*⁹¹⁸

Despite Congress' intentions when introducing the derivative works exception, academics have been critical of how it has been applied by the courts. For example, Meitus argues *Mills* can be interpreted in such a way that it protects the interests of both authors/heirs and licensees of derivative works,⁹¹⁹ but Litman takes the view that this decision made termination 'essentially alienable.'⁹²⁰ Further, Sanders and Siegelgutch have separately criticised the court in *Ahlert* for departing from the *Mills* court by preventing Warner/Chappell Music from licensing the use of a derivative sound recording.⁹²¹ More recently, scholars like Brennick and Broudy have raised the prospect that record labels may be able to bypass the intended effects of termination by remastering old sound recordings and use them as derivative works.⁹²² In particular, Brennick notes that because record labels will have a minimum of two years' notice before termination takes place under §§ 203 or 304, they would have ample time to generate remasters which 'could devastate the post-termination market for the original work because they are direct replacements.'⁹²³ Brennick also argues that publishers might 'extensively license the work

⁹¹⁵ Ibid 67.

⁹¹⁶ See Meitus 2015 (n 914), 67-68.

⁹¹⁷ 958 F Supp 170 (D SDNY, 1997).

⁹¹⁸ 60 F 3d 978 (2d Cir, 1995); for a further overview of this decision and how it compares with *Mills Music*, see Robert C Osterberg, 'The Use of Derivative Works After Copyright Termination – Does *Woods v. Bourne Expose a Quagmire*?' (1995) 43(1) *Journal of the Copyright Society of the USA* 28.

⁹¹⁹ Meitus 2015 (n 914), 72:

Allowing a terminating party to grant new mechanical licenses obviously rewards the original author and her heirs. Furthermore, allowing a derivative work licensee [sic], such as a record label, to choose between relying upon an existing license or obtaining equal or better terms in the form of a new voluntary or compulsory license preserves the rights of that licensee [sic] and simultaneously enhances the author or her heirs.

⁹²⁰ Litman 1987 (n 892), 902.

⁹²¹ Eileen Siegelgutch, 'Fred Ahlert Music Corp v Warner/Chappell Music Inc – Post-Termination Licensing of Pre-Termination Derivative Works: Whose Song Is It Anyway?' (1999) 6(2) *Jeffrey S Moorad Sports Law Journal* 379, 395; Rob Sanders, 'The Second Circuit Denies Music Publishers the Benefits of the Derivative Works Exception: *Fred Ahlert Music Corp. v Warner/Chappell Music, Inc.*' (2000) 29(3) *Southwestern University Law Review* 655, 656-660.

⁹²² See generally Ross Broudy, 'Remastering Termination Rights: Why Remastered Sound Recordings Should Never Be Considered Derivative Works as to Circumvent Copyright Termination' (2020) 27(3) *George Mason Law Review* 939; Brennick 2018 (n 909), 802-803.

⁹²³ Brennick 2018 (n 909), 803.

prior to...termination...to secure a right to revenue for post-termination uses', which would prevent the author/estate from capitalising on those opportunities.⁹²⁴

However, the lack of clarity in the US system does not preclude the benefits of a derivative works exception as highlighted previously. A derivative work exception *can* help achieve copyright's goals by promoting ongoing access to culturally valuable derivative works. Such rights should be accompanied by robust fair remuneration provisions (currently absent from US copyright law),⁹²⁵ and should be developed in consultation with stakeholders specific to each creative industry. Such consultations should help determine issues like what a derivative work is and what types of licenses are exempt from reversion.⁹²⁶

D. Exemptions versus contractual derogation

We have seen there is a rationale for certain works, whether collective works, works commissioned/made in the course of employment, or derivative works, to be exempt from the operation of statutory reversion rights. Exemptions can either be by statute or by contractual provision. Below, I argue for statutory exemptions as opposed to contractual exemptions.

1. Applying statutory presumptions of first ownership

Rightsholders should not be permitted to contract out of the operation of reversion rights for collective works, commissioned works, or works made in the course of employment.⁹²⁷ Rather, it would be more appropriate for copyright law to provide that works made in the course of employment to be the property of employers, and for there to be lists of works in respect of

⁹²⁴ Ibid 802.

⁹²⁵ Analysis on the development of these provisions is beyond the scope of this thesis.

