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Reversion's Potential

INTRODUCTION

Madeleine St John's novel *The Women in Black* is a rare peek into the post-war lives of Sydney's working women, including migrants who fled Europe in search of a better life and found themselves in a sunny, alien world. It went out of print quickly after its debut in 1993, despite another of St John's novels being shortlisted for the 1997 Booker Prize, but was rediscovered and republished in 2012 by a leading independent publisher. This time the world was ready: the new edition sold over 100,000 copies in physical and digital forms, the story was developed into a musical and a feature length film, and the book was translated into German, Italian, French and Hebrew.[1]

Republishing lost books is made possible by the fact that publishing contracts typically contain 'out-of-print' clauses that allow authors to reclaim their copyright if their book goes off the market. All kinds of creative workers can be obliged to license or assign their copyrights to cultural investors to get their works produced and distributed to audiences (including book authors and illustrators, recording artists, composers and screenwriters) and the process of reclaiming those rights is called 'reversion'. Research by the UK Authors' Licensing and Collecting Society has found that 63 per cent of authors who exercised a contractual reversion clause went on to earn more money as a result.[2] But reversion rights aren't just found in contracts – more than half the world's nations have some kind of author-protective reversion right enshrined in statute.[3]

[1] 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).

[2] Authors' Licensing and Collecting Society, 'Contracts and Rights' (Web Page) <https://www.alcs.co.uk/knowledge/contracts-and-rights/>.

[3] 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) 90.

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Reversion rights have a wide range of potential triggers, but the most common are time-based (like the US law that permits transfers to be terminated after 35 years), or use-based (like the 'use-it-or-lose-it' rights common in Europe).

Reversion has been around for as long as copyright law itself, with the first statutory reversion right appearing in the *Statute of Anne*, and the earliest contractual example we could find dating back to 1694.[4] In the digital era however they have far more potential than ever before. Consider books, for example. In the analogue world, high marginal costs of copying and distribution used to mean nearly all books quickly disappeared.[5] Although authors could often reclaim their rights to out-of-print titles, that meant little in practice unless another publisher was interested in making the substantial investments necessary to bring them back to market. Now, however, there are vastly more options for doing so. Digital printing makes smaller print runs financially feasible – right down to single copies via print-on-demand ('POD') – enabling books to be available in physical form for longer. Further, the marginal costs of digital production and global instantaneous delivery are virtually zero, which opens new opportunities for online sales, including in foreign markets, either via publishers or author-to-reader direct. Technological advances give rise to new licensing opportunities, too – for example, to public libraries for 'elending'. This has become big business, with market leader OverDrive facilitating more than half a billion ebook loans in 2023.[6]

Rapid improvements in AI technologies are creating new opportunities too. AI-powered translation is already reducing the costs of translating books for foreign-language markets.[7] In the audio realm, AI-powered text-to-speech technologies are already on the market,[8] and for those who still want a human reader, high-quality online home recording is drastically reducing the costs of audiobook production.[9]

Books are just one example: technological progress is driving new opportunities for building upon and exploiting all kinds of other works too, including video games and movies, songs, visual art and more.[10]

[4] Rebecca Schoff Curtin, 'The Transactional Origins of Authors' Copyright' (2016) 40(2) *Columbia Journal of Law & the Arts* 175, 213.

[5] Mark Twain's Testimony to the US Congress, 'Mark Twain on Copyright' <https://perma.cc/S6FR-SE23>.

[6] 'Libraries Achieve Record-Breaking Circulation of Digital Media in 2023', *OverDrive* (Blog Post, 4 January 2024) <https://company.overdrive.com/2024/01/04/libraries-achieve-record-breaking-circulation-of-digital-media-in-2023/>.

[7] Joanna Penn, 'Tips for Self-Publishing in Translation: Adventures with AI and German', *The Creative Penn* (Web Page, 22 November 2019) <https://perma.cc/S85N-QRWN>.

[8] E.g. AWS, *Amazon Polly* <https://perma.cc/R4EC-M8QL>; Google Cloud, *Cloud Text-to-Speech* <https://perma.cc/US8J-6HLS>.

[9] E.g. the Findaway Voices service, which provides high-quality audiobook narration via at-home narrators: <https://perma.cc/KA2E-5LQR>.

[10] See, e.g., Sarah E Needleman, 'How AI Is Building the Next Blockbuster Videogames', *The Wall Street Journal* (online, 17 April 2023) <https://www.wsj.com/articles/how-ai-is-building-the-next-blockbuster-videogames-6fefdd1c>; Veena McCoole, 'How AI Is Changing the Art Market', *Artsy* (online, 27 October 2023) <https://www.artsy.net/article/artsy-editorial-ai-changing-art-market>; Neil Sahota, 'The AI Takeover in Cinema: How Movie Studios Use

The availability of new exploitation opportunities should be a good thing. However, the mere fact one party holds the rights for a work does not mean that they will have the interest or capacity to fully exploit them in all the formats and markets where they have (or develop) value. If we want creators to better share in the benefits of their work, and the public to better benefit from widespread access to knowledge and culture, well-scoped reversion rights are a promising path to reform.

1.1 COPYRIGHT'S FAILED BARGAIN

We need to explore such possibilities because the current copyright bargain, at least in the Western nations that make up the world's most lucrative markets for knowledge and culture, is doing a poor job of achieving its aims. This becomes very clear when we compare what copyright is supposed to achieve against its real-world results.

1.1.1 *What Is Copyright Meant to Achieve?*

While copyright has a number of aims, it is primarily about *incentives* and *rewards*, which map to historical 'instrumentalist' and 'natural rights' justifications for copyright.[11] While the two rationales are more strongly associated with common law and civil law jurisdictions, respectively, it has been persuasively demonstrated that considerations traceable to both rationales widely coexist within both international treaties and domestic laws.[12] These rationales provide the primary justifications for

Artificial Intelligence', *Forbes* (online, 8 March 2024) <https://www.forbes.com/sites/neilsahota/2024/03/08/the-ai-takeover-in-cinema-how-movie-studios-use-artificial-intelligence/?sh=784c81e34a3f>; Elias Leight and Kristin Robinson, '5 Ways AI Has Already Changed the Music Industry', *Billboard* (online, 4 August 2023) <https://www.billboard.com/lists/ways-ai-has-changed-music-industry-artificial-intelligence/revolutionizing-production/>.

[11] Rebecca Giblin, 'A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid' (2018) 41 *Columbia Journal of Law & Arts* 369, 373.

[12] See Rebecca Giblin and Kimberlee Weatherall, 'If We Redesigned Copyright from Scratch, What Might It Look Like?' in Rebecca Giblin and Kimberlee Weatherall (eds), *What If We Could Reimagine Copyright?* (ANU Press, 2017) 17; Peter Drahos, *A Philosophy of Intellectual Property* (ANU Press, 2016) 96–7. For broader discussions of how these aims have animated global copyright policymaking, see, e.g., Martin Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (PhD Thesis, Institute for Information Law, 2004) especially 6–10; Jane C Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 *Tulane Law Review* 991, 995; Alain Strowel, *Droit d'auteur et copyright, Divergences et Convergences* (Bruylant, 1993); Gillian Davies, *Copyright and the Public Interest* (Sweet & Maxwell, 2nd ed, 2002) 348–51; JH Reichman, 'Duration of Copyright and the Limits of Cultural Policy' (1996) 14 *Cardozo Arts & Entertainment Law Journal* 625, 643–4; Sam Ricketson, 'The Copyright Term' (1992) 23 *International Review of Intellectual Property and Competition Law* 753, 755; Alfred C Yen, 'Restoring the National Law: Copyright as Labor and Possession' (1990) 51 Ohio State Law Journal 517.

the monopoly copyright creates over knowledge and culture, making them the most appropriate measures on which to evaluate its success.

1.1.2 *Copyright's Incentives*

Copyright seeks to incentivise two distinct things: first, the production of new cultural works and, second, investments in keeping those works available. While the first of these may receive the most attention, the second has always been important. That is reflected in the very first words of the full title of the first modern copyright statute, the UK's *Statute of Anne* ('An Act for the Encouragement of Learning'[13]) and in the purpose of the US Constitution's intellectual property clause ('To promote the Progress of Science and useful Arts . . .').[14] The fulfilment of those aims relies not only on knowledge being *produced*, but on the public having *access*. The importance of availability is also manifest in the effectiveness of Macaulay's 1841 speech to the UK House of Commons: his argument that a proposed copyright term extension could result in the suppression of important books was taken so seriously that it resulted in new provisions to guard against that risk.[15]

Thus, copyright's incentives were never just about getting works produced, but rather aimed at achieving the broader social benefits that flow from widespread access to knowledge and culture. Although the modern copyright discourse more commonly considers access at the exceptions level,[16] it's also critical to the rationale for granting rights in the first place. Accordingly, copyright's twin incentive aims can be more accurately thought of as access aims, which is how we refer to them in this book.

1.1.3 *Copyright's Rewards*

On top of those incentives, copyright is supposed to grant *rewards*. As Ricketson explains, '[t]here is a strong moral argument . . . that as authors confer benefits on society through their creative activity – the provision of learning, instruction and entertainment – this contribution should be duly rewarded'.[17]

[13] Copyright Act 1710, 8 Ann c 21.

[14] Constitution of the United States of America: Analysis and Interpretation, 'Article I: Section 8 Enumerated Powers: Clause 8 Intellectual Property' (Web Page) <https://constitution.congress.gov/browse/article-1/section-8/clause-8/#:~:text=Clause%208%20Intellectual%20Property,C8>.

[15] Ronan Deazley, 'Commentary on *Copyright Amendment Act 1842*' in Lionel Bently and Martin Kretschmer, *Primary Sources on Copyright (1450–1900)* (Web Page, 2008) <www.copyrighthistory.org>.

[16] See, e.g., Australian Government, Department of Infrastructure, Transport, Regional Development, Communications and the Arts, *Copyright Access Reforms* (Web Page, 13 August 2020) <https://www.infrastructure.gov.au/media-centre/copyright-access-reforms>.

[17] Ricketson (n 12) 757.

