REVERSION OF COPYRIGHT IN EUROPE

A *EUROPEAN INTELLECTUAL PROPERTY REVIEW* TRIPLE BILL

GETTING CREATORS PAID: ONE MORE CHANCE FOR COPYRIGHT LAW

MARTIN KRETSCHMER
REBECCA GIBLIN

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ELENA COOPER

CREATe Working Paper 2021/5

CREATe

Getting creators paid: one more chance for copyright law

Martin Kretschmer and Rebecca Giblin*

Published in European Intellectual Property Review (E.I.P.R.) 2021, 43(5), 279-282

Abstract

This opinion argues that copyright law must benefit creation. Rights reversion to primary creators, in particular if works are not sufficiently used, is an under-appreciated tool to achieve this aim. Rights will be held where works can be put to their most productive use. Warehousing of copyright assets is discouraged. This opinion introduces an Open Letter signed by a group of leading academics in the context of the implementation of the Directive on Copyright in the Digital Single Market . The letter to the European Commission and the relevant authorities of EU Member States advocates taking the "right of revocation" under Article 22 seriously as a "use-it-or-lose-it" provision.

Copyright law is not in a good state. There are deep ideological divisions and anxieties about digital change. The term of protection is far too long, distributing moneys from the living to the dead, causing culture to be lost and cementing the position of incumbent firms. This is not to deny that rights are economically valuable or that current arrangements work for some creators. Why would there be lobbying over something that does not produce returns? But mostly, the key beneficiaries are not authors, performers nor society as a whole.

The evidence is uncomfortable but there for all to see.[1] In the global struggle between technology giants and large right holders, primary creators are being squashed. Is it possible to re-conceive

* Martin Kretschmer is Professor of Intellectual Property Law and Director of the UK Copyright and Creative Economy Centre (CREATe), University of Glasgow; Rebecca Giblin is Associate Professor and Director, Intellectual Property Research Institute of Australia (IPRIA), University of Melbourne. The research for this special section has received funding from Prof. Rebecca Giblin's ARC Future Fellowship (The Author's Interest Project, FT170100011); the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626870626 ("reCreating Europe: Rethinking digital copyright law for a culturally diverse, accessible, creative Europe", WP3 Authors and Performers, D3.1: Dr Ula Furgał and Prof. Martin Kretschmer).

[1] The AHRC supported Copyright Evidence portal seeks to catalogue transparently all available empirical evidence relating to copyright law. The authors serve on the editorial board. As of 2021, more than 800

copyright law, returning to its underlying aims to reward authors and performers, and encourage creative production and use? The orthodox view holds that it is impossible to achieve fundamental change. The international framework of conventions and trade agreements is simply too rigid.

The alternatives are not pretty. In a dystopian future, the edifice of copyright law may collapse altogether, or even more disturbingly, rights will fall eventually into the hands of tech giants. So, is our only choice to "burn Berne" or to live under "surveillance capitalism", tracking forever the most valuable "catalogues of rights"?

One of the most promising ideas for re-imagining copyright law, within the current boundaries, is to return rights to the sources of creative production, particularly in cases where they are not being exploited.[2] Independently, our research programmes associated with The Author's Interest project[3] and the CREATe Centre at the University of Glasgow[4] have foregrounded the role of primary creators and primary producers as the drivers of innovation. Rather than encouraging the accumulation and warehousing of rights, rights should sit where they can be put to most productive use.

In the EU, there is currently what we term an "historic opportunity" to give life to and test such "use-it-or-lose-it" rights. The concept builds on an important set of provisions in Chapter 3 ("Fair remuneration in exploitation contracts of authors and performers") of the Directive on Copyright in the Digital Single Market (CDSM Directive).[5] Article 18 establishes a principle of appropriate and proportionate remuneration. Articles 19, 20 and 21 create transparency obligations and procedures for contract adjustment. Article 22 mandates a right of revocation.

In this special section of E.I.P.R., we have assembled three contributions that may help to shape this debate. First, we reproduce an Open Letter to the European Commission and the relevant authorities of Member States of the EU, signed by a group of leading copyright academics. Here we ask that the revocation right is explicitly considered in the ongoing national implementations

studies can be visualised and text-and-data-mined. See Copyright Evidence webpage available at: https://www.copyrightevidence.org/ [Accessed 10 March 2021].

