2

Statutory Reversion Rights in the British Commonwealth

INTRODUCTION

This chapter chronicles the history of statutory reversion rights in England and other Commonwealth countries.[1] While reversion was part of the copyright system since the *Statute of Anne*, and has appeared in various forms since, it has had remarkably little success in benefiting authors or their heirs. It's sometimes dismissed for that reason – the fact that reversion *hasn't* worked very well is offered as evidence that it *can't* work very well. But we show that these previous iterations were set up for failure, with every example having been implemented in ways that made it impossible to achieve their author-protective aims.

We contrast those failures with the shining success of the UK's 'Terms of Trade' reforms, which have massively increased British film and TV revenues along with the international reach of British stories. Though technically a restriction on what creators can be obliged to give away rather than a reversion right per se, they achieve the same end – and provide powerful real-world evidence of how interventions that centre creators can further copyright's access and rewards aims.

Finally, we briefly summarise the current state of play on reversion reform in South Africa, Canada and the UK. Although political realities continue to make it extremely difficult to enact reforms that would meaningfully shift money and power from investors to creators, recent developments show that reversion's potential to do so is beginning to be well and truly recognised.

[1] Some material in this chapter was first published by Sweet & Maxwell in the *European Intellectual Property Review*: 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 and is reproduced by agreement with the Publishers.

2.1 1710: THE BIRTH OF STATUTORY COPYRIGHT AND REVERSION RIGHTS

Statutory reversion rights were born with the first modern copyright statute. The UK's *Statute of Anne* provided that rights to new works would last for 14 years, after which the 'sole right of printing or disposing of copies' would return to their authors, if still alive, for 14 years more.[2] If the authors did not survive the initial period, the copyright ended after that first 14-year term.

It's unclear exactly what Parliament meant to achieve via this dual-term framework,[3] but the consensus suggests the reversion right was intended to benefit authors by giving them the right to decide what happened to their books once the initial term expired. As Bently and Ginsburg explain, '[w]ere the objective otherwise … there would be no point dividing the "sole right" into two periods, nor tying the second to the author's survival, much less designating the author as the person to whom the exclusive right shall "return"'.[4] The return of rights seems to have been intended to put authors in a position 'to grant rights anew from a stronger bargaining position should her work have earned a substantial audience',[5] particularly where the initial payment was insufficient in comparison to the book's subsequent popularity.[6]

In practice, however, authors rarely benefited from the second term. Sometimes this was because they died before it could accrue, or because their book stopped selling within the first 14 years. But even when they survived and their books kept their value, it was common practice for publishers to purport to take authors' renewal rights upfront, together with transfer of the initial term, and without payment of any fresh sum. As book historian Harry Ransom explains, '[t]he true intention of this proviso was ignored from the start: authors continued to sell their books outright'.[7] Or perhaps more accurately, considering the relative bargaining power of the various parties: publishers were powerful enough to insist on extracting both the initial and reversionary terms at the time of the initial contract, and so that's exactly what they did.

The text of the statute was ambiguous as to whether upfront takings of both terms would be valid, or whether publishers needed to wait until the second term to

[2] Statute of Anne 1710 (UK).

[3] For a detailed discussion and evaluation of the competing viewpoints see 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(3) *Berkeley Technology Law Journal* 1475, 1482.

[4] Ibid 1485.

[5] Ibid 1479; Jane C Ginsburg, 'Copyright' in Rochelle Dreyfuss and Justine Pila (eds), *The Oxford Handbook of Intellectual Property Law* (Oxford University Press, 2017) 497.

[6] Isabella Alexander, *Copyright Law and the Public Interest in the Nineteenth Century* (Hart, 2010) 25.

[7] Harry H Ransom, *The First Copyright Statute: An Essay on an Act for the Encouragement of Learning, 1710* (University of Texas Press, 1956) 104.

bargain for the additional 14 years of rights.[8] Obviously though, if publishers could simply extract all rights upfront, the reversion right would only benefit those who had sufficient bargaining power to hold onto it – and in practice, that was very few.

Writers and their supporters sought to combat this practice via new reforms, and in 1737 a draft bill was advanced to limit what authors could be obliged to give away.[9] Though crafted almost 300 years ago, its framing of the problem (and potential solution) still feels timely. The bill recognised the information problem we introduced in Chapter 1, that comes about from the fact that most copyright contracts are signed before anyone knows what the work is worth: 'foreasmuch as the true Worth of Books and Writings is, in many Cases, not found out till a considerable time after the Publication thereof'. It also acknowledges that authors might be obliged to sign away the rights prematurely: 'Authors, who are in Necessity, may often be tempted absolutely to sell and alienate the Right ... before the Value thereof is known.'

The 1737 bill would have extended copyright to last the author's lifetime plus 11 years, but simultaneously have limited grants during the author's lifetime to a maximum of 10 years at a time. Upon expiry of each term, authors and publishers could enter into fresh grants – now each equipped with much more knowledge about what the work was worth. It's worth taking a moment to consider how different the creative industries might look like today, had that been the model everything else was built on.

Obviously, that didn't happen. The bill failed to pass into law, with Deazley explaining that, '[f]rom the booksellers' point of view, [it] was anathema'.[10] His commentary suggests that it was the clauses limiting the booksellers' rights that prevented the bill from passing. 'The prospect of having to renegotiate contracts with the author every ten years must have made most of the metropolitan book trade baulk in disbelief.'[11]

Publishers continued asserting that their initial contracts with authors gave them rights not only for the full initial term, but also the entirety of the renewal.[12] In exchange, authors typically received a single lump sum payment – and not a penny more in the event they lived long enough to trigger the second term.[13]

[8] William Cornish, 'The Statute of Anne 1709–1710: Its Historical Setting' in Lionel Bently, Uma Suthersanen and Paul Torremans (eds), *Global Copyright* (Edward Elgar, 2010) 23.

[9] Bill for the better Encouragement of Learning, and for the more effectual securing the Copies of Printed Books to the Authors or Purchasers of such Copies, during the Times therein mentioned (1737).

[10] Ronan Deazley, 'Commentary on the Booksellers' Bill (1737)' in Lionel Bently and Martin Kretschmer, *Primary Sources on Copyright (1450–1900)* (Web Page, 2008) [9] <www.copyrighthistory.org>. Note however Patterson's suggestion that booksellers influenced the drafting of this bill in an attempt to obtain perpetual copyright, and were not fazed by the 10-year limit: '... the language ... indicates how little fear the booksellers had of the authors' interference with their monopoly; they were willing that an author should retain a control over his works, as they were interested only in the profits from publishing': Lyman Ray Patterson, *Copyright in Historical Perspective* (Vanderbilt University Press, 1968) 157.

[11] Deazley (n 10).

[12] For a detailed and nuanced analysis of contractual practice during the relevant period, see Bently and Ginsburg (n 3) 1494–508.

[13] Ibid 1508.

The validity of publisher attempts to extract the renewal rights upfront was not much tested, and there was considerable uncertainty about the formalities that would need to be satisfied (if any) for their extraction to be valid as a matter of law.[14] However, an unreported 1765 decision indicated pre-vestiture assignments *could* be valid,[15] and in 1786 it was held that sufficiently broad language could indeed transfer the reversionary right before it vested, even in the absence of a deed.[16] The courts that reached these findings may have been influenced by notions of freedom of contract, mentioned in Chapter 1, which were enjoying primacy around this time.[17]

Even where the contracts did not expressly deal with the renewal term – and Bently and Ginsburg's historical research demonstrates that this was often the case[18] – authors were unlikely to have succeeded in publishing their books elsewhere. By the 1730s, control of book rights had come to be concentrated in the hands of a powerful bookseller syndicate known as the Conger.[19] As Patterson explains in his comprehensive history, 'there grew up a tacit understanding among the booksellers [publishers] of the eighteenth century that there should be no interference with each other's lapsed copyrights', with any who dared publish a competitor's title after its statutory copyright expired being bullied and shunned by their peers.[20] Such practices would no doubt have been applied with even more vigour to those who tried to recognise the author's reversionary right *during* that term.

Analysis of historical records shows that the *Statute of Anne* did little to improve the economic position of authors, with authors getting paid about the same under the system of statutory copyright as under the licensing system that preceded it.[21] The reversion right seems to have been particularly ineffective, with Bently and Ginsburg's historical research unearthing just four documents that even dealt with it explicitly – most notably and ironically the contract for Adam Smith's *Wealth of Nations*.[22] Smith had held onto the copyright after the work was published in 1776 before finally selling the copyright outright for £300 in 1788.[23] In 1790, when rights 'returned' to him under the statute, his publishers paid him that same amount again to renew their copyright for another 14 years.[24] Little else is known about the circumstances surrounding this transaction, but it's likely that the initial success of Smith's treatise gave him the

[14] Ibid 1514.
[15] *Millar & Dodsley v Taylor* C33/426 (Ch 1765). See Bently and Ginsburg (n 3) 1518–22 for a more comprehensive discussion of this decision and its significance.
[16] *Carnan v Bowles*, 2 Bro. C.C. 80 (1786).
[17] Cornish (n 8).
[18] Bently and Ginsburg (n 3) 1494–508.
[19] Patterson (n 10) 151–2.
[20] Patterson (n 10) 152 citing W Forbes Gray, 'Alexander Donaldson and His Fight for Cheap Books' (1926) 38(2) *Juridical Review* 180, 193.
[21] Deazley (n 10) [5].
[22] Bently and Ginsburg (n 3) 1539.
[23] Richard B Sher, *The Enlightenment and the Book* (University of Chicago Press, 2006) 236.
[24] Ibid.

bargaining power necessary to withhold the second term. Whatever the reason, this case shows the reversion right had the potential to provide direct economic benefits to authors where they were able to hold onto it until it vested. If improving the lot of authors had indeed been parliament's intention when it designed the dual term framework, its neglect in not appropriately securing the reversion right to those intended beneficiaries goes a long way to explaining why it failed.

