6

Best-Practice Principles for Copyright Reversion Mechanisms

INTRODUCTION

In this book we have argued that copyright reversion has enormous potential to better secure economic rewards to creators and promote access to knowledge and culture, driven particularly by the new possibilities for creative production and distribution brought about by digital technologies and the internet. That potential has not yet been tapped, though movements towards reform over the last half decade exhibit growing appetite from creators and policymakers to do so.

This will be difficult to achieve. Current approaches to copyright have allowed a small number of firms to become extremely powerful. The fact that they control such vast catalogues of rights, for such long durations, gives major record labels, film studios and book and music publishers outsized power to control the future of those industries, and a strong vested interest in keeping it that way. The money and power at stake ensures that any meaningful attempt to shift the playing field in favour of creative workers will be resisted – something we've seen play out time after time in the context of reversion reform.

However, anything that cannot go on forever will eventually end.[1] As we explained in this book's Introduction, when systems reach crisis point there will be a need to urgently press new solutions into service. It is our hope that, if and when that time comes for copyright, and meaningful reforms shifting power back to creators become politically feasible, the lessons from this book will help inform discussions about how reversion's potential may be harnessed to do so. With that optimistic end in mind, this chapter sets out eight principles synthesising the most important considerations.

[1] This truism originates from the economist Herb Stein's famous observation that 'if something cannot go on forever, it will stop'. <https://www.cepweb.org/if-something-cannot-go-on-forever-it-will-stop/>.

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We express these lessons in the form of principles rather than more specific recommendations in recognition of the widely varying legal systems, infrastructure and creator dynamics that exist around the world. Those differences ensure the mechanisms for best giving effect to these principles will also be different across nations. However, the global nature of many creative markets and fact that so much of copyright's framework is harmonised worldwide via international treaties suggests these lessons *can* usefully inform reversion reform debates around the globe.

In Chapter 5 we explained that contract-based reversion rights are much harder to improve than public interventions. For those reasons, these principles apply mainly to the latter.

They address ways in which both time and use-based reversion models can help copyright laws do a better job of achieving their aims. The two models have different but complementary strengths. Time-based reversion rights have particular potential for helping creators share fairly in the rewards of their work. Since most exploitation contracts are struck before anyone knows what the work is worth, term-length durations can make it difficult for creators to secure an appropriate share upfront – as *Superman*'s creators so painfully discovered. Time limits incentivise rightsholders to share their profits with creative workers, since not doing so could provoke them into taking rights elsewhere once they have the chance. Consider how different the economics of the recorded music market would be if performers had the option of taking their rights elsewhere after a fixed period of say 10 or 20 years. The heritage recording artists who signed on to 4 per cent royalty rates in the 1970s would have had an opportunity to re-negotiate them to the prevailing market rates – around 12 per cent in the 1990s, and at least 25 per cent today[2] – ensuring that they shared in the windfall that flowed from the shift to streaming.

Time-based reversion rights can also help further copyright's access aims, even for works that are still being actively exploited: if rights to existing works were to semi-regularly return to market, it could encourage bids from potential partners who believe they can do a better job of reaching audiences, thus encouraging fresh investments.

Use-based models also have the potential to secure greater rewards to creators, though these may be more modest since often rights are unexploited because there isn't a sufficient commercial market for them. As we've seen, however, that doesn't mean there's no market at all, and emerging low-cost digital and AI-driven production and distribution options in particular make feasible a great many more exploitation opportunities than was the case in the past. If there were better mechanisms to free up unused rights in order to facilitate such uses, some creators may well be interested in exploiting unused rights themselves – for example, by licensing digital versions for sale online. The existence of stronger reversion rights could also

[2] Cory Doctorow and Rebecca Giblin, *Chokepoint Capitalism* (Scribe Publications, 2022) 59, 222.

encourage new or existing investors to develop markets to assist in their exploitation, analogous to those we've already seen for re-publishing out-of-print books.

Thus, appropriately drawn use-it-or-lose-it rights can also play a pivotal role in satisfying creators' interests in ensuring their works continue to be available to the public, as well as promoting the broader public interest in access to knowledge and culture.

After setting out our eight principles for designing reversion rights to best achieve these aims, we conclude the book by provocatively sketching out an example of how taking a radical approach to reversion rights could very directly support public access while simultaneously generating new revenue to support creators.

6.1 BEST-PRACTICE REVERSION PRINCIPLES

6.1.1 *Principle 1: Reversion Mechanisms Should Be Calibrated to Maintain Investment Incentives*

Copyright has three core aims, and it's important not to lose sight of the first (amply incentivising initial production) in order to do a better job of securing the second (incentivising ongoing access to knowledge and culture) and third (recognising and rewarding creators). Thus, reversion mechanisms should be calibrated to ensure they do not disincentivise necessary investments in works' initial creation.

This is, obviously, a balancing exercise. On the one hand, the longer and broader an assignment or license of exclusive rights, the greater the collateral damage to the public (in terms of the unavailability of works) and creators (the inability to share in the rewards that might result from revitalisation). On the other hand, if assignments or licences can be ended too quickly (via too-short time-based mechanisms, or use-based mechanisms that don't give investors appropriate opportunity to exploit their rights), investors may be put off investing in that critical initial production. The key is to ensure a balance between these interests, avoiding undesirable collateral damage while maintaining investment incentives, promoting ongoing access, and helping to secure a fair share to creators. The UK's 'Terms of Trade' approach to the regulation of contracts between public broadcasters and independent film producers provides real world evidence that this is possible, given its success in maintaining the incentives necessary for initial production whilst simultaneously increasing public access and creator rewards.[3]

The appropriate balance of investment interests will be different depending on the relevant works and creative markets (see further Principle 2). Crucially, though, that balance is empirically calculable, based on inputs such as cultural depreciation rates and present value discounting as discussed in Chapter 1.[4] In the context of

[3] See Chapter 2, Section 2.6.3.
[4] See Chapter 1, Section 1.1.4.1.

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recording copyrights, for example, in 2021 the UK House of Commons select committee proposed that rights ought to revert after 20 years, being the period after which record labels typically write off bad debt.[5] While the proposal has not yet passed, it is an example of lawmakers developing a time-based reversion mechanism with a trigger calibrated to benefit artists without deterring incentives for initial investment.

Importantly, implementing appropriate restrictions on exploitation contracts should not diminish the role investors play, or their opportunity to benefit fairly from investments in creative works. They should still have ample opportunity to compete to partner with creators, and, if they're doing a good job exploiting the rights of their existing stable, would be well placed to retain them.

Regularising the return of rights to the market would also create new investment opportunities. We saw one example of this with the Untapped project. To license books to libraries for e-lending, it's necessary to work with e-lending aggregators such as OverDrive. Before that collaboration, Untapped's publishing partner Ligature Press was too small for this to be worth their while, which meant there was no way for its small collection of a few dozen already reverted books to reach library readers. As a result of this substantial reversion project, however, it has become known as one of Australia's largest 'Classics' publishers, and provides the infrastructure for culturally important out-of-print books to be brought to libraries ongoing. If it became normal practice for rights to works to regularly return to market, it would similarly encourage the emergence of new business models and facilities to exploit them.

6.1.2 *Principle 2: Reversion Mechanisms Should Be Industry Specific*

Above, we recognised that cultural depreciation rates can differ across creative industries. They can have different investment models and reversion norms as well.