[2] Rebecca Giblin and Kimberlee Weatherall (eds), What if we could reimagine copyright? (2017), ANU Press available at: https://press.anu.edu.au/publications/what-if-we-could-reimagine-copyright; Martin Kretschmer, "Copyright Term Reversion and the 'Use-it-or-lose-it' Principle" (2012) 1 International Journal of Music Business Research 44, SSRN available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2063759 [Both accessed 11 March 2021].

[3] The Author's Interest project resource page is available at: https://authorsinterest.org/ [Accessed 11 March 2021].

[4] Projects of the CREATe centre are on the CREATe webpage available at: https://www.create.ac.uk/ [Accessed 11 March 2021].

[5] Directive 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9 and 2001/29 [2019] OJ L130/92.

of the Digital Single Market Directive and that the Commission investigates the effects of revocation.

Then follow two important original contributions. Ula Furgał presents the results of a comprehensive mapping of rights reversion provisions in EU Member States, including provisions that are no longer in force. Furgał shows that European jurisdictions tend to prefer use-based to time-based "triggers" (such as a termination right after a specific number of years). She also argues that there is a lack of understanding what sufficient exploitation means in the digital context. This should be addressed in implementing the CDSM Directive, for example, specifying meaningful use with respect to remuneration, promotion and findability of works, tailored to particular sectors.

Elena Cooper then offers a distinct historical perspective, uncovering the legislative history of reversion in the UK Copyright Act 1911, which also applied to the British Empire (and is therefore also part of the history of three EU Member States: Ireland, Malta and Cyprus).

Under the Act, copyright would automatically revert to the author's estate on the author's death, for the last 25 years of the copyright term as a non-exclusive entitlement to a 10% royalty on sale.[6]

The common law tradition of freedom of contract is shown to be compatible with constraints on contractual transfers. UK reversion provisions historically were a direct response to the significant increase in the copyright term in 1911 (to the author's life plus 50 years). It was a key question whether later in the term of copyright, the right to receive royalties should go to assignees (such as publishers) or benefit the author's interests. It is possible to understand reversion rights as an insurance against buyer power that may result in works being "withheld from the public" or priced "at a monopoly figure".

Going beyond the CDSM Directive, we believe that rights reversion should also be considered for contracts that independent primary producers conclude with large buyers. In fact, this is the constellation under which so-called "terms of trade" were approved by the UK Communications regulator Ofcom, under the 2003 Communications Act.[7] Terms of trade ensure

[6] Giblin and Yuvaraj have previously written about this provision in the E.I.P.R. as well as the spurious reasons for its removal. See Rebecca Giblin and Joshua Yuvaraj, "Why Were Commonwealth Reversionary Rights Abolished (and What Can We Learn Where They Remain)?" (2019) 41 E.I.P.R. 232.
[7] Communications Act 2003 s.285 (Code relating to programme commissioning).

that independent TV producers retain intellectual property rights in negotiations with public service broadcasters, enabling secondary exploitation in international markets.[8]

The contributions in this special section highlight rights reversion as a potentially powerful instrument for copyright reform. It cannot be that the increase in value from the prevalence of copyright materials on multiple digital channels only benefits the investors that buy up copyright assets.[9] Copyright law must benefit creation.

[8] Naysun Alae-Carew, "Intellectual Property and 'Terms of Trade': The Challenges for Entertainment Businesses in the Emerging Platform Economy", CREATe Working Paper 2020/05 (2020); Kenny Barr, Martin Kretschmer and Philip Schlesinger, "Public service broadcasting, streaming services and the future for 'terms of trade'" (2020), Response by the CREATe Centre to the Parliamentary Inquiry by the Digital, Culture, Media and Sport Committee, "The future of public service broadcasting" (2020) available at: https://www.create.ac.uk/blog/2020/06/19/public-service-broadcasting-streaming-services-and-the-future-for-terms-of-trade [Accessed 11 March 2021].

[9] Nic Fildes, "From Bob Dylan to Blondie—why investors are buying up hit songs" (11 December 2020), Financial Times available at: https://www.ft.com/content/71c2be62-b823-47d9-9f43-ab322883aa8c [Accessed 11 March 2021].

Open Letter to the European Commission and the relevant authorities of Member States of the EU

"Use-it-or-lose-it": an historic opportunity to achieve better copyright outcomes for creators—will it go to waste?