2.2 1814: REVERSION RIGHTS EXTINGUISHED

With the *Statute of Anne*'s reversion right having been rendered all but useless by this combination of judicial interpretation and industry practice, it had few mourners when it was finally repealed by the British Parliament in 1814. Its replacement substituted *Anne*'s dual term with 28 years of protection, or the author's lifetime if they were still living after that.[25]

The new law was the result of spirited publisher lobbying. Although they had been successful in using contracts to wrest away all authors' rights upfront, *Anne*'s second 14 years wouldn't accrue unless the author was still alive at the expiry of the first. But rather than pointing out how this harmed their commercial interests, publishers instead argued the old system had been 'productive of great hardships to the families of authors'.[26] An anonymously published pamphlet purporting to represent the views of authors (but subsequently attributed to solicitor Sharon Turner, who had given evidence on behalf of the booksellers when the 1814 law was being debated[27]) emotionally evoked those hardships:

> The author's family loses all the profits of his labours at the very time when, from the event of his death, they are in the greatest need of them. It seems the dictate of reason and justice that authors should have at least the full twenty eight years, without any reference to the life of the author.[28]

Bently and Ginsburg describe this argument as 'tendentious to say the least', since so many publishing contracts purported to extract the full right upfront, and because even those few authors who held on to their copyrights initially still tended to sell them within the initial term.[29] As they point out, had the *real* intent been to benefit the families of deceased authors, the renewal term could have vested in them, as became the law in the US and Canada soon after.[30]

[25] *Literary Copyright Act 1814*, 54 Geo 3, c 156.
[26] Bently and Ginsburg (n 3) 1543 citing 24 PARL DEB, HC (1st ser) (1812) 308, 310 (UK).
[27] Ibid 1546.
[28] Ibid 1543 citing Sharon Turner, *Reasons for a Modification of the Act of Anne Respecting the Delivery of Books and Copyright* (Nichols, Son, and Bentley, 1813) 1.
[29] Ibid 1544.
[30] Ibid.

Thus, although the linkage between author's lifetime and copyright term appeared to be a victory for creators, in practice it was unlikely to serve them much better than the old regime: those additional rights could be (and were!) acquired in their entirety by publishers, often for a fixed sum rather than ongoing royalties.[31] Accordingly, Bently and Ginsburg describe it as 'of largely symbolic, rather than pecuniary, significance', before acidly noting the disconnect between rhetoric and practice:

> The amendment reflected the legal embodiment of what Bracha has called 'the ideology of authorship,' at the same moment that the law abandoned its attempt to intervene in the functioning of the book market to protect the interests of real, flesh-and-blood, writers.[32]

2.3 1911: REVERSION RIGHTS RETURN IN THE UK AND COMMONWEALTH

Statutory reversion rights next appeared almost a century later with the passage of the *Imperial Copyright Act* 1911 (UK) ('Imperial Act'), which applied throughout the British Empire,[33] and was adopted by self-governing dominions including Australia,[34] Canada[35] and New Zealand.[36]

That law extended copyright to the author's life plus 50 years, but with a wrinkle found in a proviso to section 5(2): authors could not assign or license their rights to

[31] Ibid 1548.

[32] Ibid citing Oren Bracha, 'The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright' (2008) 118(2) *Yale Law Journal* 186.

[33] Uma Suthersanen, 'The First Global Copyright Act' in Uma Suthersanen and Ysolde Gendreau (eds), *A Shifting Empire: 100 Years of the Copyright Act 1911* (Edward Elgar Publishing, 2013) 18. See *Copyright Act 1911* (UK) 1 & 2 Geo 5, c 46, s 25(1) ('*Copyright Act 1911* (UK)'). These are 'believed to include the following: Anguilla, Antigua, Ascension Islands, Australia, Bahamas, Bangladesh, Barbados, Barbuda, Belize, Bermuda, Botswana, British Antarctic Territory, British Virgin Islands, Brunei, Canada, Cayman Islands, Central and Southern Line Islands, Channel Islands, Cyprus, Dominica, Falkland Islands, Federated Malay States, Gambia, Ghana, Gibraltar, Grenada, Guyana, Haiti, Hong Kong, India, Republic of Ireland, Isle of Man, Israel, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Malta, Mauritius, Montserrat, New Zealand, Nigeria, North Borneo, Pakistan, Pitcairn Islands, Redonda, Republic of South Africa, Sarawak, Seychelles, Sierra Leone, Singapore, Solomon Islands, Somalia, South Georgia, South Sandwich Islands, Sri Lanka, St Helena, St Kitts-Nevis, St Lucia, St Vincent, Swaziland, Tanzania, Tonga, Trinidad and Tobago, Tristan de Cunha, Turks and Caicos Islands, Tuvalu, Uganda, United Kingdom, Zambia, Zimbabwe': Alter Kendrick Baron, 'Protecting Your Musical Copyrights', *Copyright Due Diligence*, 32 n 33 <https://akbllp.com/wp-content/uploads/Protecting-Your-Musical-Copyrights.pdf>.

[34] *Copyright Act 1912* (Cth), implementing the *Copyright Act 1911* (UK) (n 33). See also Sam Ricketson, 'The Imperial Copyright Act 1911 in Australia' in Uma Suthersanen and Ysolde Gendreau (eds), *100 Years of the Copyright Act 1911* (Edward Elgar Publishing, 2013) 52, 68–9; Benedict C Atkinson, *The True History of Copyright: The Australian Experience 1905 – 2005* (Sydney University Press, 2007) 94–5.

[35] *Copyright Act 1921* (Canada) RSC 1985, c C-42, s 11(2) ('*Copyright Act 1921* (Canada)').

[36] *Copyright Act 1913* (NZ) s 8(2).

anyone for longer than their lifetime plus 25 years. Once that time passed, rights would revert, automatically, to their heirs, regardless of any contract to the contrary.[37] The reversion right contained within the proviso applied to all instances where the author was the first owner of the copyright, except in cases involving collective works.

When we first wrote about this right back in 2018–19, we described its origin as something of a mystery.[38] The Committee commissioned to review Britain's copyright law in light of the 1908 Conference on the Berne Convention made no such recommendation, and even the contemporaneous legislative debates indicated confusion about its source.[39] Fortunately, copyright expert Dr Elena Cooper took that as invitation to fill the gap, and we are now able to draw on her historical research to better explain how it came to be.[40]

The Berne Convention's Berlin revision mandated that copyright terms be extended to life plus 50 years. For the UK, that was a substantial jump. Until it was implemented, literary copyrights lasted 42 years or 7 years after the author's death, whichever was longer.[41] Engravings and sculptures were covered by copyright for just 28 years from publication.[42]

As Cooper explains, that jump was controversial on two main grounds. First, it was criticised for favouring the interests of assignees over those of authors.[43] Like the emotive rhetoric that supported the removal of *Anne*'s reversionary term in favour of a single lump sum term, the rhetoric used to sell the term extension strongly emphasised the interest of authors in providing for their families after their passing. However, critics pointed out that it would do little to ensure that. Among them were Lord Courtney, debating the bill in the House of Lords:

> I believe that this change in the law will not be found to operate at all to the advantage of authors, speaking broadly. It will be found to operate to the advantage of publishers only, who will get an extended period of the copyright in the books which they publish.[44]

[37] *Copyright Act 1911* (UK) (n 33) s 5(2).

[38] Yuvaraj and Giblin (n 1) 233.

[39] Report of the Committee on the Law of Copyright (1909). See also, e.g., United Kingdom, *Parliamentary Debates*, House of Lords, 14 November 1911, vol 10, col 113–66, 15–18 per Lord Courtney: 'There is no convention at all leading up to [this provision] … I do not know how the proposal originated, and I do not know that it is found in the system of laws of any other country … it is an entirely novel proposition … for which there is no parallel elsewhere … That is, indeed, putting authors in leading strings, and treating them as persons who cannot take care of their own interests and who must be protected in this very unusual fashion.'

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

[41] *Copyright Act 1842* (5 & 6 Vict c 45) s 3; Cooper (n 40) 294.

[42] Cooper (n 40) 294 n 22.

[43] Ibid 295–6.

[44] Ibid 295 citing United Kingdom, *Parliamentary Debates*, House of Lords, 31 October 1911, vol 10, col 49 (Lord Courtney).

The reversion right was ultimately proposed by the Solicitor-General as a way of addressing this controversy.[45] Alive to the possibility that an author would be obliged to contract away rights for the entirety of the copyright term (however long that might be), the amendment sought to ensure that their heirs would have an opportunity to benefit from the extension in some meaningful way. In other words, it sought to ensure the scope of rights better matched the rhetoric being relied upon to justify the extension.

The other key criticism of the term extension was that it would impede access to important knowledge and culture, both by reducing access to public domain works and keeping prices higher for longer.[46] These concerns were addressed via two compulsory licensing provisions. A proviso to what became section 3 in the Imperial Act gave any publisher the right to republish works 25 years after the author's death upon payment of a 10 per cent royalty. Section 4, which applied where copyright owners had withheld public access to works after the author's death, authorised the grant of compulsory licences for the purposes of republication. Parliament hoped that these provisions would prevent important books from being lost altogether, or being accessible only at a high price.[47]

The reversion right is sometimes called the 'Dickens' provision', a nod to the public outrage in the decades prior to its passage over publishers benefiting from the sale of Charles Dickens' books while his descendants were living in poverty.[48] While there's no direct link – Dickens' longest literary copyrights had expired by the time the 1911 Act came into operation – it's likely that scandal drove public and parliamentary support for meaningful protections for author heirs.

But, like the *Statute of Anne* before it, this law signally failed to improve the lot of authors or their heirs, with Copinger and Skone James describing 'the benefits to the author's family or dependants [as] somewhat illusory'.[49] The reasons are obvious with hindsight, and indeed should have been anticipated and addressed at the time of drafting. While the legislature learned from the previous failure by explicitly making it impossible for the author to transfer the reversionary right during their lifetime, it regrettably introduced new shortcomings that proved almost as detrimental.