This rewards motivation is reflected in the Berne Convention's adoption of terms based on the author's lifetime, which Ricketson described as 'represent[ing] the success of an idea, rooted in natural law concepts, that authors have a natural right to property in the fruits of their creative endeavours."[18] Even the US, which boasts a copyright tradition firmly anchored on the instrumentalist side of the spectrum, is demonstrably influenced by creators' moral claims.[19] That has been reflected in various statutory and judicial interventions, including its current law entitling creators to terminate most copyright transfers after 35 years (something we examine in detail in Chapter 3). Fromer describes this as 'a powerful signal to authors that copyright law cares about the personhood, labor, and possessory interests they have in their work'.[20]

The power and significance of rewards rationales can be seen in how persistently authors' interests have been used to justify broader and longer terms of copyright protection. Again, this can be seen even in the US, where the rhetoric accompanying the 1998 US term extension focused on the desirability of '[a]uthors [being] able to pass along to their children and grandchildren the financial benefits of their works.'[21] Such arguments dominated lobbying efforts even though the beneficiary of the resulting extension was, in almost all cases, the rightsholder at the time it was passed – very little was actually secured to the author or their heirs.[22]

Such rhetoric appeals to our inclinations to reward authors for their creative contributions, and they're effective because those moral claims have real power.[23]

Creators' moral claims to rewards are the leading justification for copyright terms that go beyond the amount necessary to incentivise initial production and promote ongoing availability of existing works: the public accepts that it's appropriate to grant additional rights because creators *deserve* some of the additional social surplus of their creations. If those rewards were captured by others instead, this justification would disappear.

[18] Ibid 783.

[19] Ginsburg (n 12).

[20] Jeanne C Fromer, 'Expressive Incentives in Intellectual Property' (2012) 98 *Virginia Law Review* 1745, 1806.

[21] House of Representatives, 105th Congress 2d Session, Report 105-452, Copyright Term Extension Act.

[22] See Copyright Term Extension Act of 1998, Pub L No 105-298, § 101, 112 Stat 2827, 2828 (1998) <https://perma.cc/58MK-GQBK>. The only exception was that the Extension Act did amend the Copyright Act to give authors and their heirs a termination right at the end of the original 75 years from first publication, but only if they hadn't exercised their prior termination right at the end of 56 years from first publication. See 17 USC § 304(c)–(d). See also William Patry, 'The Failure of the American Copyright System: Protecting the Idle Rich' (1997) 72 *Notre Dame Law Review* 907, 908.

[23] For a detailed tracing of the ways in which the concept of authorship has been used to promote particular positions in legal discourse, including in ways directly contrary to authors' interests, see Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of Authorship'(1991) *Duke Law Journal* 455; Rebecca Giblin, 'Should It Be Copyright's Role to Fill Houses with Books?' in Susy Frankel and Daniel Gervais (eds), *Intellectual Property and the Regulation of the Internet* (Victoria University Press, 2017) 18–19.

1.1.4 *How Well Is Copyright Achieving Its Aims?*

The copyright discourse typically blurs the distinction between incentives and rewards, talking about what investors *need* and what creators *deserve* without separating the one from the other.

When evaluating the extent to which copyright is achieving its aims, however, it is necessary to distinguish between them. Critically, we don't mind who gets copyright's incentive components: there, the public is simply interested in getting the works produced and available.[24] However, we *are* interested in who gets the rewards component. Since that is justified by authors' moral claims, it ought to be primarily captured by the person who actually creates the work.[25] This isn't to say that cultural investors don't play a vital role in the copyright ecosystem – of course they do. Authors, illustrators, photographers, screenwriters, recording artists, music composers, game developers and other creative workers partner with cultural investors to access the capital and services necessary to get their work produced and distributed, including services that they cannot or don't want to provide themselves. However, the importance of investors to creative ecosystems does not alter the fact that investors' interests and authors' interests are different, and need to be satisfied in different ways.

So how well is copyright achieving its aims? In a word – poorly.[26] There are any number of reasons for this of course, as we recognise below, including those arising from broader social, cultural and economic realities that are well outside the scope of this book.[27] The specific problem we're concerned with here lies in copyright's structural deficiencies around licensing and ownership. In sum, copyright rights are far longer and broader than what's necessary to incentivise initial production, but very often those rights are made alienable in a way that actually blocks investments in ongoing availability, and makes it harder for creators to appropriate rewards. This is the fundamental problem that reversion has such potential to help resolve.

1.1.4.1 Current Copyright Grants Are Far Broader than What's Necessary to Incentivise Initial Production

Incentivising initial production is a purely economic aim, and the extent of rights necessary to do so is readily calculable. Two inputs are particularly significant to that

[24] 'Rebecca Giblin explains why authors and artists struggle to get paid' (*YouTube*, 2019) <https://www.youtube.com/watch?v=uaDIyE1UGt4>.

[25] Ibid.

[26] Our analysis below is drawn from Giblin's comprehensive evaluation of the extent to which existing approaches to copyright promote its incentives and rewards aims in 'A New Copyright Bargain', and we refer readers to that work if they wish to delve into greater detail on any of its points. See Giblin (n 11) 372–86.

[27] See the discussion about the limitations of our claims at Section 1.2.

calculus: the discounting necessary to reflect the time value of money, and rates of cultural depreciation.[28]

The 'time value of money' recognises that the further away in time a benefit will be received, the less it is currently worth. Thus, the promise of $100 next week is worth much more to us today than the promise of $100 in a decade's time. You do not have to be an economist to grasp this concept. Just imagine that you are interviewing housemates, and they offer the same amount in rent – but one would pay monthly in advance, and the other 10 years after they move out. One of those is obviously worth considerably more to you, right now, than the other.

The upshot of this principle is that the prospect of money to be received in the distant future will provide much less incentive than that you'll receive quickly. Assuming a real interest rate of 7 per cent, a dollar today is worth 93 cents if it's to be paid in a year, but just a fraction of a cent if it's going to take 80 years to end up in your pocket.[29]

Cultural depreciation also plays an important role in determining the incentives necessary to achieve the desired production. Like new cars and televisions, cultural works tend to lose commercial value over time. In the case of fiction books, sales become negligible within a single year.[30] Music takes a little longer, but a 2013 study out of the US Bureau of Economic Analysis found that most songs depreciate by 65 per cent in a year, making almost all their revenue in the first five years.[31] While the rise of streaming seems likely to extend lifespans, it's too new for there to be reliable data to measure its effects, and thus it's unlikely to be yet changing the assumptions on which businesses set the terms of their deals.[32]

Once the value of future earnings is discounted to their present value, and cultural depreciation is factored in, the consensus is that the period of exclusivity necessary to incentivise initial creation of even the most expensive works is about 25 years or less.[33]

[28] Brief of George A Akerlof et al. as Amici Curiae in Support of Petitioners, *Eldred v Ashcroft*, 537 US 186 (2003) (No 01-618) 5–7.

[29] Ibid.

[30] Andrew Gowers, HM Treasury, *Gowers Review of Intellectual Property* (2006) 52 <https://perma.cc/78YV-RN3T>.

[31] Rachel Soloveichik, *Music Originals as Capital Assets* 27 (Bureau of Econ. Analysis, Working Paper No WP2013–8, 2013) <https://www.bea.gov/system/files/papers/WP2013-8.pdf>.

[32] From the data available to them in their 2019 study, Garcia and McCrary note that, while 'streaming may prolong the commercial viability of the average record', the resulting payments 'are so low that the economic benefit of this additional volume is unclear'. See Kristelia A Garcia and Justin McCrary, 'A Reconsideration of Copyright's Term' (2019) 71(2) *Alabama Law Review* 351, 380.

[33] William M Landes and Richard A Posner, 'Indefinitely Renewable Copyright' (2003) 70 *University of Chicago Law Review* 471, 476 ('[T]he incremental incentive to create new works as a function of a longer term is likely to be very small (given discounting and depreciation) beyond a term of twenty-five years or so'). Rufus Pollock, 'Forever Minus a Day? Calculating Optimal Copyright Term' (2009) 6(1) *Review of Economic Research on Copyright Issues* 35, 56. Elsewhere, Kretschmer has argued for a still shorter initial term of 10 years, followed by

You can see these principles in action via sub-licensing practices between book publishers. Assume that a publisher who controls a book's rights across all languages decides to sub-licence the German rights. The German publisher will have virtually all the same costs of getting the original book to market, including editing, typesetting, distribution and so on, plus the cost of the translation to boot. If publishers really needed the full duration of copyright to incentivise such investments, that's how long those sub-licences would last. But when economist Paul Crosby and his team analysed over 9,000 international licensing deals, they found that publishers most commonly licensed translation rights for five-year terms (42.5 per cent), and that 62 per cent of deals were for a term of seven years or less.[34]

The fact that sub-licensees are willing to make such substantial investments in exchange for so much less than the full copyright term provides real-world confirmation that, even if publishers would *like* to have rights for the entire copyright term, they don't *need* them to incentivise their investments. We find similar evidence in the fact that record labels commonly write off bad debt after 20 years, indicating they don't expect copyrights to still generate value beyond that.[35]

This doesn't necessarily mean that it's problematic for copyright to last longer than that – it simply means that, to the extent copyright rights go beyond the amount necessary to incentivise initial production, they must be justified on other rationales. And copyrights nearly always last beyond this point: for works, treaties mandate minimums of the author's lifetime plus at least 50 years,[36] and often life plus 70.[37] Sound recordings and films must be protected for at least 20 and 50 years,

reversion to the author. See Martin Kretschmer, Copyright Term Reversion and the 'Use-It-or-Lose-It' Principle (2012) 1 *International Journal of Music Business Research* 44, 44–53.

[34] For details of that project see Paul Crosby et al, *Success Story – International Rights Sales of Australian-Authored Books* (Macquarie University, 2019). The data around sub-licensing deals was not separately broken out in the results that have been published so far, but were provided by email: email from Paul Crosby to Rebecca Giblin, 9 May 2024.

[35] Digital, Culture, Media and Sport Committee, *Economics of Music Streaming* (House of Commons Paper No 50, Session 2021–22) 34, 67.

[36] See *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, [1901] ATS 126 (entered into force 5 December 1887), as last revised by the *Paris Act relating to the Berne Convention for the Protection of Literary and Artistic Works*, signed 24 July 1971, 1161 UNTS 30 (entered into force 15 December 1972), and as amended by the *Amendments to Articles 22 and 23 of the Paris Act of 14 July 1971 of the Berne Convention for the Protection of Literary and Artistic Works*, signed 28 September 1979, [1984] ATS 40 (entered into force 19 November 1984) art 7(1). See also *Marrakesh Agreement establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C ('*Agreement on Trade Related Aspects of Intellectual Property Rights*') art 12.