⁹²⁶ Similar reasoning could be applied to exempt licences granted by publishers to third parties at the time of reversion: allowing those third parties to keep making works available is consistent with copyright's incentive (access) goals as long as authors are being appropriately remunerated for those continued uses. Consultations with industry stakeholders would be needed to establish whether all third-party licences would be exempt or whether some should still be ended by reversion. For an example of such a provision, see e.g., Working Group 1984 (n 343), 312, Provision 9(4):

The termination of the contract according to any of paragraphs (1), (2) and (3) shall not affect existing licenses that the publisher was entitled under the contract to grant to third parties, and shall not be prejudicial either to any claims the author may have to shares in the returns from such licenses, or to any other claim to payment of fees or damages that the author or the publisher may have against the other party at the time of the termination of the contract. After the termination of the contract owing to lapse of its agreed duration, the publisher shall have no right to continue to sell copies of the work still in stock, unless the author expressly authorizes him to do so.

⁹²⁷ See e.g., allegations in a recent filing by musician Dwight Yoakam against Warner Music Group in the US District Court: 'Complaint for (1) Declaratory Relief; And (2) Copyright Infringement Or, In The Alternative, (3) Conversion', filed by Richard S Busch, for plaintiff, *Dwight Yoakam v. Warner Music Group* (D CD Cal, 2:21-cv-1165, 9 February 2021) [70]-[76].

which commissioning parties are considered first owners (including collective works), set out in regularly updated regulations and developed in consultation with industry stakeholders. This will help ensure all parties have input into the definition of collective works, based on industry norms about how those works are commissioned and the types of investments made by the various stakeholders.

2. The need for clear definitions of collective, commissioned, and derivative works

It is important for regulations to clearly stipulate the kinds of works that are considered collective, commissioned, or derivative works. If the definitions are ambiguous, rightsholders may be able to argue that works not envisioned to be collective, commissioned, or derivative works (and to which the rationales behind excluding these works do not apply) are also exempt from reversion rights. The concern raised by Brennick and Brundy in relation to record labels potentially using remasters as ‘derivative works’ to bypass the intent of termination is one example;⁹²⁸ the sound recording work-for-hire debate in the US is another.⁹²⁹

(a) *The sound recording debate in the US*

As mentioned above, the work-for-hire exemption under §§ 203 and 304 covered works that are made in the course of employment, or ‘specially ordered or commissioned for use as...contribution[s] to...collective work[s]...[or] as...compilation[s].’⁹³⁰ Sound recordings were not included in this definition, and the rest of the definition suggests Congress had in mind works like dictionaries and encyclopaedias than sound recordings. However, the record industry has argued for decades that sound recordings are covered as ‘collective works’, ‘compilations’, or works of employment.⁹³¹ In fact, the RIAA lobbied for the inclusion of sound recordings in the definition of works-made-for-hire,⁹³² and a ‘technical amendment’ was made to this effect in 1999.⁹³³ The RIAA and the congressional staff member who made the

⁹²⁸ See above 165.

⁹²⁹ Some of the analysis and sources surveyed below are canvassed in *U.S. Copyright Termination Notices*: Yuvaraj et al 2021 (n 298), 33.

⁹³⁰ *Copyright Act of 1976*, 17 USC § 101.

⁹³¹ Statement of Marybeth Peters, The Register of Copyrights, before the Subcommittee on Courts and Intellectual Property Committee on the Judiciary, US House of Representatives, 106th Congress, 2nd Session, 25 May 2000, *Sound Recordings as Works Made for Hire* <<https://www.copyright.gov/docs/regstat52500.html>> (under heading ‘Pre-November 29, 1999, Recordings’).

⁹³² See Kathryn Starshak, ‘It’s the End of the World as Musicians Know It, or Is It?: Artists Battle the Record Industry and Congress to Restore their Termination Rights in Sound Recordings’ (2001) 51(1) *DePaul Law Review* 71, 90.

⁹³³ Mark H Jaffe, ‘Defusing the Time Bomb Once Again – Determining Authorship in a Sound Recording’ (2005) 53 *Journal of the Copyright Society of the USA* 601, 616.

amendment (who later became an RIAA lobbyist⁹³⁴) claimed the amendment was intended ‘to ensure that recording artists were protected under the Cyber-Piracy Prevention Act.’⁹³⁵ There was fierce opposition to this amendment. A Congressional committee heard from various industry stakeholders including artist groups, the RIAA, and the Register of Copyrights, and legal academics.⁹³⁶ Following negotiations, the amendment was effectively repealed,⁹³⁷ leaving the status of sound recordings as it was before the amendment.