[45] Ibid, 296 n 52.
[46] Ibid 294–5.
[47] Ibid 295.
[48] David Vaver and Pina D'Agostino, 'What the Dickens? Fact or Folklore?', *IPOsgoode* (Blog Post, 19 July 2021) <iposgoode.ca/2021/07/what-the-dickens-fact-or-folklore/>.
[49] Walter A Copinger and EP Skone James, *Copinger and Skone James on Copyright: Including International Copyright, with the Statutes and Orders Relating Thereto and Forms and Precedents* (Sweet & Maxwell, 11th ed, 1971) 163; see also JM Cavendish, *A Handbook of Copyright in British Publishing Practice* (Cassell, 1974) 32: 'Few people today seem to know that this proviso exists, probably because it is seldom worth anyone's while to invoke it. To publishers it can only mean a loss; to an author's heirs, sorting out rights of inheritance via an estate 25 years old or more, it will usually mean legal expenses without any offsetting financial advantage.'

One of the most substantial arises from the way in which the law actually returns the rights. We have been discussing the 1911 right as being for the benefit of author heirs, but that's a convenient shorthand: technically, reverted rights vested in the author's 'legal personal representatives as part of his estate'. This can be contrasted with the US termination rights (discussed in Chapter 3), which vest directly in heirs. The Imperial right's structure is problematic because, by 25 years after the author's death, when the rights actually vested, few estates would still be open.[50] Assets that accrue so long after death can be a headache for executors. The available evidence suggests that few executors of author estates were even aware of their reversionary assets, and that those who were often sold it off cheaply soon after death so they could fully wind them up.[51]

Another reason for the lack of value is the way the reversion right interacted with section 3's compulsory licence. Recall that section 3 (the compulsory royalty) and section 5 (the reversion right) both applied from 25 years after the author's death. Their combined effect was to give heirs a fresh opportunity to benefit from their copyrights while capping the financial upside: after all, nobody would pay more than the 10 per cent royalty they could obtain under the compulsory licence, and the fact they could not be guaranteed the exclusive right to publish (since anyone could take advantage of the compulsory licence) further reduced the value.[52]

In practice, both the reversion right and compulsory licence were largely ignored from the get-go: '[p]ublication by former publishers of technically reverted works simply continued, and royalty payments continued to be made pursuant to and at the royalty rates contained in prior grants.'[53] The law worked so poorly that it might as well not have existed at all.

2.4 1956–1968: REVERSION REPEALED AGAIN

Countries were prompted to again re-evaluate their copyright laws following the 1948 Brussels Revision of the Berne Convention. In the UK, this process was led by the Gregory Committee. The compulsory licensing provisions in section 3 (entitling republication 25 years after the author's death upon payment of a royalty) and section 4 (covering cases where the copyright owner withheld access from the public) were justifiably challenged for interfering with the rights mandated by Berne, and the Gregory Committee recommended their repeal.

[50] M William Krasilovsky, 'Reversion: The Sleeping Giant of British Copyright' (1979) 9(1) *Performing Art Review* 1, 2.

[51] Copinger and Skone James (n 49) 163.

[52] Ibid.

[53] 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, 27.

However, it additionally recommended repealing section 5, the reversionary provision, due to a perceived link with the problematic section 3.[54] Remarkably, the Committee's linkage of section 5 (the reversion right) and section 3 (the provision for compulsory licence) seems to have come about simply because of that shared reference to a 25-year period after the author's death. That reasoning is woefully inadequate, especially since the two provisions had such distinct motivations. The contemporaneous parliamentary record, and subsequent judicial and academic commentators, agree the reversion right was intended to provide some protection to authors and their heirs where works had been subjected to term-long contracts that turned out to be disadvantageous.[55] The fact that the compulsory licensing provision was no longer possible did nothing to change the need for that protection. The Gregory Committee found it must be repealed regardless.

Its reasoning has been criticised, with neither the English Court of Appeal nor the authors of *Copinger and Skone James on Copyright* convinced of a link between the section 5(2) reversion right and the problematic section 3.[56] The Canadian committee tasked with post-Brussels review did not even consider whether the reversionary right was incompatible with Berne, suggesting it, too, was unconvinced by the Gregory analysis,[57] and the New Zealand review committee expressly disagreed that

[54] Great Britain Copyright Committee, *Report of the Copyright Committee* (Cmd 8662, 1952) 9 [23] ('Gregory Committee Report'). See also Paul Abel, 'The Brussels Copyright Convention and Its Influence on Domestic Copyright Legislation (in Particular in the United Kingdom and in Austria)' (1954) 3(2) *International & Comparative Law Quarterly* 880, 888.

[55] See, e.g., Gillian Davies, Nicholas Caddick and Gwilym Harbottle (eds), *Copinger and Skone James on Copyright* (Sweet & Maxwell, 17th ed, 2016) 5–118. See also Paul Torremans and Carmen Otero García Castrillón, 'Reversionary Copyright: A Ghost of the Past or a Current Trap to Assignments of Copyright?'(2012) 2 *Intellectual Property Quarterly* 77, 78; EJ Macgillivray, *The Copyright Act, 1911 Annotated* (Steven and Sons, 1912) 67; David Vaver, *Essentials of Canadian Law: Copyright Law* (Irwin Law, 2000) 110; Hugh Laddie et al, *The Modern Law of Copyright and Designs* (Butterworths, 3rd ed, 2000) 882; George Stuart Robertson, *The Law of Copyright* (Oxford University Press, 1912) 97; Charles Clark (ed), *Publishing Agreements: A Book of Precedents* (Unwin Hyman, 3rd ed, 1998) 191; *Chappell & Co Ltd and others v Redwood Music Ltd* [1980] 2 All ER 817, 825; *Redwood Music Ltd v Francis, Day & Hunter Ltd and Others* [1978] RPC 429, 450 (Goff J); *Crown Record Co Ltd v Eng Kin Film Co Ltd* [1992] HKCA 241 [17]; *Anne of Green Gables Licensing Authority Inc v Avonlea Traditions Inc* [2000] OJ No 740 [83]. See also Bernard Rudden, 'The Resurrection of Reversionary Copyright: Redwood Rides Again' (1981) 1(2) *Oxford Journal of Legal Studies* 296, 298; Helen Norman, *Intellectual Property Law Directions* (Oxford University Press, 2011) 444–5; United Kingdom, *Parliamentary Debates* (n 39) 159 (Viscount Haldane).

[56] *Novello and Co Ltd v Keith Prowse Music Publishing Co Ltd* [2004] EWCA Civ 1776 [41]; Davies et al (n 55) 5–120 n 98. Cf. *Novello & Co Ltd v Keith Prowse Music Publishing Co Ltd* [2004] EWHC 766 (Ch) [10], [22], in which the court approved the Gregory Committee's reasoning.

[57] Though note it referred to the Gregory Report elsewhere and did find the Canadian equivalents of the impugned compulsory licence provisions problematic: Edmond Cloutier, *Canadian Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs* (Report on Copyright, 1957).

removing section 5(2) was a 'necessary corollary' to removing sections 3 and 4 of the Imperial Act.[58]

Australia's review committee ('the Spicer Committee') described the Berne compatibility of the reversion right as 'somewhat doubtful',[59] but provided no analysis or authority in support. That omission is particularly notable given its New Zealand counterpart had so recently reached the opposite conclusion. Proceeding from that view, the Spicer Committee observed that the reversion right could only be maintained if Australia refused to ratify Berne's Brussels revision, and found it was not sufficiently beneficial to authors' families to justify such drastic intervention.[60]

In this regard too, its analysis was lacking. The Spicer Committee cited *Copinger and Skone James on Copyright* as authority for the proposition that the reversionary right's benefits were limited, but seemingly failed to notice that *Copinger*'s criticisms of the limited benefits the reversionary right generated for heirs were inextricably entwined with the existence of section 3's compulsory licence provision.

As flagged above, *Copinger* argued publishers did not pay much for reversion rights because the compulsory licence provisions meant they could not acquire an exclusive right, and in any event had the right to publish so long as they paid a 10 per cent royalty.[61] But section 3's compulsory licence provision would have to be repealed to ratify the Brussels Act, and on *Copinger's* reasoning that would *increase* the value of the reversionary right – a reality the Committee seemed to overlook.

Ultimately, the Spicer Committee recommended that Australia repeal its reversionary provision.[62] To the best of our knowledge, that was the only provision in Australia's copyright law that directly secured benefits to authors or their heirs, as distinct from other assignees, making that cavalier disposal particularly worthy of note.

Had the Committee engaged in a fuller analysis of the treaty compatibility issue, the reversion right could have been kept – as was the case in Canada, and as was recommended in New Zealand. The New Zealand review committee had described removal as 'a retrograde step' that would benefit publishers or other assignees over authors' families,[63] and reasoning that the proviso should be retained since it 'can do no harm and may possibly do good'.[64] Unfortunately for authors, this point seems to

[58] New Zealand Copyright Committee, *Report of the Copyright Committee* (Appendix to the Journals of the House of Representatives of New Zealand H. 46, 1959) 35 [80] ('*Report of the New Zealand Copyright Committee*').

[59] Copyright Law Review Committee, Parliament of Australia, *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider what Alterations are Desirable in the Copyright Law of the Commonwealth* (1959) [395] ('Spicer Committee Report') <https://static-copyright-comau.s3.amazonaws.com/uploads/2015/05/R00079-theSpicerReport.pdf>.

[60] Ibid.

[61] Davies et al (n 55) 5–126.

[62] *Spicer Committee Report* (n 59).

[63] *Report of the New Zealand Copyright Committee* (n 58) 24–5.

[64] Ibid 35 [80].

be one of the very few on which the New Zealand Parliament disagreed with the Copyright Committee – it repealed the right despite a strong recommendation to keep it.[65]

As well as being repealed in the UK, Australia and New Zealand, the Imperial reversion right has now also been abolished in nearly every other enacting country.[66]

The Berne Convention is supposed to protect the interests of authors (as distinct from those of assignees), and the moral claims of author heirs were central to the campaign to secure Berne's extension of rights to life plus 50 years. It's ironic then that compliance with that Convention was used to justify the removal of one of the only provisions that focused on precisely that.[67]

2.4.1 *The Imperial Reversion Right Could Benefit Author Heirs*

While none of the review committees identified any evidence about actual use of the reversionary interest by author heirs, two notable examples arising after the repeal suggest the New Zealand Committee's view was correct: that the reversionary right originating with the Imperial Act *could* achieve its aim of benefiting author heirs.[68] These cases, discussed below, demonstrate some of the real-world potential that could be unlocked were we to take reversion rights more seriously.