[37] See Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version) (OJ L 372, 27.12.2006, 12–18). In 2005 Australia ratified the Australia-US Free Trade Agreement which required Australia to amend its domestic copyright laws to extend copyright protection in most cases to 70 years after the death of the author. See *Copyright Act 1968* (Cth) s 33(2).

respectively, under the Rome and Berne conventions,[38] but are routinely given far longer terms: throughout the EU, for example, thanks to an extension we return to in Chapter 4, copyright over sound recordings lasts for 70 years.[39]

1.1.4.2 Copyright Makes Valuable Culture Disappear

One key rationale for terms that exceed what's necessary to elicit initial investment is that it is necessary to persuade rightsholders to invest in making works available ongoing.[40] In other words, achieving copyright's second access aim requires additional rights on top of what was necessary to achieve the first aim of getting them produced in the first place.

As we saw above, the core aim behind promoting ongoing access to knowledge and culture is to facilitate learning and progress.[41] Of course, this doesn't require making *all* works available ongoing – far from it. Many (perhaps most) works have no informational or cultural value, no audience and no justification for further investment. However, if we were to take this aim to its furthest point, it might suggest that all people with the time and inclination to benefit from past work would be able to access it.

In reality of course, there are numerous barriers to that ideal, including discovering such work exists in the first place, getting to the physical place necessary to experience it (or having the technology to do so) and the costs associated with all the above. Granting longer copyright rights can't help with any of those, but the promise is that those additional rights will nonetheless improve access by encouraging rightsholders to make investments in ongoing availability that they otherwise wouldn't.

The clearest example of the power of this aim comes from the project to extend the US copyright term in the 1990s. The then US Register of Copyrights testified to Congress in 1995 that a 'lack of copyright protection ... restrains dissemination of the work, since publishers and other users cannot risk investing in the work unless assured of exclusive rights'.[42] Others, including the Coalition of Creators and

[38] Regarding sound recordings, see *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, opened for signature 26 October 1961, 496 UNTS 43 (entered into force 18 May 1964) art 14(a); *Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms*, opened for signature 29 October 1971, 866 UNTS 67 (entered into force 18 April 1973) art 4. Regarding films, see (n 36).

[39] See Chapter 4, Section 4.2.1.3.

[40] See Jacob Flynn, Rebecca Giblin and François Petitjean, 'What Happens When Books Enter the Public Domain? Testing Copyright's Underuse Hypothesis Across Australia, New Zealand, the United States and Canada' (2019) 42(4) *University of New South Wales Law Journal* 1215, 1219–22.

[41] See Section 1.1.2.

[42] Evidence to Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary, House of Representatives, United States Congress, Washington, 13 July 1995, 171 (Statement of Marybeth Peters, Register of Copyrights and Associate Librarian for Copyright Services, Library of Congress).

Copyright Owners and the US Commissioner of Patents and Trademarks made similar claims.[43] Although none cited any empirical evidence in support of this argument, it was explicitly accepted by the US House of Representatives in its report recommending the copyright term be extended,[44] and by the Supreme Court upholding its constitutionality.[45] The close attention paid to these arguments throughout the process confirms the importance of ongoing access to works as a justification for copyright.

The reason none of its proponents provided evidence in support was that this claim had not yet been empirically tested. However, in the succeeding decades it has been (at least in Western, English-language, nations), and the resulting evidence overwhelmingly shows that the opposite is actually true: that works are subject to more investment, and become more available, when they enter the public domain.[46]

One striking finding emerged from a study by Paul Heald examining the availability of books by age on Amazon, which found availability drops sharply soon after publication, then spikes again as their copyright expires. The effect was so marked that there were more books from the 1880s available than from the 1980s.[47] This indicates there's appetite to invest in making older titles available, but that it's being stymied because rights are controlled by those with no wish to do so.

Another study carried out by Giblin's team investigated how commercial investment in books differed depending on copyright status. In *What happens when books enter the public domain?* the team used current editions of the Oxford Companions to English, Australian, New Zealand, American and Canadian Literature to identify authors with ongoing cultural significance, selecting all those who had died between 1962 and 1967. They then examined the relative availability of their books for libraries to license in digital form across New Zealand, Canada, Australia and the

[43] Flynn et al (n 40) 1220–1.

[44] Its report recommending the extension stated, among other reasons, that it would 'provide copyright owners generally with the incentive to restore older works and further disseminate them to the public'. House of Representatives Committee on the Judiciary, United States Congress, Copyright Term Extension Act (Report No 105-452, 18 March 1998) 4.

[45] *Eldred* (n 28) 207 (Ginsburg J for Rehnquist CJ, Ginsburg, O'Connor, Scalia, Kennedy, Souter and Thomas JJ).

[46] See, e.g., Paul J Heald, 'Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Bestsellers' (2008) 92(4) *Minnesota Law Review* 1031; Paul J Heald, 'How Copyright Keeps Works Disappeared' (2014) 11(4) *Journal of Empirical Legal Studies* 829; Tim Brooks, Council on Library and Information Resources and Library of Congress, *Survey of Reissues of US Recordings* (Report, August 2005); Christopher Buccafusco and Paul J Heald, 'Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension' (2013) 28(1) *Berkeley Technology Law Journal* 1; Flynn et al (n 40). But cf. B Zorina Khan, *Does Copyright Piracy Pay? The Effects of US International Copyright Laws on the Market for Books, 1790–1920* (Working Paper No 10271, National Bureau of Economic Research, January 2004) <https://www.nber.org/papers/w10271>.

[47] Heald (n 46) 843.

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US. All of these texts were in the public domain in New Zealand and Canada and under copyright in Australia. In the US, where they could have either status depending on whether their copyrights had been renewed, we coded each book as being in or out of copyright.[48] Since none of these books was natively digital, digitising the texts indicated some genuine investment by publishers. After controlling for other factors, they found that commercial publishers were investing in digitising and licensing culturally important older books at substantially higher rates in countries where they had entered the public domain compared to where they were still under copyright.[49] This again suggests that, during the copyright term, controlling exclusive rights didn't persuade the rightsholder to invest – but they *did* block other publishers from doing so.

This new evidence demonstrates that, just because an investor controls rights, that doesn't mean they'll actually exploit them.

Of course, not all copyrighted material has value (economic, social or cultural), and as we saw above, even that which does is unlikely to have it for long.[50] We're certainly not suggesting that *all* copyrighted material should be made available ongoing: doing so would waste resources that could be better used elsewhere, while doing nothing to further the underlying aim of promoting access to knowledge and culture. However, if copyright is to be justified as promoting investments in ongoing availability, it should actually do so. Where ongoing value does exist, where there is appetite to make those investments, and where the creator is eager to make it happen, copyright should help, rather than hinder.

The problem, in our view, stems from the ease with which investors can extract rights when combined with the absence of effective obligations (under the law or contracts) to actually use them.[51] Of course, it's perfectly rational for cultural investors to insist on taking broad rights, because at the time most copyright contracts are signed, nobody has a clear idea of what the work will be worth.[52] As noted above, investors play a critical role in cultural production, often by fronting the cost of getting works produced and available to audiences. That role is especially important given the notorious difficulty of predicting in advance which works will become hits – copyright markets are 'winner takes all', with investors taking a risk on a number of projects knowing that most will never make back the initial investment, but betting that one or more will pay off to such a degree that the overall enterprise turns a profit.[53]

[48] Flynn et al (n 40) 1227–32.
[49] Flynn et al (n 40) 1239.
[50] See Section 1.1.4.1.
[51] As we discuss at Chapter 4, the evidence suggests 'use-it-or-lose-it' provisions in various European countries have had little impact on creators' positions.
[52] Giblin (n 11) 384.
[53] Garcia and McCrary (n 32) 386.

These realities were already factored into the above analysis of the rights necessary to incentivise initial investments,[54] but they also help explain why cultural investors typically take the broadest rights they can. Those broad rights are necessary in case *this* one turns out to be a mega blockbuster that's worth exploiting in all possible formats and in all possible territories. If they can manage it (and they often can), they'll take rights for the entire term of copyright, which might be a hundred years or more.[55] Some contracts even extract upfront the benefit of any future rights that might accrue to the author later on – such as additional years of copyright protection, if lawmakers extend its term. Since at least 1919, the standard language in contracts between US music publishers and songwriters has delivered the benefit of any and all future term extensions to investors,[56] and our own empirical work has seen this happen in book publishing, too.[57]

Of course, very few works do become blockbusters, so most of the rights that are taken are never actually exploited. And even those that *are* aren't necessarily used for long, thanks largely to those high cultural depreciation rates we discussed above. For example, 87 per cent of video games released before 2010 were not available for purchase in the US by 2023.[58] But it means rights over an extraordinary number of creative works are locked up in the vaults of rightsholders who have no interest in exploiting them (or lack the capacity to do so). That becomes particularly problematic where the creator (independently or in partnership with a new investor) has the appetite to do so, but is blocked by a previous assignment.

There is widespread evidence that a great deal of culture with enduring value (which we define as unmet public appetite) is controlled by rightsholders who have no interest in exploiting them, or cannot adequately do so.[59] Very often, those

[54] See Section 1.1.2. For a more detailed treatment of the argument that additional rights are necessary to incentivise production in other cultural works, see Giblin (n 11) 376–7.

[55] See, e.g., Joshua Yuvaraj and Rebecca Giblin, 'Are Contacts Enough? An Empirical Study of Author Rights in Australian Publishing Agreements' (2021) 44(1) *Melbourne University Law Review* 380, 402–3.

[56] See William F Patry, 'The Copyright Term Extension Act of 1995: Or How Publishers Managed to Steal the Bread from Authors' (1996) 14 *Cardozo Arts and Entertainment Law Journal* 661, 675–6.

[57] Yuvaraj and Giblin (n 55). See also Alexander Lindey and Michael Landau, 'Lindey on Entertainment, Publishing and the Arts', *Thomson Reuters* (online, 11 April 2024) § 5:14, cl 1; Hugh Jones and Christopher Benson, *Publishing Law* (Routledge, 3rd ed, 2006) 77.

[58] Phil Salvador, *Survey of the Video Game Reissue Market in the United States* (July 2023, study for Video Game History Foundation and the Software Preservation Network in collaboration with the University of Washington Information School GAME Research Group) 2.