These differences can make it very difficult for lawmakers to formulate appropriate reversion triggers. Law reform processes for determining the scope of 'umbrella' provisions that apply universally across a wide range of creative industries (such as the US time-based termination right, or the EU's use-it-or-lose-it right) necessarily end up catering to the lowest common denominator. By that we mean whichever industry successfully pleads the need for broadest rights in order to maintain its investment or distribution incentives will effectively determine the fate of creators in quite distinct fields. In the context of time-based rights, if there are compelling reasons why one form of cultural output (say sound recordings) should not revert until 20 years after transfer, that might result in the same limit being set for other forms that depreciate much more quickly (e.g. news articles), rendering rights to reclaim the latter all but valueless. Such special pleading might potentially explain

[5] See Chapter 2, Section 2.6.3.2.

why the EU DSM's use-it-or-lose-it right was given a strict 'no exploitation' rather than broader 'inadequate exploitation' trigger.

By contrast, sector-specific provisions (such as the detailed French use-it-or-lose-it provisions applying to book publishing, or the Spanish and Italian time limits that apply in that same context) can grant rights with much more effective and useful triggers without threatening any industry's viability.

For these reasons, we recommend that rights be tailored to the specificities of key creative industries, perhaps in the form of binding codes of conduct, with umbrella provisions simply providing a supplementary catch-all where necessary.

6.1.3 *Principle 3: To Achieve Their Ends, Reversion Mechanisms Need Appropriate Triggers*

Reversion rights can only further copyright's aims if their triggers allow them to do so – and as this book's review of existing rights has demonstrated, that is rarely the case. We've argued that is partly explainable by the use of 'umbrella' rights that cover a wide variety of creative sectors rather than industry-specific approaches. Assuming industry-specific rights are adopted instead, we recommend thought also be given to the following considerations.

6.1.3.1 Take Advantage of Opportunities Created by Technological Developments

When Samuel Clemens (aka Mark Twain) lobbied the US Congress for longer copyright terms in 1906, his claim wasn't based on the value of books, but their *lack* of value. Pointing out that 'only one book in 1000 . . . can outlive the [existing] forty-two-year limit', he argued that when copyrights expired those few valuable books continued to be published, and the valueless continued not to be: the only difference was in whether or not their publishers would be obliged to continue sharing the profits with authors or their heirs. In those circumstances, there was no downside in granting long terms to every single work: it would enable authors of the few with lasting value to share in those benefits, and the rest would be lost to obscurity regardless.[6]

At the time, he was correct: high marginal costs of copying and distribution meant that only the most popular and valuable works could be made enduringly available. But that is no longer the case. Not only has the popularisation of the internet and digital technologies driven the marginal cost of copying and global distribution, for many kinds of work, to almost nothing, but technological developments such as

[6] A Bill to Amend and Consolidate the Acts Respecting Copyright: Hearing on S. 6330 and H.R. 19853 Before the H. and S. Comms. on Patents, 59th Cong (1906) (statement of Samuel L Clemens [Mark Twain]), in James Boyle and Jennifer Jenkins (eds), *Intellectual Property: Law & The Information Society* (Center for the Study of the Public Domain, 3rd ed, 2016) 286–9.

generative AI are also massively reducing the costs of making derivatives and translations. As demonstrated in Chapter 1, the mere fact that a cultural investor holds those rights doesn't mean they'll have any interest in exploiting them. Unlike in Clemens' day, however, that can now have real costs.

In response to these changed realities, it's important that creators be able to appropriately reclaim unused rights *even where* some rights are being used. The approach of Spain and Lithuania to allow authors to revert rights over unused languages are good examples of this, as is the French publishing law that permits authors to revert digital rights even where the print rights are being sufficiently handled, and vice versa. By contrast, the EU's approach to Article 22, which appears to permit rightsholders to retain all rights so long as they are doing anything to exploit any one of them, wastefully throws away potential access for the public and rewards for creators.

6.1.3.2 Maintain the Traditional Copyright Bargain

As we have seen, works' continued availability in the analogue era relied upon rightsholders being willing to make substantial investments, for example via new print runs, marketing to retail outlets, physical distribution, and the handling of unsold product and returns. Where they were no longer willing to do so, the work would become unavailable, with the consequence that neither the creator nor the rightsholder would continue to benefit.

However, the shift to digital distribution means that, in many cases, the rightsholder can keep works available ongoing without anything like the commitment previously required to do so – a shift encapsulated by HarperCollins CEO Brian Murray's recent description of publishers' growing backlist revenue as 'almost like an annuity'.[7] This changes the bargain in favour of rightsholders, allowing them to capture a bigger share than what is justified by their investments – and helping explain why the largest trade publishers with their huge backlists have much fatter profits than smaller competitors. Giving authors an opportunity to reclaim rights where their investment partners aren't doing enough to actively promote their works would give them an opportunity to renegotiate their deals to more fairly reflect the rightsholder's risk and investment, or perhaps shift them to one willing to take a more active approach.

6.1.4 *Principle 4: Reversion Mechanisms Should Be Kept Fit for Purpose*

This book's review of statutory and contractual reversion rights demonstrated how quickly they can become outdated, reducing their ability to achieve their aims.

[7] Guy LeCharles Gonzalez, 'Marketing Math: Penguin Random Hour's 2 Percent Gambit', *The Hot Sheet* (Web Page, 14 September 2022) <https://mailchi.mp/hotsheetpub/publishing-math#mctoc3>.

The breakneck pace of economic, technological, environmental and political change necessitates careful consideration about how to ensure any reversion rights remain fit for purpose.

6.1.4.1 Consider Making Reversion Rights 'Living Rights'

One appealing option is to make them what we call 'living rights', akin to the book publishing scheme contained in the French Intellectual Property Code. That code entitles authors to terminate book publishing contracts where their publisher fails to ensure permanent and continuous exploitation in print or digital form.[8] It also provides for the making of binding collective agreements to deal with prescribed issues, including the question of what amounts to permanent and continuous exploitation, with the Council of State able to determine those matters by decree in the absence of such an agreement.[9]

In 2014, the first collective agreement under this scheme was made binding, setting out a detailed set of requirements including what is necessary for publishers to ensure 'permanent and continuous exploitation'. That requires publishers to 'ensure the active distribution of the work to give it every chance of success with the public'.[10] It goes on to include specific mandates of what this involves: '[p]resent [ing] the work as available in at least one of the major interprofessional databases of commercially available works' (for printed editions) and '[m]ak[ing] … it available in a technical format that can be used, taking into account the usual formats on the market and their evolution, and in at least one non-proprietary format' (for digital editions).[11]

The agreement applies indefinitely, but the parties must consider revisions at five-yearly intervals in order 'to anticipate the changes brought about by digital technologies, to adapt to changes in professional practices or to resolve any difficulty arising from the application of the agreement'.[12] Any revised agreements will become mandatory too. Under this scheme, authors have an ongoing 'static' right to revert for failure to ensure permanent and continuous exploitation, but the

[8] Code de la propriété intellectuelle 1992 (Intellectual Property Code 1992 (France)) art L132–17-2.

[9] Ibid art L132–17-8(III).

[10] Arrêté du 10 décembre 2014 pris en application de l'article L. 132-17-8 du code de la propriété intellectuelle et portant extension de l'accord du 1er décembre 2014 entre le Conseil permanent des écrivains et le Syndicat national de l'édition sur le contrat d'édition dans le secteur du livre (Order of December 10, 2014 taken pursuant to article L. 132-17-8 of the intellectual property code and extending the agreement of December 1, 2014, between the Permanent Council of Writers and the National Publishing Union on the publishing contract in the book sector) (France) ('**PCW-NPU Agreement**', Microsoft Edge translation) cl 4 <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000029966188>.