Contracts covering copyright and performers' rights are typically very broad, often covering all economic rights, worldwide, for the entire term of copyright (which can be a century or more). These broad takings can be highly problematic: very often, the investor who holds those rights stops exploiting them long before the contract expires, leaving the creator unable to further profit from their work, and the public unable to gain access.

In 2019, the EU adopted the Directive on Copyright in the Digital Single Market, which for the first time regulated the contracts of creators. Important provisions establish the principle of appropriate and proportionate remuneration and transparency obligations. Article 22 mandates a right of revocation. Authors and performers should have the right to reclaim their rights where their works are not being exploited by publishers or record labels—a principle of "use-it-or-lose-it".

This historic initiative creates the possibility of new income for creators, new exploitation opportunities for investors, and new access for the public. "Use-it-or-lose-it" rights already exist in some EU Member States (and other countries around the world). There are all kinds of variations, including entitlements to reclaim rights:

- Over books that have gone out of print;
- Over languages (in the case of books) that have had rights assigned but were never exploited;
- Where the rightsholder has gone bankrupt;
- Where a creator contributed to a work that was never completed;
- Where royalties haven't been paid, or appropriate royalty statements have not been provided;
- When the work has not been accepted for publication.

These examples hint at the potential. However, our new analysis (CREATe, "Mapping all reversion rights currently in existence in the EU" (19 November 2020)) shows that these laws were modelled on analogue practices. They do not fully take advantage of digital possibilities, and are often limited to certain kinds of works (such as books).

Termination under these laws is never automatic. Instead, these rights act as the starting point for renegotiating contracts, helping ensure that long-term contractual relationships continue. However, they also provide an important safety valve to release contracts that have outlasted their time.

EU Member States are now deep into the implementation process for the Copyright Directive, which must be completed by July 2021. However, few countries are expressly inviting consultation around Article 22, and some implementation proposals omit mention altogether. Even countries which already have use-it-or-lose-it rights in their national legislation do not deal explicitly with digital uses (except France in the limited case of books). It is a critical question how to treat works that are technically available online without being meaningfully exploited.

All countries could benefit by taking this opportunity to think critically how use-it-or-lose-it rights could help creators and investors, and help reclaim culture that would otherwise be lost. The new EU mandate offers a once-in-a-generation opportunity to create meaningful new rights for creators—something that is especially important as we look for ways to rebuild the creative industries post-COVID.

We ask Member States to include the revocation right explicitly in their consultations about implementing the Directive on Copyright in the Digital Single Market. We ask the Commission to collect information and conduct a study about the effects of revocation.

Prof. Martin Kretschmer, Professor of Intellectual Property Law

Director, CREATe (UK Copyright and Creative Economy Centre), University of Glasgow

martin.kretschmer@glasgow.ac.uk

Dr Ula Furgał, Postdoctoral Researcher

CREATe, University of Glasgow

ula.furgal@glasgow.ac.uk

Assoc. Prof. Rebecca Giblin, ARC Future Fellow

Director, Intellectual Property Research Institute of Australia (IPRIA), University of Melbourne

rebecca.giblin@unimelb.edu.au

First signatories

Prof. Valérie-Laure Benabou, Aix-Marseille Université (AMU)

Prof. Lionel Bently, Director, Centre for Intellectual Property and Information Law (CIPIL), University of Cambridge

Prof. Maurizio Borghi, Director, Centre for Intellectual Property Policy & Management (Jean Monnet Centre of Excellence 2018-21), Bournemouth University

Dr. Roberto Caso, Associate Professor of Comparative Private Law, Università di Trento

Dr. Elena Cooper, Leverhulme Early Career Fellow, CREATe, University of Glasgow

Prof. Estelle Derclaye, Professor of Intellectual Property Law, University of Nottingham

Prof. Leonhard Dobusch, Professor of Business Administration, University of Innsbruck, and Academic Director of the Momentum Institute, Vienna

Prof. Séverine Dusollier, School of Law, SciencesPo, Paris

Dr. Marcella Favale, Senior Research Fellow, Centre for Intellectual Property Policy & Management (CIPPM), Bournemouth University

Prof. Christophe Geiger, Professor of Law, Centre d'Etudes Internationales de la Propriété Intellectuelle (CEIPI), Université de Strasbourg

Prof. Reto Hilty, Director, Max-Planck-Institute for Innovation and Competition, Munich