As there is still a lack of clarity in the legislation, there are different scholarly views as to the proper characterisation of sound recordings. Some argue sound recordings should be considered works-for-hire when they are grouped into albums because they ‘are specially ordered or commissioned by record labels for use as contributions to a collective work.’⁹³⁸ As Johnson explains:

...each track on an artist’s album is a separate and independent work in and of itself...[and] the selection and arrangement of sound recordings on an album meet the minimal degree of creativity in order to warrant copyright protection for the overall collection.⁹³⁹

LaFrance even goes so far as to argue that sound recordings themselves – independently of whether they are included in albums – are ‘collective works’ under the statute because they involve ‘multiple musical performances’.⁹⁴⁰

However, there are more persuasive arguments against the inclusion of sound recordings as works for hire under § 101. In relation to the first limb – that the record label and artist have an employer-employee relationship – there are significant differences between the traditional employment relationship and the record label-artist relationship, such as the creative control artists have over recordings, the lack of regular working hours, and the use of royalties rather than wages as remuneration for the artist.⁹⁴¹ In any case, the sheer variety of contractual

⁹³⁴ Starshak 2001 (n 922), 89, although I make no claim that there was any relation between their employment and the amendment.

⁹³⁵ Ibid 89.

⁹³⁶ Ibid 92.

⁹³⁷ Ibid 94; William Henslee and Elizabeth Henslee, ‘You Don’t Own Me: Why Work for Hire Should Not be Applied to Sound Recordings’ (2011) 10 *The John Marshall Review of Intellectual Property Law* 695, 702-703.

⁹³⁸ Jessica Johnson, ‘Application of the Copyright Termination Provision to the Music Industry: Sound Recordings Should Constitute Works Made for Hire’ (2013) 67 *University of Miami Law Review* 661, 664, 669; Daniel Gould, ‘Time’s Up: Copyright Termination, Work-For-Hire and the Recording Industry’ (2007) 31(1) *Columbia Journal of Law & the Arts* 91, 128; Mary LaFrance, ‘Authorship and Termination Rights in Sound Recordings’ (2002) 75 *Southern California Law Review* 375, 387.

⁹³⁹ Jessica Johnson 2013 (n 938), 670; Gould 2007 (n 938), 129.

⁹⁴⁰ LaFrance 2002 (n 938), 389.

⁹⁴¹ Ryan A Rafoth, ‘Limitations of the 1999 Work-For-Hire Amendment: Courts Should Not Consider Sound Recordings to Be Works-For-Hire When Artists’ Termination Rights Begin Vesting in Year 2013’ (2000) 53(3) *Vanderbilt Law Review* 1021, 1032-1037. See generally Kristen O’Connor, ‘Going Solo: Harmonizing Judicial

relationships between artists and their record labels means that it is simply not possible to adopt a blanket characterisation of sound recordings as works for hire in an employment context.⁹⁴²

On the second limb – that sound recordings can be characterised as collective works under § 101 – a group of sound recordings in an album does not necessarily have to be a collective work. It can still be regarded as ‘an integrated work – a package of songs unified by a common concept.’⁹⁴³ Collective works tend to contain contributions from several creators, which may be similar to an album with songs from multiple musicians (e.g. a Christmas album) but is different to the production of an album by one artist.⁹⁴⁴ The work of a record company in preparing a sound recording for distribution can be analogised to that of a book publisher: if the book is not considered a work made for hire, why should the sound recording be?⁹⁴⁵ As with the employer-employee relationship, it is not possible to routinely characterise all sound recordings as collective works under § 101, because of the different circumstances involved in the creation of particular sound recordings.⁹⁴⁶

There are also persuasive policy arguments for not characterising sound recordings as works for hire. Termination rights were designed to help to address situations of unequal bargaining power in creative industries, including the record industry.⁹⁴⁷ Moreover, while other media types like movies may require the exemption because of market realities – for example, because they would be less available to the public post-termination if movie companies had to re-license them after 35 years or so – it is not clear that such realities characterise the recording industry.⁹⁴⁸ On the basis of the above, the case that sound recordings are not works for hire under the existing statutory framework is more compelling than the alternative. However, it remains a live debate which may make recording artists reticent to exercise their termination

Treatment of the Work-For-Hire Preclusion to Music Copyright Termination’ (2014) 36(2) *Thomas Jefferson Law Review* 373, 383-389, in which O’Connor argues that the common law factors set out in *Community for Creative Non-Violence v Reid* 490 US 730 (1989) to determine whether a relationship is one of employment are inadequate when confronted with the realities of the artist-record label relationship.

⁹⁴² See Gould 2007 (n 938), 137.

⁹⁴³ Rafoth 2000 (n 941), 1043.

⁹⁴⁴ Corey Field, ‘Their Master’s Voice – Recording Artists, Bright Lines and Bowie Bonds: The Debate over sound Recordings as Works Made for Hire’ (2000) 48(1-2) *Journal of the Copyright Society of the USA* 145, 174.