[11] Ibid cl 4.1 and 4.2.

[12] Ibid Preamble.

content of that right is 'alive', able to evolve alongside the book industry's changing realities.

By applying updated rights to existing contracts, this model not only helps rights remain fit for purpose, but ensures all creators benefit when amendments are made to clarify any ambiguities that emerge – a desirable attribute, given the importance of certainty to the effectiveness of rights (discussed further at Principle 5). A 2017 Code of Good Practices for the Publication of Musical Works provides similar detail on how the publishing contract provisions will apply to music publishing,[13] demonstrating this model's capacity to scale to works other than books.

Using collective agreements to determine the scope and evolution of rights relies upon creator representatives having sufficient resources and bargaining strength, but where such conditions exist, it's an attractive way of ensuring the particularities of specific industries are adequately reflected.

6.1.4.2 Time-Limited Licences May also Help

The importance of actively ensuring rights remain fit for purpose is heightened by the inordinate terms copyright transfers can often last for under current approaches – sometimes a century or more. If those contracts were to be wholly or partly subject to stricter time limits, enabling fresh bargains to be regularly restruck, the need for 'living' rights becomes less urgent.

In this regard the UK's 'Terms of Trade' regulating the agreements between public broadcasters and independent producers (discussed in Chapter 2) may provide inspiration. While they don't specify how independent producers can regain their rights, they do regulate what can be given away, and by imposing relatively short time limits they require investors to renegotiate deals rather than taking rights initially without a reflection of the changing value of the work across the copyright term.[14] The requirement for those terms to be sanctioned by an independent regulator further helps safeguard creator interests.

6.1.5 *Principle 5: Reversion Mechanisms Should Be Designed to Maximise Clarity and Certainty*

Regulation may take the form of standards (which are flexible, but correspondingly harder to apply to any given fact scenario) or rules (more precise and thus easier to predict how they will apply, but have less flexibility).[15]

[13] *Code of Good Practices for the Publication of Musical Works* (4 October 2017) <https://www.snac.fr/site/wp-content/uploads/2017/10/Code-of-Good-Practices-for-the-Publication-of-Musical-Works.pdf>. At the time of writing we could not confirm that this Code had been made binding like the book publishing code.

[14] See Chapter 2, Section 2.6.3.1.

[15] See, e.g., Vincy Fon and Francesco Parisi, 'On the Optimal Specificity of Legal Rules' (2007) 3(2) *Journal of Institutional Economics* 147.

6.1.5.1 Reversion Rights Should Be Enhanced by Rules

In our view, reversion rights need to be at least accompanied by rules in order to achieve a desirable level of certainty. This is feasible only where there is some degree of industry-specificity (as argued for in Principle 2), since the rules that are most appropriate to book publishing don't apply as aptly to music publishing or recording.

The French example referenced above illustrates how rules can supplement standards to promote certainty. The entitlement for authors to reclaim rights in the absence of 'permanent and continuous exploitation' is a standard, while the industry codes that give it more precise meaning in the context of books and music are rules. They are specific enough to enable publishers and creators to each get a sufficiently clear understanding of their rights and responsibilities, and how to enforce them. And, because they are agreed collectively by creators and publishers after a formal bargaining process, they're much less likely to contain the kind of ambiguities and uncertainties that our research has found in individual contracts.[16]

Another benefit of having a single set of rules to regulate the reversion rights of an entire industry is that creators and their representatives (including unions, agents, lawyers and so on) can become deeply familiar with them, ensuring greater consistency of interpretation whilst simultaneously reducing the costs of determining and enforcing rights. Since high transaction costs would rule out most potential-but-not-particularly-lucrative uses, keeping them low would help further copyright's access and rewards aims.

6.1.5.2 There Should Be Mechanisms for Resolving Uncertainties

Of course, as this book's analysis of the US termination law demonstrated, it's possible to have bad rules that are simultaneously inflexible and uncertain. That analysis also demonstrated the deleterious effects uncertainty can have on creators seeking to enforce their rights. Key uncertainties (such as whether and when sound recording transfers can be terminated) remain unresolved after more than half a century on the statute books, and those few creators who have pockets deep enough to challenge their contracting partners are quietened by confidential settlements to keep it that way. It is undesirable for reversion's public policy aims to be undermined by such uncertainties.

France's system of living rights, described above, is one potential solution to the certainty problem. Indeed, one of the express purposes of the five yearly reviews of France's collective agreements is 'to resolve any difficulty arising from the application of the agreement'.[17] Since updated rights apply to existing as well as future deals, all creators covered by the scheme benefit from any clarifications that are made.

[16] See generally Chapter 5.
[17] PCW-NPU Agreement, n 11, Preamble.

Alternative options for promoting certainty include requiring regulators to sign off on terms (as per the UK Terms of Trade model) or funding test cases in legal systems where that is appropriate.

Certainty may also be improved through the adoption and use of guidelines. This suggestion is inspired by a project that created guidelines to help documentary filmmakers navigate the US 'fair use' standard, markedly improving both their understanding of the law and their confidence actually exercising those rights.[18]

Industry guidelines could reduce uncertainty by helping parties determine the parameters of reversion mechanisms (e.g. around what types of works are typically considered works for hire, collective works, joint works, derivative works). They would not need to be prescriptive – the goal could simply be to inform creators of how reversion mechanisms have been operationalised in different industries, to improve certainty about what might happen if they try to rely on or enforce those mechanisms in a particular way.

6.1.6 *Principle 6: Reversion Mechanisms Must Be Protected against Contractual Subversion*

Above, we warned against allowing rightsholders to use uncertainty to undermine the author-protective intent of reversion rights. Additional care is necessary to prevent contracts from being used to achieve the same end. Throughout this book we have shown that rightsholders have consistently sought to use their superior bargaining power to require that creators effectively give up the benefit of statutory reversion rights. Sometimes this is explicit, as when rightsholders in the UK and US asserted they were taking both the initial and reversionary terms upfront. In other cases it is implicit, as when choice of law or choice of forum clauses are used to subvert one nation's author-protective laws. Since such practices can diminish or even obliterate the intended benefits, reversion mechanisms must be appropriately insulated against contractual subversion.

6.1.6.1 Appropriate Prohibitions on Contracting Out

In the domestic context, this should primarily be achieved by appropriate prohibitions on contracting out, effectively limiting the alienability of the relevant rights.

[18] See, e.g., Association of Independent Video and Filmmakers, Independent Feature Project, International Documentary Association, National Alliance for Media Arts and Culture, and Women in Film and Video, Washington D.C., Chapter, *Documentary Filmmakers' Statement of Best Practices in Fair Use* (18 November 2005) <https://cmsimpact.org/wp-content/uploads/2016/01/Documentary-Filmmakers.pdf>. Regarding the success of those guidelines at promoting certainty, see Pat Aufderheide and Aram Sinnreich, *Documentarians, Fair Use, and Best Practices* (Summer 2014) <https://cmsimpact.org/resource/documentarians-fair-use-and-best-practices/>.

Such prohibitions already have strong precedents in the UK, US and EU for both time-based and use-based rights. In determining what is 'appropriate', slightly different considerations apply to time- and use-based rights given the different ends they seek to achieve.