2.4.1.1 Mbube: The Solomon Linda Story

In 1939, Solomon Linda recorded his song *Mbube* with the Gallo record label, in what was then the only recording studio in Africa. The third take was different to any version that had come before. 'He just opened his mouth and out it came, a haunting skein of fifteen notes that flowed down the wires and into a trembling stylus that cut tiny grooves into a spinning block of beeswax.'[69]

[65] See mentions of the copyright term in New Zealand, *Parliamentary Debates*, House of Representatives, v 332, 24 October 1962, 2324; also see amendments to be read in, none of which involve the reversionary provision, in New Zealand, *Parliamentary Debates*, House of Representatives, v 333, 27 November 1962, 2970.

[66] Canada still retains this law: *Copyright Act*, RSC 1985, c C-42, s 14(1).

[67] Since 2013, the UK has had an additional reversion right applying in limited circumstances to performers in sound recordings, contained in section 191HA of the *Copyright, Designs and Patents Act* 1988. As this was mandated by an EU Directive, we discuss it in Chapter 4 instead.

[68] There may be other cases of rights returning to heirs under the reversionary scheme elsewhere in the Commonwealth: see, e.g., *Newspapers Ltd v Ratna Shankar Prasad* AIR 1977 All 356 per R Misra and J Sinha (4 April 1977, Allahabad High Court, India). However, we focus on the *Mbube* and *Redwood* examples for their prominence in discourse about how the Imperial reversion right operated.

[69] Rian Malan, 'Inside the Long, Hidden Genealogy of "The Lion Sleeps Tonight"', *Rolling Stone* (online, 14 May 2000) <https://www.rollingstone.com/feature/in-the-jungle-inside-the-long-hidden-genealogy-of-the-lion-sleeps-tonight-108274/>.

The saga that followed that moment of magic has been described as 'one of the most complicated and convoluted music publishing-songwriting stories ever',[70] and we don't have room here to fully unskein it. But here are the key points. The song became a huge hit – the first South African record to sell more than 100,000 copies. It soon caught the attention of American folk legend Pete Seeger, who meticulously transcribed it before releasing it as *Wimoweh* with his band, The Weavers, in 1952. Their music publisher, Folkways, registered the song's US copyright in January that year.

In May, Gallo registered its own US copyright claim telling Folkways the song was written by Linda but that it owned the rights. So it did – but the ink was barely dry on the transfer. Although the song had been recorded some 13 years earlier, the copyright was not formally assigned until April 1952, when Gallo called Linda into the office (he was working in a low-level job at their record pressing plant) and had him sign over the entirety of his rights to the song.[71] In exchange they paid him 10 shillings – about US$0.87.[72]

With the new exposure from the *Wimoweh* cover, Mbube's haunting melody quickly captured the imaginations of other musicians. More than 150 other versions came out.[73] Several were hits, but the song became part of the cultural zeitgeist with its appearance in Disney's *The Lion King* as 'The Lion Sleeps Tonight'.

While *Mbube* generated enormous wealth in its various forms, almost none of it went to Linda. He died in 1962 with just a few dollars to his name, his wife unable to afford a stone for his grave.[74] Indeed, even after *The Lion King* became a global phenomenon, Linda's family received only meagre royalties. It's not entirely clear, but it seems these came from Pete Seeger's share of *Wimoweh*, which he tried to secure to Linda once he discovered the tune was not a traditional Zulu song as he'd originally been told, but one by a living composer. However, it seems that even Seeger's minority share didn't always reach his family, which continued living in poverty: one daughter died of AIDS-related complications when her family couldn't afford the medicine that could have helped her,[75] and others worked as domestic servants.[76] While all this was happening, the powerful corporations who were

[70] Randy Lewis, 'Who Wrote "The Lion Sleeps Tonight"? A Netflix Film Seeks Answers, and Closure', *Los Angeles Times* (14 May 2019) <https://www.latimes.com/entertainment/music/la-et-ms-lion-sleeps-tonight-netflix-documentary-20190515-story.html>.

[71] *The Lion's Share* (ReMastered, Triage Entertainment, 2018) 0:26:00.

[72] Bill DeMain, 'The Lion Sleeps Tonight AKA "MBUBE" AND "WIMOWEH"' (2006) 14(95) *Performing Songwriter* 92.

[73] Ibid.

[74] Ibid.

[75] TraxpAdmin, 'The Lion King's Ransom: The Story of "Mbube", "The Lion Sleeps Tonight" and the 70 Years Struggle to Get the Writer, Solomon Linda Credited', *Traxploitation* (29 July 2019) <https://traxploitation.com/solomon-linda>, archived at <https://web.archive.org/web/20230130035313/https://traxploitation.com/solomon-linda>.

[76] Rory Carroll, 'Lion Takes on Mouse in Copyright Row', *The Guardian* (online, 3 July 2004) <https://www.theguardian.com/world/2004/jul/03/film.arts>.

benefiting most from the song strategised to keep it in their grasp, twice requiring Linda's heirs to freshly sign over any rights they may have had on top of what they'd already extracted from Linda himself.[77]

A spotlight was finally shone on the injustice in 2000, when South African journalist (and descendant of an apartheid-era prime minister) Rian Malan published an exposé in *Rolling Stone*.[78] The story captured global media attention, including a documentary. Leading South African copyright lawyer Owen Dean was approached by Gallo, now facing a PR nightmare for its role in the heist, and wondering what might be done.[79]

Dean initially thought it was hopeless given how broadly the contracts were worded, but then he remembered an obscure reversion provision he'd come across a few years before – the Imperial Act had been law in South Africa until 1965. The proviso to section 5 had been repealed in South Africa as in most other countries, but under the transitional arrangements, it still applied to this work. Linda died in 1962, so in 1989 the song rights had reverted. Without fresh licences, subsequent uses would be infringing.

As discussed above, reverted rights technically vested in the author's 'legal personal representatives as part of his estate'. That technicality usually made things more difficult for heirs, since estates are usually wound up long before that, but here it turned out to be the saving grace. The additional agreements Linda's wife and daughters had been obliged to sign extracted not only any rights they may have had at that time, but any they might obtain in the future. As Dean explains, 'The effect of the assignments they executed would be that, once copyright in *Mbube* became vested in them, those assignments would be activated and immediately deprive them of their copyright in favour of the assignees.'[80] To avoid that happening, he came up with the plan of having an executor appointed to the estate as Linda's legal representative. If successful, the *executor* would take ownership of the reverted rights.

Given the success of the song in its myriad forms, numerous individuals and companies could have been targeted by an infringement claim. The family's legal team decided to target the most formidable of them all: Disney. That caused Gallo to withdraw its offer to fund the case, knowing how hard the media giant would fight, and aware of its ability to harm the record label's own commercial interests. As one executive explained: 'If Disney had withheld all the rights that Gallo held at that time, it would have had a major impact on our earnings.'[81]

[77] DeMain (n 72).
[78] Malan (n 69).
[79] See Owen Dean, *Awakening the Lion: The Case of the Lion Sleeps Tonight* (Tafelberg, 2013) ch 1.
[80] Ibid ch 3.
[81] *The Lion's Share* (n 71) 0:50:00.

That would have probably been the end of the fight, had Linda family's lawyers not persuaded the South African culture ministry to step in and fill the gap.[82] Once that was done, the underdogs obtained a big victory – an order attaching Disney's South African trade marks as security for any award made against the corporation, effectively putting Donald Duck and Mickey Mouse on the line.[83] Dean remembers the retribution being swift and savage, just as Gallo had anticipated. '[Disney] reacted like scalded cats, and brought their heavy artillery to bear on us and anything connected to us.'[84]

Despite that pressure, the parties eventually reached a confidential settlement acknowledging Linda as the original composer of what became 'The Lion Sleeps Tonight'. A trust was established to take ownership of the song rights (avoiding the trap that was waiting for any heir who took ownership in their own right), and the compensation for past infringement as well as future royalties as agreed under the settlement. Critically, the royalty obligation was not limited to uses in South Africa (which were minimal), but worldwide.[85] In achieving that result, the applicants may have been assisted by the fact that identical reversionary rights applied throughout the Commonwealth, meaning that similar actions could have been launched in the UK and other nations.

Disputes remain ongoing about whether the licensees are actually paying what's owed, and whether the settlement amount was fair.[86] However, as a result of the reversion right contained in the 1911 Act, Linda's heirs have now received far more than they would have without it.

2.4.1.2 The Redwood Music Litigation

When he was 25, Fats Waller signed a contract assigning all rights in the ten songs from his Broadway musical *Connie's Hot Chocolates* for US$500.[87] His work went on to make a great deal of money for other people, making this assignment precisely the kind of 'improvident' transaction the British parliament intended the reversion right to guard against.

Miriam Stern, a passionate advocate for songwriters and former director of the American Guild of Authors and Composers, got wind of the inequity around the Waller transfer, as well as those affecting the estates of other composers including Sergei Rachmaninoff, and thought the British reversionary right might be able to

[82] Ibid 0:51:00.
[83] *Disney Enterprises, Inc. v S.G. Griesel*, High Court of South Africa [Transvaal Provincial Div.] Case No 12003/04 (2004).
[84] *The Lion's Share* (n 71) 0:55:00.
[85] Regarding the settlement generally, see Dean (n 79) ch 7.
[86] *The Lion's Share* (n 71).
[87] Mark Chilla, 'The Songs of Razaf and Waller', *Afterglow* (Web Page, 5 April 2019) <https://indianapublicmedia.org/afterglow/songs-razaf-waller.php>.

help. Though it had been repealed by the time she took up the cause, the UK law's transitional arrangements meant it still applied to works created before 1957.[88] Motivated by concern for the heirs of composers including Waller, who were often too poor to afford lawyers, she set up the Miriam Rose Stern Agency (MRSA) to help estates enforce their reversionary rights and bargain for a fairer share. The MRSA quickly came to represent 177 estates and up to 40,000 songs.[89]

Undaunted by the refusal of leading music publishers to negotiate with her agency, Stern initiated a series of test cases. The most critical issue concerned whether the assignment of the copyright in a song was the assignment of 'the copyright in a collective work', and thus excluded from the reversion right by the final sentence of the proviso to section 5(2). Most songs have lyrics written separately from the music, and the defendant music publishers strenuously argued that in such cases the reversion right did not apply.