⁹⁴⁵ Dustin Osborne, ‘What’s Mine is Mine: Why Sound Recordings Should Never Be Considered Works Made for Hire’ (2017) 28(1) *Entertainment, Arts and Sports Law Journal* 50, 52; see also David Nimmer and Peter S Menell, ‘Sound Recordings, Works For Hire, and the Termination-Of-Transfer Time Bomb’ (2001) 49(2) *Journal of the Copyright Society of the USA* 387, 415.

⁹⁴⁶ Nimmer and Menell 2001 (n 945), 387, 402-403.

⁹⁴⁷ See e.g., Gould 2007 (n 938), 100.

⁹⁴⁸ Gould 2007 (n 938), 102.

rights in relation to sound recordings, for fear of expensive and time-consuming lawsuits by record labels.⁹⁴⁹

The sound recording debate shows that if there is ambiguity about what types of works are collective or commissioned works exempt from reversion rights, rightsholders may seek to include other works within those categories, works in respect of which reversion *should* apply. Thus, policymakers should take care to ensure that as little ambiguity exists as possible when drafting lists of these types of works (as well as derivative works). The benefit of placing these lists in regulations is that they can be regularly reviewed and more easily amended or reissued than legislation, so any unforeseen issues like the sound recording debate can be more easily rectified than if legislation needed to be amended. I have highlighted works which may be appropriate to categorise as commissioned or collective works for the purposes of first ownership, like dictionaries, encyclopaedias, and textbooks. However, policymakers should undertake further industry consultation to develop comprehensive lists of such works in every creative sector, to ensure the public policy behind reversion rights is upheld and that rightsholders are not able to bypass reversion rights through loopholes in those lists.

3. Allowing contracting out of statutory presumptions by rightsholders for collective or commissioned works

With lists of collective and commissioned works, it will be clear to authors who owns the copyright in what they create: them, or the commissioning parties. However, it can be beneficial for authors and rightsholders to be able to agree that such presumptions *do not* apply, such that authors are regarded as the first owners of copyright and can enforce reversion rights.⁹⁵⁰ This approach protects authors by ensuring rightsholders cannot contract out of reversion rights in a manner seen in the US and the UK. However, it allows authors to have the option of negotiating with publishers who do not mind giving up their ownership rights, which may benefit some authors (although most publishers are unlikely to want to give up first ownership rights).

IV. CONCLUSION

There is a strong case for statutory reversion rights to be inalienable in most cases. Allowing publishers to contract out of reversion rights wholesale would undermine the public policy

⁹⁴⁹ As we saw in *U.S. Copyright Termination Notices*, most counter-notices we found on the Copyright Office Catalog were filed by record labels: Yuvaraj et al 2021 (n 298), 32-33.

⁹⁵⁰ For examples of such provisions, see e.g., *Copyright Act 1968* (Cth), s 35(3); *Copyright Act RSC 1985* c C-42, s 13(3); *Copyright Act 1994* (NZ), s 21(4).

behind those rights: enabling authors to seek further reward for their labour and creating potential for works to be made more available to the public. The examples from the US and UK further show that for hundreds of years since the introduction of reversion rights in the Anglosphere, rightsholders have been attempting to derogate from the application of those rights. Making reversion rights inalienable and preventing authors from assigning post-time-limit reversionary interests until shortly before those time limits expire is necessary to preserve the interests of authors and the public, particularly because rightsholders are not incentivised to balance those interests with their own (which results in them taking as many rights as they can at great cost to authors and the public).

However, it may be appropriate for certain types of works to be exempt from reversion where commissioning parties provide significant direction, investment, and creative contributions to works for ongoing public availability (e.g. commissioned textbooks and loose-leaf services). Similarly, works made in the course of employment should be the property of employers considering their investment, direction, and the resources provided to employees to create those works. Publishers should also be able to continue using derivative works created before reversion so that culturally valuable adaptations are not lost to the public, although fair remuneration provisions are required to ensure the authors of the base works continue receiving payments for the ongoing use of those adaptations. Comprehensive lists of works that are considered collective, commissioned, and derivative works should be set out in regularly-updated regulations, developed in consultation with industry stakeholders.

IX. CONCLUSION

I. INTRODUCTION

In this thesis, I provided new empirical evidence on the development and use of reversion rights in contract and in statute. This new evidence helpfully fills a gap in the reversion discourse and enables both policymakers and researchers to better assess the kinds of reforms that may be needed to better achieve copyright's incentive and reward goals. I also built on the findings of these empirical studies by providing recommendations as to the different types of reversion rights that could be applied in statute in Australia and other common law countries (the UK, US, NZ, and Canada). While I have focused on how reversion could benefit the trade publishing industry in these jurisdictions, much of the data and analysis may have broader implications for reversion's potential in other industries and jurisdictions.