[59] United States Copyright Office, *Report on Orphan Works: A Report of the Register of Copyrights* (Report, January 2006) <https://www.copyright.gov/orphan/orphan-report.pdf>. In the US context, for example, the Copyright Office reports unmet demand from creators seeking to incorporate existing material into new works (at 36); institutions seeking to make material available to the public (at 37) and enthusiasts looking to make niche content available on a 'limited basis' (at 38). This demand is blocked due to inabilities to identify the owner (at 23, 26); or obtain the necessary permission, for example because the rightsholder does not respond (at 34).

owners cannot even be found: a UK regulatory impact assessment estimated rates of orphaning for works held by British cultural organisations (a proxy for ongoing public value) at up to 25 per cent for visual art, 10 per cent for sound recordings, 30 per cent for written material and 90 per cent for archive photographs.[60] A 2006 US Copyright Office report found that there is real demand for a wide variety of orphaned works, including from creators wishing to build upon them in new works, enthusiasts and public institutions.[61] Without provisions for appropriately promoting such uses, copyright terms that outlast their owners' interest in works can get in the way of desired access without any corresponding benefit.

But the problem of unmet demand is by no means limited to works with unlocatable owners. There are plenty of instances where rightsholders know they control rights that have some cultural or economic value, but choose not to exploit them anyway.

First-hand evidence of this was generated via *Untapped: The Australian Literary Heritage Project*, spawning from the Author's Interest Project and also headed up by Giblin. That project was influenced by concerns that most of Australia's literary heritage was out of print, and unavailable to the public. A preliminary scoping survey by Giblin investigating the availability of former winners of the Miles Franklin, Australia's most prestigious literary prize, which is awarded annually to 'a novel which is of the highest literary merit and presents Australian life in any of its phases', found that 37 per cent of former winners were not available as ebooks, 65 per cent were not available as audiobooks, and 16 per cent were unavailable to Australian audiences in any form at all.[62] Given the lack of investment in these well-famed books, you can readily imagine how many other stories were being lost: local histories and memoirs, beloved children's titles, the books that tell the story of a country and its people. That begged the question: were Australia's books being lost because there was no interest in them?

A collaboration between a multidisciplinary research team (including Giblin, economist Paul Crosby and literary sociologist Airlie Lawson), the Australian Society of Authors, a publishing partner (Matt Rubinstein of Ligature Press) and library partners from all around Australia, *Untapped* sought to answer that and other questions.

An independent, nationwide panel of library collections experts identified culturally important lost books to be targeted for inclusion in the project. After the team worked with writers, literary agents and heirs to help them navigate their contractual

[60] Regulatory Policy Committee, *Orphan Works* (Impact Assessment, 15 June 2012) 11 <https://webarchive.nationalarchives.gov.uk/ukgwa/20140603093549/http:/www.ipo.gov.uk/consult-ia-bis1063-20120702.pdf>.

[61] United States Copyright Office (n 59) 36–8.

[62] Rebecca Giblin, 'The Availability of Miles Franklin Winners as eBooks, Audiobooks and in Print', *The Author's Interest* (Blog Post, 17 March 2020) <https://authorsinterest.org/2020/03/17/the-availability-of-miles-franklin-winners-as-ebooks-audiobooks-and-in-print/>.

out-of-print rights and re-license their books for publication in digital form, in December 2021 the Untapped imprint eventually republished 161 previously lost titles.[63] For the next year, the team gathered data to evaluate the extent of unmet demand for this neglected subset of Australia's literary heritage. That demand was higher than anyone had expected: during the data collection period covering the first year of availability, 5,923 copies were sold on retail platforms, and libraries lent out the ebooks almost 16,000 times. Although the team originally expected to be able to make them available only in digital form, the eventual collection was so strong that the team succeeded in selling the print rights as well. As a result, 148 *Untapped* titles also returned to physical shelves.[64]

Participating authors benefited from royalties on sales and loans and an advance of almost $500 on each print title, with some reporting that the return to availability had generated additional economic opportunities as well, including speaking fees, international translations and negotiations for film and television rights.

Why would publishers leave this value on the table? That's easy: it wasn't worth scooping up. Thompson's comprehensive history of trade publishing shows how the largest trade publishers came to adopt a deliberate strategy of maximising profits by reducing both the number of titles they publish, and the number of workers needed to support them.[65] Eventually, they downsized their sales teams to the point they could only support a quarter of the new titles being published.[66] While this obviously left money on the table, their reduced costs and the fact they weren't splitting the revenues from megasellers across a bigger range of books meant this still generated the best returns for their investors.

These principles scale to smaller publishers as well. As we showed, *Untapped* demonstrated substantial unmet demand for culturally important works, and when the rights were freed up to enable that new exploitation, it generated a small but welcome amount of new revenue for authors. However, the surplus generated across all titles was certainly less than what a publisher would make from publishing an equivalent number of quality new books. In those circumstances, it is perfectly rational for them to invest their limited resources elsewhere, despite controlling rights that still have value – to their authors, and to the broader public.

Such practices are much less problematic in circumstances where creators can easily get their rights back and exploit their works elsewhere. As we will explain in Chapter 5, this wasn't always the case for participants in *Untapped*. And it's not the case for

[63] For more about the project see 'Untapped: The Australian Literary Heritage Project' <untapped.org.au>; see also James Shackell, "Most of Australia's Literary Heritage Is Out of Print": The Fight to Rescue a Nation's Lost Books', *The Guardian* (online, 24 June 2021) <https://www.theguardian.com/books/2021/jun/24/most-of-australias-literary-heritage-is-out-of-print-the-fight-to-rescue-a-nations-lost-books>.

[64] 'Untapped' (n 63).

[65] John Thompson, *Merchants of Culture: The Publishing Business in the Twenty-First Century* (Wiley, 2nd ed, 2012) 189–90.

[66] Ibid.

https://doi.org/10.1017/9781009334839.001 Published online by Cambridge University Press

creators in other fields who similarly experience rightsholder neglect of their work, but who lack the benefit of appropriate and enforceable rights to reclaim them.

Unmet public demand for knowledge and culture products exists well beyond the sphere of books.[67] In the context of sound recordings, this was evidenced by a clever 2005 study on behalf of the National Recording Preservation Board at the US Library of Congress that examined the exploitation of sound recordings during that medium's first 75 years of existence. At the time of the study, virtually all sound recordings ever made were still restricted by copyright in the US, with one of the key rationales being that it would incentivise rightsholders to invest in making those older recordings available to the public.[68] In other countries, however, older recordings had fallen into the public domain. That gave rise to a natural experiment: if it was true that works are under-exploited in the absence of copyright, those older recordings should have been made more available by their owners, who are not only likely to have the best access to master copies, but greater incentives to produce them thanks to their ongoing monopoly rights. However, the study found that, on average, just 14 per cent of sound recordings published between 1890 and 1964 had been re-released by rightsholders on compact disc. Over 50 per cent more recordings were re-issued by investors where they were in the public domain.[69] The sizeable investments needed to manufacture and distribute new physical versions makes these investments a good proxy for unmet public demand: record labels were unlikely to take that risk if they did not believe there was a market for those works. These results also provide further evidence that the mere control of rights translates poorly to investments in ongoing availability.

Many critically acclaimed television shows are unavailable despite public demand as well.[70] Often, this seems due to the copyright owner's unwillingness to make the investments necessary to clear the rights for incorporated works such as the music in their soundtracks. Barry Levinson was an executive producer for *Homicide: Life on the Street*, a multi-Emmy-award-winning drama which ran for seven seasons, but has lamented the unavailability of that work on streaming platforms:

> For the last four years, I've tried to get an answer for why we're not on streaming. No one, I mean no one, has been able to give me an answer. There's money to be made. You can't figure out how to handle whatever rights issues that may come up? You're talking over 120-some episodes. And somehow no one can figure out how to handle the rights? That doesn't make sense.[71]

[67] See our discussion on lost cultural value above in this section.

[68] 'One consideration by Congress in extending copyright protection to owners for such a long period was to give those owners an incentive to reissue, and thereby preserve, older recordings.' Tim Brooks, *Survey of Reissues of U.S. Recordings* <https://perma.cc/4ZX2-SSW8>.

[69] Ibid 7–8.

[70] See, e.g., Brian Tallerico, '11 Great Shows You Can't Find Streaming Anywhere (and Why)', *Vulture* (online, 17 April 2024) <https://www.vulture.com/article/best-shows-not-streaming-why.html>.

[71] 'When "Homicide" Hit Its Stride', *The New York Times* (online, 11 May 2023) <https://www.nytimes.com/2023/05/11/arts/television/homicide-life-on-the-street.html>.

In such cases, although copyrights are supposed to incentivise investments in ongoing availability, there are no consequences for studios failing to make them available. And the shift to a subscriber-only model of access to audiovisual content has curtailed *consumers*' ability to preserve that content (e.g. through purchasing DVDs and VCR recordings).[72] When physical, or permanent digital, copies of that content are not available for purchase, that culture is just 'gone'.[73]

While allowing corporations to take broad rights without any obligation to use them may be effective at driving their profits, this analysis suggests that it does not maximally promote the broader public interest in ongoing access to valuable knowledge and culture. If we really wish copyright to promote investments in ongoing availability, we need to design it in ways that facilitate the flow of rights to those who will actually make those investments – rather than making it so easy for them to languish with those who won't.

1.1.4.3 Current Approaches to Copyright Divert Rewards Away from Creators

We demonstrated above that copyright grants are far broader than what's necessary to incentivise investments, but that, at least when they're awarded as a lump sum that can be easily extracted from creators upfront, those additional rights don't translate to investments in ongoing availability the way the public was promised they would. In fact, the evidence shows that they can actually hinder rather than help such investments. We'll now show that this lump sum approach also makes it harder for creators to share in copyright's rewards component – the amount above and beyond what is necessary to achieve copyright's incentives aims.

As we saw above, copyright's rewards component is justified by the moral claims of creators. For this to actually support that additional grant then, creators must be its primary beneficiaries.[74] In practice however, the evidence shows that this value is very often largely captured by investors instead. When this occurs, it is once again largely attributable to the way in which they can, very often, extract broad and long rights from creators via contracts.