Prof. P. Bernt Hugenholtz, Professor of Intellectual Property Law, Institute for Information Law, University of Amsterdam

Dr. Martin Husovec, Assistant Professor of Law, London School of Economics

Prof. Marie-Christine Janssens, Head of Unit, Centre for IT & IP Law (CiTiP)—imec, KU Leuven

Prof. Thomas Margoni, Research Professor of Intellectual Property Law, Centre for IT & IP Law (CiTiP)—imec, KU Leuven

Dr. Péter Mezei, Associate Professor of Law, Institute of Comparative Law and Legal Theory, University of Szeged

Prof. Alexander Peukert, Chair in Civil and Intellectual Property Law, Goethe Universität, Frankfurt am Main

Dr. João Pedro Quintais, Assistant Professor, Institute for Information Law (IViR), University of Amsterdam

Prof. Marco Ricolfi, Chair of Intellectual Property Law, Department of Legal Studies, Turin University, and Co-Director of the Nexa Center of the Polytechnic of Turin

Prof. Thomas Riis, Professor, Centre for Information and Innovation Law, University of Copenhagen

Prof. Martin Senftleben, Director, Institute for Information Law (IViR), University of Amsterdam

Dr. Sebastian Felix Schwemer, Associate Professor, Centre for Information and Innovation Law (CIIR), University of Copenhagen

Dr. Caterina Sganga, Associate Professor of Comparative Private Law, Coordinator, reCreating Europe H2020 consortium, Scuola Superiore Sant'Anna, Pisa

Prof. Alain Strowel, Professor, UCLouvain and Université Saint-Louis

Dr. Tatiana Eleni Synodinou, Associate Professor, Dept. of Law, University of Cyprus

Prof. Paul Torremans, Professor of Intellectual Property Law, Co-director, Commercial Law Centre, University of Nottingham

Dr. Stef van Gompel, Associate Professor, Institute for Information Law (IViR), University of Amsterdam

Prof. Raquel Xalabarder, Chair in Intellectual Property, Universitat Oberta de Catalunya, Barcelona

Interpreting EU reversion rights: why "use-it-or-lose-it" should be the guiding principle

Ula Furgał*

Published in European Intellectual Property Review (E.I.P.R.) 2021, 43(5), 283-291

Abstract

This article presents the findings from a comprehensive mapping of copyright reversion provisions which are currently or were historically a part of the laws of EU Member States. The analysis identifies patterns and argues for a "use-it-or-lose-it" guiding principle that should govern the whole term of creator contracts. This principle is being made explicit within EU copyright law by a new revocation right provided by art.22 of the Directive on Copyright in the Digital Single Market . Whereas the current reversion rights landscape is fragmented, Member States' preference for use-based provisions is clear. The understanding of "use", especially in the digital context is, however, vague. This article proposes a way to address those shortcomings while bringing all reversion rights under a "use-it-or-lose-it" umbrella during the implementation process of the Copyright in the Digital Single Market Directive.

Introduction

Article 22 of the Copyright in the Digital Single Market Directive (CDSM Directive)[1] provides for a right of revocation, which introduces a use-it-or-lose-it principle to EU copyright law. The right came about quite unexpectedly. It was not actively considered by the European Commission during the drafting phase, and advocacy by creator organisations was limited. Revocation rights

* Dr Ula Furgał is a postdoctoral researcher at CREATe, University of Glasgow. The project has received funding from Prof. Rebecca Giblin's ARC Future Fellowship (The Author's Interest Project, FT170100011) and the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626870626 ("reCreating Europe: Rethinking digital copyright law for a culturally diverse, accessible, creative Europe", WP3 Authors and Performers, D3.1: Dr Ula Furgał and Prof. Martin Kretschmer). Data development for an interactive digital resource, mapping reversion rights across the EU has been supported by the AHRC Creative Industries Policy & Evidence Centre (www.pec.ac.uk – AH/S001298/1): https://www.create.ac.uk/reversion-rights-resource-page/. The author thanks Martin Kretschmer, Rebecca Giblin and Amy Thomas for support and feedback in writing this article.