In **Part II** of this Chapter, I summarise the substantive findings of this thesis. In **Part III**, I highlight avenues for future research into reversion rights. I then conclude in **Part IV**.

II. FINDINGS

In **Chapter II**, I provided a theoretical basis for reversion rights, whether in publishing contracts or in statutes. I first explored copyright's goals in the common law tradition. While there is ongoing debate as to the rationales for copyright, I examined two overarching narratives that are consistently present in the literature: incentives and rewards. Under the incentives rationale, copyright is granted to incentivise the *creation* of works for the public benefit, the initial investments in those works by rightsholders, and investments in the continuing availability of those works to the public. Thus, the end point of this goal is that the public has access to culture and knowledge. Meanwhile, the rewards rationale is for authors to receive fair return on their creative labour. Under other natural law conceptions, copyright is seen as an extension of an author's personality. I later showed how existing approaches to copyright are deficient in attempting to achieve these goals: there is no evidence to indicate lengthy copyright terms are necessary to incentivise creation or investment, and under existing approaches (e.g., lump sum assignments of copyright), rightsholders, rather than authors, receive the benefit of term extensions.

Reversion rights can help address these problems. Authors can benefit from being able to take advantage of new opportunities to exploit their works when they reclaim their rights. But: these

opportunities also allow works to be made more available to the public than they otherwise might have been. In the context of the trade book industry, new opportunities for reward are particularly welcome because of the consistently low writing incomes reported by authors in countries like Australia and Canada. Equally, many books rapidly go out of print, which leads to a significant loss of cultural value when new technologies (ebooks, audiobooks, even blockchain) make republication of out-of-print books and associated material more accessible to authors. And of course, the public does not have widespread access to these works when they stay out of print, which runs counter to the access end point of copyright's incentive goal.

The initial response to *Untapped: The Australian Literary Heritage Project*, which aims to 'digitis[e]...culturally important out-of-print Australian [books]' and make them available for sale and borrowing through libraries,⁹⁵¹ suggests there is demand for out-of-print books: Australian libraries have begun committing to the not insignificant costs of digitising these books (approx. \$700 per book).⁹⁵² Even so, the point is not that reversion *will definitely* lead to greater sales or borrowing, but that *without* reversion, authors, publishers, and libraries simply *cannot* take advantage of the new opportunities afforded by technological developments, because their books will stay out of print.

I concluded Chapter II by showing the legal framework of Australia does not provide reversion rights for authors, nor is there adequate recourse for them under other parts of the law for them to reclaim their rights. The common law's vitiating factors for contracts and consumer protection law may provide some protection if authors wish to challenge the terms of their contracts. However, these require authors to meet those high thresholds and be able and willing to sustain legal action against their publishers. Given the similarities with the legal frameworks in the UK and New Zealand, authors in these countries must rely on reversion rights in their publishing contracts alone. This is not the case in the US and Canada, which both have inalienable time-based reversion rights that I explored later in the thesis.

In **Chapter III**, I presented the results of a study co-authored with my main supervisor, Associate Professor Rebecca Giblin, into the development of reversion clauses in publishing

⁹⁵¹ *Untapped: The Australian Literary Heritage Project* (Web Page) <<https://untapped.org.au/>>.

⁹⁵² 'Untapped: the Australian Literary Heritage Project Launch 24.11.20', *University of Melbourne* (Web Page), from 22:51-23:03 (statement by Associate Professor Rebecca Giblin) <<https://law.unimelb.edu.au/about/mls-video-gallery/public-lectures-and-events/untapped-the-australian-literary-heritage-project-launch-24.12.20>>; James Shackell, 'Most of Australia's literary heritage is out of print': the fight to rescue a nation's lost books', *The Guardian* (online, 24 June 2021), citing Associate Professor Rebecca Giblin on the approximate cost of digitising a book <<https://www.theguardian.com/books/2021/jun/24/most-of-australias-literary-heritage-is-out-of-print-the-fight-to-rescue-a-nations-lost-books>>.

contracts in Australia and publishing contract templates from the US and the UK. The goal of this study was to determine whether contracts are adequate repositories for these important rights: the results of the study strongly suggested they are not. Contracts often took rights for the entire copyright term and relied on reversion clauses that did not allow authors to regain their rights when publishers were no longer using them or the books were out of print (e.g. authors could only reclaim their rights when books were ‘not available in any edition’). These thresholds may have made sense in a print-only era, when it would have cost publishers to republish out-of-print books: not doing so would have been a clear indicator they no longer needed the rights. However, in the digital era, publishers do not need to invest anywhere near as much to keep copies of books available online but are still able to retain the rights. Meanwhile, the length of most publishing contracts means clauses will continue to be inadequate, as it is extremely difficult to draft clauses that will address changes to industry and technology sometimes a hundred years in advance. The inadequacy of publishing contracts indicates there is a need, in the book industry in Australia at least, for statutory provisions which apply independently of contracts and which are regularly reviewed to reflect changing realities. While more research into contracts in other jurisdictions is welcome, the consistent advocacy from author organisations around the world for more appropriate contract terms suggests these problems, and the need for reversion rights, are not limited to Australia.