We could choose countless stories to illustrate the way contracts can divert copyright's rewards away from creators, but we'll lead with one involving a cultural icon most people will know: Superman. Jerry and Joe Schuster came up with the

[72] See further Kathryn VanArendonk, 'TV Has Always Disappeared. This Feels Different', *Vulture* (online, 14 December 2022) <https://www.vulture.com/article/hbo-max-warner-cancelations-disappearing-tv-streaming-future.html>.

[73] Ibid.

[74] See discussion in *YouTube* (n 24).

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character in the 1930s, and assigned all rights to DC Comics for a lump sum of US$130.[75] Their creation went on to generate billions of dollars for other people during the succeeding decades, but, having signed away their rights via contract, its progenitors were virtually 'destitute'.[76] It was only after the media publicised this injustice that Warner Brothers finally agreed, almost 40 years after the initial grant, to provide Superman's first creators with health insurance, a modest annual annuity, and attribution. Warner Brothers described itself as under a 'moral obligation' to do so,[77] which is undoubtedly true – and makes it even more damning that it took public shaming, decades after that obligation arose, before they would do even the minimum necessary to put things right.

While this story is particularly egregious, it's reflective of a broader pattern. Copyright rights have expanded considerably over the last few decades, and that additional value correlates with an increase in the equity value of the major firms that exploit them.[78] Over the same period, however, creator wages have stagnated or fallen.[79]

[75] *Siegel v Warner Bros. Entertainment, Inc*, 542 F Supp 2d 1098 (CD Cal, 2008) 1107; Barbara Goldberg, 'Check That Bought Superman Rights for $130 Sells for $160,000', *Reuters* (online, 17 April 2012) <https://www.reuters.com/article/idUSBRE83G02F/>.

[76] Anthony Cheng, 'Lex Luthor Wins: How the Termination Right Threatens to Tear the Man of Steel in Two' (2011) 34(2) *Columbia Journal of Law & the Arts* 261, 273, referring to *Siegel* (n 75) 1112 (citing Mary Brested, 'Superman's Creators, Nearly Destitute, Invoke His Spirit', *New York Times*, 22 November 1975, 62).

[77] See *Siegel* (n 75) 1107, 1112–13.

[78] Matthew J Baker and Brendan M Cunningham, 'Court Decisions and Equity Markets: Estimating the Value of Copyright Protection' (2006) 49 *The Journal of Law and Economics* 567.

[79] For more on creator incomes, see, e.g., Amy Thomas, Michele Battisti and Martin Kretschmer, 'UK Authors' Earnings and Contracts 2022: A Survey of 60,000 Writers' (CREATe, 2022) 7; Paul Crosby, David Throsby and Jan Zwar, '2022 National Survey of Australian Book Authors' (2022) 21; Thomas, Battisti and Kretschmer, 'UK Authors' Earnings', 2022, pp. 26–31; Jan Zwar, Paul Crosby and David Throsby, '2022 National Survey of Australian Book Authors' Industry Brief No. 3: Authors' Income' (Macquarie University, 2022) 7–8 <https://doi.org/10.25949/C63Y-XQ77>; Craig Butt, 'Average Income Interactive: How Authors Take on Extra Jobs to Make Ends Meet', *The Sydney Morning Herald* (online, 2 June 2017) <https://www.smh.com.au/entertainment/books/average-income-interactive-how-authors-take-on-extra-jobs-to-make-ends-meet-20170531-gwh7ug.html>. Economics of Music Streaming (Second Report) 31; see generally George Morgan and Julian Wood, 'Creative Accommodations: The Fractured Transitions and Precarious Lives of Young Musicians' (2014) 7(1) *Journal of Cultural Economy* 64; David Arditi, 'Precarious Labour in COVID Times: The Case of Musicians' (2021) 18(1) *Fast Capitalism* 13, 18; Bill Mesce, *Artists on the Art of Survival: Observations on Frustration, Perspiration, and Inspiration for the Young Artist* (University Press of America, 2004) 19; Joseph Darlington, 'The Writer's Action Group (WAG) and the Fight for Public Lending Right (PLR)' (2021) 13 *Angles* [33]; Ann-Mari Jordens, 'Assisting Australian Writers: Recording the History of the Public Lending Right and Educational Lending Right Schemes' (2005) 2(2) *History Australia* 47-1, 47-5; 'Devaluing Creators, Endangering Creativity. Doing More and Making Less: Writers' Incomes Today', The Writers' Union of Canada (2015) 5 <https://www.writersunion.ca/sites/all/files/DevaluingCreatorsEndangeringCreativity_0.pdf#overlay-context=news/canadian-writers-working-harder-while-earning-less>.

This contrast is particularly stark in the recorded music business, which more than doubled its revenue between 2015 and 2023 thanks to the surging market for music streaming.[80] By 2023, some 84 per cent of recorded music revenues came from streaming.[81] Streaming costs labels considerably less than other forms of music distribution because it has none of the manufacturing costs associated with physical media, and is much cheaper to distribute.[82] Thus, the music industry isn't just bigger now – it's more profitable than ever before.[83]

But while Sony Music CEO Rob Stringer happily boasts of its 'excellent' margins',[84] artists hear a different song. The structure of recording and songwriting deals means little of those rewards flow through to the people who actually make the music. In part, that's attributable to record industry recoupment practices, which require artists to repay most of the label's production and distribution costs from their share of royalties before being credited with any income. Under this system, a band signed in the 1970s with a $150,000 recoupment debt and earning a 5 per cent royalty would need their music to generate three million dollars before their 5 per cent (still just $5 out of every hundred generated) would be credited to their bank account rather than their label's.[85] There's no transparency around the number of artists who manage to recoup, but it's vanishingly small: expert Richard Burgess estimates it to be fewer than 5 per cent of all acts signed to major labels.[86]

This helps explain why, when two thirds of all UK recorded music revenue came from streaming in 2019,[87] streaming royalties made up just 6 per cent of artists' music-related income.[88] Even the few that have big commercial hits can end up earning almost nothing – like songwriter Fiona Bevan, who made just £100 from her hit track 'Unstoppable', co-written with and performed by Kylie Minogue

[80] Mark Mulligan, 'Global Recorded Music Revenues Grows by 9.8% in 2023', *MIDiA* (Blog Post, 18 March 2024) <https://www.midiaresearch.com/blog/global-recorded-music-revenues-grew-by-98-in-2023>.

[81] RIAA, *Year-End 2023 RIAA Revenue Statistics* <https://www.riaa.com/wp-content/uploads/2024/03/2023-Year-End-Revenue-Statistics.pdf>.

[82] Competition and Markets Authority, *Music and Streaming* (Final Report, 29 November 2022) 34 <https://assets.publishing.service.gov.uk/media/6384f43ee90e077898ccb48e/Music_and_streaming_final_report.pdf>; Will Page, Submission to Digital, Culture, Media and Sport Committee, *Economics of Music Streaming* (16 November 2020) 26 <https://committees.parliament.uk/writtenevidence/15367/pdf/>.

[83] Digital, Culture, Media and Sport Committee, *Economics of Music Streaming: Second Report of Session 2021–22* (House of Commons Paper No 50, Session 2021–22) 26 <https://committees.parliament.uk/publications/6739/documents/72525/default/>.

[84] Tim Ingham, 'Rob Stringer Talks Sony's Strategy, Tencent/Universal … And Why Music Is Worth More than "2 Minutes of Someone Snoring in Lapland"', *Music Business Worldwide* (online, 26 September 2019) <https://www.musicbusinessworldwide.com/rob-stringer-talks-strategy-tencent-and-why-sonys-music-is-worth-more-than-2-minutes-of-someone-snoring-in-lapland/>.

[85] Rebecca Giblin and Cory Doctorow, *Chokepoint Capitalism* (Beacon Press, 2023) 53–4.

[86] Richard James Burgess, *The History of Music Production* (New York: Oxford University Press, 2014) 41.

[87] Competition and Markets Authority (n 82) 13, fig 1.1.

[88] Report Commissioned by the IPO (2021), *Music Creators' Earnings in the Digital Era* 171.

on an album that topped the British charts.[89] Songwriters like Bevan have been particularly hard-hit by the shift to streaming, to the point many are being forced to leave the industry.[90] The dismal financial picture for songwriters may also be influenced by the recoupment practices we identified above. The Big Three record labels control almost 70 per cent of the global market for recorded music, and they own the three music publishers that control almost 60 per cent of global song rights.[91] Since recording artists tend to have much higher recoupment debts than songwriters, these labels enjoy higher profits where income is attributed to the former, incentivising them to resist reforms that would help composers secure a fairer share.[92]

Heritage artists are another group that is disproportionately harmed by the shift to streaming. It was not uncommon for 1970s-era artists to have royalty rates as low as 4 per cent, reflecting that era's high costs of recording, producing, manufacturing and distributing music.[93] Those costs have fallen drastically with the advent of digital, and acts signed today will commonly be on royalty rates of at least 25 per cent.[94] Since those earlier contracts were for the entire copyright term however, the musicians who pioneered R&B, disco, soul and hip-hop keep having their royalties calculated at the same paltry rate. Although copyright's beyond-incentive rewards are justified only by the moral claims of artists, their record labels have no obligation to pass it on, and the resulting windfall fattens the wallets of investors instead.

A recent UK parliamentary inquiry confirmed that 'the major music groups are disproportionately benefiting from music streaming relative to creators', with 'record high levels of income and profit growth and historic levels of profitability for the major labels' – all while performers' incomes averaged less than the median wage.[95] Why do they have so much power? As Giblin and Doctorow explain in *Chokepoint Capitalism*, it's in part because they have been able to accumulate such huge portfolios of copyright rights, which they now use to shape music markets in ways that benefit their shareholders over the artists they claim to represent.[96]

That control over catalogue gave them the power to shape the music streaming market, which they quite understandably wielded to maximise their own profits at

[89] Digital, Culture, Media and Sport Committee (n 83) 45.
[90] MIDiA Research, *Rebalancing the Song Economy* (2021) <https://www.midiaresearch.com/free-report/rebalancing-the-song-economy>; Annie Reuter, 'Evolution of the Nashville Songwriter: From Solo Writes to Songwriting Apps', *Forbes* (online, 16 May 2020) <https://www.forbes.com/sites/anniereuter/2020/05/16/evolution-of-the-nashville-songwriter-from-solo-writes-to-songwriting-apps/?sh=65b42d5145a3>.
[91] Giblin and Doctorow (n 85) 56.
[92] Ibid 69–70.
[93] Ibid 59.
[94] Ibid 58.
[95] Digital, Culture, Media and Sport Committee (n 83) 63.
[96] Giblin and Doctorow (n 85) chs 4 and 5.

the cost of artists.[97] As journalist and music commentator Pelly observes, streaming 'was shaped *by* the majors *for* the majors.'[98]

As generative AI technologies hit the market, these same dynamics are playing out. The majors have recently been in negotiations to license rights to YouTube for an AI tool that will use existing works to generate new music using the voices of existing artists.[99] If it makes commercial sense to license their catalogues in ways that conflict with artist interests to the benefit of their shareholders, they'll do so: since they already hold broad rights for the entire term of copyright, there is little to discipline them into treating their artists well.