At first instance Goff J agreed with the publishers, reasoning that songs comprising both music and lyrics (and thus both musical and literary copyrights) were indeed collective works.[90] Redwood had argued that songs were not collective works as conceptualised under the proviso to section 5(2), because that proviso only excluded assignments of the copyright in a collective work, and after all, the combination of the music and lyrics did not create a separate combined copyright.[91] But Goff J ruled such songs did fall within the scope of the exclusion, influenced not only by principles of statutory interpretation but also practical considerations: his Honour thought it would be highly inconvenient if ownership of different parts of a song were to change at different times.[92]

A second test case, this time involving a song with jointly authored music and lyrics – that is, written by two authors together, rather than separately – evoked a different result. The reversion right was held to apply notwithstanding the inconvenience that might bring about.[93]

The UK Court of Appeal had more good news for heirs, overturning the lower court ruling that reversion wouldn't apply to songs with separate authors for music and lyrics.[94] While songs with lyrics and music written by different authors were confirmed to be collective works, they were nevertheless not excluded from the scope of the reversion right because 'there is no separate and independent copyright in the song as a collective work'.[95] The only copyrights were those for the lyrics and music, and the reversion right applied to each.[96] Emphasising that the proviso's

[88] *Redwood Music* (1978) (n 55) 434.
[89] Ibid 433–7.
[90] Ibid 455.
[91] Ibid 451.
[92] Ibid 450–3.
[93] *Redwood Music Ltd v B Feldman & Co Ltd* [1979] RPC 385, 404–6 ('*Redwood Music* (1979)').
[94] Ibid 403–3.
[95] Ibid 402–3.
[96] Ibid 400–3.

intention 'was to safeguard authors and their heirs', the House of Lords upheld that decision.[97]

This long battle translated to real benefits for songwriter heirs. In the case of the Fats Waller songs that began the whole saga, the previous music publisher acknowledged it no longer had any claim.[98] Within two years of the litigation finally ending, new deals entered into by Waller's sons had already secured them some US$12,500, with 'substantial additional sums expected' to follow from sources such as theatrical licence fees.[99]

2.4.1.3 Lessons from the Canadian Experience

Although these examples show that the Imperial right could achieve its aim of benefiting author heirs, their scant number (relative to the literally millions of works covered by the right across the Commonwealth) says much more about the legislature's failure to achieve its aims. In Canada, where the equivalent right has so far survived both the wave of Berlin revision repeals, and multiple subsequent calls for its abolition,[100] we found just two reported examples where the Imperial right actually, or even potentially, benefited an heir.

The first Canadian example involved Theresia Winkler, the elderly former landlord of writer Thomas P Kelley Jr, and heir and executor of his estate. Kelley, who died in poverty in 1982, had been a prolific writer of pulp fiction – most notably two books loosely based on a vigilante murder which are estimated to have sold over

[97] *Chappell & Co Ltd v Redwood Music Ltd*; *Redwood Music Ltd v Francis, Day & Hunter Ltd* [1980] 2 All ER 817 (Viscount Dilhorne dissenting).

[98] Krasilovsky and Meloni (n 53) 36.

[99] Ibid.

[100] See, e.g., Laurent Carrière, 'Limitation Where Author Is First Owner of Copyright: Reversionary Interest in the Copyright', *Limitation Where Author Is First Owner of Copyright: Reversionary Interest in the Copyright – Some Comments on Section 14 of the Canadian Copyright Act* (Web Page, 1 January 2003) 10 <https://www.robic.ca/en/?publications=limitation-where-author-is-first-owner-of-copyright-reversionary-interest-in-the-copyright-some-comments-on-section-14-of-the-canadian-copyright-act> referring to Andrew A Keyes and C Brunet, *Copyright in Canada: Proposals for a Revision of the Law* (Consumer and Corporate Affairs Canada, 1977) 76 <https://publications.gc.ca/collections/collection_2021/isde-ised/RG43-41-1977-eng.pdf>; Judy Erola and Francis Fox, *From Gutenberg to Telidon: A White Paper on Copyright* (Consumer and Corporate Affairs Canada, 1984); Barry Torno, 'Term of Copyright Protection in Canada: Present and Proposed' (1980) 46 *Canadian Patent Report* (2d) 257. Two other government copyright reports were released between the Ilsley Report and the 1988 amendments, being the Report on Intellectual and Industrial Property (1971) and the Charter of Rights for Creators – Report of the Subcommittee on the Revision of Copyright (1985). Neither of these reports mention the reversionary provision. See also Douglas A Smith, 'Recent Proposals for Copyright Revision: An Evaluation' (1988) 14(2) *Canadian Public Policy/Analyse de Politiques* 175, 175; Linda Hansen, 'The Half-Circled "c": Canadian Copyright Legislation' (1992) 19(2) *Government Publications Review* 137, 144–8.

a million copies.[101] Winkler succeeded in obtaining a declaration that the publishing and film rights in those books would revert to her in 2007, 25 years after the author's death.[102] Subsequently, Darling Terrace Publishing, which appears to be run by John Winkler, republished Kindle editions of those books in 2019. This allows Kelley's heirs to keep benefiting from sales of these books, but also keeps a fascinating part of Canadian history available to the public.[103]

The second involved descendants of author LM Montgomery who, in the 1980s, discovered rights in the beloved (and highly lucrative) *Anne of Green Gables* series had reverted to them, and began licensing rights for the production of *Anne* merchandise, like dolls, clothing and souvenirs.[104] They terminated one of those licences for non-payment of royalties, and instituted legal action after the defendant – then the world's largest *Anne* merchandiser – continued to use the names and likenesses.[105]

The Court rejected the defendant's argument that the heirs did not own the rights, finding they had a valid copyright interest from the rights having reverted to them, either as a result of the Canadian iteration of the Imperial law or transitional arrangements covering works that pre-dated it.[106] The Court didn't have to decide which, because the heirs did not become aware of their interest until the mid-1980s – rendering the choice of avenue used to calculate the date the reversionary interest began immaterial. As a result, the heirs were able to benefit from their rights for only a few years before the *Anne* books entered the public domain.

2.4.1.4 The Imperial Reversion Right's Illusory Promises

The fact that there was so little awareness around reversion even for such lucrative properties further demonstrates how poorly tailored this law was to the job at hand. Even in Canada, where it's still on the statute books, it is routinely ignored, with licensees continuing to exploit works even after the rights automatically revert.[107] They can get away with that because, as Tarantino explains, lack of awareness of the law means relatively few estates assert their rights.[108] That lack of awareness follows

[101] Paul Waldie, 'Fight over Black Donnellys Novels Settled', *The Globe and Mail* (online, 25 September 2002) <https://www.theglobeandmail.com/news/national/fight-over-black-donnellys-novels-settled/article1026530/>.
[102] *Winkler v Roy* [2002] FCT 950, [62].
[103] Joshua Yuvaraj, 'Back to the Start: Re-envisioning the Role of Copyright Reversion in Australia and Other Common Law Countries' (PhD Thesis, Monash University, 2021) 68–9, n 412.
[104] *Anne of Green Gables Licensing Authority Inc v Avonlea Traditions Inc* 2000 CanLII 22663 (ON SC) [87]; [2000] OJ No 740 (QL); 4 CPR (4th) 289.
[105] Ibid 4.
[106] Ibid at [87], [90].
[107] Bob Tarantino, 'Long Time Coming: Copyright Reversionary Interests in Canada' (2013) 375 *Développements récents en droit de la propriété intellectuelle* 3, 26 <https://ssrn.com/abstract=2368464>.
[108] Ibid.

from the fact that the right, overwhelmingly, has so little value. Since Canada repealed the compulsory licence provision, publishers can now be assured of exclusive rights during the reversionary term. However, their financial value is nonetheless impacted by the fact that rights don't revert until a full generation after death, and because they vest in estates that by then probably no longer exist, making ownership complicated and costly to assert.

The fact it takes so long to kick in also raises the transaction costs of complying by making it harder to identify the heirs.[109] The copyrights may have been left to multiple people, who may be difficult to track down (or may even have died themselves) by the time the rights transfer to them.

While these criticisms of the Imperial right are valid, others have less merit. For example, a 1977 report published by Canada's Department of Consumer and Corporate Affairs argues that the reversion right's limitation on what can be assigned would tend to reduce the prices paid.[110] However, as discussed in Chapter 1, the time value of money and cultural depreciation mean that, at the time of entry into the original contract, publishers are exceedingly unlikely to pay any more for life plus 50 years than they would for life plus 25 years. Thus, a reversion right that kicks in so late is unlikely to have any downward effect on prices.

The same report criticises the right for being 'defeatable by testamentary disposition'.[111] This is a reference to the fact that while the statute otherwise prohibits authors from disposing of the interest in their lifetime, it permits dispositions by will. In theory then, a rightsholder might subvert the intent of the statute by requiring an author to bequeath it the reversionary interest as well as their lifetime rights. The author might change their will later, but contracts involving transfer of property interests can survive death, so such circumstances might still give rise to a claim against the estate for breach of contract. Rather than being used to attack the case for reversion rights altogether, however, this risk could be managed by rendering void contracts bequeathing reversionary rights where the effective intent is to render those rights alienable, an option we examine further in Chapter 6.

Tarantino criticises the Canadian reversion right for creating uncertainty in publishers about when rights will revert,[112] but we don't find this argument convincing either: they should know when their authors die, at least because it will result in the entitlement to royalties transferring elsewhere, and after that time they still have 25 years – a full generation! – to plan for the handover.