I then conducted a three-chapter examination of statutory reversion rights. In **Chapter IV**, I showed that statutory reversion rights are justified impositions on the freedom of contract. The previous two chapters showed problems in the way that contracts protect author interests (lengthy, expansive grants and inadequate reversion mechanisms), and that authors may not always be able to negotiate better terms. As such, it is appropriate to override contractual freedom so that authors have reversion rights they can rely on *outside* their contracts. I then examined the existing scholarship on statutory reversion rights. Most of the English-language scholarship on reversion rights focuses on the EU, Canada, the USf, the UK, and South Africa. These jurisdictions have all had in the past, currently have, or are seeking to implement, various types of reversion rights. It would be natural for policymakers to look at these countries when thinking about what kind of reversion models they might apply: indeed, Canada appears to have taken this position by suggesting a version of the US statutory termination law (which allows authors to end their copyright grants after 35 years or so). However, there may be valuable information and lessons from reversion rights operating in other parts of the world, which I focused on in **Chapter V**.

Using legal mapping techniques, I surveyed the reversion laws of the 193 UN Member States and presented results from Africa, Asia, Central America, South America, and Oceania. This data provides different reversion models which policymakers could consider implementing. Equally, there are several lessons that can be learned from this data. First, reversion laws must reflect changing industry and technology realities. Many of the laws reflected pre-digital era realities, like allowing authors to reclaim their rights when all copies of works were destroyed. However, not updating these provisions for new realities (e.g. when is a file destroyed?) may make them ineffective like many of the reversion clauses in *Are Contracts Enough?* As such, policymakers should regularly review and update these reversion laws to make sure they stay fit for purpose. Second, reversion laws should generally be inalienable. Several countries imposed reversion laws that parties could contract out of: publishers can render these ineffective by contracting out of them, and this should be prevented to ensure those laws can be used by authors. Third, a combination of reversion laws is needed to address different realities. The survey presented a rich variety of reversion laws, dealing with all kinds of issues: books going out of print, publishers inadequately exploiting rights, publishers transferring their businesses, and so on. While the US and the UK have historically adopted a one-size-fits-all approach to their reversion rights, the survey reminds policymakers that different laws address different issues, and that there is no need to stop at one.

In **Chapter VI**, I presented new data on the use and operation of the US termination rights. These provisions allow authors to end copyright grants after prescribed time periods. They are some of the most hotly debated reversion provisions in the world. However, there is little empirical research on how these provisions are being used, despite termination records being publicly available from the US Copyright Office. Together with my co-authors Associate Professor Rebecca Giblin, Dr Daniel Russo-Batterham, and Associate Professor Genevieve Grant, I conducted a whole-of-universe analysis of copyright termination notices from the Copyright Office Catalog, spanning 1977-2020. The resulting open access datasets are hugely beneficial for copyright researchers and policymakers, as they present termination data from the Catalog in an accessible manner allowing detailed statistical analysis.

Our preliminary analysis of the data highlighted a number of trends about the use of the termination right. First, it suggests that moving forward, the termination right under § 203 is likelier to benefit successful creators and estates in relation to books. This may be due to the complexity of the provisions: many authors may not be able to afford legal representation to help them exercise their termination rights. Even if they are able to engage such representation,

the fact so many books go quickly out of print means few will retain enough value for long enough to make it worth exercising the termination rights. Further, the data highlighted the battles between recording artists seeking to terminate their rights and record companies resisting these attempts. It's likely that these battles are at least partially influenced by an unhelpful lack of clarity surrounding the status of sound recordings under the termination laws. These inefficiencies show areas for improvement in reversion lawmaking, which informed the normative recommendations set out in the next two chapters.