6.1.6.1.1 LIMITING USE-BASED RIGHTS. There may be circumstances where a blanket prohibition on contracting out of use-based rights could problematically interfere with the certainty required for rightsholders to make their initial investments in works – something Principle 1 emphasised the importance of maintaining.

In that discussion, we flagged the importance of investors having appropriate opportunity to exploit the rights that do have value – and that can take some time to emerge. Use-it-or-lose-it rights should always be framed in ways that reasonably permit that to occur, and the industry-tailored rules we recommend provide scope to do so.

If greater certainty is required, however, consideration may be given to an approach like that of Austria and Hungary. As we saw in Chapter 4, those countries permit creators to waive their general use-it-or-lose-it rights for three and five years, respectively, effectively providing a guaranteed window for the rightsholder to determine which rights it is interested in exploiting. However, we caution against the approach taken by Denmark with its equivalent right, which prohibits contracting out but does allow the relevant time limits (including the period before which reversion can be enforced) to be altered by contract. The risk is that rightsholders could use their superior bargaining power to extend them to a length that could eliminate the right's value to its intended beneficiaries.[19]

Another approach that might be considered is to permit contracting out of specific reversion rights as part of collectively bargained agreements, as per the EU Parliament's original draft of what became Article 22 of the DSM Directive.[20] This could improve flexibility, which is especially important in cases where rights are framed to apply universally, rather than being tailored to different creative industries.

The appropriateness of such an approach depends on creator unions or equivalent bodies that are sufficiently strong and well-resourced to reach fair and informed deals. However, even where such conditions are present, additional safeguards against subversion would likely be needed. These are especially important given the public interest in ongoing access to knowledge and culture since the public would not usually be represented in negotiations for a collective bargain. One possible safeguard is to require that collective agreements contain some equivalent protection of the reversionary interest. EU lawmakers did something analogous in Article 20 of the DSM Directive by giving creators a legal right to seek adjustment of

[19] See Chapter 4, Section 4.2.2.3.
[20] See Chapter 4, Section 4.4.1.

a disproportionate exploitation contract if there was no equivalent mechanism in a collective agreement.[21]

6.1.6.1.2 LIMITING TIME-BASED RIGHTS. A central advantage of time-based reversion rights is that they can allow creators to negotiate fresh deals once the value of their work is better known, enabling them to more fairly share in the resulting rewards. That potential is subverted where rightsholders are permitted to procure the post-reversion period of rights via the initial contract, as we saw in the context of the UK and US rights. Similar attempts at undermining have been documented in Spain, where publishers have allegedly tried to get around the statutory 15-year limit on publishing contracts via the inclusion of automatic renewal clauses.[22]

Such blatant attempts to avoid reversion's author-protective intent should obviously be prohibited. However, care should be taken not to be too rigid lest that interfere with investments in fresh exploitations. For example, an inalienable right to reclaim rights 20 years after transfer could potentially deter rightsholders from making new investments near the end of the term. Such undesirable consequences can be avoided by simply allowing the parties to terminate the original contract by mutual agreement, replacing it with a new one that restarts the time clock. These are precisely the kind of renegotiations that stronger reversion rights should seek to achieve: those that will elicit revisions that incentivise new investments of the kind that will promote access and enable the original creator to share fairly in their work's value. So long as those fresh deals also contain time limits to appropriately provoke further renegotiations, they should be encouraged.

6.1.6.1.3 ALIENABILITY POST-DEATH. Since copyright lasts long after death, measures restricting alienability raise questions about how to determine the disposition of those rights once the author has passed. There are two main approaches. The first permits the creator to decide who inherits, creating an exception to the inalienability of those rights in order to respect their testamentary freedom. The second enshrines inalienability by prescribing those who inherit independent of the creator's testamentary wishes.

The US termination scheme has adopted the second approach, prescribing statutory heirs of the termination rights. As we saw in Chapter 3, where the testamentary heirs of the copyright are different to the statutory heirs of the termination right, disputes sometimes emerge. Do renegotiated deals that re-start the termination clock undermine the inalienability of those rights?[23]

The issue remains unsettled at US law, but in our view the more important question is *who* should have the right to decide who will benefit from reversion rights that don't accrue until after an author's death. Since reversion rights are

[21] EU DSM Directive, art 20(1).
[22] See Chapter 4, Section 4.2.2.3.
[23] See Chapter 3, Section 3.2.3.

predominantly about protecting the interests of creators, we see no reason why they should not be able to choose the beneficiary of their reversion rights in the same way as they can choose the beneficiary of their copyright rights. Any concern that this could lead to undermining (by, for example, rightsholders obliging artists to will reversionary interests to them or a related entity) could be addressed via statutory provision for testamentary dispositions to be set aside where there is evidence of subversionary intent.

6.1.6.2 Protections against International Subversion

6.1.6.2.1 CHOICE OF LAW AND CHOICE OF FORUM CLAUSES MAY DEPRIVE CREATORS OF RIGHTS. The cross-jurisdictional nature of many creative markets (e.g. recordings, music publishing, books) means exploitation contracts will often cover many jurisdictions and specify the laws that will govern those contracts (choice of law), as well as where any resulting disputes will be adjudicated (choice of forum).

Rightsholders can use, and have used such clauses to avoid the operation of one country's reversion rights elsewhere. The *Gloucester Place Music v Le Bon* case pitting Duran Duran against its music publisher is the most famous example. As we saw in Chapter 3, the contract at issue involved a worldwide assignment of song rights, and specified it was to be governed by English law and adjudicated by English courts. The music publisher secured a finding that Duran Duran's exercise of statutory US termination rights would be a breach of English contract law.[24]

Allowing such clauses to dictate the applicable law can deprive creators of the benefits lawmakers intended them to have when crafting domestic reversion provisions. It can also exacerbate existing inequalities between the parties if the contract is governed by the laws of a country the author is unfamiliar with, as they may struggle to understand the language, legal system, and/or engage effective representation.

Unfortunately, this case was decided without the parties putting the choice of law question into controversy – a different outcome may have resulted if it had been.[25] Choice-of-law and choice of forum clauses are not always definitive. Courts may apply private international law rules to say the governing law is other than what the contract says. Private international law rules provide that if an issue relates to copyright law, it will be dealt with under the laws of the country where the work is exploited (*lex protectionis*).[26] But if it relates to the law of contract (*lex contractus*),

[24] See Chapter 3, Section 3.2.3.3.2.

[25] See Richard Arnold and Jane C Ginsburg, 'Foreign Contracts and U.S. Copyright Termination Rights: What Law Applies?' (2020) 43 *Columbia Journal of Law & the Arts* 437, 449.

[26] Jane C Ginsburg and Pierre Sirinelli, *Private International Law Aspects of Authors' Contracts: The Dutch and French Examples* (2015) 39 *Columbia Journal of Law & the Arts* 171, 177; Jane C Ginsburg, 'The Author as Revenue Sharer: Lecture in Memory of William R. Cornish' (2023) 18(11) *Journal of Intellectual Property Law & Practice* 787, 791.

it is dealt with either under the law of the country set out in the contract, or 'the law of the country in which the contractual relationship is localized.'[27] This means the contract between Duran Duran and Gloucester Place Music might have said it was governed under the laws of England, but a court may still have applied US law if they characterised the termination issue to be one about copyright.