[1] Directive 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9 and 2001/29 [2019] OJ L130/92.

and the use-it-or-lose-it principle art.22 CDSM Directive is based on, are not, however, a novelty. The majority of EU Member States already offers provisions which allow creators,[2] under certain conditions, to change or terminate their contractual relationships. Those provisions are quite fragmented, and often address only certain types of works and agreements. More than half are, however, triggered by the lack of use of a work. This preference for non-use reversion provisions sets the EU apart from Commonwealth countries which offer only time-based termination. Whereas this preference for use-based reversion provisions is clear, the understanding of "use" is not. The currently binding reversion provisions lack detail and do not account for digital forms of exploitation, making it difficult for creators to take advantage of their rights.

This article argues that the right of revocation provided by the CDSM Directive is an opportunity to bring order to the fragmented EU reversion rights landscape by introducing an overarching use-it-or-lose-it principle. This principle requires transferees to use works entrusted to them by creators throughout the whole term of an agreement. The continuous use requirement, compared with one limited in time, is better suited to address the current long term of copyright protection and buy-out creator contracts. For the new right to be fully effective, the Member States legislators need to address the vague concept of "use" when implementing art.22 CDSM Directive into their national legal orders.

This article builds on the results of a comprehensive mapping of reversion provisions which are currently or were historically a part of the national laws of the EU Member States, carried out as a part of a collaborative project between CREATe (University of Glasgow) and IPRIA (University of Melbourne). As the introduction of the right of revocation by the CDSM Directive was not preceded by a focused debate, the mapping project aimed to identify the lessons which can be learned from the currently binding provisions to inform the implementation of art.22 CDSM Directive. The complete record of the mapped provisions has been published as a CREATe Working Paper,[3] and can be explored on the project's webpage.[4] The mapping project also led to the publication of an Open Letter on art.22 CDSM Directive signed by a group of leading international academics, with a view of drawing attention to the issue of the revocation right, and the historic opportunity it creates not only for bettering the position of creators, but also

[2] The term "creators" in this article is used to refer jointly to authors and performers unless stated otherwise.
[3] Ula Furgał, "Reversion rights in the European Union Member States", CREATe Working Paper 2020/11 (2020) available at: https://zenodo.org/record/4281035#.X8dg9bPLeUk [Accessed 8 March 2021].
[4] The Reversion Rights Resource Page is available at: https://www.create.ac.uk/reversion-rights-resource-page/ [Accessed 8 March 2021], presents two interactive features: a map and a table, which allow the exploration of the mapped reversion provisions.

advancing public interest. The text of the letter is published in the same E.I.P.R. issue as this article.[5]

After the introduction, this article begins with an explanation of what reversion rights are and how the revocation right found its way into the CDSM Directive. It continues by painting a picture of the fragmented landscape of current reversion rights in the EU Member States, emphasising the preference for use-based provisions. This article then proceeds to the discussion of the express and implied use requirements, the meaning of "use", and the challenges creators face in a system where they are the ones making decisions to terminate or modify their contractual relationships. This article concludes with recommendations for implementation of the CDSM Directive revocation right.

What are reversion rights?

By way of creator contracts, authors and performers transfer[6] their rights in works and performances in exchange for remuneration and promise of exploitation. Their contractual counterparts, content producers, publishers, distributors and the like, benefit from the advantaged position since creative industries enjoy a continuous excess of creative works.[7] Acting as a weaker bargaining party, creators are often unable to fully secure their interests. Additionally, not many creators can make a living solely by their artistic craft, as cultural markets are winner-takes-all markets where a small percentage of authors earns the lion's share of total earnings.[8] Copyright contract law provides for a variety of solutions to aid creators in their contractual dealings with third parties, which can concern both the form and contents of copyright agreements. One of those solutions are reversion rights, rights which entitle authors and performers, under certain conditions, to reclaim the rights they have transferred to a third party.

The value of reversion rights is being increasingly recognised by scholars, even though the empirical data on the effects of reversion rights in Europe is scarce, if not non-existent. Rebecca Giblin's The Author's Interest Project, which framed CREATe's and IPRIA's co-operation,

[5] Martin Kretschmer and Rebecca Giblin, "Getting Creators Paid: One More Chance for Copyright Law" (2021) 43 E.I.P.R. 279.
[6] The term "transfer" in this article is used to refer jointly to assignments and licences, unless stated otherwise.
[7] Ruth Towse, "Copyright Reversion in The Creative Industries: Economics and Fair Remuneration" (2018) 41 Columbia Journal of Law & Arts 467, 476.
[8] A 2018 survey commissioned by the ALCS and carried by CREATe has found that the top 10% of writers in the UK earn about 70% of total earnings in the profession. See Martin Kretschmer et al, "UK Authors' Earnings and Contracts 2018: A Survey of 50,000 Writers" (2019) available at: https://www.create.ac.uk/uk-authors-earnings-and-contracts-2018-a-survey-of-50000-writers/ [Accessed 8 March 2021].