There are other reasons too why creators so often end up transferring so much of copyright's rewards to others in the cultural value chain, as we explore below, including a chronic oversupply of creative workers and willingness to provide creative labour for less than other forms of work.[100] Here, however, it's sufficient to say that these combined realities mean that, when copyright laws are structured to enable investors to extract broad and long rights upfront, they make it harder, not easier, for creators to benefit from the rewards component that is justified as being especially for them.

1.1.5 *Is Any of This a Problem?*

The rationales for copyright are important because they justify why the public ought to agree to monopolies over knowledge and culture that, prima facie, make it more expensive and difficult to access.[101] The copyright bargain promises that these broad and long grants of rights will incentivise initial cultural production, promote ongoing access to the knowledge and culture that has enduring value, and ensure that the creators who come up with the works that add to human enlightenment and joy are fairly rewarded.

But as our above evaluation shows, the public is getting a poor deal. Allowing investors to take broad and long rights upfront, at least in the developed Western nations that are the subject of the empirical evaluations available to us, can actually act as a barrier to investments in the ongoing availability of works that have cultural and/or economic value that their current rightsholder has no interesting in exploiting.

[97] Ibid ch 5.
[98] Ibid 67.
[99] Cait Stoddard, 'YouTube Negotiates Licensing Agreements with Major Record Labels for Forthcoming AI Tool' (online, 19 October 2023) <https://music.mxdwn.com/2023/10/19/news/youtube-negotiates-licensing-agreements-with-major-record-labels-for-forthcoming-ai-tool/>.
[100] See Section 1.3.1.
[101] See Deazley (n 15); Simone Schroff, 'The Purpose of Copyright – Moving beyond the Theory' (2021) 16(11) *Journal of Intellectual Property Law & Practice* 1262; Jane C Ginsburg and John M Kernochan, 'One Hundred and Two Years Later: The U.S. Joins the Berne Convention' (1988) *The Columbia Journal of Law & the Arts* 1.

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Such practices simultaneously make it harder for creators to benefit from copyright's rewards component – something that's particularly problematic given the extent to which copyright's beyond-incentive grants are justified by their moral claims.

Drahos and Braithwaite have advanced a third distinct justification for copyright which sits outside the traditional incentives and rewards rationales. Dubbed 'financier's copyright', it 'rests on the view that copyright must serve the financier of copyright works by guaranteeing rights of exploitation in whichever markets the financier chooses to operate.' In this conception, 'Copyright becomes the servant of the financier rather than the author of the public welfare.'[102]

If we were evaluating copyright's performance against this rationale, the results would be much more favourable: the evidence above demonstrates that allowing investors to extract broad and long rights upfront is highly effective at prioritising their interests over both the public's interest in ongoing access and creators' interests in sharing fairly in the rewards of their work. However, cultural investors do not ground their claims in such terms – perhaps because they understand them to be much less sympathetic than those based on public access and creator rewards – and that's not the bargain the public has agreed to. If we really *are* motivated to achieve its public aims, consideration must be given to how we can design it to do a better job.

1.2 HOW REVERSION RIGHTS CAN HELP

Since 2018 we've been working on the Author's Interest Project, an Australian Research Council-funded project focused on authors' rights. While there are various ways to reframe copyright to help creators, including the EU's recently mandated rights to fair remuneration and transparency,[103] we focused on reversion rights because of their potential to address copyright's two failed aims at the same time: that is, to not only help creators get paid, but to simultaneously support investments in making works available ongoing.

We investigated reversion from a number of different angles. Using a range of historical, comparative and empirical methods, members of the project team have investigated how statutory reversion rights have been implemented around the globe,[104] the way rightsholder lobbying has affected their development,[105] how

[102] Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy* (Earthscan, 2002) 176.

[103] 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, arts 18–20 <https://eurlex.europa.eu/eli/dir/2019/790/oj>.

[104] Joshua Yuvaraj, 'Data for Legal Mapping Study into Copyright Reversion Laws Applicable to Book Publishing Contracts (up to March 2019)', *Bridges* (Monash University) <https://doi.org/10.26180/16416747.v3>; Yuvaraj (n 3) ch 5; Ula Furgal, *Reversion Rights in the European Union Member States* (CREATe Working Paper 2020/11).

[105] 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.

real-world publishing contracts deal with reversion and how those practices have evolved over time[106] and how the US termination rights are actually being used.[107] We've generated new empirical evidence showing how current approaches cause culture to be lost,[108] and identifying the practical obstacles authors face when they attempt to exercise their rights.[109] We have also conducted theoretical work proving even quite radical approaches to reversion can be implemented without breaching the outdated, virtually unamendable treaties that stand in the way of some other promising reform pathways.[110]

And of course, as introduced above, we've experienced what reversion can achieve up close, via *Untapped: The Australian Literary Heritage Project*. As well as generating evidence about the unmet public demand for culturally important but neglected books, this project enabled us to study the challenges authors and their heirs experience when attempting to enforce contractual reversion rights,[111] and the economic and non-economic benefits that flowed from republication.

The results of the above program have convinced us that well-executed reversion rights are a promising tool for reshaping the copyright bargain in a way that better achieves its aims. This book seeks to persuade you of that, too.

Of course, there are limits to the scope of our claims. We're not claiming that reversion rights (no matter how well-framed!) are the solution to all of copyright's failures: among other things they need to be complemented by appropriately drawn rights and exceptions, effective enforcement mechanisms and effective interventions to help creators secure fair remuneration and transparency around use of their works.

Further, we acknowledge that they are an explicit response to Western common law philosophies of copyright, and do little to address the focus on individual authorship (rather than collaborative and iterative contributions over time) and individual ownership (as distinct from communal custodianship) that make the resulting colonial frameworks so inappropriate for protecting traditional cultural expressions.[112]

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

[107] Joshua Yuvaraj et al, 'U.S. Copyright Termination Notices 1977–2020: Introducing New Datasets' (2022) 19(1) *Journal of Empirical Legal Studies* 250.

[108] Flynn et al (n 40).

[109] See Chapter 5, Section 5.2.4.

[110] Giblin (n 11); Rebecca Giblin, 'A Future of International Copyright? Berne and the Front Door Out' in Graeme Austin et al (eds), *Across Intellectual Property: Essays in Honour of Sam Ricketson* (Cambridge University Press, 2020).

[111] 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>.

[112] For more on importing Western conceptions of copyright, and/or its underlying values, outside Western contexts, see, e.g., Alpana Roy, 'Copyright: A Colonial Doctrine in a Postcolonial Age' (2008) 26(4) *Copyright Reporter* 112; Akalemwa Ngenda, 'The Nature of the International

Our claims are further limited by the sources we have been able to access. Our investigations of Commonwealth and European reversion rights (populating Chapters 2 and 4) drew upon contributions from local scholars where possible, plus machine translation, but for the most part we have been obliged to rely largely on English-language materials and databases. The result is admittedly but unavoidably Western-centric, on everything from philosophies of copyright to the nature of creativity to practices around cultural production and distribution.

Finally, our work does not address the broader social, economic and legal contexts that have contributed substantially to the dire economic fortunes of today's creative workers, or indeed the growing inequality affecting the broader publics both in the Western nations we've focused on and beyond. Those structural realities have obvious impacts on our ability to achieve copyright's aims no matter how well those laws are framed, but as well outside the scope of this book.

Against the context of these limitations, this book's thesis is modest but important: that, where licensing and distribution practices result in copyrights being allocated in ways that are inconsistent with the rationales for awarding them in the first place, ensuring that creators have appropriately scoped reversion rights could do a great deal to improve outcomes.

1.3 CRITICISMS OF REVERSION

Unsurprisingly, not everyone agrees that reversion rights are a good idea. Below, we briefly canvass the dominant arguments against mandatory reversion rights, together with our responses. There are three main ones: that they unjustifiably interfere with freedom of contract, that they're insulting to authors, and that they might actually reduce the amount creators are paid for their work.

1.3.1 *What about Freedom of Contract?*

Perhaps the most common argument against statutory rights reversion mechanisms is that they would interfere with freedom of contract,[113] a key tenet of 'laissez-faire' capitalism.[114]

Intellectual Property System: Universal Norms and Values or Western Chauvinism?' (2005) 14(1) *Information & Communications Technology Law* 59.

[113] For examples of such arguments, see responses of music publishers in Richard Osborne and Hyojung Sun, 'Rights Reversion and Contract Adjustment' (UK Intellectual Property Office, 2023) 69 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4443144>: '[I]t's an industry based on good faith conduct and relationships and to start interfering in ways which can't be anticipated is probably not taking account of that. It makes an assumption around unfairness which we view as unfair.'; it's 'quite unreasonable when you have a willing buyer and a willing seller to then subsequently several years after the fact introduce a change which says I know you signed this contract willingly, but now it no longer says what you say it says.'

[114] See Richard A Epstein, 'Free Bargaining and Formalism' in FH Buckley (ed), *The Fall and Rise of Freedom of Contract* (Duke University Press 1999) 29–30.

