5

Contractual Reversion Rights

INTRODUCTION

While we argue that reversion rights have real potential to re-draw copyright's broken bargain, none of the statutory interventions we canvassed across Chapters 2 to 4 has succeeded in doing so. Do those failures mean we should leave creator rights to be determined via private contracts rather than public regulation?

Cultural investors have long and consistently argued in favour of exactly that, lauding contracts as the best way of regulating the legal rights and responsibilities between themselves and the creators they work with.[1] You may recall that creator submissions to the 2013 EU reform consultation consistently criticised contracts for

[1] See, e.g., *Memorandum Statement by the Copyright Committee of the Motion Picture Association of America* before the Committee on the Judiciary House of Representatives Subcommittee No. 3, 89th Congress, 1st session 990 <https://babel.hathitrust.org/cgi/pt?id=pst.000014112416&seq=342&q1=freedom>; *Copyright Law Revision Part 3* (US Government Printing Office, 1964), Philip B Wattenberg on behalf of Music Publishers' Association of the US, 285<https://babel.hathitrust.org/cgi/pt?id=pst.000014112416&seq=5&q1=wattenberg>; Thomas J Robinson, Motion Picture Association of America, 288; *Music Publishers Association, Submission to the European Commission Public Consultation on the Review of the EU Copyright Rules* 39; International Publishers Association, Submission to New Zealand Ministry of Business, Innovation and Employment, *Review of the Copyright Act 1994* [11] <https://www.mbie.govt.nz/dmsdocument/6707-international-publishers-association-review-of-copyright-act-1994-issues-paper-submission-pdf>; Publishers Association of New Zealand, Submission to New Zealand Ministry of Business, Innovation and Employment, *Review of the Copyright Act 1994* [11] <https://www.mbie.govt.nz/dmsdocument/6753-publishers-association-of-new-zealand-review-of-copyright-act-1994-issues-paper-submission-pdf>; 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 (Danny Dohmen, Immediate Past President of Licencing Executives Society of South Africa).

failing to safeguard their interests, providing evidence of the ways in which their unequal bargaining power led to unfair terms, a lack of transparency, and lack of scope to negotiate better deals.[2] Rightsholder responses to that review painted a very different picture, insisting that authors and performers were being 'appropriately remunerated thanks to existing law and practice in all sectors of the creative industries' and calling for creator rights to 'be regulated by the market'.[3] The most important issue, in the view of the publishers, producers and broadcasters who responded, was 'ensuring that there is contractual freedom, freedom of negotiation and the right for an author to choose his/her representative'.[4]

When statutory reversion rights come on the agenda, rightsholders resist with rhetoric that warns against 'statutory intrusion upon the sanctity of contract',[5] and argues that they would 'arbitrarily restrict. . . freedom to trade'.[6] They sometimes even argue that statutory interventions are unnecessary because such rights can already be incorporated via contracts. In Canada for example, in response to Bryan Adams' call for a new entitlement to revert rights 25 years after transfer, the Executive Director of the Professional Music Publishers Association told a parliamentary committee that if Adams wanted such a limit he should have simply negotiated it into his contract. 'There's nothing in the law that stops what we're discussing being effective in a contract. You could say that after 35 years the copyright would go back to the composer. That's already possible to do if we wish to do it.'[7] That's undeniable, so far as it goes, but disingenuously ignores the fact that they do *not* wish to do it, and that very few composers have the bargaining power to force them to do so.

We've previously shown that the highly unequal bargaining power between cultural investors and creative workers means that, in practice, contractual 'freedom' is usually illusory.[8] But do contracts nonetheless result in reversion rights that appropriately balance and promote copyright's access and rewards aims? We aim to answer that question in this chapter, primarily by drawing upon the results of two empirical studies. The first analyses half a century of publishing contracts sourced from the archive of the Australian Society of Authors to determine how they allocate rights, the way in which they provide for reversion and how those practices have evolved over time. The second investigates what happens when authors actually attempt to enforce their contractual rights.

[2] European Commission, 'Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules' (July 2014) 78–9.

[3] Ibid 80.

[4] Ibid.

[5] *Motion Pictures Association of America, Comment to the Copyright Office Library of Congress in the Matter of Modernizing Recordation of Notices of Termination*, 4 <https://www.motionpictures.org/wp-content/uploads/2023/04/MPA-Comments-on-Termination-Recordation.pdf>.

[6] National Council of Provinces Trade & Industry, 7 March 2023 (n 1).

[7] INDU, *Evidence*, 1st Session, 42nd Parliament 19 September 2018, statement by Jérôme Payette (executive director of the Professional Music Publishers Association) 7.

[8] See e.g. Chapter 1, Section 1.3.1.

As the following pages will show, we find that contractual practice results in similar failures to the statutory model, including outdated, missing and poorly designed rights, and a balance that favours the interests of rightsholders over those of creators or the public. We also find that author attempts to enforce contractual rights can result in an additional panoply of problems, including challenges determining whether a particular work is eligible to revert, getting publishers to respond to reversion requests, and even finding the relevant contracts in the first place. While some of these problems can be addressed, we conclude the chapter by identifying a number of structural features that make the deficiencies of contracts much harder to rectify than those of statutes, and argue that the best path towards reversion reforms that could meaningfully improve copyright's ability to achieve its aims involves some form of public intervention.

5.1 INTRODUCING REVERSION RIGHTS IN PUBLISHING CONTRACTS

5.1.1 *Out-of-Print Clauses*

As we've previously observed, book publishing is the creative industry with the longest and strongest history of contractual reversion, almost exclusively in the form of use-it-or-lose-it rights.[9] These practices recognise the importance of not just publishing books in the first place, but keeping them available ongoing. As leading British publisher Stanley Unwin observed in 1947, permitting authors to reclaim rights where publishers cannot or will not reprint their books is 'eminently just'.[10]

Such 'out-of-print' clauses are publishing's best-known reversion right. Traditionally, they entitled authors to reclaim rights granted under publishing contracts (usually excepting those that have previously been sub-licensed) once the book has gone 'out of print'. Sometimes such clauses operate automatically: for example, by reverting rights after the book has been out of print for more than six months.[11] More commonly however, reversion occurs after the author gives notice that the book is no longer available for purchase, and the publisher fails to re-print.[12]

Out-of-print clauses are intended to motivate publishers to keep books available, which clearly benefits the public (by promoting access) and authors (by ensuring

[9] See e.g. Chapter 1, Introduction.

[10] Stanley Unwin, *The Truth About Publishing* (Unwin Brothers, 5th ed, 1947) 97; see also Stanley Unwin, *The Truth About Publishing* (Lyons & Burford, 1995, reprinting the 1960 edition of the book published by George Allen & Unwin) 93.

[11] *The Publishers Weekly* (1906) No 1776, 667; *Harper & Bros v M A Donohue & Co* (1905) 144 F 491, [493].