It is not always clear when an issue stops being about copyright and starts being about contract.[28] Ginsburg and Sirinelli have expressed concern that rightsholders may incorporate choice-of-forum clauses for disputes to be heard by courts in jurisdictions most likely to characterise those disputes as being about the contract.[29] That would make choice-of-law clauses likelier to prevail, allowing rightsholders to rely on them to subvert domestic reversion mechanisms.

6.1.6.2.2 EXPLICIT GUARDING AGAINST INTERNATIONAL UNDERMINING. There are various ways to design reversion mechanisms against international subversion. This includes via explicit reference to such intention, which might influence interpretations of foreign courts. For example, the DSM Directive requires Articles 19–21 (though not Article 22) to be made mandatory, and for contractual clauses designating as applicable the law of a state other than that Member State to 'not prejudice the application' of those provisions.[30] The Netherlands has applied this protection to reversion as well, however, explicitly asserting that its domestic use-it-or-lose-it right will apply even if a choice-of-law clause exists in an exploitation contract applying the law of another jurisdiction to the dispute.[31] The requirement for this protection is that the contract would have been governed by Dutch law in the absence of that clause, or the exploitation does, or should, take place 'predominantly' or entirely in the Netherlands.[32]

6.1.6.2.3 USE DOMESTIC LAW TO LIMIT THE POTENTIAL SCOPE OF ASSIGNMENTS. Another way to minimise the risk of subversion is to design rights in ways that make it clear that creators *cannot* assign certain reversionary interests via contracts. In Chapter 3, we saw an example of this in the Second Circuit's interpretation of the existing US termination law in the *Morricone* case, involving a licence agreement the parties had agreed was governed by Italian law.[33] While the music publishing rights at issue had been transferred for the maximum permissible duration in each country worldwide, the Second Circuit ruled that the scope of the US grant was subject to the termination right, and thus did not include any copyright

[27] Ginsburg and Sirinelli (n 26) 177; Ginsburg (n 26) 791.
[28] Ginsburg and Sirinelli (n 26) 177–8.
[29] Ibid 178.
[30] EU DSM Directive, recital 81; see art 23(1).
[31] *Copyright Contract Act* (the Netherlands) art 25h(2).
[32] Ibid.
[33] See Chapter 3, Section 3.2.3.3.3.

that would revert to the creator after exercising them.[34] Effectively, Morricone could not license any more than 35 years of protection, because that was all US law gave him to give.

This suggests that policymakers could minimise subversion by clarifying that copyright assignments or licences under the relevant domestic law do *not* include reversionary interests. They could also specify, to the extent possible in domestic law, that their statutory reversion mechanisms are 'overriding mandatory provisions' which other domestic courts must give effect to under the Rome I Regulation (an international treaty governing choice of law among other contract law issues).[35]

6.1.6.2.4 INTERNATIONAL TREATY REFORM. While the above tactics could help counter the threat of international subversion of domestic reversion mechanisms, there are limits to what any one country can do to influence the application of foreign law, or adjudications by foreign courts. Given the limits of domestic policymaking, in the event that international subversion of domestic reversion rights were to become prevalent, it may be appropriate to deal with it via international treaty.

6.1.7 *Principle 7: Reversion Mechanisms Should Incorporate Appropriate Carveouts*

Rights reversion isn't appropriate for all works, or all circumstances. While it's important to prevent rights from being subverted, it's equally important to ensure that those rights are appropriately scoped in the first place. This exercise can be tricky. Overbroad carveouts can remove much of the value a reversion right could generate (as we saw from the US's disastrously broad and uncertain work-for-hire exceptions), but framing them too narrowly can result in collateral damage too – for example, if that prospect would make it unfeasible to invest in works being created at all. This makes deciding on appropriate carveouts one of the most important aspects of reversion mechanism design. What's appropriate will differ by jurisdiction and context, but here we flag the carveouts that have proved most controversial in the jurisdictions we've focused on in our research: those covering works made in the course of employment, derivative works and collective works.

[34] Ibid.

[35] See further Graeme W Austin, 'Authors' Human Rights and Copyright Policy' (2017) 40(4) *Columbia Journal of Law & the Arts* 405, 425–9; Arnold and Ginsburg (n 25) 450; Regulation (EC) No 593/2008 of the European Parliament and of the council of 17 June 2008 on the law applicable to contractual obligations (Rome I). This would only be possible for contracts executed after 17 December 2009: art 28. According to art 9(1): 'Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.'

6.1.7.1 Works Made in the Course of Employment

In what circumstances should works made in the course of their employment revert back to employees? The US termination law says the answer is none – and indeed, designates the employer as the legal author of its employees' works.[36] Canada's approach is slightly different, as Heald points out: 'only works created by people who look like employees are ineligible for reversion'.[37] And European nations, as we saw in Chapter 4, take a variety of approaches, including sometimes allowing employees to reclaim rights unless their employment contracts explicitly provide elsewise.[38]

While these three examples sit at varying points on the spectrum, they all recognise the importance of allowing employers to hold onto the rights of works created by employees in the course of their employment.

There are several justifications for this special treatment. Employee-created copyrighted material is made in exchange for salary and other benefits, commonly at the direction of their managers, which shows its originators have less claim to an ongoing interest than creators who develop work on their own behalf (and bear the risk that it won't pay off). Additionally, if employees could reclaim their rights, it could lead to similar problems to those affecting derivative works and collective works (discussed below), in terms of holdups, uncertainty and increased transaction costs. The risk of reversion might make it unfeasible for the business to invest in the initial creation of that work in the first place.

These arguments have merit. We note, however, that it's vital to frame employment carveouts in ways that don't leave them open to unfair manipulations by rightsholders – like the practice of US record labels to designate artists as employees exclusively for the purpose of the copyright ownership clause, without giving them the pay or conditions that usually accompany that status.[39]

In recognition of the ongoing link that can exist between creators and their outputs, we suggest that policymakers also consider including provisions that could allow employee creators to claim at least some rights, in appropriate cases. In this context, a partial reversion might sometimes be sufficient to achieve the desired ends while striking an appropriate balance of interests – for example, by granting the employee a right to a non-exclusive licence over uses that do not undermine the business purpose.

[36] 17 USC § 101.

[37] Paul J Heald, 'The Impact of Implementing a 25-Year Reversion/Termination Right in Canada' (2021) 28(1) *Journal of Intellectual Property Law* 63, 91.

[38] See Chapter 4, Section 4.2.2.2.3.

[39] Donald C Farber (ed), *Entertainment Industry Contracts: Negotiating and Drafting Guide* (LexisNexis, 2024) form 159-3, cl 4; see also Alexander Lindey and Michael Landau, *Lindey on Entertainment, Publishing and the Arts* (Thomson Reuters, 2024-1 ed) § 9:39, cl 5(c) ('employer for hire').

Works that are specially commissioned may also be inappropriate subjects of reversion even outside the employment context, particularly where the commissioner has exercised a high degree of control over the output, a particularly personal connection (as may be the case for wedding photographs, for example), or where the possibility of reversion would unjustifiably undermine the purpose of the commission. Yuvaraj has argued elsewhere that it may be appropriate to exclude such works from reversion *if* the rightsholder exercises discretion and control over the final product in a way that mirrors the employment relationship *and* the creator has been appropriately compensated for their labour.[40]

6.1.7.2 Derivative Works

Works derived from existing copyrighted works (called 'derivative works' in the US context) need particularly careful treatment – Heald describes 'the question of how to treat the status of a properly licensed derivative work after reversion' as '[o]ne of the most bedeviling problems associated with any rights reversion system'.[41] Consider *The Witcher*, for example. This was originally a series of books and short stories written by the Polish author Andrzej Sapkowski; that source material has now been translated into 37 languages, been the subject of one film and two television adaptations, and spawned both a comic book series and a wildly successful video game.[42] That's a lot of new creativity derived from Sapkowski's original work!