At its core, freedom of contract rests on the belief that individuals are best able to determine their own interests, and then bargain for the conditions that best achieve them. In this conceptualisation, the law is there to ensure the bargain is voluntary and then enforce it – not to determine its terms.[115]

Proponents assume that, if reversion rights were in fact necessary to a deal's proper functioning, the parties would ensure that they were appropriately included in the contract, and there would be no need for external intervention.[116]

From the beginning, the principle was couched in romantic terms – that courts would 'hold sacred' contracts that had been entered into 'freely and voluntarily'.[117] In its nineteenth-century heyday, the principle was given so much deference that courts permitted contracts to override worker protection statutes[118] and provide legal imprimatur to the activities of trade cartels.[119]

Not surprisingly, it soon became clear that prioritising freedom of contract above all else had seriously harmful effects. Freedom of contract relies upon relative equality of bargaining power between the parties to achieve the 'voluntariness' that is at its heart.[120] In the absence of that, the will of the stronger party will simply be imposed on the weaker. In response to this reality, even the most economically liberal countries soon introduced broad limits on contractual freedom, justified on both economic and public interest grounds.[121]

For example, employees are commonly granted statutory protections that employers cannot derogate from, like mandatory annual and sick leave, parental leave, and protections against discrimination and job loss.[122] In many jurisdictions, consumers can similarly rely on guarantees that sellers cannot bypass, for example that goods

[115] Arthur Chrenkoff, 'Freedom of Contract: A New Look at the History and Future of the Idea' (1996) *Australian Journal of Legal Philosophy* 1, 37.

[116] See, e.g., 'Statutory Review of the Copyright Act: Report of the Standing Committee on Industry, Science and Technology' (Chair: Dan Ruimy), 42nd Parliament, 1st Session, June 2019, 36–7; 'Review of the Copyright Act 1994: Submission by the International Publishers Association' (4 April 2019) 7 <https://www.mbie.govt.nz/dmsdocument/6707-international-publishers-association-review-of-copyright-act-1994-issues-paper-submission-pdf>; 'Submission on Review of the Copyright Act 1994: Issues Paper', Publishers Association of New Zealand, 9 <https://www.mbie.govt.nz/dmsdocument/6753-publishers-association-of-new-zealand-review-of-copyright-act-1994-issues-paper-submission-pdf>.

[117] *Printing and Numerical Registering Company v Sampson* (1875) LR 19 Eq 462, 465.

[118] *Lochner v New York*, 198 US 45 (1905).

[119] PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press, 1985) 697–703.

[120] See generally Carl Renner and Michael Zollner, 'Contracts and Humanity: How Freedom and Fairness of Contract Can Be Secured in the Digital Age' in Kai Jacob, Dierk Schindler and Roger Strathausen (eds), *Liquid Legal – Humanization and the Law* (Springer, 2022) 343.

[121] Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in Guy Davidov and Biran Langille (eds), *The Idea of Labour Law* (Oxford Academic, 2011); Atiyah (n 119) 703–8.

[122] See, e.g., *Fair Work Act 2009* (Cth) ss 87, 70, 119–22; *Cap 57 Employment Ordinance* (Hong Kong) 12, 15E, 41AA, 31B(1)(a); *Employment Rights Act 1996* (UK) ss 71–72, 76–77, 13-5-136; *Working Time Regulations 1998* (UK) 13, 13A; *Canada Labour Code* (RSC, 1985, c L-2): 183–187.1, 204–206.1, 235(1).

will be of reasonable quality.[123] Many countries have introduced schemes by which standard form contracts between consumers and suppliers, and small businesses, can be declared unfair and unenforceable.[124] And some countries, recognising that companies can suffer from power imbalances too, even give small businesses special protections in their interactions with larger ones.[125] Each of these interventions recognises the need to protect the more vulnerable party.

This is relevant because creative workers are particularly vulnerable in their interactions with cultural investors. That vulnerability begins with the fact that creative labour markets are characterised by an oversupply of labour, caused by the fact that many individuals view creative work as more desirable than other jobs.[126] That then translates to lower wages: because many creators are driven by an intrinsic desire to create, they're willing to do this for less than what they'd charge to pore over spreadsheets.[127] The fact that unions like the Screen Actors' Guild try to stop their members from driving down their own wages by prohibiting them from taking work that does not comply with union minimums hints at the strength of the enticement to do so. As Johnson wryly puts it: 'the only way actors can overcome the temptation to work for below scale is to enter into a group pledge to punish one another for doing so'.[128]

This isn't to say that a desire to make a living is not also a powerful motivator,[129] but simply to point out that creators' vulnerability to exploitation is exacerbated by

[123] See, e.g., *Consumer Protection Act, 2008* (South Africa) ss 55–56; *Consumer Protection Act 1999* (Malaysia) ss 30–65; *Consumer Protection (Fair Trading) Act 2003* (Singapore) ss 14–18; *Consumer Rights Act* (UK) ss 9–24; *Competition and Consumer Act 2010* (Cth) Sch 2, ss 51–64A; *Cap 26 Sale of Goods Ordinance* (Hong Kong) ss 15–16; *Consumer Guarantees Act 1993* (NZ) ss 5–34.

[124] See, e.g., *Consumer Protection Act 2019* (Zimbabwe) ss 45–46; *Consumer Protection Act 68 of 2008* (South Africa) s 48; 'Unfair Contract Terms and the Consequences Thereof under the CPA', *Dentons* (Web Page, 27 April 2016) <https://www.dentons.com/en/insights/newsletters/2016/april/27/south-africa-newsletter/south-africa-newsletter-april-edition/unfair-contract-terms-and-the-consequences-thereof-under-the-cpa>; *Competition and Consumer Act 2010* (Cth) Sch 2, ss 23–28; *Consumer Rights Act 2015* (UK) Part 2; *Unfair Contract Terms Act 1977* (UK); Cap 458 (Unconscionable Conduct Ordinance (Hong Kong) s 5(1); *Consumer Protection Act 1999* (Malaysia) s 24G; Sophie Bienenstock, 'The Deterrent Effect of French Liability Law: The Example of Abusive Contract Terms' (2019) 129(2) *Revue D'Économie Politique* 205, [20]–[22]; 'Unfair Contract Terms', *European Commission* <https://commission.europa.eu/document/download/dc0fbc69–185d-4f69-a095-f1dfaa4f3a4d_en?filename = Unfair%20contract%20terms_2023.pdf>; *Unfair Contract Terms Act BE 2540* (1997) (Thailand).

[125] See, e.g., *Competition and Consumer Act 2010* (Cth) Sch 2, ss 21–23.

[126] See Giblin (n 11) 382–3.

[127] See Ruth Towse, *Creativity, Incentive and Reward* (Edward Elgar, 2001) 53–8; Charles David Throsby and BJ Thompson, 'But What Do You Do for a Living? A New Economic Study of Australian Artists' (1994) (reporting on an extensive study of Australian artists demonstrating that artists often worked in non-arts jobs, but only to the extent necessary to support their artistic occupation).

[128] Eric E Johnson, *Intellectual Property and the Incentive Fallacy* (2012) 39 *Florida State University Law Review* 623, 668–9.

[129] See, e.g., TJ Stiles, 'Among the Digital Luddites' (2015) 38 *The Columbia Journal of Law & the Arts* 293.

their having motivations that go beyond the purely economic. As Boyle muses, there seems to be some 'innate human love of creation that continually drives us to create new things even when homo economicus would be at home in bed, mumbling about public goods problems'.[130] Leading cultural economist Ruth Towse sums up the result: '[f]irms in the creative industries are able to "free-ride" on the willingness of artists to create and the structure of artists' labor markets, characterized by short term working practices and oversupply, mak[ing] it hard for artists to appropriate rewards'.[131]

That oversupply of labour can also contribute to creator fears that, if they attempt to negotiate the terms they're offered, the deal might simply be transferred to the next person in line – something we'll talk about in more detail in Chapter 5.[132] These fears are exacerbated now that decades of corporate consolidation have dramatically reduced the number of buyers available for many kinds of cultural work. We already saw that three record labels control almost 70 per cent of the global market for recorded music, and they own the three music publishers that control almost 60 per cent of global song rights, but that's just the tip of the iceberg. The music streaming market is controlled by Spotify and a few companies owned by Big Tech; Amazon has a stranglehold on large markets for physical, digital and audio books; and if you're watching music videos, you're almost certainly doing it on YouTube.[133] Live Nation Entertainment controls concert promotion and ticketing, Disney takes 35 per cent of the US box office, and Google and Facebook have a lock on the digital ads that are wrapped around online music, videos and news.[134] Even the video game market has become massively consolidated.[135] Investors can offer terms on a take-it-or-leave-it basis knowing there is a bottomless pool of exciting prospects, while creators know that accepting that deal might be their only chance to break through.[136]

[130] James Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain' (2003) 66 *Law and Contemporary Problems* 33, 45–6.

[131] Ruth Towse, 'Copyright and Cultural Policy for the Creative Industries' in Ove Granstrand (ed), *Economics, Law and Intellectual Property* (Springer 2003) 419, 427.

[132] See Chapter 5, Section 5.3.1.

[133] By way of disclosure Yuvaraj is an independent musician with music available for streaming and purchase on major platforms.

[134] Giblin and Doctorow (n 85) 2, 56.

[135] Lewis Gordon, 'The Great Consolidation of the Video Game Industry', *The Ringer* (online, 19 August 2022) <https://www.theringer.com/video-games/2022/8/19/23308468/video-games-acquisitions-mergers-microsoft-sony-tencent-embracer>.

[136] Theresa E Van Beveren, 'The Demise of the Long-Term Personal Services Contract in the Music Industry: Artistic Freedom Against Company Profit' (1996) 3 *UCLA Entertainment Law Review* 377, 384; see also Lauren K Turner, 'The Impact of Technology on Pre-Digital Recording Agreements: An Examination of *F.B.T. Productions, LL v. Aftermath Records*' (2011) 114(1) *West Virginia Law Review* 347, 351; Kate Darling, 'Contracting about the Future: Copyright and New Media' (2012) 10(7) *Northwestern Journal of Technology and Intellectual Property* 485, 502.

Since many creative workers have low incomes, that makes it harder for them to access expert advice on the terms they're offered[137] – something that's particularly problematic given how complex copyright contracts can get. It also further adds to the inequality between the parties, since the investor is usually the one to draft the contract, and is much more likely to have had the benefit of legal advice to do so. These relationships clearly lack the 'freedom' that freedom of contract relies on.