[12] E.g., Alexander Lindey and Michael Landau, *Lindey on Entertainment, Publishing and the Arts* (Thomson Reuters, 3rd ed, 2024) s 5:109, cf. Lynette Owen (ed), *Clark's Publishing Agreements* (Bloomsbury Professional, 10th ed, 2017) 57.

they still have a chance to earn royalties).[13] When unused rights revert, the pool of potential beneficiaries also includes publishers whose fresh investments in previously neglected works pay off – as when Text Publishing republished the out-of-print *Women in Black* in an edition that went on to sell over 100,000 copies, be developed into a stage production and feature length film, and be translated for new audiences in Germany, Italy, France and Israel.[14]

5.1.1.1 When Will a Title Be 'Out of Print'?

'Out of print' has had different meanings over time, and across different parts of the publishing industry.[15] Accordingly, authors' organisations have long insisted that contracts should provide clear, objective standards for determining a book's print status. In 1968, for example, the Society of Authors' (UK) model contract defined a book as being out of print if the publisher had 'fifty (50) copies or less in stock'.[16] By 1991, it was recommending that rights should revert if a book was out of print *or* average sales had fallen below 250 copies, and the publishers had declined to reprint.[17] US and Australian author organisations similarly recommended objective standards by around the same time.[18]

Rather than adopting objective criteria for determining print status, however, some publishing guides simply replaced outdated 'out of print' language with alternative formulations, like 'off the market', 'out of print in all editions', or

[13] The Authors Guild, 'A Publishing Contract Should Not Be Forever', 28 July 2015 <https://perma.cc/T3U6-FUKV>; Australian Society of Authors, *Australian Book Contracts* (Keesing Press, 4th ed, 2009) 24.

[14] Text Publishing, *The Women in Black* <https://perma.cc/GM63-3BYJ>; Text Publishing, *Ladies in Black* <https://perma.cc/7XUF-CFWL>; Andrea Hanke, 'Editorial: Rising Stars', *Think Australian*, Books+Publishing, 15 November 2018 <https://perma.cc/KW25-6483>; email dated 18 November 2019 from Anne Beilby (Rights and Contracts Director, The Text Publishing Company).

[15] E.g., JM Cavendish, A *Handbook of Copyright in British Publishing Practice* (Cassell 1974, 1st ed) 155: 'A book is said to be out of print ('o/p') when not enough copies are available from stock to satisfy reasonable public demand'; Jonathan Kirsch, *Kirsch's Handbook of Publishing Law* (Acrobat Books, 1995) 224: 'A book is "out of print," according to book industry practice, when it is no longer generally available to consumers through ordinary channels of trade in the book industry.'

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

[17] Denis De Freitas, 'Copyright Contracts: A Study of the Terms of Contracts for the Use of Works Protected by Copyright under the Legal System in Common Law Countries' (1991) 11 *Copyright* 222, 241.

[18] The US Authors Guild recommended that authors should be allowed to terminate publishing contracts if books were out of print *and* annual royalties did not meet a particular threshold after ten calendar years: see ibid 250. The Australian Society of Authors' 1994 model contract specified that 'a book shall be deemed to be out-of-print where the Publisher's stocks are less than fifty (50) or where less than twelve (12) copies are shown as having been sold in any six (6) months accounting period.' Australian Society of Authors, *Australian Book Contracts* (Keesing Press, 2nd ed, 1994) 36.

'not available in any edition'.[19] Such formulations require books to be entirely unavailable, including in digital form or via print-on-demand ('POD'), before authors could reclaim their rights.

In today's era of natively digital manuscripts, keeping a title available digitally or via POD requires virtually no investment – certainly far less than a fresh print run would require. But under these 'technical availability' standards, such minimal contributions can be enough to enable publishers to hold on to the rights forever, even if the book is no longer selling and no royalties are being paid.[20]

Writers have long expressed concern that these changed realities could radically alter their traditional bargain with publishers. In 1994, the US National Writers Union argued that out-of-print clauses needed to be 're-thought in the electronic era, when small quantities or even single copies of a work can be reproduced easily and cheaply'. The Union argued that 'the real criterion for whether a publisher can retain rights is whether the work is still being actively marketed', although instead of suggesting objective sales or stock-based thresholds it recommended that the publisher be required 'to notify the author when it has decided that it no longer makes sense to make even minimal efforts to promote the work'.[21]

In the succeeding decades, author associations around the English-speaking world have consistently warned their members about the dangers of out-of-print clauses being based on 'technical availability' standards that could be satisfied by eBooks or POD, as early as 2000 (Authors Guild, US),[22] 2001 (Australian Society of Authors),[23] and 2006 (Society of Authors, UK).[24] As the Society of Authors further explained in 2008:

> Publishers will be tempted to argue that a book is "available" – the term now often used in preference to "in print" – if it can be supplied as POD or as an eBook. It becomes all the more important for authors to ensure that they have the option of reverting rights if sales – preferably in units, but possibly in revenue – fall below figures agreed in the publishing contract.[25]

Authors have long raised this issue with the Australian Society of Authors, which noted in 2021 that 'being caught by the "never-out-of-print ebook/POD

[19] Lynette Owen (ed), *Clark's Publishing Agreements: A Book of Precedents* (Bloomsbury Professional, 10th ed, 2017) 54; see also Roy Kaufman, *Publishing Forms and Contracts* (Oxford University Press, 2008) 19.
[20] The Authors Guild (n 13).
[21] US National Writers Union, *Statement of Principles on Contracts between Writers and Electronic Book Publishers* <https://perma.cc/66WZ-WGZZ>.
[22] The Authors Guild, *Bulletin*, Spring 2000, 5.
[23] Australian Society of Authors, *Australian Book Contracts* (Keesing Press, 3rd ed, 2001) 31.
[24] Society of Authors, *The Author*, Winter 2000, 129.
[25] Society of Authors, *The Author*, Autumn 2008, 94.

loophole" … thwart[s] their ability to end publishing agreements and explore other options.'[26]

While there are some variations in the criteria different author associations recommend authors to use, especially the appropriateness of unit sales versus dollar amounts,[27] the message of each organisation has long been consistent: that objective criteria are needed to make it possible for authors to reclaim rights where publishers are no longer meaningfully investing in their books' success.

Despite these consistent calls, industry practice guides have been slow to adopt objective criteria to define out-of-print clauses. As late as 2010, *Clark's Publishing Agreements* ('*Clark's*'), a leading UK guide to publishing contracts,[28] still recommended that contracts give authors the right to reclaim their rights if their book was 'out of print in all editions' and the publisher had not at least commenced a new edition within nine months of having received a written request from the author to do so.[29] It did, however, acknowledge that the 'main trend' since its 2007 edition was the move to definitions based on objective criteria, and described the question of when a book is 'out of print' as 'one of the significant by-products of the move into the digital/electronic era'.[30]

It was not until 2013 that *Clark's* finally recommended permitting the author to reclaim their rights in a work if the work failed to meet a minimum sales threshold based either on quantity of copies sold or royalty value.[31] The 2017 edition noted that setting appropriate levels was an 'inexact science', but recognised that 'authors should be entitled to get their rights back if the publisher is not properly supporting

[26] Australian Society of Authors, 'APA Updates Code of Conduct following ASA Campaign' (Web Page, 3 November 2021) <https://www.asauthors.org.au/news/apa-updates-code-of-conduct-following-asa-campaign/>.

[27] The Australian Society of Authors is comfortable with sales measures (Australian Society of Authors, *Contracts* <https://perma.cc/PS4F-36ZY>), but the Society of Authors (UK) recommends that authors only agree to contracts that give them a right to recover their rights when the work is available only in digital/POD editions, or where 'sales have dwindled below an agreed level' (leaving it open whether that's calculated with reference to revenue or copies sold) (Society of Authors, *Before You Sign: Getting Your Rights Back* <https://perma.cc/PN8L-24W6>). By contrast, the Author's Guild (US) is wary of using unit sales as a benchmark: 'Publishers might … be able to game the clause by offering one-cent e-books the way they've gamed existing clauses by using e-books and print-on-demand.' It prefers yearly income thresholds (e.g. US$250–$500), below which authors can terminate the contract and exploit their books via other means: The Authors Guild (n 13).

[28] *Clark's* has been described as an 'integral reference work for the publishing industry' (Huw Alexander, 'Clark's Publishing Agreements: A Book of Precedents (8th edn)' (2011) 22(1) *LOGOS: The Journal of the World Book Community* 68, 70) and Martin Woodhead, 'Clark's Publishing Agreements: A Book of Precedents, 9th edn' (2014) 27(4) *Learned Publishing* 315, 317.