sees statutory reversion rights as one of the ways to better the financial position of authors while simultaneously reclaiming otherwise lost culture to the broader society.[9] Her empirical research with Joshua Yuvaraj demonstrates that contract-based approaches are not sufficient to safeguard creators' reversion interests.[10] Paul Heald's work exploring the effects of the US termination provisions has found that shifting the ownership of rights in books back to the authors has caused previously out-of-print works to be available again.[11] Marcella Favale has recognised the value of reversionary rights for solving the orphan works problem[12] and Séverine Dusollier sees the use reversion rights as a way out of excessive or buy-out copyright transfers.[13] Not all the effects of reversion rights, however, are necessarily positive. As noted by Karas and Kirstein, such rights can potentially reduce publishers' incentive to invest and lower authors' remuneration.[14] This prediction, however, was made in relation to the time-based termination, not the use-it-or-lose-it provisions on which this article focuses.

Right of revocation—an unexpected but welcome surprise

The EU has largely refrained from legislating in the area of copyright contracts, leaving this matter to the Member States.[15] Chapter 3 CDSM Directive is an exception from the EU's traditionally non-interventionalist approach. It offers a set of provisions aimed at bettering the contractual position of creators, including the principle of proportionate and appropriate renumeration, the contract adjustment mechanism, and of course the right of revocation. Creators have been provided with both the means of obtaining information on the exploitation of their works, and a way of adjusting or terminating their contractual relationships. Pursuant to art.22 CDSM Directive, authors and performers can reclaim the rights they have assigned or licensed on an exclusive basis when their works or other subject-matter are not being exploited.

[9] The Author's Interest webpage is available at: https://authorsinterest.org/ [Accessed 8 March 2021].
[10] Rebecca Giblin and Joshua Yuvaraj, "Are Contracts Enough? An Empirical Study of Author Rights in Australian Publishing Agreements" (2020) 44 Melbourne University Law Review 1.
[11] Paul Heald, "Copyright Reversion to Authors (and the Rosetta Effect): An Empirical Study of Reappearing Books", SSRN available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3084920 [Accessed 8 March 2021].
[12] Marcella Favale, "Bouncing Back from Oblivion: Can Reversionary Copyright Help Unlock Orphan Works?" (2019) 41 E.I.P.R. 339.
[13] Séverine Dusollier, "EU Contractual Protection of Creators: Blind Spots and Shortcomings" (2018) 41 Columbia Journal of Law & Arts 435, 447.
[14] See Michael Karas and Roland Kirstein, "Efficient Contracting under the U.S. Copyright Termination Law" (2018) 54 International Review of Law and Economics 39; Michael Karas and Roland Kirstein, "More Rights, Less Income?: An Economic Analysis of the New Copyright Law in Germany" (2019) 175 Journal of Institutional and Theoretical Economics 420.
[15] Two major studies were commissioned by the EU bodies to explore Member States legal framework applicable to creator contracts. See Lucie Guibault and Bernt Hugenholtz, "Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union" (University of Amsterdam: IViR, 2002); Séverine Dusollier et al, "Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States" (European Parliament Committee on Legal Affairs, 2014).

Rights can be revoked by creators either in full or in part, and only after a reasonable period following the conclusion of an agreement. Member States are left with considerable freedom in implementing this provision: they can decide whether to adopt special provisions for particular types of works and sectors, and whether to limit waivability and exercise of rights in time.

The EU has notably intervened on creator contracts once before, when by the way of the Term Directive it introduced the right of revocation for performers.[16] To date, this is the only revocation provision common to all Member States. The Term Directive requires Member States to allow a performer to terminate the agreement with a phonogram producer if, 50 years after the phonogram was first lawfully communicated to the public, the producer does not offer copies of the phonogram for sale in sufficient quantity, or does not make it available to the public. This right follows the use-it-or-lose-it principle; however, it is quite narrow in its scope.