Tarantino also argues 'exploiters will be disinclined to invest resources towards the exploitation of a work which is nearing the reversionary threshold, because they will be uncertain whether an author's estate/heirs will assert an ownership claim'.[113]

[109] Ibid 25.
[110] Keyes and Brunet (n 100) 69.
[111] Ibid.
[112] Tarantino (n 107) 25.
[113] Ibid 26.

This argument is not persuasive either. The reversionary interest becomes assignable immediately upon death,[114] as Tarantino himself notes elsewhere,[115] and there's nothing stopping the rightsholder from negotiating with heirs to buy the interest then (or at any later point) to secure their future investments.

Finally, Tarantino argues that further uncertainty arises because publishers don't know 'whether an author's estate or heirs will be informed or savvy enough to become aware of the reversionary interest and assert ownership'.[116] But we don't consider it a relevant detriment that publishers must factor in uncertainty over whether they will be successful in heisting an interest that rightfully belongs to others! They could always manage that risk by doing what the original lawmakers intended, and negotiating a fresh deal with the author's heirs.

The real objection by rightsholders to Canada's reversion law seems to be that they would need to pay an additional amount for still valuable works after decades of benefit – even though that's precisely the bargain they struck.

2.5 OTHER COMMONWEALTH STATUTORY REVERSION RIGHTS

So far this chapter has focused exclusively on the reversion rights that originated in the UK. As we noted above, the Imperial right was widely exported throughout the Commonwealth. In addition to that, however, some nations have enacted additional rights. Language and resource restrictions prevent us from any comprehensive analysis, but we have summarised some of these provisions in Table 2.1.[117]

They include rights to revert where publishers are acquired, where they fail to publish a work within a specific time, or where a work goes out of print. Additionally, Malawi, Mauritius, Nauru, Tanzania and Zanzibar have a general 'use it or lose it right' entitling creators to reclaim their copyrights for lack of exploitation. Use-it-or-lose-it rights are more commonly found in European copyright laws, and the EU's 2019 Digital Single Market Directive mandated that all Member States provide mechanisms for authors and performers to reclaim their

[114] Copinger and Skone James (n 49) 110–11.
[115] Tarantino (n 107) 22–3.
[116] Ibid 26.
[117] These provisions are drawn from a study Yuvaraj undertook in 2019 into copyright reversion provisions applicable to all types of works and also specifically to book publishing contracts. For more information about the study's methodology please refer to Yuvaraj (n 103) ch 5. The dataset is available here: 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>. The provisions at Table 2.1 are current, as far as we can tell, as of March 2024. For consistency we used the list of countries on the official Commonwealth webpage: 'Member Countries', *The Commonwealth* (Web Page) <https://thecommonwealth.org/our-member-countries>. Further research into reversion provisions specific to recording artists, screenwriters and other types of creator would helpfully supplement this data.

TABLE 2.1 *Copyright reversion provisions in Commonwealth countries that are different from section 5(2) of the 1911* Imperial Copyright Act

Country	Law	Description of provision
Pakistan	Copyright Ordinance, 1962, art 14(1)	No copyright assignment by an author can last for longer than 10 years 'except where the assignment is made in favour of a Government or an educational, charitable, religious or non-profit institution'.
Cameroon	Law No. 2000/011 of 19 December 2000 on Copyright and Neighbouring Rights, ss 46–47	The author can end a publishing contract if the publisher's transfer of their business would 'seriously jeopardize the material and moral interests of the copyright holder' (s 46(2)).
		The publishing contract will automatically end if the publisher destroys all copies of the work (s 47(1)).
		The author can terminate the contract if the publisher fails to republish the work after the author gives notice, with a work being out of print if two 'requests for supply of copies sent to the publisher are not met within six months' (s 47(2)).
Mauritius	Copyright Act 2014, art 14	The creator can revoke a grant of exclusive rights in a work if those rights are not exercised, or are exercised inadequately, in a way that is prejudicial to the creator's legitimate interests (art 14(1)).
		The creator must allow a minimum of three years from the grant of the right or when they provided the work to the exploiter before attempting to revoke rights (art 14(3)).
		The creator cannot revoke rights where the non-exploitation or inadequate exploitation is 'primarily due to circumstances which the author can be expected to remedy' (art 14(2)).
		The use-it-or-lose-it right cannot 'be waived in advance' (art 14(4)).
Malawi	Copyright Act, 2016, art 55(5)–(7)	The creator can revoke a grant of exclusive rights in a work if those rights are not exercised in a way that is prejudicial to the creator's legitimate interests (art 55(5)).

Country	Law	Description of provision
		The creator must allow a minimum of two years from the grant of the right or when they provided the work to the exploiter before attempting to revoke rights (art 55(6)). To do so the creator must give the exploiter a reasonable time to exercise the right, failing which they can revoke the grant (art 55(7)).
Rwanda	Law No. 31/2009 of 26/10/2009 on the Protection of Intellectual Property, arts 235, 237	A publishing contract will end if the publisher transfers their business and this is likely to harm the author's moral or economic interests *and* they are not equitably compensated for this (art 235). The author can terminate the publishing contract when the edition is 'exhausted' and the publisher fails to reprint after two successive reprinting notices without reasonable grounds (art 237).
United Republic of Tanzania	The Copyright and Neighbouring Rights Act, 1999, s 20 which governs copyright law in mainland Tanzania and the Zanzibar Copyright Act, 2003, s 21(4)–(6) which covers copyright protection in Zanzibar.	**Copyright and Neighbouring Rights Act 1999** The creator can revoke a grant of exclusive rights in a work where those rights are not used in a way that is 'prejudicial to [the creator's] . . . legitimate interests'. The creator can only exercise this right two years from the contract or when the work was delivered, and must give the exploiter a reasonable opportunity to exercise the right, 'except . . . where the exercise of the right by the [exploiter] . . . became impossible or he refused it.' The creator cannot 'waive . . . [this right] in advance' (s 20). **Zanzibar Copyright Act 2003** The creator can revoke a grant of exclusive rights in a work if those rights are not exercised, or are *inadequately exercised*, in a way that is prejudicial to the creator's legitimate interests (s 21(4)). The creator must give the exploiter a reasonable time (s 21(6)), and cannot revoke rights where the non-exploitation

(*continued*)

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TABLE 2.1 (*continued*)

Country	Law	Description of provision
		or inadequate exploitation is 'primarily due to circumstances which the author can be expected to remedy' (s 21(5)).
Togo	Law No. 91-12 of June, 1991, on the Protection of Copyright, Folklore and Related Rights, art 56	The author can terminate a contract if the publisher has failed to publish the work having been given a specific time in which to do so.
		The author can terminate the contract if the publisher fails to republish the work after the author gives notice, with a work being out of print if two 'requests for delivery of copies addressed to the publisher have not been met within six months.'
		The publishing contract will automatically end if the publisher destroys all copies of the work.
Nauru	Copyright Act 2019 (amended by the Revised Written Laws Act 2021), s 22	The creator can revoke a grant of exclusive rights in a work if those rights are not exercised, or are *inadequately exercised*, in a way that is prejudicial to the creator's legitimate interests (s 22(1)).
		The creator must wait at least two years from the grant or delivery of the work before revocation (s 22(2)).
		The reversion right cannot 'be waived in advance' (s 22(3)).

copyrights in cases of a 'lack of exploitation'.[118] As we will discuss in Chapter 4, that mandate has been largely implemented in a way that suggests rights can only be reclaimed where there is no exploitation at all.[119] The Malawian and Tanzanian laws are similarly narrow, but the others are scoped more broadly to entitle creators to take back inadequately exploited rights. Inquiry into the way those laws actually work in practice is beyond the scope of this book, but it's an interesting counterpoint to the restrictiveness of the EU's approach.

Nauru, Mauritius and Tanzania also prevent authors from transferring their use-it-or-lose-it rights via contract, which may reflect lessons learned from the failures we

[118] *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 130/92, art 22.

[119] See Chapter 4, Section 4.4.4.

described at the beginning of this chapter. This is again a stricter approach than that taken by the EU, which as we will see did not require Member States to prohibit contracting out of its own use-it-or-lose-it right.[120]

2.6 RECENT DEVELOPMENTS

In the last few years, there are signs that the laissez-faire approach is losing currency even in Commonwealth strongholds, with the strongest pushes for reversion rights reform coming from Canada, South Africa and the UK.

2.6.1 *Canada*

Reversion rights became a hot topic in Canada in 2017 when singer-songwriter Bryan Adams and law professor Daniel Gervais argued before a Committee of the Canadian House of Commons that rights ought to revert 25 years after transfer rather than 25 years after the author's death.[121] One parliamentary standing committee subsequently recommended an amendment to that effect, while another proposed the introduction of an inalienable 25-year termination right bounded by certain additional restrictions.[122]

As we go to press, however, more than half a decade later, there are few signs that a more meaningful reversion right will actually pass into Canadian law. There was an ideal opportunity to do so in 2022, when Canada extended its copyright terms from life plus 50 years to life plus 70 years as mandated by the Canada-US-Mexico trade agreement, but it was ultimately passed without the recommended reversion reforms.[123]

However, the Canadian equivalent of the Imperial right – as unsatisfactory as it is – remains in force, and thanks to that term extension, heirs are now entitled to the final 45 years (rather than 25 years) of copyright. The publicity triggered by the reform effort may have raised awareness among executors and heirs about the potential value of their rights, and that this long-ignored feature may finally have a greater impact.

[120] See Chapter 4, Section 4.4.5.

[121] Canadian Parliament, Canadian Heritage Committee Meeting #118, 18 September 2018 per Bryan Adams at 11:25am <https://openparliament.ca/committees/canadian-heritage/42-1/118/bryan-adams-7/?page=1>.

[122] Standing Committee on Canadian Heritage, Parliament of Canada, *Shifting Paradigms: Report of the Standing Committee on Canadian Heritage* (Report, 42nd Parliament, 1st Sess, May 2019); Standing Committee on Industry, Science and Technology, Parliament of Canada, *Statutory Review of the Copyright Act: Report of the Standing Committee on Industry, Science, and Technology* (Report, 42nd Parliament, 1st Sess, June 2019).