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

[30] Ibid 54.

[31] Lynette Owen (ed), *Clark's Publishing Agreements: A Book of Precedents* (Bloomsbury Professional, 9th ed, 2013) 55.

the book'.[32] That emphasis on 'proper support' confirms the continuing validity of the traditional 'out of print' bargain: publishers must exhibit some minimally meaningful commitment to ensure they hold onto the rights. The 2017 edition of *Clark's* stated that termination clauses based on minimum sales or minimum income 'have become the norm',[33] but even now some publishing guides do not reflect that.[34]

As of 2019, the leading author advocacy associations in the US, UK and Australia all reported that, whilst objective criteria have finally now been adopted by all or almost all major trade publishers, they were still seeing new contracts with 'out of print' defined by technical availability standards rather than objective criteria (particularly from academic publishers and small trade presses).[35]

5.1.2 *Other 'Use It or Lose It' Rights*

'Out of print' rights are the main form of 'use-it-or-lose-it' reversion right in publishing contracts, but others do exist. For example, contracts might take rights in multiple territories or languages, but then provide for their return if the publisher fails to exploit them within a certain period.[36]

The Society of Authors has observed that 'many publishers will agree' to such mechanisms on request.[37] However, not all authors know to negotiate for 'use-it-or-lose-it' rights to be included in their contracts, and many simply agree to whatever terms they were originally offered, particularly early in their writing careers.[38]

[32] Owen (ed) (n 19) 56.

[33] Ibid 34.

[34] E.g., Mark A Fischer, E Gabriel Perle and John Taylor Williams, *Perle, Williams & Fischer on Publishing Law* (Wolters Kluwer, 4th ed, 2019, last updated May 2019) ('*Perle*') 2–71; *Lindey* ss 5:14, cl 16, 5:109, 5:110; 5:117, 5:118; 5:163; *Entertainment Industry Contracts* (Matthew Bender, 2019) Form 41-1, cl 15(b), 15.

[35] Joshua Yuvaraj and Rebecca Giblin, 'Are Contracts Enough? An Empirical Study of Author Rights in Australian Publishing Agreements' (2020) 44(1) *Melbourne University Law Review* 380, 391, n 50.

[36] For instance, a template contract from 'Big 5' publisher Random House in *Lindey* allows the author to revoke the publisher's rights to license the work in the British Commonwealth (except Canada), South Africa and the Republic of Ireland if those rights have not been exercised within 18 months of the work first being published in the United States (*Lindey* (3rd ed) s 5:114, cl 1(b)). A further right of revocation is included for the 'right to license in all foreign languages and all countries' if no license or option is granted three years after the book is first published in the United States (*Lindey* (3rd ed) s 5:114, cl 1(c)). See also *Perle* (4th ed, 2019) 2–43; *Entertainment Industry Contracts: Negotiating and Drafting Guide* (10th ed, 1995) 41-17.

[37] The Society of Authors, 'Before You Sign | Getting Your Rights Back' (Web Page, 16 February 2018) <https://societyofauthors.org/News/Blogs/Before-you-Sign/February-2018/Before-You-Sign-Getting-Your-Rights-Back#:~:text=Many%20publishers%20will%20agree%20to,an%20agreed%20time%2C%20those%20rights>.

[38] Martin Kretschmer, 'Copyright and Contracts: A Brief Introduction' (2006) 3(1) *Student's Guides to the US Government Series* [3]; Lucie Guibault, 'Relationship between Copyright

If use-it-or-lose-it' clauses can be included on request, but not by default, that risks disproportionately disadvantaging emerging and less-well-resourced authors.

5.1.3 *Liquidation Rights*

Some publishing contracts also contain clauses allowing authors to reclaim rights in situations like publisher bankruptcy or liquidation, similarly to some of the European copyright laws surveyed in Chapter 4.[39] Whether they are enforceable depends on the jurisdiction and drafting. For example, in Australia the *Corporations Act 2001* (Cth) prevents termination of a contract if one party enters administration (as opposed to liquidation).[40] The Act also requires liquidators to maintain corporate assets, like publishing rights and earnings due to authors, for creditors.[41] Absent a contractual allowance, they may not be *able* to return rights to authors, even if they wished to do so.[42] For this reason it's important that contracts specify what happens when a publisher goes out of business, and leading publishing guides recommend allowing the author to terminate in such circumstances.[43]

5.2 HOW EFFECTIVE ARE REVERSION RIGHTS IN PUBLISHING CONTRACTS?

In 2020, we published a study that drew upon the Australian Society of Authors' archive of author contracts, comprising over 50 years of documents provided by members for the purpose of obtaining advice about their terms. There have been few previous attempts to investigate contractual practice around reversion,[44] probably because contracts (being spread across so many parties) are notoriously difficult to study, and we were keen to get a better understanding of how they allocated rights and responsibilities between the parties.

The archive's time span allowed us to not only investigate the ways in which publishers dealt with reversion rights in their contracts, but how those practices evolved in response to the major technological, cultural and economic shifts that

and Contract Law' in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar, 2009) 519; David Caute, 'A Survey of Publisher's Contracts' (1980) 99 (2569) *New Statesman; London* 892, 892.

[39] See Chapter 4, Section 4.2.2.1.3.

[40] See, e.g., *Corporations Act 2001* (Cth) s 451E(1); *Rathner, in the matter of Citius Property Ltd (Administrator Appointed)* [2023] FCA 26, [60] (finding the s 451E stay does not prohibit exercise of a contractual termination right arising on the other party entering liquidation).

[41] *Corporations Act 2001* (Cth) s 420A(1).

[42] See further Charles Clark, 'Contracts between Authors and Publishers' (1992) XXVI(4) *Copyright Bulletin* 17, 24.

[43] See, e.g., Lynette Owen (ed), *Clark's Publishing Agreements* (Bloomsbury, 11th ed, 2022) 60–1, 102–3.

[44] We review the existing literature at Yuvaraj and Giblin (n 35) 393–5.

occurred within that period, most notably publishing's transition from analogue to digital.

Our investigation addressed three key questions:[45]

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

5.2.1 *Methodology*

Our full methodology is set out in the published paper,[46] but in brief: we selected a purposive sample of 145 contracts ('sample') that authors provided to the Australian Society of Authors for advice between 1960 and 2014.[47] The contracts related to a range of publishers across the period 1960–2014, with between one and six contracts per year (an average of 2.8). We excluded contracts with confidentiality clauses.[48] We coded the contracts to generate quantitative data using relevant variables (the duration of the grant, the presence and nature of reversion rights, etc.).

The findings of our study are not necessarily generalisable to Australian publishing contracts. The Australian Society of Authors had destroyed a portion of the archive in 2016 due to space constraints, and the contracts it does have relate only to the self-selecting category of authors who sought advice from them in the first place. However, our findings are consistent with publishing practice literature and experiences reported by leading author organisations.[49] These findings also have broad relevance through the English-language world because of the structural similarities between publishers, publishing's global nature,[50] and the general absence of statutory reversion rights for authors in these countries.[51] They also have broader normative implications for discussions about reversion law reform in relation to other

[45] Ibid 395.

[46] A detailed explanation of our method, including data collection, coding, reliability testing and limitations, can be found at ibid 395–402.

[47] Contracts were examined under conditions of confidentiality and our findings do not necessarily reflect the Australian Society of Authors' views.

[48] See further Yngvar Kjus, 'Twists and Turns in the 360 Deal: Spinning the Risks and Rewards of Artist-Label Relations in the Streaming Era' (2022) 25(2) *European Journal of Cultural Studies* 463, 467.