If Sapkowski had an untrammelled ability to reclaim his rights over the source material, there is a risk that he might 'hold-up' those subsequent licensees for an unreasonable share of revenue, potentially making it impossible for the creators of that subsequent creativity to continue to benefit from it, as well as blocking continued public access. That risk could disincentivise investment in the creation of such derivative works in the first place, with similarly deleterious impacts.[43]

The US responded to these risks by carving derivative works out of its termination law entirely – no new derivative works can be made post-termination, but existing ones can continue to be exploited. However, that risks harming the original creator, who might as a result never be able to renegotiate their original contract, no matter how unbalanced that may have been.

We recommend that policymakers consider more nuanced approaches in order to more appropriately balance the interests of creators of 'base' works (to be able to renegotiate grants in order to more fairly share in the value created by their work),

[40] 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) 161–3.

[41] Heald (n 37) 88.

[42] 'The Witcher', *Wikipedia* <https://en.wikipedia.org/wiki/The_Witcher>.

[43] Jill I Prater, 'When Museums Act like Gift Shops: The Discordant Derivative Works Exception to the Termination Clause' (1996) 17 *Loyola of Los Angeles Entertainment Law Review* 97, 105–6.

creators of derivative works (to encourage investments in their creation, and share in the associated rewards), and the public (to enjoy ongoing access).

One way of doing so might be to couple any exception permitting the post-reversion use of derivative works with robust fair remuneration rights.[44] This would eliminate the possibility of destructive and wasteful hold-ups, whilst enabling original creators to renegotiate their royalties where it's appropriate to do so.

6.1.7.3 Collective Works

The final controversial carveout we flag concerns application of reversion rights to collective works, by which we mean works that incorporate distinct works by multiple different authors.

The individual contributions that make up collective works often have their own copyrights, but there can additionally be a copyright in the compilation itself, first owned by whoever selected and arranged the material. The critical question is whether individual contributors should be able to withdraw their rights to contributions to larger projects.

This was one of the major controversies during development of the US termination law, as we saw in Chapter 3. Encyclopaedia and textbook publishers were particularly vocal in arguing against their having any ability to do so, and their arguments had merit. Such works can have contributions from a vast number of authors at different points in time, and the prospect of having to untangle and replace them might threaten the viability of the overall work. Permitting authors to withdraw such contributions could create the same kind of hold-ups as are feared in the context of derivative works. That could harm all three of copyright's core aims, by threatening necessary to elicit the initial investment, but also risk public access and put into doubt the ability of other contributors to ongoing rewards for the other contributors.

Carveouts need to be crafted in ways that guard against that kind of collateral damage. However, the US experience also warns policymakers to cabin them carefully, lest exceptions designed to protect against the circumstances described above get co-opted by rightsholders to exclude works that have no such considerations – such as the record labels who try to prevent artists from reclaiming rights to albums, by characterising them as compilations. As discussed in Chapter 3, the carveouts from the US termination right introduced a number of uncertainties and ambiguities, including around collective works, that have had the practical effect of

[44] See, e.g., EU DSM Directive, art 20. 'Bestseller' clauses and fair remuneration are also important elements in the battle against copyright's broken bargain, but they are beyond the scope of this book to discuss. For further research on these types of clauses, see, e.g., Dirk JG Visser, 'Dutch Copyright Contract Law' in Simon Geiregat and Hendrik Vanhees (eds), *Copyright Contracts Tomorrow* (LeA Uitgevers, 2023) 31–3; Anikó Grad-Gyenge, 'The Renewed Bestseller Clause of the Copyright Act' (2022) 18(1) *European Integration Studies* 93.

stripping away much of the law's intended value for creators. Designing rights with an emphasis on certainty (Principle 5) and ensuring they're readily updatable in case any ambiguities nonetheless come to light (Principle 4) would help safeguard against such problems.

6.1.8 *Principle 8: Reversion Mechanisms Should Promote Enforceability*

The value of any right depends on its ability to be enforced. As we've seen, creators face particular challenges enforcing rights against their investment partners, with high costs and fears about retribution both acting as significant deterrents. These issues need to be taken seriously: even the most carefully scoped reversion rights cannot achieve their potential if enforcement barriers keep their intended benefits theoretical, rather than actual.

6.1.8.1 Reversion Should Be Available at the Lowest Possible Cost

We've seen that most works depreciate quickly, and that even where rights continue to have commercial value, it might not be substantial. Thus, for a reversion regime to successfully promote the exploitation of such rights, it needs to free them up as cheaply as possible.

In this regard the US once again provides an example of what not to do: the complexity and uncertainty of its regime makes it difficult to navigate without professional advice, which can be costly, and the high fees charged on top of that put it out of reach of many creators. The latter can be particularly problematic for fields such as photography and music, where creators may generate high numbers of works.

Of course, the exercise of rights does need to follow some appropriate procedure – for example, requiring some form of notice containing necessary details identifying the creator, rightsholder, work and the entitlement to revert – but this does not have to be expensive. It's possible to create fair, clear rules that can be applied at a low cost, particularly where these are developed for specific industries rather than attempting to fit all potential cases. The US is an outlier in making reversion subject to any fee at all, and it could be avoided via procedures that either bypass any central registry or provide for the costs of any such service to be covered from other sources.

The adoption of updatable 'living rights', discussed at Principle 4, can further aid enforcement by providing a mechanism for clarifying uncertainties, and ensuring those updated rules apply even to pre-existing contracts. That's attractive, given the extent to which uncertainty can interfere with creators' ability to actually exercise their rights (discussed at Principle 5). By ensuring all agreements within a particular industry were governed by the same rules, such an approach could also welcomely reduce the cost of expert advice.

European nations have created their own disincentives to enforcement, notably via mechanisms that require judicial intervention for reversion to take place.[45] Such approaches unnecessarily raise costs whilst also exacerbating creator fears of retaliation (discussed further below), and should be avoided. Third party interventions should be required only where there is some dispute between the parties, for example as to whether the reversion trigger has been met in a given case.

Where disputes do arise, consideration should be given to providing creators with low-cost enforcement options for resolving them. That's important because traditional litigation's high costs and potential liability for the other party's costs put it out of reach for most.[46] The EU went some way towards recognising that reality via Article 21 of the DSM Directive, which requires Member States to provide 'voluntary' alternative dispute resolution ('ADR') procedures for disagreements concerning Article 19's transparency right and Article 20's right for creators to obtain additional remuneration should existing arrangements not reflect the subsequent success of their work. While they did not mandate availability of ADR for disputes arising from the Article 22 reversion right, it's easy to see how it might help. For example, should it *really* be necessary for there to be some independent imprimatur before rights revert, perhaps because a rightsholder disagrees that the trigger is satisfied, ADR processes could provide an appropriately low-cost way of getting it.

The ADR processes giving effect to Article 21 vary by nation. For instance, some EU Member States have simply said this can be a mediator or arbitrator as regulated in their national law,[47] while others have used existing general or IP-specific alternative dispute resolution mechanisms.[48] That is another reminder of the importance of tailoring rights to their specific legal and cultural context. Having

[45] See Chapter 4, Section 4.3.1.4.