The Proposal for the CDSM Directive tabled by the European Commission in September 2016 did not include a reversion right, and the accompanying Impact Assessment did not consider it an option.[17] But the idea of adopting an EU-wide general reversion right has not been foreign to the European Commission. In its 2014 Report on the Public Consultation on the review of the EU copyright, the Commission noted that according to authors' and performers' submissions they should be able to claim their rights back, particularly when a work is not being exploited.[18] However, out of 167 organisations self-identifying as a "representative of authors/performers" which submitted responses to the consultation, only 20 mentioned rights reversion when asked about mechanisms for ensuring creators receive an adequate remuneration for exploitation of their works or performances.[19] Thus, the fact that the Commission has singled out this issue from over 9,500 replies is by itself surprising.

The European Composer and Songwriter Alliance (ECSA) and the UK Society of Authors (SoA) were among those creator organisations to identify reversion rights as a missing element of the Proposal. Both organisations noted that authors in some Member States already benefit from

[16] Directive 2011/77 amending Directive 2006/116 on the term of protection of copyright and certain related rights [2011] OJ L265/1 art.3(2a).
[17] Commission Staff Working Document, Impact Assessment on the Modernisation of EU Copyright Rules: Accompanying the document Proposal for a Directive on Copyright in the Digital Single Market and Proposal for a Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes SWD(2016) 301 final.
[18] European Commission, Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules (2014), p.79.
[19] European Commission, "Public Consultation on the review of the EU copyright rules" (2013), Questions 72–74.

reversion rights, and that the EU should provide for "an equal regulatory framework in every Member State"[20] by ensuring that all creators in Europe enjoy the same rights.[21] Both organisations actively advocated a right of revocation even before the Proposal was tabled, publishing recommendations[22] and lunching campaigns[23] aimed at bettering contractual position of creators. The attention of the majority of the creator organisations lay elsewhere, on the right of fair remuneration[24] and the share of platforms' revenues to be delivered thanks to the new intermediary liability regime provided by what now is art.17 CDSM Directive.[25]

While advocacy for the introduction of the reversion provision was limited, especially compared with news organisations' campaign for the new press publishers' right, creator organisations warmly welcomed the introduction of the provision in the European Parliament compromise.[26] A new art.16a introduced by the Parliament proposed a revocation right triggered not only by the absence of exploitation of works but also the lack of regular reporting. The Industry, Research and Energy (ITRE) Committee's opinion and the amendments tabled in the Legal Affairs (JURI) Committee proposed even more triggers, suggesting that creators should be able to reclaim their rights also in case of lack of promotion, payment of remuneration and reporting as well as insufficient exploitation.[27] The records of the JURI Committee meetings do not explain why only

[20] "The Society of Authors' Response to the Intellectual Property Office's Calls for Views on the European Commission's Draft Legislation to Modernise the European Copyright Framework' (2016) available at: https://www.societyofauthors.org/SOA/MediaLibrary/SOAWebsite/Submissions/20161205-Submission-to-IPO-on-DSM-directive-dec-2016.pdf [Accessed 8 March 2021].

[21] "EC Draft Proposal for a Directive on Copyright in the Digital Single Market and related issues: Point of View of Europe's Music Creators" (2016) available at: http://composeralliance.org/wp-content/uploads/2016/12/2016-draft-copyright-directive-ECSA-viewpoint.pdf [Accessed 8 March 2021].

[22] "ECSA-FACDIM Draft Recommendations on the Status of Music Creators" (2015) available at: http://composeralliance.org/wp-content/uploads/2015/03/ECSA_FACDIM_Resolution_Unfair_Contracts_For_EC_Review_2014-11-11.pdf [Accessed 8 March 2021].

[23] The Society of Authors, C.R.E.A.T.O.R., "Fair contract terms" available at: https://www.societyofauthors.org/Where-We-Stand/C-R-E-A-T-O-R-Campaign-for-Fair-Contracts [Accessed 8 March 2021].

[24] See Raquel Xalabarder, "The Principle of Appropriate and Proportionate Remuneration for Authors and Performers in Art.18 Copyright in the Digital Single Market Directive. Statutory Residual Remuneration Rights for Its Effective National Implementation" (2020) 4 InDret 1.

[25] See Christina Angelopoulos and João Pedro Quintais, "Fixing Copyright Reform: A Better Solution to Online Infringement" (2019) 10 J.I.P.I.T.E.C. 147.