[49] See Katherine Day, *Publishing Contracts and the Post Negotiation Space: Lifting the Lid on Publishing's Black Box of Aspirations, Laws and Money* (Taylor & Francis, 2023) 103; Yuvaraj and Giblin (n 35) 397.

[50] See, e.g., Helge Rønning and Tore Slaatta, 'Marketers, Publishers, Editors: Trends in International Publishing' (2011) 33(7) *Media, Culture & Society* 1109, 1110; see further Giulia Trentacosti and Nick Pilcher, 'Dealing with the Competition of English-language Export Editions: Voices from the Dutch Trade Book Market' (2021) 37 *Publishing Research Quarterly* 278, 280–1 on the dominance of Anglo-American publishing.

[51] See generally Chapters 2 and 3.

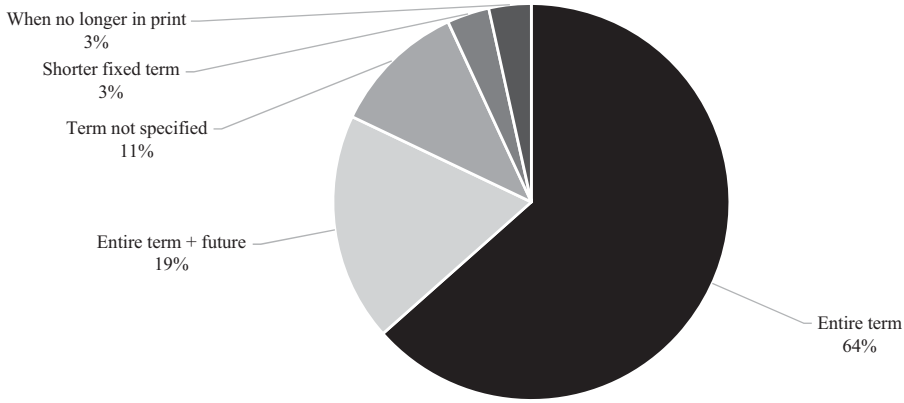

FIGURE 5.1 Length of publishing contracts.

industries (music publishing, recording, etc.), because the features of creative markets that lead to the adoption of reversion clauses in publishing contracts are often present in those fields as well.[52]

5.2.2 *Results*

5.2.2.1 Publishers Took Extremely Broad Rights

5.2.2.1.1 MOST LICENCES WERE FOR THE ENTIRE TERM OF COPYRIGHT. Most contracts in the sample took rights for the entire term of copyright (Figure 5.1), which is consistent with the advice to publishers in leading industry guides.[53] Nineteen per cent even took rights for any and all *additional* terms of copyright that may be granted by lawmakers at some future time.[54] Just 6 per cent of contracts either specified a shorter fixed term, or limited the term until the work went out of print. The remaining 11 per cent did not specify a term, and under Australian law a reasonable term would be implied.[55]

[52] See generally Section 5.3.

[53] For sample clauses, see, e.g., Owen (ed) (n 43) 7, 10; Alexander Lindey, *Lindey on Entertainment, Publishing and the Arts* (Thomson Reuters, 2024-1 ed) § 5:14, cl 1; David Nimmer, *Nimmer on Copyright* (LexisNexis, 2024) form 26-1 cl 1; Donald C Farber (ed), *Entertainment Industry Contracts: Negotiating and Drafting Guide* (LexisNexis, 2024) form 41-1 cl 1.

[54] See, e.g., Lindey (n 53) § 5:14, cl 1. Jones and Benson recommend that this allowance is made if publishers take rights for the entire term: Hugh Jones and Christopher Benson, *Publishing Law* (Routledge, 3rd ed, 2006) 77.

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

5.2.2.1.2 RIGHTS TAKEN WERE BROAD, AS WELL AS LONG. Most contracts took exclusive rights over printing and publishing (79 per cent). A further 17 per cent purported to take the entire copyright, which is common practice in relation to educational and academic texts but less so for trade books.[56]

Some contracts exhibited confusion as to precisely what was being taken. For example, a 1964 contract gave the publisher the copyright *and* an exclusive licence for printing, publishing and selling the book, even though the latter would not be necessary if the publisher owned the copyright. A 2002 contract said copyright belonged to the publisher but later listed the author's name after the copyright symbol, with an identical listing for the publisher: who did the parties to that contract believe actually owned the copyright? And a 2012 contract granted the publisher an irrevocable, perpetual exclusive licence – which it also made terminable on 10 days' notice. A licence cannot of course be simultaneously irrevocable and terminable. Inconsistencies like this suggested some publishers lacked the expertise or resources to draft appropriate contracts, and sometimes failed to even understand what they were taking.

Contracts were similarly expansive in the language and territory rights they gave publishers.[57] Eighty-three per cent granted worldwide printing, publishing and licensing rights without the author's further approval.

Nearly half (n = 72) explicitly took rights in all languages. A further 7 per cent allowed publishers to print and publish books in all languages so long as the author approved the sale of translation rights. Just 13 per cent specified that the publisher took English-language rights only.

We identified ambiguities in the context of language rights too. Two contracts were so unclear we could not determine the languages for which publishers had been granted printing, publishing and/or licensing rights. A further 29 per cent (n = 42) did not specify the languages in which the publisher could print, publish and/or license the book. However, 60 per cent (n = 25) of those then gave the publisher translation rights without requiring the author's approval.

In sum, the publishers captured by the sample took extremely broad rights:

1. 79 per cent took exclusive rights, including copyright assignments, for at least the entire copyright term;
2. 66 per cent expressly took term-long exclusive rights worldwide; and
3. 44 per cent expressly took term-long exclusive rights, worldwide, in all languages.

[56] See, e.g., Hugh Jones, *Publishing Law* (Routledge, 2016) 96; Lynette Owen, *Selling Rights* (Routledge, 5th ed, 2006) 29, 31; Lynette Owen, *Selling Rights* (Routledge, 6th ed, 2010) 39, 41; Owen (ed) (n 43) 82–3.

[57] We anticipate this proportion would have been lower had agented author contracts been available for study, because agents often prefer to sell world and language rights themselves (and will therefore withhold them from publishers if possible).

It's understandable that publishers wish to take broad rights upfront – they want to ensure their commercial interests are protected in the event one book turns out to be a runaway bestseller. However, such practices make it all the more important to provide clear and appropriate mechanisms for returning rights where (as is nearly always the case) they aren't all used. As we demonstrate in the following section, however, the sampled contracts showed much less consideration for the return of rights than for their initial extraction.

5.2.2.2 Most Contracts Had Out-of-Print Rights, but These Were Slow to Evolve

Most contracts in the sample had out-of-print rights (n = 126, 87 per cent). Six of the 19 contracts without such rights were for educational and academic texts, for which it can be appropriate *not* to have such a clause because those texts are designed to be regularly revised, and can be originated by publishers rather than authors and are designed to be regularly updated.[58] But over half the contracts without out-of-print clauses involved trade non-fiction books, providing evidence that out-of-print clauses are less universal than the publishing industry sometimes represents them as being.[59]

5.2.2.2.1 MOST OUT-OF-PRINT FORMULATIONS WERE UNFIT FOR PURPOSE. Just 7 per cent of sampled contracts with out-of-print clauses (n = 9) accorded with best practice by using objective criteria to determine print status. One 2014 example defined 'out of print' as where there had been gross royalties of under AUD $100 across print and ebook sales during the previous 12 months. Such triggers gave authors clarity about the circumstances in which they could exercise their reversion rights. Welcomely, this example explicitly encompasses digital sales – something we saw in Chapter 4 is not always the case in European statutory formulations that provide objective criteria to define print status.[60]

The earliest contract we found referencing objective criteria was dated 1987, and five of the nine contracts that did so were dated 2009 or earlier. That suggests that at least some publishers were aware of the importance of evolving their definitions of 'out of print' during the shift to the digital era.