In **Chapter VII**, I argued the case for implementing use-it-or-lose-it rights and time limits. Both fulfil different but equally important roles. Use-it-or-lose-it rights enable authors to reclaim their rights once it is clear publishers are no longer willing or able to exploit those rights, having had a reasonable time to do so. I examined Article 22 of the EU Directive on Copyright in the Digital Single Market, which mandates its Member States implement a use-it-or-lose-it right for creators in their copyright statutes. Article 22 forms a useful basis for use-it-or-lose-it rights. However, I argued that the threshold for when a creator can enforce it should be when there is *minimal* exploitation rather than no exploitation at all: the latter would simply leave authors vulnerable to publishers retaining rights as long as they had done *something* to exploit the works, but were not actively investing in marketing or publishing the work. Further, sector-specific guidelines on when exploitation will be considered inadequate is necessary for use-it-or-lose-it rights to be effective. These should be placed in easily updateable regulations, to be reviewed regularly to ensure they continue being effective.

I also argued for the imposition of time limits because they fulfil a different role to use-it-or-lose-it rights. Time limits allow authors to have a second chance at negotiating publication deals for their works, based on what they know about how successful those works are. For successful authors, this will help them capitalise on that success (which may be why successful authors seek to terminate their rights in the US). For authors of works which are not as successful, time limits still enable them to re-evaluate their options and pursue alternate exploitation avenues which could yield greater rewards. Different time limits may be necessary for different creative industries. For the trade book industry, the Spanish (15-year) and Italian (20-year) limits may be effective limits, but further research is necessary to determine the impacts of implementing such reforms. Both of these suggested reforms should be the subject of consultation with industry stakeholders.

In **Chapter VIII**, I argued that statutory reversion rights should generally be inalienable. Allowing publishers to contract out of reversion rights contravenes the policy behind them,

which is to help better achieve copyright's incentive and reward goals by enabling authors to reclaim their rights. I showed how, from the Statute of Anne in 1710 to the dispute between Gloucester Music and Duran Duran today, publishers have sought to contract out of the operation of reversion rights. I argue these rights should generally be inalienable to prevent publishers stymying their intended effects. However, there may be situations in which it is appropriate for works to be exempt from reversion, such as works made for hire, certain collective works, works made on commission, and derivative works. The exceptions for such situations should be set out in statute with lists of exempted works in easily updateable regulations.

III. FUTURE RESEARCH

In this thesis I have shown why reversion rights matter, presented vital new data on reversion rights in contracts and statutes around the world, and set out normative recommendations on how reversion rights could be more effectively implemented in copyright laws in Australia and other common law countries. However, this thesis makes no claim of being the final word on reversion rights. Below, I sketch out avenues for future research that would helpfully supplement the research undertaken in this thesis.

A. Further research into the application of reversion rights in other creative industries

My discussion of reversion rights in this thesis was set against the backdrop of the trade book industry in Australia and other common law countries. However, many of the same issues which reversion can help address may be present in other industries. For example, our termination study showed there were far more musical compositions and sound recordings than books subject to termination notices under §§ 203 and 304 of the US Copyright Act. This suggests composers and recording artists see great value in being able to regain their rights before the end of the copyright term. The fact that most counter-notice we identified were filed by record labels indicates they too see the value in retaining rights to those works. And other examples explored in this thesis like the Solomon Linda case, the Duran Duran litigation, and the Redwood cases all suggest composers and recording artists see reversion as crucial to giving them a greater ability to participate in the success of their songs and recordings than they have under current approaches.

To that end, further research would be welcome on implementing rights like time limits and use-it-or-lose-it rights in ways that would be effective for different industries: music, film, art, etc. Our termination right study suggested that a one-size-fits-all approach may not adequately

address the different features of various creative industries. While I have made a start in this thesis by exploring how reversion rights could apply in the trade book industry, creators in other industries would benefit from research into how reversion could be effectively applied in their contexts.

B. Further empirical research into the use and operation of different statutory reversion models

Further empirical research into the use and operation of different statutory reversion models would also helpfully supplement the new empirical research in this thesis. Knowing how the many reversion rights highlighted in this thesis are used in practice will help policymakers evaluate their effectiveness more accurately.⁹⁵³ In particular, it is important to examine the impacts of statutory reversion rights in the context of the incentive and reward goals of copyright: are they making works more available to the public, and are they leading to greater rewards and recognition for creators? In this thesis I argued that statutory reversion rights *can* help achieve these goals, and presented evidence that suggests that there are structural issues in reversion schemes around the world, particularly the US, that appear to hinder them from achieving these goals. However, empirical evidence on the market impacts of statutory reversion rights (e.g., on sales) is sparse, and policymakers would benefit from such evidence so they can make more informed decisions about the kinds of policies they wish to implement in their own copyright laws.