[123] Michael Geist, 'The Canadian Government Makes Its Choice: Implementation of Copyright Term Extension without Mitigating against the Harms', *Michael Geist* (Blog Post, 27 April 2022) <https://www.michaelgeist.ca/2022/04/the-canadian-government-makes-its-choice-implementation-of-copyright-term-extension-without-mitigating-against-the-harms/>.

2.6.2 *South Africa*

South Africa has also been considering reversion reform. But the proposal for such reform goes even further than those mooted in Canada, potentially giving authors one of the world's most powerful reversion rights: an automatic 25-year limit on all copyright assignments for literary and musical works.[124]

The Copyright Review Commission initially proposed this limit in 2011 to deal with musical artists not getting royalties because they had made poor initial assignments.[125] The initial bill, however, was considerably wider: it covered *all* copyright assignments.

This proposal garnered opposition, including from Owen Dean, despite his success with the Imperial provision in the *Mbube* case: 'There is no logic to this provision and it is completely arbitrary.'[126] Dean was concerned that non-authors would benefit because *all* assignments were limited, not just the ones authors made: so if the author assigned the rights to the publisher, who then assigned it to another publisher, the first publisher would benefit.[127] He also interpreted it as not allowing assignments *shorter* than 25 years, which was 'preposterous'.[128]

Other stakeholders continued to oppose reversion through Parliamentary committee discussions and consultations,[129] even though its scope was subsequently reduced to literary and musical works.[130] Lawmakers persisted with reversion,

[124] Copyright Amendment Bill B13F-2017 (South Africa) cl 25. This section adapts material from Yuvaraj (n 103) 76–8.

[125] Department of Trade and Industry Republic of South Africa, *Copyright Review Commission Report* (2011) 80 [10.12.10] <https://www.gov.za/documents/other/copyright-review-commission-report-2011-31-aug-2012>.

[126] Anton Mostert, *Commentary on the Copyright Amendment Bill 2015* (2015) 54('*Commentary on the Copyright Amendment Bill 2015*') <https://blogs.sun.ac.za/iplaw/files/2015/08/CIP-Formal-Comments-Copyright-Amendment-Bill-2015-Online1.pdf>.

[127] Ibid.

[128] Ibid.

[129] International Federation of the Phonographic Industry, *Submission to the Portfolio Committee on Trade and Industry of the Parliament of the Republic of South Africa on the Copyright Amendment Bill 2017* (22 February 2019) <https://www.asktheeu.org/en/request/7916/response/28127/attach/28/9%20EN%20annexe%20acte%20autonome%20nlw%20part1%20v1.pdf?cookie_passthrough=1>; Law Society of South Africa, *Submission to the Portfolio Committee on Trade and Industry of the Parliament of the Republic of South Africa on the Copyright Amendment Bill 2017* (16 May 2017) <https://www.lssa.org.za/wp-content/uploads/2020/01/LSSA-Submission-on-Copyrigt-Amendment-Bill-2.pdf>; Publishers Association of South Africa on the Copyright Amendment Bill, *Submission to the Portfolio Committee on Trade and Industry of the Parliament of the Republic of South Africa on the Copyright Amendment Bill 2017* (18 July 2018) <https://publishsa.co.za/wp-content/uploads/2021/07/Pasa-Submission-Copyright-Amendment-Bill-18-July-2018-1.pdf>.

[130] National Assembly Trade, Industry and Competition Committee, Parliament of the Republic of South Africa, *Copyright Amendment Bill: DTI Briefing on Bill and DAC & DTI Positions* (31 May 2018) <https://pmg.org.za/committee-meeting/26550/>; Copyright Amendment Bill B13B-2017 (South Africa) s 23(b).

though, and it looked like it would pass in 2019 when Parliament sent the Bill to President Cyril Ramaphosa for assent. However, the President refused, citing concerns over the Bill's constitutionality.[131]

Rightsholders were particularly vocal against reversion when the Bill came back to Parliament.[132] They argued that *creators* would be worse off by not being able to bargain away more than 25 years of rights,[133] that reversion unduly imposed on the parties' contractual freedom,[134] and that works would be lost to the public if joint authors/performers held up attempts to re-license works.[135] The Publishers' Association of South Africa expressed concern that other publishers or platforms could profit from all the work a first publisher had done in the initial 25-year

[131] Parliamentary Monitoring Group, 'Bill Returned to Parliament by the President', *That Week in Parliament* (Blog Post, 6 July 2020) <https://pmg.org.za/blog/BillReturnedtoParliamentbythePresident>.

[132] See, e.g., National Assembly Trade, Industry and Competition Committee, Parliament of the Republic of South Africa, *Copyright & Performers' Protection Amendment Remitted Bills: Further Public Hearings Day 2*, 12 August 2021 (Bertrand Moullier, Senior Advisor of the International Film Producers' Association Film Producers Worldwide); National Council of Provinces Trade & Industry, Economic Development, Small Business, Tourism, Employment & Labour Committee, Parliament of the Republic of South Africa, *Copyright Amendment Bill & Performers' Protection Amendment Bill: Public Hearings*, 21 February 2023 (Philippa Rafferty, Group Executive Legal and Business Affairs of eMedia Investments); National Council of Provinces Trade & Industry, Economic Development, Small Business, Tourism, Employment & Labour Committee, Parliament of the Republic of South Africa, *Copyright Amendment Bill & Performers' Protection Amendment Bill: Public Hearings*, 7 March 2023 (Stan McCoy, Motion Picture Association; Brian Wafawarowa, Publishers Association; and Danny Dohmen, Licensing Executives of South Africa); National Council of Provinces Trade & Industry, Economic Development, Small Business, Tourism, Employment & Labour Committee , Parliament of the Republic of South Africa, *Copyright Amendment Bill & Performers' Protection Amendment Bill: Public Hearings*, 14 March 2023 (Sipho Diamini and Pierre Rautenbach, Recording Industry of South Africa; Ziyanda Buthalezi-Ngcobo and Bradely Silver, Netflix; and Anne Kang and Lindi Vundla, Amazon).

[133] National Council of Provinces Trade & Industry, Economic Development, Small Business, Tourism, Employment & Labour Committee, Parliament of the Republic of South Africa, *Copyright Amendment Bill & Performers' Protection Amendment Bill: Public Hearings*, 7 March 2023 (Danny Dohmen and Brian Wafawarowa).

[134] National Assembly Trade, Industry and Competition Committee, Parliament of the Republic of South Africa, *Copyright & Performers' Protection Amendment Remitted Bills: Further Public Hearings Day 2*, 12 August 2021 (Bertrand Moullier, Senior Advisor of the International Film Producers' Association Film Producers Worldwide); National Council of Provinces Trade & Industry, Economic Development, Small Business, Tourism, Employment & Labour Committee, Parliament of the Republic of South Africa, *Copyright Amendment Bill & Performers' Protection Amendment Bill: Public Hearings*, 21 February 2023 (Philippa Rafferty, Group Executive Legal and Business Affairs of eMedia Investments).

[135] National Council of Provinces Trade & Industry, Economic Development, Small Business, Tourism, Employment & Labour Committee, Parliament of the Republic of South Africa, *Copyright Amendment Bill & Performers' Protection Amendment Bill: Public Hearings*, 14 March 2023 (Collen Dlamini and Pierre Rautenbach).

period: 'Amazon and others would reap where they have never sown, cherry picking and leaving the rest stranded like a ship in the Namib."[136]

Parliament was undeterred, however, and passed the Bill without amending the reversion provision.[137] As we go to press, however, the Bill's future is uncertain: the President referred it to the Constitutional Court in October 2024 over constitutional concerns, though none in relation to the reversion provision.[138]

We find most of these arguments unpersuasive for reasons documented elsewhere in the book. However, we are concerned that the automatic operation of this provision may worsen the problem of orphan works. As we explain in Chapter 6, making reversion rights automatic can be an effective way of helping creators actually enforce them. But what if rights revert to creators or heirs who have no interest in them, or perhaps don't even realise they control them? To avoid such undesirable outcomes, we recommend automatic mechanisms be combined with appropriate safeguards to ensure they promote rather than hinder access.[139] Unfortunately, the South African law contains no such scaffolding.

It's also problematic in other ways. For example, it doesn't expressly bar publishers from signing multiple agreements for different 25-year blocks when initially negotiating the copyright grant with an author or composer, increasing the risk of its author-protective intent being undermined.[140] This kind of subversion is a real risk: as we explain in Chapter 4, publishers in Spain have attempted to contract around

[136] Publishers' Association of South Africa, *Submission to National Council of Provinces Select Committee on Trade and Industry, Economic Development, Small Business Development, Tourism, Employment and Labour* (27 January 2023) <https://publishsa.co.za/wp-content/uploads/2023/02/PASA-Submission-to-NCOP-Select-Committee-27Jan2023.pdf>; see also National Council of Provinces Trade & Industry, Economic Development, Small Business, Tourism, Employment & Labour Committee, Parliament of the Republic of South Africa, *Copyright Amendment Bill & Performers Protection Amendment Bill: Public Hearings* (7 March 2023) (Brian Wafawarowa).

[137] National Council of Provinces Committee on Trade and Industry, Economic Development, Small Business Development, Tourism, Employment and Labour, Parliament of the Republic of South Africa, *Copyright & Performers' Protection Amendment Bill: Voting on Negotiating Mandates (Continuation)*, 20 June 2023 (Meeting Minutes) <https://pmg.org.za/committee-meeting/37264/>; South Africa, *Parliamentary Debates*, National Council of Provinces, 26 September 2023 <https://pmg.org.za/hansard/37600/>.

[138] Matamela Cyril Ramaphosa, President of the Republic of South Africa, *Notice of Referral in Terms of Sections 79(4)(b) and 84(2)(c) of the Constitution of the Republic of South Africa, 1996: Copyright Amendment Bill [B13F – 2017] and Performers' Protection Amendment Bill [B24F – 2016]* (Letter to Constitutional Court, 10 October 2024) <https://static.pmg.org.za/Copyright_Bill_Notice_of_Referral.pdf>.