[46] For discussions of the time and cost of litigation, see, e.g., Tania Sourdin and Naomi Burstyner, 'Justice Delayed Is Justice Denied' (2014) 4(1) *Victoria University Law and Justice Journal* 46; Charles Silver, 'Does Civil Justice Cost Too Much?' (2002) 80(7) *Texas Law Review* 2073; Satu Saarensola, 'The Risk of Legal Costs and Its Effects on Access to Court' in Laura Ervo and Anna Nylund (eds), *The Future of Civil Litigation: Access to Courts and Court-annexed Mediation in the Nordic Countries* (Springer, 2014); Noel Semple, 'The Cost of Seeking Civil Justice in Canada' (2015) 93(3) *Canadian Bar Review* 639. The existence and impact of costs provisions varies widely by country, but see, e.g., Erik S Knutsen, 'The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada' (2010) 36(1) *Queen's Law Journal* 113.

[47] European Union (Copyright and Related Rights in the Digital Single Market) Regulations 2021, rr 27(9); 28(5) (Ireland); 180–1, Legea nr. 8 din 14 martie 1996 privind dreptul de autor şi drepturile conexe Publicat în Monitorul Oficial nr. 489 din 14 iunie 2018 (Law no 8 of 14 March 1996 on copyright and related rights (Romania)) art 48; Ula Furgal, 'Creator Contracts: Report on the Implementation of Chapter 3 of the Directive on Copyright in the Digital Single Market', Report for the European Composer & Songwriter Alliance (June 2022) 19 <https://composeralliance.org/media/721-creator-contracts-report-on-the-implementation-of-chapter-3-of-the-directi.pdf>.

[48] Furgal (n 47).

said that, however, there are a few principles that policymakers everywhere may find useful to take into account in order to help achieve the desired outcomes.

For one thing, consideration should be given to ensuring those procedures have open justice, rather than confidentiality. Doing so upholds the integrity of the process and lets others learn from past decisions, thus promoting 'certainty and predictability'[49] and potentially reducing the enforcement costs for future cases. Consideration should also be given to offering ADR to creators as an option, not a mandate, allowing them to pursue recourse via courts should they wish to do so.[50]

Increasing the scope of ADR powers beyond resolving disputes could also be considered as a way of improving the creator-investor balance. For example, ADR bodies could be granted the power to ban certain terms in exploitation contracts or declare them unenforceable, as courts in Australia and New Zealand can do for unfair standard form contract terms.[51] Such powers could trigger meaningful change across entire creative industries at relatively little cost – and the very fact of their existence could potentially discipline rightsholders against abuses.

6.1.8.2 Reversion Frameworks Should Reduce Retaliatory Potential

The bigger enforcement challenge is to design reversion rights in ways that ameliorate creator fears that exercising their rights could lead to retaliation.

As explained previously, such concerns are greatest in relation to rights that are intended to benefit creators within their working lives, since that's when potential loss of deals or support will cut deepest. Those (well-founded![52]) concerns are created by the same factors that make it difficult for creators to negotiate fair terms in the first place, including the oversupply and desirability of creative labour and the lack of potential buyers that comes from excessive market concentration.

There are any number of ways of reducing the risk of retaliation, and what's most appropriate will of course differ by industry and jurisdiction. However, we offer the following ideas by way of inspiration.

Retaliation is less likely where there is widespread acceptance of the legitimacy and fairness of rights, as well as awareness of their existence and scope. One way of promoting this is by using collective agreements to determine them in the first place,

[49] Sundaresh Menon, 'Arbitration's Blade: International Arbitration and the Rule of Law' (2021) 38(1) *Journal of International Arbitration* 1, 11.

[50] EU DSM Directive, recital 79. Arbitration agreements can attempt to bar parties' rights to seek recourse via the court system, though courts may also find such provisions invalid: see, e.g., *Heller v Uber Technologies* 2020 SCC 16, discussed in Jodi Gardner, 'Being Conscious of Unconscionability in Modern Times: *Heller v Uber Technologies*' (2021) 84(4) *Modern Law Review* 874.

[51] See, e.g., *Competition and Consumer Act 2010* (Cth) Schedule 2, ss 23–28A; *Fair Trading Act 1986* (NZ) ss 26A–26E.

[52] See Chapter 5, Section 5.3.1.

as per the French example. Express prohibitions on retaliatory practices would also help.

Giving creator representatives such as unions the right to take enforcement action could also help achieve the desired outcomes with less risk to individual authors. This may have been the inspiration for the mandate in Article 21 of the DSM Directive that representative organisations be able to initiate proceedings on behalf of authors and performers. Such intermediaries don't have the same vulnerabilities as individuals, so allowing them to take the driver's seat on enforcement reduces the scope for retaliation, particularly if they are given the power to challenge practices on behalf of a class rather than specific individuals.

Policymakers can also help by introducing measures aimed at normalising reversion. As the practice grows more common, it follows that retaliation would become increasingly administratively costly and less well tolerated. New markets would also likely emerge to exploit freed-up rights, giving creators additional options and greater confidence that it's safe to exercise their rights. Accompanying reversion rights with investments intended to encourage such markets – for example, in the form of public initiatives to fund republication of culturally important works, analogous to the Untapped project but on a larger scale – could welcomely accelerate this process. Awareness-raising campaigns could also assist, though the extent to which they'll successfully reach creators depends on the degree to which rights are likely to provide them with any meaningful benefit.

Another option is to make reversion automatic, rather than creator-initiated, thereby ensuring no individual has done anything for which they would need to fear retaliation. However, care must be taken to ensure that automatic reversion does not interfere with copyright's aim of promoting ongoing access – something that may easily occur if authors or their heirs are not aware that they now control the rights, or if they are unwilling or unable to appropriately exploit them. Canada's law automatically reverting rights to heirs 25 years after the author's death has been validly criticised for leading to precisely such outcomes, as has the prospective South African law that will automatically revert rights 25 years after transfer.[53]

This does not mean automatic reversion should be ruled out – simply that any such mechanisms need to be accompanied by appropriate safeguards. In the following section, we sketch one radical proposal for a time-based reversion right that would not only avoid the potential for orphaning, but generate additional rewards to support new creativity in the process.

6.2 A FINAL PROVOCATION

The best practice principles set out above are intended to act as prompts to help guide policymakers and advocates in their thinking about how they might craft

[53] See Chapter 2, Section 2.6.2.

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bespoke reversion mechanisms that are well suited to their local conditions and which re-write the copyright bargain to benefit creators, investors and the public alike.

As we bring this book to a close, though, we wanted to leave you with a more detailed and provocative vision of what a reversion mechanism implementing some of these principles might actually look like – a radical upending of traditional thinking around copyright ownership that would maintain incentives for initial investment, improve access to knowledge and culture *and* generate new income for creators, all within the existing treaty framework. It is drawn from Giblin's previous theoretical work, and those interested in diving deeper can find all the eye-watering detail there.[54] In these final pages though, we provide just an outline, with the intent of encouraging you to dream about the kind of system we *could* have if we got serious about designing copyright to better achieve its aims.