However, the overwhelming majority of contracts with out-of-print clauses (88 per cent) instead relied on technical availability standards (Figure 5.2). These included 'out of print and not available in any edition' (n = 54), 'out of print in all editions' (n = 21), 'out of print' (n = 18), and 'out of print or off the market' (n = 10). Other variants also appeared, and in fact became more common in the later years of the

[58] See, e.g., Owen (ed) (n 43) 98; Nimmer (n 53) form 465-26-2, cl 11.
[59] Rebecca Giblin, 'Does Australia Really Need Author Rights? A Response to Industry Pushback' (2019) 235 *Overland* <https://perma.cc/M55E-YYNG>.
[60] See Chapter 4, Section 4.2.2.1.2.

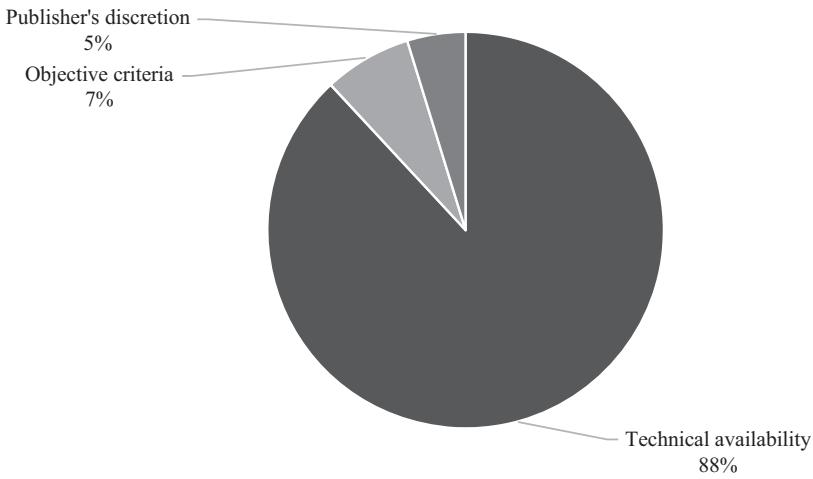

FIGURE 5.2 Standards determining whether a book is out of print.

sample.[61] We were unable to determine whether these various formulations had different meanings – would 'out of print' include books that were only available in digital editions? Would there be a different result for 'out of print or off the market'? That lack of clarity is likely to make it more challenging for authors to confidently ascertain the scope of their rights.

As explained above, formulations based on technical availability have long been inconsistent with industry best practice. That they were so prevalent in our sample despite the concerted, decades-long efforts of author advocates to reform them shows that it can take an inordinately long time for changes to industry reality to flow through to contractual practice.

The final six contracts with out-of-print clauses gave publishers the power to determine when a title was out of print, by, for example, declaring that demand or changed conditions don't justify further publication. Such formulations are also undesirable for lack of clarity, and for their reliance on intervention from publishers at a time when they're likely to have very little remaining interest in a particular title.

5.2.2.2.2 AUTHORS HAD TO WAIT A LONG TIME TO RECLAIM THEIR RIGHTS. Where a book did meet the out-of-print criteria, just four contracts provided for rights to revert immediately to authors upon notification to their publisher. It was much more common for authors to be obliged to give their publisher notice to reprint, and permitted to exercise their reversion right only after that notice expired (93 per cent, n = 117).

The notice framework is intended to balance the needs of publishers to profit from their investments with the interests of authors in reclaiming rights that are no longer

[61] Yuvaraj and Giblin (n 35) 408, n 107.

https://doi.org/10.1017/9781009334839.005 Published online by Cambridge University Press

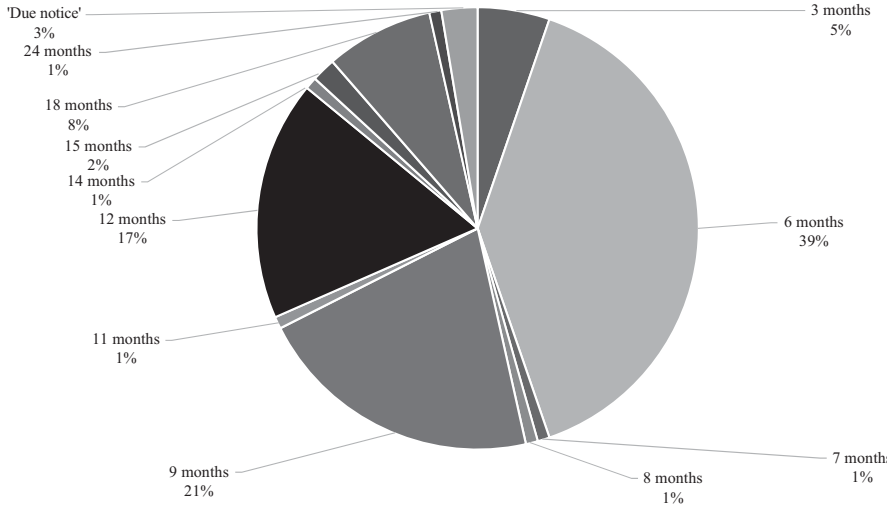

FIGURE 5.3 Periods of notice for publishers to reprint in contracts with out-of-print clauses.[62]

being meaningfully exploited. But the longer the notice period, the bigger the hurdle for authors wanting to capitalise on new exploitation opportunities. As shown in Figure 5.3, the explicit notice periods contained in the sample contracts varied between two months and two years. Some contracts didn't specify a time at all, but required authors to give 'due notice', adding an additional layer of uncertainty to the process.

Interestingly, we observed a general upward trend in the notice period to reprint (Figure 5.4), even though *Clark's* exhibited a *downward* trend in recommended notice periods across its various editions over time.[63] The *Clark's* reduction is consistent with technological advancements making it cheaper and faster to print books, including the kind of small print runs that were economically infeasible in prior eras. Logically this should have translated to publishers requiring less notice to reprint, not more. While the findings are not necessarily generalisable, they are consistent with the overall picture of publishers extracting broader rights from authors than what they actually need.

Sometimes contracts required authors to wait out multiple waiting periods before exercising their out-of-print rights. Sixteen per cent of contracts with out-of-print clauses imposed a waiting period after publication before the author could give notice to reprint. Five per cent imposed a waiting period after the work went out of print before the author could give notice to reprint. Notably, one 2011 contract

[62] We excluded three contracts from 1977, 1987 and 2014 because we could not confidently determine the notice periods. Also, 19 contracts indicated the period was to 'commence' the republication process. In these instances, we added six months to the contractual notice period, assuming it to be a reasonable time for the publisher to finalise reprinting.