[139] See Chapter 6, Section 6.1.8.2. For a more detailed exploration of how such safeguards could be constructed to simultaneously generate rewards for creators and promote access for the public, see Rebecca Giblin, 'A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid' (2018) 41 *Columbia Journal of Law & Arts* 369.

[140] Owen Dean, 'Authors, You've Got a Friend?', *The Anton Mostert Chair of Intellectual Property* (Blog Post, 31 May 2021) <https://blogs.sun.ac.za/iplaw/2021/05/31/authors-youve-got-a-friend/>.

an analogous 15-year limit on publishing contracts by making them automatically renewable in 15-year blocks.[141]

Further, the provision doesn't address vital issues like what happens with joint authors and collective works, or commissioned works/works made in the course of employment. And Dean's initial criticism remains valid, too: it's unclear to us why it should apply to assignments made by those *other than* the author.

As we argue in Chapter 6, such issues *must* be appropriately dealt with for reversion rights to fully achieve their potential. We anticipate significant problems will emerge in the implementation of the forthcoming South African reversionary system precisely because it does not adequately address them.

2.6.3 *The UK*

Finally, the UK has also exhibited considerable renewed interest in reversion rights over the last few years.

2.6.3.1 The 'Terms of Trade' Triumph

That new interest is contextualised by the success of the UK's independent film industry since 2004, when public service broadcasters like the BBC and Channel 4 ('PSBs') were required to implement new codes of conduct regulating the terms on which they commissioned independent productions.[142] These 'Terms of Trade' must cover matters such as licence duration, exclusivity of rights, and transparency around payment, and be approved by the regulator, OFCOM.[143]

The biggest effect of the change was to give independent film and television producers greater control over secondary rights to their content. Before this, independent film and television producers had little power to negotiate with PSBs, which are a powerful force in the UK market, and as a result were often obliged to license all or virtually all their rights in order to get their projects funded.[144] However, just as we've seen in other culture markets, that didn't mean the broadcasters actually actively exploited those rights, by (for example) licensing them into other territories: 'the PSBs had little or no interest in actively or even passively

[141] European Commission, Directorate-General for Communications Networks, Content and Technology, Olivia Salamanca and Lucie Guibault, *Remuneration of Authors of Books and Scientific Journals, Translators, Journalists and Visual Artists for the Use of Their Works* (2016) 115 <https://data.europa.eu/doi/10.2759/14126>.

[142] *Communications Act 2003* (UK) s 285(1).

[143] Ibid s 285(3).

[144] Oliver & Ohlbaum, *The Impact of Terms of Trade on the UK's Television Content Production Sector: A Report Prepared for the Canadian Media Producers Association (CMPA)* (2018) 2 <https://ised-isde.canada.ca/site/broadcasting-telecommunications-legislative-review/sites/default/files/attachments/968_CMPAAppendixC1.pdf>.

administered much of the content they controlled'.[145] This frustrated the production companies who had made the works and wanted them to be widely accessible, but because they'd been obliged to hand over the foreign rights, they were unable to exploit them themselves.[146]

Under the new regime, however, the producers retain control over those secondary rights. While they must share any proceeds with the commissioning broadcaster, the creators themselves get to decide where and how to monetise their projects overseas.[147] The change 'had a radical, sector-altering impact on television production in the UK'.[148] From 2004 to 2008, international income from UK TV rights grew an average of 22 per cent per year, and then continued to grow at around 7 per cent, while overall TV revenues increased from £1.5 billion in 2004 to more than £2.6 billion in just 13 years.[149]

Terms of Trade are limits on what creators can be obliged to give away, rather than reversion rights per se, but they achieve the same end: they help creators share fairly in the proceeds of their work by enabling them to negotiate additional deals once they have a better idea of what the work is worth, and help promote access to knowledge and culture by placing the exploitation rights in the hands of those most motivated to exploit them.

France now similarly regulates terms of trade for its film industry by limiting licence terms. Previously, streaming companies like Netflix insisted on buying out all rights on the shows it financed, but the new restrictions limit exclusive rights to a maximum of just three years.[150] Recognising the power of such interventions, creator organisations are advocating for them elsewhere, too.[151]

[145] CREATe, *Public Service Broadcasting, Streaming Services and the Future for "Terms of Trade": Response by CREATe (www.create.ac.uk) to the Parliamentary Inquiry by the Digital, Culture, Media and Sport Committee into 'The Future of Public Service Broadcasting'* (2020) 5 <https://committees.parliament.uk/writtenevidence/7077/pdf/>.

[146] Ibid 5–6.

[147] Ibid 5.

[148] Ibid 6.

[149] Oliver & Ohlbaum (n 144).

[150] Elsa Keslassy, 'Netflix, Amazon Must Invest 20–25% of French Revenues in Local Content, France Government Decrees' (online, 30 June 2021) <https://variety.com/2021/streaming/global/avms-france-netflix-new-rules-streamers-1235008364/>.

[151] See, e.g., Lateral Economics, *Taking Australian Stories and Skills to the World in the Age of Global Streaming: A Lateral Economics Discussion Paper Commissioned by Screen Producers Australia* (7 October 2021) <https://assets-us-01.kc-usercontent.com/89c218af-4a5a-00a2-9d83-3913048b3bc7/6d1aca76-d99a-4806-957a-38fecf032f73/Lateral%20Economics%20SPA%20Report%20Final%207%20October%2021.pdf>; Patrick Frater et al, 'Damming the Stream: Global Governments Try to Set Boundaries for Streaming Giants. Will They Work?' (online, 1 July 2019) <https://variety.com/2021/global/global/netflix-europe-avms-regulation-streamers-1235009148/>; and Oliver & Ohlbaum, *Supporting Local Content Investment: International Policy Approaches to VOD Services: A report for the ABC and Free TV Australia* (May 2021) <https://www.infrastructure.gov.au/sites/default/files/documents/mrgp-abc-attachment-b-oliver-and-ohlbaum.pdf>.

2.6.3.2 Recognising Reversion's Potential

British creator groups, most notably the Society of Authors, were among those pushing hardest for the inclusion of 'use-it-or-lose-it' rights in the European Digital Single Market Directive. Book authors often have reversion rights included in their publishing contracts, but that approach is far from satisfactory (as we demonstrate in Chapter 5), and they have long advocated for improved protections.[152] Although the campaign to incorporate these rights into the Directive succeeded, authors did not enjoy the fruits of that work in the UK, with Brexit torpedoing domestic implementation.[153]

Reversion rights stayed on the agenda, however, thanks to a UK parliamentary committee inquiry into the economics of music streaming. As we explained in Chapter 1, it found that the major record labels had become massively more profitable in the streaming era, but that those rewards were not being shared equitably with the recording artists and songwriters who actually make the music.[154]

In response, it recommended that creators be entitled to reclaim their rights 20 years after transfer, being after the point labels commonly write off bad debt, but likely still within the creator's working life.[155] This, in the Committee's view, 'would create a more dynamic market for rights and allow successful artists to go to the market to negotiate better terms for their rights'.[156] It also recommended adopting other creator-favouring interventions such as rights to equitable remuneration and contract adjustments to bring the UK in line with Europe.[157]

We revisit this proposal in our upcoming best practice analysis (Chapter 6). As we go to press, however, it remains unclear whether the inquiry's recommendation will translate to legislative reform. Giving musicians the right to reclaim rights after 20 years is the kind of intervention we think would make a real difference to their bargaining power, resulting in more profits going to artists and less to their labels. This would disproportionately affect the majors who control the bulk of catalogue, and whose record profit margins are being fattened by the contracts of heritage artists that pay much lower royalties than the going rate today. Given the power of those

[152] See, e.g., the 2015 CREATOR campaign, which called for reasonable contract terms including time limits and use-it-or-lose-it clauses: Society of Authors, 'C.R.E.A.T.O.R – Fair Contract Terms', *Where We Stand* (Web Page) <https://societyofauthors.org/Where-We-Stand/C-R-E-A-T-O-R-Campaign-for-Fair-Contracts>.

[153] Answer from Chris Skidmore, 'Copyright: EU Action: Question for Department for Business, Energy and Industrial Strategy', *UK Parliament Written Questions, Answers and Statements* (Web Page, 21 January 2020) <https://questions-statements.parliament.uk/written-questions/detail/2020-01-16/4371>.

[154] Digital, Culture, Media and Sport Committee, *Economics of Music Streaming* (House of Commons Paper No 50, Session 2021–22) 34, 63.

[155] Ibid 67.

[156] Ibid.

[157] Ibid.

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labels, such an initiative would take real political courage. It may be that the UK's highly effective Terms of Trade reform was only politically possible because it was limited to *public* broadcasters. Will British lawmakers have the appetite to take on the Big Content and Big Tech giants who would lose out if creators had meaningful rights to negotiate fresh deals in other contexts?

2.7 CONCLUSION

Neither of the statutory reversion rights to have originated from Britain was designed in a way that would have allowed them to meaningfully benefit creators. The *Statute of Anne*'s author-protective intent was defeated by allowing publishers to extract the reversion right up front. The Imperial right was also designed to fail, by kicking in far too late (at a point most works had long ended their commercial lives) and by vesting in estates long after most of them had been wound up. Despite its deficiencies, the *Mbube* and *Redwood* cases still demonstrate the importance of reversion rights in correcting the injustices that can result from current contracting practice, and hint at the potential upside that could come from designing them in ways designed to further copyright's access and reward aims.

The use-it-or-lose-it model observed in some Commonwealth nations, in Africa and the Pacific presents a different, and intriguing, model which we examine more fully in Chapter 4 and our recommendations in Chapter 6. But the most effective intervention discussed in this chapter has undoubtedly been the UK's Terms of Trade reform that limited what creators can be obliged to give away. While not strictly a reversion right, it provides additional real-world evidence of the potential upside that could follow from introducing author-protective rights aimed at re-balancing bargaining power between creators and investors. Recent law reform developments in Canada, South Africa and the UK suggest that the *concept* of reversion is very much alive in lawmakers' minds as a way of addressing those imbalances.