6.2.1 *Revert Rights Automatically after 25 Years*

Imagine if rights over most works – think books, music, sound recordings and visual art – boomeranged back to their creators automatically, after a specific period of time. As described above, the most appropriate time period would differ by industry, but empirical modelling clearly demonstrates that 25 years at the outside would amply incentivise even the most lavish investments in initial production and distribution.[55]

At that point rights would return to the market, giving creators the opportunity to re-negotiate deals with the original investors or seek new exploitation avenues. That could spur the original rightsholder to give works a fresh promotional push, or propose a new royalty split that reflects its lower level of investment. Since the rights for so many works would be potentially up for grabs, it would encourage investors to develop with new business models to serve them.

Where works still had meaningful value by this time, such a mechanism would give creators an opportunity to ensure they share fairly in it. The recording artists signed to 4 per cent royalty rates in the 1970s would have been able to re-negotiate rates above 10 per cent after the first 25 years, and to at least 25 per cent the next renegotiation after that, consistent with the deals new acts were securing at those times. That would have translated to the biggest labels having less of a profit edge, giving them less capacity to buy up distressed competitors, and less to spend on rent-seeking. It would also have created the conditions for greater competition: new investors could compete for valuable catalogue by demonstrating their ability

[54] Rebecca Giblin, 'A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid' (2018) 41(3) *Columbia Journal of Law & the Arts* 369; Rebecca Giblin, 'A Future of International Copyright? Berne and the Front Door Out' in Megan Richardson et al (eds), *Across Intellectual Property* (Cambridge University Press, 2020).

[55] See Chapter 1, Section 1.1.4.1. See also more detailed analysis in Giblin (n 54) 374–7.

to do a better job. Even before the termination took place, the knowledge that it was *coming* could do much to discipline rightsholders into treating their artists fairly, so they would want to sign for another term. All this would promote a healthier balance of power between creators and the investors they rely upon to get their works to market.

6.2.2 *Getting Creators Paid* by *Promoting Access to Culture*

Making reversion automatic would turbocharge the pace of change, and reduce creator fears that taking action to reclaim their rights could provoke retaliation. But it creates the risk of actually becoming less available to the public, which could easily happen if rights went to authors or heirs without their knowledge, or to those who weren't willing and able to exploit them. Safeguards are necessary to prevent that from happening.

Throughout this book we've been focused on two core failings of copyright: the fact that despite having used the moral claims of authors to justify its expansion for decades, it doesn't do a very good job of getting them paid; and second, that current approaches very often cause cultural value to be lost. This latter is partly driven by a collective action problem: the threshold for copyright is so low that the overwhelming majority of works are not individually valuable enough for their owners to exploit, but cumulatively the lost value to society from copyrights that outlast their owners' interest is enormous. In other words then, there's not enough money, and there's money being left on the table. What if we used one problem to help solve the other?

This framing evokes Victor Hugo's idea of a domaine public payant. Hugo argued that publishers should have an obligation to share revenues from out-of-copyright books with authors' heirs. Interestingly though, he didn't think they should go to an authors' blood heirs (at least not beyond a single generation), but rather their 'heirs of the spirit' – new generations of writers who needed support to write and get established.[56] Some of the proceeds from their own works could then, in turn, nourish future generations of writers.

What if we were to take inspiration from Hugo, and design reversion rights in a way that not only eliminated the potential for orphaning, but generated new revenue to directly support authors at the same time?

We could achieve this by asking creators to register ongoing interest in their copyrights as the time for reversion comes near (see Giblin's work elsewhere for a detailed analysis of how this can be achieved while complying with international treaty prohibitions on formalities[57]). If they didn't do so, the rights could be held on

[56] See Victor Hugo, *Actes et Paroles Depuis L'exil 1876–1880* (J Hetzel and Cie – Maison Quantin eds, 1889) 99–104.

[57] Giblin (n 54).

trust by a cultural steward, tasked with the dual mission of generating revenues while also promoting widespread availability and access.

What kind of access might be enabled by such a system? Books could be bulk-licensed to universities, schools and libraries. New investments could be made into making them available in digital and audiobook formats. Museums and galleries could open up access to swathes of art and culture. Lost video games could be made available again. Creators could license forgotten songs, news snippets and postcards to remix them into new forms of creativity. Documentary filmmakers would have new troves of material to draw upon. And recordings of culturally iconic sporting moments might no longer be locked away in broadcaster archives: they could be re-released and re-marketed to stimulate youth participation in those sports.[58]

But the real beauty of such a scheme is that it would generate new revenue that is currently being left untapped, which could be used to benefit authors generally – Hugo's 'heirs of the spirit'. It could be distributed via initiatives such as fellowships, grants, pensions and prizes, securing more rewards to creators and providing the resources to fund new creativity. Of course (as Giblin elaborates elsewhere[59]) it would be vital to get the governance right, and there would need to be mechanisms permitting creators to appropriately reclaim rights they'd previously not registered. Assuming appropriate attention is given to such logistics, however, this provocation shows how a much more radical approach to reversion could help get creators paid *by* reclaiming lost cultural value.

6.3 REVERSION, RE-ENVISIONED

Our goal with this book has been to raise awareness of reversion's potential to help copyright better achieve its aims, and identify the considerations key to designing rights that can succeed in doing so. The automatic time-based approach presented above is just one way reversion could help recover lost culture and secure greater rewards for creators. If it excites you, we encourage you to dream even bigger by thinking about how such a system could be tailored to different industries, cultures and legal systems, and how time-based rights might be supplemented by similarly bold use-it-or-lose-it rights to help creators and the public get more of what they need.

Our Western bias means the lessons in this book are most readily applicable to jurisdictions such as the US, UK, EU and Australia. But they can also be integrated more widely as long as policymakers appropriately contextualise them to address the issues they face in their own countries.

[58] As a devoted Australian rugby fan, Yuvaraj dreams of the day historical Wallabies content is freely and fully available on streaming platforms to encourage greater youth participation and public interest in 'the game they play in heaven'.

[59] See Giblin (n 54) 396–411 for a much more detailed exploration of the mechanics such a scheme might involve.

Further research would help to ensure that any new rights have the best chance of achieving their aims. We would particularly welcome new empirical evaluations comparing the effects of 'no exploitation' vs 'inadequate exploitation' thresholds for EU use-based reversion laws, as well as investigations exploring creator perspectives about how to make reversion rights maximally useful (in terms of development process, scope and enforcement) across different creative sectors. If we are correct in our hypothesis that the DSM Directive's Article 22 will do little to shift the needle in favour of creators, such work would usefully inform the planned 2026 review of the DSM Directive, giving lawmakers a fresh opportunity to get it right.[60]

We are also intrigued by the potential for using rights reversion as a tool for improving enforceability of other creator-protective rights. Recall that the EU Parliament's initial proposal for the DSM Directive would have allowed authors and performers to reclaim rights for failure to comply with the transparency obligation that became Article 19.[61] While this was deleted for reasons that weren't made public,[62] it could have provided a powerful incentive for rightsholders to comply with those obligations. Transparency is just one of the additional triggers that could be considered: the Industry, Research and Energy Committee of the European Parliament recommended including others, too, such as a lack of reporting, inadequate promotion and non-payment.[63] While making the case for any specific trigger is outside this book's scope, we encourage consideration of how rights reversion could incentivise rightsholders to comply with their broader contractual and statutory obligations to creators as well.

Anything that cannot last forever must eventually end. When we finally reach the tipping point, and are ready to demand that the copyright bargain be rebalanced to give creators and the public more of what they need, reversion gives us pathways to do so.

[60] EU DSM Directive, art 30(1).
[61] See Chapter 4, Section 4.4.1.
[62] See Chapter 4, Section 4.4.3.
[63] Ibid.