In the absence of publicly available data on the exercise of reversion rights, scholars could seek documentary evidence from government intellectual property agencies, author and publisher organisations, or individual authors and publishers. This may be in the form of reversion notices, letters, and other correspondence pertaining to authors exercising their statutory rights. An example of such data may be the ‘registered letter[s]’ which authors are required to send publishers in France if they want to reclaim unexploited electronic rights in books.⁹⁵⁴ There may also be case law on disputes between authors and publishers regarding the exercise of reversion rights, which may form data for the purposes of empirical analysis.⁹⁵⁵ Scholars could apply content analysis or other documentary analysis methods to these documents to create quantitative datasets on how reversion laws have been used in practice, as we did with the

⁹⁵³ Acknowledging, of course, that I have only reviewed English-language scholarship and that empirical research into reversion rights may already exist in other languages.

⁹⁵⁴ France, art L132-17-2(II).

⁹⁵⁵ See generally Hall and Wright 2008 (n 523).

archived contracts in *Are Contracts Enough?* The computational methods applied in *US Copyright Termination Notices* also present a useful model for further research into large datasets, whether they are created by researchers (e.g., manual data entry from scanning paper documents) or by participating organisations (e.g., the US Copyright Office Catalog). Future versions of the surveys undertaken by author associations and other researchers could also include questions about the exercise of statutory reversion rights, their awareness of those rights, and the willingness of publishers to comply with those provisions.⁹⁵⁶

It should be noted that this thesis did not focus on other forms of author-protective legislation, like the fair remuneration provisions set out in the EU Directive.⁹⁵⁷ Further empirical research into the impacts of those provisions, and how they interact with reversion rights, would also be useful, especially because my recommendations for derivative works to be exempted from reversion rights relies on there being robust fair remuneration provisions to give authors the benefit of continued use of their derivative works.⁹⁵⁸

IV. CONCLUDING THOUGHTS

Reversion rights have immense potential to help better achieve copyright's incentive and reward goals. Whether they are used to secure settlements and royalty payments for impoverished family members of composers like Solomon Linda, enable widespread dissemination of culturally valuable works like Prof James J O'Donnell's textbook on Augustine, or lead to smash hit movie adaptations of previously out-of-print books (*Ladies in Black*),⁹⁵⁹ the positives of effective reversion rights are clear to see. But even though there is no guarantee that all works will be successful when they are reverted, reversion opens up possibilities that would otherwise not be available for authors and publishers. The burgeoning ebook and audiobook markets, direct licensing to libraries, and self-publishing are just some of the many avenues through which reverted rights may benefit authors, new publishers, and the public. Without reversion, such opportunities would remain out of reach for authors, with books staying out of print and the public losing access to culture and knowledge. This thesis focused on reversion rights in the trade book industry in Australia and other common law

⁹⁵⁶ See further Towse 2018 (n 111), 485, on 'the role of questionnaire studies as a source of empirical evidence on contract reversion and renewal.'

⁹⁵⁷ EU Directive (n 137), arts 18-21.

⁹⁵⁸ See above 163.

⁹⁵⁹ *Ladies in Black* (Sony Pictures Releasing International, Stage 6 Films, 2018); Madeleine St John, *The Women in Black* (Andre Deutsch Ltd, 1993); Madeleine St John, *The Women In Black* (Text Classics, 2012).

countries, but the rich variety of reversion laws around the world and the examples from both the music and various book industries above suggest reversion can have a far broader reach.

Equally, reversion rights can be rendered ineffective for various reasons. Reversion rights in publishing contracts can be ineffective: even if they were drafted well at the time those contracts were executed, the contracts themselves last way too long to appropriately reflect all the changes that are likely to happen over the lives of those contracts. There's a strong case, therefore, that statutory reversion rights, operating independently of contracts, are necessary to give authors effective means to regain their rights. As mentioned, a wide range of those laws exist around the world, giving policymakers different options to consider. Based on my research into these laws, I recommended two main types of reversion laws: use-it-or-lose-it rights and time limits. Both address different issues, allowing authors to reclaim rights in unexploited works *and* renegotiate exploitation agreements once publishers have had enough time to use those rights. Care must be taken to ensure these laws are regularly reviewed and updated so they remain current and effective. Publishers should be prevented from contracting out of them, and exceptions should be implemented where appropriate, e.g., in the case of derivative and commissioned works.

It is hoped that this thesis inspires copyright policymakers to consult with industry stakeholders about the potential for implementing reversion rights in copyright legislation both in Australia and beyond. It is also hoped that this thesis inspires further research into how reversion rights can help address incentive and reward inefficiencies in other fields, like the recording industry. Last, it is hoped that the new empirical research in this thesis inspires further empirical research into the use and operation of the many statutory reversion provisions discussed herein. In particular, the use of content analysis and computational methods helpfully provides a model for future research into documentary evidence on the use of these provisions.

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