[63] Yuvaraj and Giblin (n 35) 116–18.

https://doi.org/10.1017/9781009334839.005 Published online by Cambridge University Press

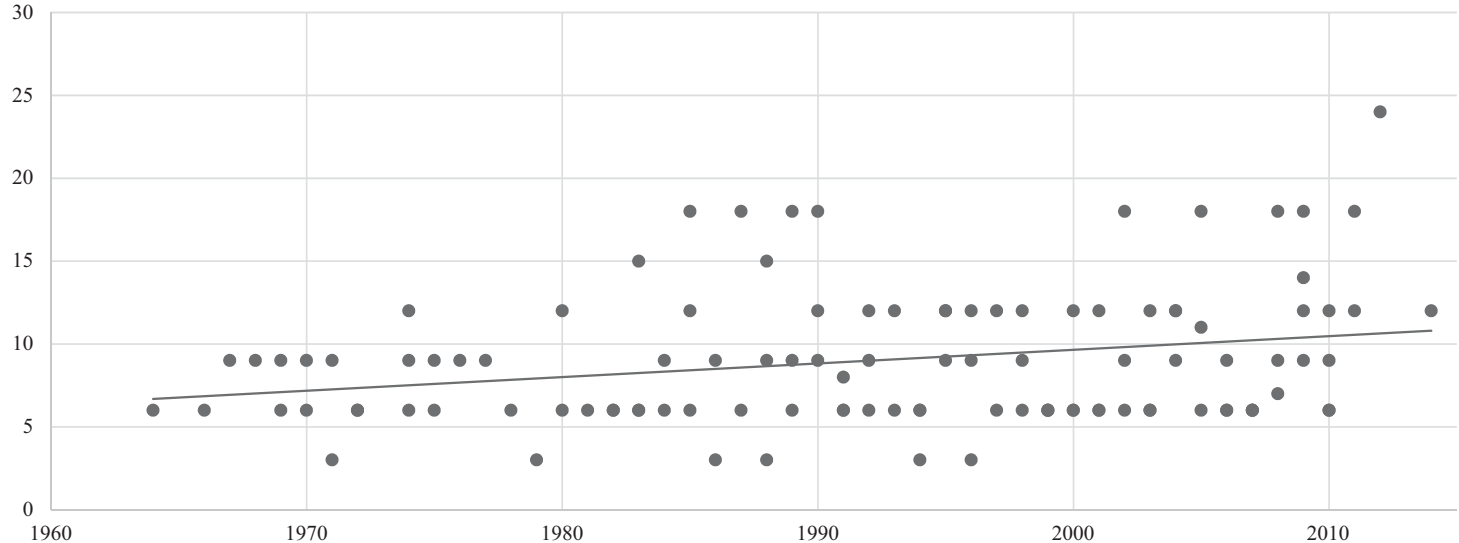

FIGURE 5.4 Notice to reprint (months over time) in contracts with out-of-print clauses.
The Y-axis charts the notice to reprint in months, while the X-axis lists the years of the contracts in the sample.

required *all three*: the author had to wait 12 months after initial publication, plus 12 months after the book went out of print to issue the notice to reprint, then wait a further 12 months after that to actually get their rights back in the event the book wasn't returned to market.

Long notice periods make it harder for authors to ascertain their rights, and make it more time consuming and expensive to exercise them. Even if they have an opportunity to partner with another investor to exploit unused rights, being obliged to wait years to actually reclaim them may mean the opportunity disappears by the time they are able to do so.

5.2.2.2.3 SOME CONTRACTS REQUIRED AUTHORS TO PAY TO RECLAIM THEIR RIGHTS. In the early days of publishing, authors were sometimes required to pay to reclaim rights to out-of-print titles.[64] By the 1970s, however, such requirements were seen as being of purely historic interest, with reductions in the cost of book publishing long having eliminated the need to impose them.[65]

Against that backdrop, we were startled to find six contracts in our sample, dated between 1964 and 1998, that still required the author to repay the unearned portion of their advance and/or contribute to the cost of plant used to print the book. This provides additional evidence that it can take decades for changed industry realities to be fully reflected in contractual practice.

5.2.2.3 Not All Contracts Provided for Return of Rights in the Event of Liquidation

Seventy per cent of the sampled contracts provided for authors to reclaim their rights if publishers went out of business, which suggests this issue is of considerable importance to authors. However, the remaining 30 per cent were silent on this issue, raising questions about what would happen to those titles in the event their publisher went under.

5.2.2.4 Almost No Contracts Provided Mechanisms to Return Unused Language and Territory Rights

As we saw above, the contracts in our sample took broad exclusive rights over a wide swathe of territories and languages, nearly always for the entire term of copyright.

[64] 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, 1512–13.

[65] Stanley Unwin, *The Truth About Publishing*, rev Philip Unwin (George Allen & Unwin, 8th ed, 1976) 68. The most current edition of *Clark's Publishing Agreements* at the time of writing also expressly indicates repaying an unearned advance is not required for reversion under the out-of-print clause: Owen (ed) (n 43) 63.

Such practices would be less problematic if the contracts adequately provided for their return to authors in the event they went unused, and author associations routinely recommend that contracts incorporate mechanisms to do so.[66] Such rights operate in parallel to 'out of print' rights. For example, a book may still be in print in the UK, but not available in Australia, or in a Spanish language edition, or anywhere in digital form. Best practice would let the publisher hold on to the UK print rights, but permit the author to reclaim rights to unused territories, languages and formats after the publisher has had a reasonable opportunity to exploit them. However, just eight contracts in our sample (6 per cent) made any provision to return unexploited language or territory rights to authors.

5.2.3 *Publishing Contracts Are a Poor Repository of Reversion Rights*

The above results show that, when it comes to reversion rights, publishing contracts result in similar problems to those we identified in the context of Europe's statutory equivalents, including inconsistent coverage and outdated formulations. Strikingly, sometimes the problems were identical – such as reversion rights predicated on a book going 'out of print' – a standard that is either radically changed in meaning since the advent of the digital era, or lost meaning altogether, depending on how it's interpreted.[67]

We were particularly concerned by the extent to which the contracts in our sample were missing out-of-print clauses altogether (13 per cent), had out-of-print clauses based on problematic technical availability standards (88 per cent), failed to provide for reversion of unused languages and territories (94 per cent), and failed to provide for reversion in the event of publisher liquidation (30 per cent).

We were also concerned by the ambiguities and inconsistencies we identified in relation to these clauses. Within documents, we sometimes observed different fonts and inconsistent use of terminology, suggesting that these problems may sometimes have emerged from publishers cutting and pasting from different versions over time. While these inconsistencies may have resulted from good faith attempts to reflect changing practices, the results suggest not all publishers have the expertise or resources to draft contracts well.

The Australian Society of Authors successfully used *Are Contracts Enough?* as 'a catalyst' to lobby the Australian Publishing Association ('APA') to change its Code of Conduct,[68] which as a result now advises members to specify clear, objective criteria

[66] The Society of Authors, 'CREATOR – Fair Contract Terms' (Web Page) <https://www.societyofauthors.org/Where-We-Stand/C-R-E-A-T-O-R-Campaign-for-Fair-Contracts>; International Authors Forum, 'Authors: Ten Principles for Fair Contracts' (Web Page) <https://www.internationalauthors.org/wp-content/uploads/2019/01/Authors-Ten-Principles.pdf>.

[67] See Chapter 4, Section 4.3.1.6.

[68] Australian Society of Authors (n 26).

for determining print status in their out-of-print clauses.[69] While this development is certainly welcome, its effects are limited. Not all Australian publishers are members, and not all members will follow the advice. Further, it does nothing to improve the situation for authors bound by existing deficient contracts (which as we've seen may last for a hundred years or more). And, finally, it addresses only one of the myriad deficiencies we have identified above. While it now addresses out-of-print rights for example, the APA's Code of Conduct remains silent about how to appropriately provide for the return of other unused rights.

5.2.4 *Enforcing Contractual Rights Is Problematic Too*

One limitation of our archival study was that it only looked at the text of the documents – not how they were applied in practice. That's potentially significant, because publishing industry practice sometimes sees publishers return rights to authors even in circumstances where the contract does not strictly require them to do so.[70] To more fully evaluate the degree to which a contract-based approach is problematic, it's necessary to understand what happens when authors actually seek to enforce their rights.