Cultural investors are themselves well aware of how unequal power can translate to poor outcomes from contracts. Consider the record industry for example, which has for years sought help from lawmakers in its campaign against the 'value gap' – the difference between the royalty rates the labels were able to negotiate with music streamers like Apple and Spotify, and the amount it had been able to persuade Google's YouTube to agree to.[138] YouTube's stranglehold over the video streaming market gave it the power to extract a better deal, similarly to how major labels use their hegemony to put the squeeze on artists. But of course, the record industry didn't respond to YouTube's tactics by acknowledging the sanctity of freedom of contract – rather, it begged for (and finally obtained) legal intervention.[139]

1.3.2 *Aren't Reversion Rights Insulting to Authors?*

Another argument against reversion rights is that they are insulting to creators. Justice Felix Frankfurter exemplified this in a US Supreme Court judgment we'll revisit in Chapter 3: 'While authors may have habits making for intermittent want, they may have no less a spirit of independence which would resent treatment of them as wards under guardianship of the law.'[140]

Rightsholder representatives resisting the push for meaningful US termination rights in the 1970s similarly claimed that mandatory reversion rights made authors out to be 'improvident', 'nincompoops' and 'fools'.[141] Around the same time, Barry Torno, a leading Canadian entertainment lawyer, argued that reversion laws 'perpetuate the stereotypical image of the author as the gifted but "congenitally irresponsible" artist who cannot be expected to assume full responsibility for the consequences of his actions and must be guarded against himself'. This was 'insulting', he argued, and 'do[ing] a disservice to authors'.[142]

[137] See, e.g., Séverine Dusollier, 'EU Contractual Protection of Creators' (2018) 41 *Columbia Journal of Law & Arts* 435, 474; *Arts Law Centre of Australia Annual Report 2017* (Report, 2017) 6–7.

[138] IFPI, *Global Music Report 2018: Annual State of the Industry*, ch 26 <https://perma.cc/sGZ3-PLhM>.

[139] See (n 103) art 17.

[140] *Fred Fisher Music Co v M Witmark & Sons*, 318 US 643, 657 (1943).

[141] Copyright Law Revision Part 3 (US Government Printing Office, 1964) 282, 285; Copyright Law Revision Part 4 (US Government Printing Office, 1964) 250, 275.

[142] Barry Torno, *Term of Copyright Protection in Canada: Present and Proposed* (Consumer and Corporate Affairs Canada, 1980) 39.

Such claims obviously fail to acknowledge the power imbalances between creative workers and the investors, discussed above, which are a much more compelling reason for introducing mandatory reversion protections than the idea that authors are stupid or uninformed. And they are further undermined by the fact that creators are themselves the staunchest advocates for mandatory reversion protections. During development of the 1976 US copyright law for example, authors made it clear that reversion rights were so important to them that they would oppose *any* amendment of the copyright law in the event they were not included. Karp explained the strong author support for reversion was because they were the *opposite* of improvident, nincompoop fools:

> Any prudent, provident author, bargaining to sell or lease rights to a motion picture company, doesn't want to give away his copyright forever. He wants to give a limited grant, because he knows that the value of his rights can't be adequately determined at the time the bargain is made. He knows that in thirty years the rights may be worth many times more. He knows that if he gives a limited grant the movie company could make the movie, distribute copies, and exploit their work. He knows that if he gets another crack at it he will then get the same chance that everybody else involved with the second remark of the movie gets – of being paid, according to latter-day standards, the value of what he contributes. And, as I say, he would never assign the copyright away unless he were forced to. The same holds true in book publishing, and music publishing, and every other kind of publishing. (Copyright Law Revision Part 3, 286)

As the following chapters will show, in the subsequent decades creative workers have lobbied strongly for reversion rights all around the globe. Given that they clearly don't find such rights paternalistic, arguments to the contrary have a disingenuous odour. It's the foxes arguing it's insulting to chickens to coop them at night.

1.3.3 *Wouldn't Reversion Reduce Creator Pay?*

Finally, reversion rights are sometimes resisted by arguing that they'll result in authors being paid even less than under current arrangements.[143] Such arguments can be powerful: creators struggling to survive on an already measly share are understandably fearful at the prospect of receiving still less.

But of course, whether or not any reversion right would put downward pressure on prices depends on factors like its design and the likelihood of its being successfully exercised. Entitlement for an author to reclaim rights that it's clear the investor

[143] See, e.g., Guy A Rub, 'Stronger than Kryptonite? Inalienable Profit-Sharing Schemes in Copyright Law' (2013) 2749, 97–8 (2013); Kate Darling, 'Occupy Copyright: A Law & Economic Analysis of U.S. Author Termination Rights' (2015) 63 *Buffalo Law Review* 147, 165–6; Amy Gilbert, 'Note, The Time Has Come: A Proposed Revision to 17 U.S.C. § 203' (2016) 66 *Case Western Reserve Law Review* 807, 810; AA Keyes and C Brunet, 'Copyright in Canada: Proposals for a Revision of the Law' (Consumer and Corporate Affairs Canada, 1977) 69 <https://publications.gc.ca/collections/collection_2021/isde-ised/RG43-41-1977-eng.pdf>.

is not going to exploit, for example, is likely to have minimal impact, since they rarely expect to use all the rights they take, and would have already had ample opportunity to exploit all those that turned out to have value.

In the case of time-based rights, their likelihood of reducing prices depends primarily on when they may be exercised. If a creator had a mandatory right to reclaim their copyrights after just a year, that could certainly be expected to depress the original price paid. However, longer periods of exclusivity are less likely to have any negative effect, as we saw in the above analysis of how the present value discounting and cultural depreciation impact investor incentives. That showed that, beyond a relatively short time horizon, the grant of additional years of exclusivity makes little or no difference to the value of those rights at the time the decision is made to invest. Given these realities, it's not surprising that there is no evidence that the US law entitling creators to terminate most copyright transfers after 35 years has had any downward impact on prices.[144] In fact, recent economic modelling suggests that, rather than making contracts riskier for authors, it might actually have a beneficial effect.[145]

We get another hint of the upside potential of time-based reversion rights in the practices around publisher sub-licensing deals, which as we saw commonly last just five years or less. By insisting that rights revert back after that, the head publisher puts themselves in a position to negotiate a subsequent, better deal in the event the translation is a commercial success (or a more modest continuation if it's not). If authors had the power to do the same, they might similarly increase their ability to share in their work's success.

Another problem with arguments that reversion rights will reduce creator incomes is that they assume the amounts paid are economically rational in the first place. As we saw above, however, the oversupply of creative labour, willingness to provide it for less than other forms of labour and fear of losing deals to the next artist in line all prevent this from being the case. In other words, the dynamics of creative labour markets mean that what rightsholders extract from creators can be largely divorced from both the cost of their investment and the work's ultimate commercial value. Indeed, as the UK's parliamentary streaming inquiry discovered, many recording artists and composers receive no upfront payment at all.[146]

In light of these realities, Litman has argued that giving creators a right to revert after, say, 10 years, may actually improve the initial terms on offer.[147] That's because

[144] Giblin (n 11) 397.

[145] Michael Karas and Roland Kirstein, 'Efficient Contracting under the U.S. Copyright Termination Law' (2018) 54(C) *International Review of Law and Economics* 39.

[146] See Digital, Culture, Media and Sport Committee (n 35) 31 citing All Party Parliamentary Jazz Appreciation Group, Submission to Digital, Culture, Media and Sport Committee, *Economics of Music Streaming* (15 November 2020) 6 (regarding recording artists); 47 (regarding songwriters) <https://committees.parliament.uk/writtenevidence/15360/pdf/>.

[147] Jessica Litman, 'Real Copyright Reform' (2010) 96 *Iowa Law Review* 1, 48.

intermediaries would be motivated to keep their creators happy to ensure they aren't tempted to leave the stable – a prospect they don't have to concern themselves much about under current arrangements. For the same reason, such rights could also rein in the kind of abuses the major labels engaged in when striking their deal with Spotify, and which have been up in the air again as providers of generative AI technologies seek licences of their own.[148] It would of course be vital to calibrate the duration of the initial term carefully to avoid interfering with the incentives for initial investment, but if copyright laws permitted, dissatisfied creators could take their rights elsewhere after that, it's well plausible that more of the wealth generated by creative labour would flow to those who actually do the work.

1.4 NAVIGATING THIS BOOK

This book makes the case that reversion rights have enormous potential as a mechanism for reworking the copyright bargain in a way that better achieves its ends. But if that's the case, why haven't they done so already? After all, as we pointed out right at the beginning, statutory reversion rights have been around for as long as copyright itself.

The answer will become clear in Chapters 2 and 3, which trace the histories of statutory reversion rights in the UK and US, and Chapter 4, which evaluates current approaches in Europe. That work will show that these reversion rights have not been effective because, despite their long history, they have not generally been implemented in a way that would meaningfully shift the balance of power between creators and cultural investors. In particular, we show there were remarkably few attempts to tailor reversion rights in ways that take advantage of the new exploitation opportunities facilitated by the shift to digital technologies and the internet.

The lack of meaningful reversion rights doesn't reflect a lack of appetite for them. We show how attempts in these jurisdictions to enact reversion rights in ways that could have actually made a meaningful difference to creators were derailed – both by poor design *and* by resistance from the same powerful corporations that were the primary beneficiaries of existing arrangements. That resistance should be viewed as evidence of reversion's potential: rightsholders would not have fought so hard (or so dirty) if they had not believed that reversion did not have the potential to retilt the playing field.

Chapter 5 then takes a closer look at copyright contracts, sharing results from our empirical studies investigating how reversion rights are incorporated into publishing

[148] See further Hibaq Farah, 'Google and Universal Music Working on Licensing Voices for AI-Generated Songs', *The Guardian* (online, 9 August 2023) <https://www.theguardian.com/technology/2023/aug/09/google-and-universal-music-working-on-licensing-voices-for-ai-generated-songs>; Chris Cooke, 'Sony Music Tells 700+ AI Companies to Respect Its Copyrights', *Complete Music Update* (online, 17 May 2024) <https://completemusicupdate.com/sony-music-tells-700-ai-companies-to-respect-its-copyrights/>.

contracts, and the challenges authors face when actually exercising those rights. That evidence builds on the observations in this chapter by identifying additional problems that make contracts an inappropriate repository for these important author rights.

Finally, Chapter 6 synthesises the key lessons learnt throughout the book in a series of best practice principles for advocates and lawmakers to consider as we move toward reform. The tremendous wealth and influence wielded by the Big Tech and Big Content companies that are the major beneficiaries of existing structures create obvious political barriers to any reforms that might redirect any meaningful amount of wealth, and in the current political environment they may well be insurmountable. However, as Giblin and Doctorow pointed out in *Chokepoint Capitalism*, it's important to have 'ideas lying around' that can be picked up and pressed into service once a system reaches crisis. The perilous state of creative labour markets suggests we might be close. When that point arrives, it's our hope that this contribution will help.

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