The Untapped experiment, introduced in Chapter 1, fills that gap.[71] Project member Airlie Lawson, a literary sociologist with some 20 years' experience in Australian and international publishing, worked closely with participating authors, agents and heirs ('participants') to secure the rights necessary to republish a collection of culturally important lost books under the Untapped imprint, first digitally, and later in print.

Rights to 115 titles had already been reverted at the time participants were approached about the project, demonstrating a strong degree of ongoing interest in rights that their publishers had found to be commercially exhausted.[72] The project team also assisted participants with navigating the reversion process for a further 46 titles, recording any challenges or obstacles they faced. The team then interviewed 23 participants (e.g. authors or heirs) to obtain a deeper understanding of their experiences actually exercising their reversion rights.

Preliminary results from this research are striking. They suggest participants faced a wide range of obstacles in the course of exercising their contractual reversion

[69] Australian Publishers Association, 'Constitution and Code of Conduct' (Web Page) <https://publishers.asn.au/Web/Web/About-Us/Governance/Constitution-Code-of-Conduct.aspx>.

[70] Interview with author association staff member A, 7 November 2018.

[71] These findings are drawn from Paul Crosby, Tessa Barrington, Airlie Lawson and Rebecca Giblin, 'Untapped Potential: Results from the Australian Literary Heritage Project' (October 2024) <https://law.unimelb.edu.au/__data/assets/pdf_file/0007/5096446/Untapped-Research-Report_v4.pdf>. As indicated at p. 14 of the report, we intend to publish and make available a more detailed analysis of the project's findings via SSRN.

[72] Crosby et al (n 72), 14.

rights. Their combined experiences generate important insights into the appropriateness of relying on contracts to secure rights reversion.

In some cases, participants struggled to identify their rights because they could no longer locate the relevant contracts. This was not a surprise, given that those contracts were often decades old by this point. However, it was surprising to discover that in some cases their publishers also could not produce those contracts.

Some participants were also not sure what their book's print status was, and thus whether they were entitled to initiate the reversion process. As we saw above, out-of-print clauses are often drafted in ways that make this difficult to ascertain, and since the contracts rarely oblige publishers to report print status to their authors, they generally don't do so. Some participants further reported that their publishers resisted their attempts to reclaim their rights, despite no indications that the publishers would seek to re-publish those out-of-print works.

One of the biggest surprises was the discovery that sometimes books can disappear entirely through the gaps that can emerge when publishers are acquired, or their catalogues sold. In one instance, for example, the author could not reliably determine which publisher, if any, owned the rights, which made it difficult to verify the chain of ownership for reversion and republication purposes. The team made the call to proceed on the basis that the rights were effectively reverted, but was struck by the way careless recordkeeping could effectively disappear culturally valuable books without their authors even knowing.

As these results show, the process of actually enforcing contractual reversion rights can be far from smooth. While it was not surprising to discover that participants could not locate their original contracts, the sheer range of other obstacles they encountered in the course of exercising their rights *was* surprising.

5.3 KEY PROBLEMS WITH CONTRACTS SIMPLY CANNOT BE FIXED

Combined, our empirical investigations into publishing contracts and their real-world enforcement identify serious deficiencies arising from the use of contracts to safeguard authors' reversion rights. Many of these problems echo those of the statutory regimes we evaluated in Chapters 2 to 4, including poor design, outdatedness, inconsistency, uncertainty and undermining by rightsholders.

Our conclusions are of course most directly applicable to the English-language book publishing contexts in which these studies were conducted, and would be helpfully supplemented by further research into the experiences of creators in other fields and jurisdictions. But (a) the prevalence of the access and reward problems we identified in Chapter 1 across different creative industries and countries, (b) the vigour with which creators and representative organisations across the board have for decades campaigned for stronger statutory reversion mechanisms, and (c) the fact that most countries around the world have such protections all strongly suggest a widespread acceptance (beyond English-language book publishing industries) by

creators and lawmakers that contracts are not enough when it comes to providing reversion rights for creators.

However, rightsholders, having a very strong preference for leaving author rights to be determined by their contracts, may argue that if contractual and statutory interventions result in similar deficiencies, there's no reason for statutory rights at all. While existing approaches have indeed resulted in similar problems, we argue that these would be far harder to rectify in the context of contracts than statutes. In other words, while statutory and contractual approaches currently both do a poor job of securing appropriate reversion rights to creators, contracts have certain structural features that make them *incapable* of doing it well. We identify these below.

5.3.1 *Individual Bargaining Exacerbates Power Imbalances*

In Chapter 4, we noted concerns that some of Europe's statutory rights were not being enforced because creators were afraid of retaliation from rightsholders, including the possibility of being 'blackballed' from future opportunities.[73] Such fears are a natural consequence of the structure of most creative labour markets, characterised as they are by an oversupply of workers willing to work at a discount, the small number of potential buyers for most cultural goods, and the fact that nobody knows what most works are worth at the time the contract is signed.[74]

The same fears also undermine creator enforcement of their contractual rights – and indeed, as Day documented in her comprehensive 2023 study of publishing practice, can be well founded. She recounts how one publisher proudly told her how they retaliated against an author who told them they wanted to take their books elsewhere to get a better deal. '[I]mmediately we stopped putting focus on her backlist because we've got plenty of other authors who we're going to give a backlist revamp and promotion to.'[75]

Such power imbalances don't just affect enforcement: they also cause creators to hold back from requesting changes to the offered terms for fear of 'jeopardis[ing] . . . the negotiation altogether'.[76] These realities are comprehensively evidenced by Day's study as well, which draws upon survey responses from 71 authors across various English-speaking territories.[77] Twenty-one per cent were unsatisfied or very unsatisfied with the negotiations over their publishing contracts.[78] These authors felt

[73] See Chapter 4, Section 4.3.1.4.

[74] See further Europe Economics, Lucie Guibault, Olivia Salamanca and Stef van Gompel, *Remuneration of Authors and Performers for the Use of Their Works and the Fixations of Their Performances* (2015) 138–9, 145 <https://op.europa.eu/en/publication-detail/-/publication/c022cd3c-9a52-11e5-b3b7–01aa75ed71a1>.

[75] Day (n 49) 107.

[76] Ibid 42, 45.

[77] Ibid 50.

[78] Ibid 55. The total number of the remainder is not clear from figure 4.9 (55), although it appears around 63 per cent of the total authors surveyed. The findings don't tell us whether the satisfied

the terms of those deals were generally non-negotiable,[79] with one describing publishers as 'mostly unwilling to budge'. Another described their publisher as having 'tried to bulldoze [them] … into accepting terms that favoured [the publisher] … rather than [the author]', while yet another reported their publisher was 'unhappy … [they] got guidance on the contract from a friend who is also a literary agent'.[80]

However, most dissatisfied authors reported that they agreed to problematic terms despite their concerns.[81] This makes sense given the vast mismatch between the number of authors keen to be published, and capacity of publishers to do so, but suggests we should not be leaving such important rights to be determined by contracts. While statutorily mandated rights can also suffer from undermining by rightsholders, creators collectively advocating for appropriate rights as part of public lawmaking processes necessarily have substantially more bargaining power than individuals negotiating alone.

5.3.2 *Legal Advice Is Expensive*

Rub and Clark argue any imbalances in the creator-exploiter dynamic can be addressed by authors using agents or lawyers when negotiating their contracts,[82] but we see two critical problems with this.

First, representation is expensive. Given how little authors already make from their writing,[83] it will rarely be feasible for them to have their contracts reviewed. In a 2022 study of UK author incomes, for example, 79 per cent of authors reported signing publishing or production contracts without the benefit of expert advice in the year prior.[84]

authors *were* able to negotiate changes to their contracts. They may have been happy just to receive a contract: see, e.g., Don E Tomlinson, 'Everything That Glitters Is Not Gold: Songwriter-Music Publisher Agreements and Disagreements' (1995) 18(1) *Hastings Communications and Entertainment Law Journal* 85, 176 in relation to music publishing contracts.

79 Day (n 49) 55–6.

80 Ibid 56.

81 Ibid 59–60, figure 4.13.

82 Guy A Rub, 'Stronger than Kryptonite? Inalienable Profit-Sharing Schemes in Copyright Law' (2013) 27(1) *Harvard Journal of Law & Technology* 49, 85; see also Clark (n 42) 25 (claiming that most published authors in general trade publishing in the US and UK have agents); see also Copyright Law Revision Part 4 (US Government Printing Office, 1964) 275: 'Today an author is generally represented by a literary agent, by an attorney trained in the field of literary property and by tax counsel.'

83 See Chapter 1, Section 1.1.4.3.

84 Amy Thomas, Michele Battisti and Martin Kretschmer, 'UK Authors' Earnings and Contracts: A Survey of 60,000 Writers', *CREATe* (2022) 55. Samples reported in this study may display self-selection bias, but their findings still usefully highlight trends in the publishing industry: see further Rebecca Giblin, 'A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid' (2018) 41(3) *Columbia Journal of Law & the Arts* 369, 394.

Second, given the number of very similar creator contracts that are formed every day, it would be highly inefficient to rely on reversion rights being negotiated separately each time, even if it *was* economically feasible to do so. The high transaction costs of such an approach would shift even more of the profits from creative labour away from workers. For industries such as book publishing, where well-developed reversion norms already exist (even if they're not always well complied with), a shared set of clear, uniform, baseline rights makes particular sense.

5.3.3 *Investors Aren't Always Equipped to Draft Contracts Well*

We've seen that contracts can be ambiguous and poorly drafted, making it more expensive and time-consuming for authors to understand and enforce their rights. Our research unearthed examples of publishers imposing terms without understanding their legal significance, author entitlements we couldn't make sense of, core terms that were missing altogether, and unreconcilable inconsistencies. There were clear signs that at least some of these problems were caused by drafters not having the resources or expertise to do it well.

As we've seen, the same problems can afflict statutory provisions governing reversion – but in that context, they can be fixed via well-informed and thoughtful reform processes that learn from the flaws we identify within this book, combined with skilful legislative drafting. It would be exceedingly unrealistic to expect each individual publisher to achieve a similar result, especially given their decades of poor results, and highly inefficient to do so, given the potentially high costs of legal advice and drafting. Given how difficult it has proved to get right a finite number of statutory rights, it's not difficult to imagine how much harder it would be to achieve an appropriate standard across thousands of individual contracts.

5.3.4 *Contracts Evolve Too Slowly*

Our analysis showed that publishing contracts can be inordinately slow to evolve in response to changing industry norms. Most strikingly, although author organisations have consistently advocated for the use of objective criteria to determine print status from as early as the 1960s, nearly all the contracts we analysed with out-of-print clauses still used outdated formulae based on technical availability criteria, and almost none provided for the return of other unused rights. Assuming motivated policymakers and functional governments (which we do acknowledge are not always present), statutory reform is a much faster way of ensuring creator rights reflect best practice.

5.3.5 *Contracts Last Too Long*

Even if best practice reversion rights were routinely included in contracts, the sheer length of those deals still makes them an inappropriate repository. Depending on the

author's age at signing, these agreements may bind the parties for a century or more. These inordinate durations cause two big problems.

First, as time passes, the risk increases that nobody will be able to find the contract to ascertain what the rights actually are.[85] The Untapped team experienced this reality with participants, who were at times unable to locate the documents enshrining their rights. It was startling to discover that sometimes even their publishers cannot do so. By contrast, nobody can lose rights enshrined in statute.

Second, not even the most prescient publishers, authors or agents will be able to predict the social, technological, economic and environmental realities of the 2100s. By making contracts the source of author rights, however, that's effectively what we're asking them to do. Consider how out-of-date contracts from the 1980s are today. In the four decades since, we've seen the advent of digital technologies and the internet and seismic shifts in the technological and economic realities of publishing. What will the next six decades bring? Without knowing, it's a hopeless task to try to predict so far in advance the circumstances in which authors should be able to reclaim their rights.

The statutory reversion rights we've examined in this book are, admittedly, as static as their contractual counterparts – but they don't need to be. In Chapter 6, we discuss possibilities for creating rights that can evolve over time in response to changing realities, which we think is well worth considering for situations involving decades-long terms.

5.3.6 *The Public Interest Isn't Represented in Contractual Bargains*

Since creators and investors are the only parties to these deals, there is nobody at the negotiating table to represent the public interest. That's important. When books, songs, video games and other types of works become unavailable because their rights are locked up with rightsholders who are not interested in exploiting them, it doesn't only affect authors: the public interest in access is injured too.

Creators do largely share that interest, but we've seen that their power, information and resource asymmetries relative to investors makes it difficult for them to negotiate terms that appropriately promote it. They have enough on their plates during contract negotiations in trying to protect their individual interests – it's not their responsibility to also concern themselves with the collateral damage that results from so many rights being locked up in the vaults of uninterested owners. That's not the concern of cultural investors, either: the winner-takes-all nature of most culture markets understandably put their focus on taking maximally broad rights 'just in case' rather than thinking about how best to provide for the return of those they

[85] E.g., Brianna Schofield, 'Joseph Nye: A Rights Reversion Success Story', *Authors Alliance* (Web Page, 22 January 2016) <https://perma.cc/D2YK-Q3RX>.

don't exploit.[86] However, the public interest in access does need to be safeguarded *somehow*, and public lawmaking processes can ensure that it is.

5.3.7 *Public Rights Are the Path to Reform*

The structural realities we describe above may well have contributed to the World Intellectual Property Organization ('WIPO') convening a multi-continental working group to build model provisions to supplement contracts in the mid-1980s.[87] The group generated detailed draft provisions dealing with termination for works going out of print and publishers going into liquidation, including requirements for written notice and preservation of existing sub-licences. These provisions were supposed to form part of a 'Model Law on Copyright', but the initiative was abandoned around 1990. However, the fact that stakeholders from three continents managed to propose agreed principles for reversion of publishing rights suggests the issues are global: wherever books are published in the world (and *especially* in the developing world,[88] this initiative recognised the importance of authors having the ability, *independently of their contracts*), to regain their rights if books went out of print or publishers went out of business. More generally, given publishing market dynamics are broadly reflected in other creative industries,[89] this global lawmaking initiative further highlights the *importance* of going beyond contracts to best protect creators' reversionary interests.

For all the reasons identified above, we agree. If we are to have any hope of achieving reversion rights that meaningfully promote copyright's access and reward goals, it will not be via contracts.

While we're largely agnostic about what is used instead, we need mechanisms that are clear, identifiable, easier to update, not reliant upon individual legal advice and negotiation, and less subject to massive disparities of bargaining power. This all suggests publicly mandated rights would be most appropriate, whether in the form of statute, regulations, binding codes of practice or some other instrument. Chapter 6 draws upon the key lessons generated earlier in the book to provide a set of best practice principles to inform future reform discussions about how such public interventions could most effectively take advantage of reversion's unmet potential to reclaim lost culture and get artists paid.

[86] See Chapter 1, Section 1.1.4.2.

[87] This paragraph adapts material from 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) 78–82.

[88] See World Intellectual Property Organization, 'Working Group on Model Provisions for National Laws on Publishing Contracts for Literary Works (Geneva, June 18 to 22, 1984)' (1984) 9 Copyright: Monthly Review of the World Intellectual Property Organization (WIPO) 307, 315 [11].

[89] See Section 5.3.6.