[26] "Authors' Group Open Letter to the Council of the EU in Support of the Copyright Directive" (2019) available at: https://composeralliance.org/authors-group-open-letter-in-support-of-the-copyright-directive/ [Accessed 8 March 2021].

[27] Pursuant to the ordinary legislative procedure, the Legal Affairs Committee of the European Parliament was responsible for drafting a report on the CDSM Directive, which later was voted on during the Parliament plenary. The Industry, Research and Energy Committee was one of five Parliament Committees providing supporting opinions during the report-drafting process. See European Parliament, "Opinion of the Committee on Industry, Research and Energy for the Committee on Legal Affairs on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market", PE-

two triggers made their way to the JURI Report and later to the European Parliament compromise. The Parliament compromise on art.16a, later renumbered to art.22, was accepted during the trialogue, with the right's triggers narrowed to the "lack of use" and some other modifications. No information beyond a simple note that art.16a is "to be discussed at the political level" in the trialogue compromise proposal document is available.[28] Since the CDSM Directive provides only for minimum harmonisation, there is no obstacle to expanding the list of triggers by Member States[29] but the "lack of use" or, as the Recitals phrase it, situations where "the works and performances … are not exploited at all"[30] remains the only required trigger of the newly introduced EU-wide general revocation right.

Existing landscape of national revocation provisions

The existing laws of Member States offer a wide variety of provisions allowing authors and performers to reclaim their rights. There are currently more than 150 statutory provisions enabling change or termination of creator contracts. Those are only copyright and related rights specific statutory provisions. Creators might be able to reclaim their rights also under general contract law or pursuant to contractual reversion clauses. Some of the statutory reversion provisions are general in their nature, others apply only to certain works (audiovisual, adaptations, journalistic) or agreements (publishing, adaptation, performance).

Not only reversion rights sensu stricto lead to rights reverting back to the creators. Provisions prescribing a maximum term of an agreement inevitably result in termination. There are also provisions which simply describe what a creator is permitted to do. For example, in Austria after a set period of time, the author of a contribution to a periodical publication is allowed to reproduce and publish their work elsewhere.[31] Also, not all reversion rights are referred to as reversion rights. Member States use different terminology to describe provisions with reversionary effect, including such terms as termination, withdrawal and revocation. Some of those differences are a consequence of an English translation of respective national laws, but

592.363; European Parliament; "Amendments 673-872, Draft report Therese Comodini Cachia, PE-601.094v01-00, Amendments 952, 953, 958, 959, 960.

[28] Compromise text of the CDSM Directive as of 23 November 2018 available at: https://juliareda.eu/wp-content/uploads/2018/11/Copyright-Directive_4-column-document_ARTICLES-Version-3.2-for-3rd-trilo…pdf [Accessed 8 April 2021].

[29] See "Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 18 to 22 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market" available at: https://europeancopyrightsocietydotorg.files.wordpress.com/2020/06/ecs_comment_art_18-22_contracts_20200611.pdf [Accessed 8 March 2021].

[30] CDSM Directive para.80.

[31] Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte (Urheberrechtsgesetz) StF: BGBl. Nr. 111/1936 (StR: 39/Gu. BT: 64/Ge S. 19.) (Austrian Copyright Act) s.36.

there are instances where a Member State uses different terms for provisions caused by different triggers.[32] Thus, to grasp a full range of revocation provisions available, one needs to look at a provision's effect: a creator's ability to reclaim their rights, not its name or form.

Effects of reversion provisions

Where the effects of reversion are concerned, those provisions do not necessarily lead to termination. The dissolution of an agreement is only one of the two options. The second is an end to the exclusive character of a transfer. The Member States revocation provisions allow agreements to be terminated either in full or in part, with the partial termination concerning particular works (e.g. agreements on future works terminated only with respect to the works which have not yet been completed)[33] or uses (e.g. the possibility to terminate a publishing agreement with respect to the languages in which the work has not been published).[34] When the exclusive right of a transferee is brought to an end, it either means that the exclusive agreement between the parties changes into a non-exclusive one[35] or simply that the creator can perform certain acts which used to be reserved exclusively to the transferee. Such is the case in Austria, where the author is free to publish their work after 20 years but only as a part of a complete edition of their works.[36] There are also provisions which have less conventional consequences. For example, in Portugal, when a publisher, regardless of the author's calls, does not publish all agreed copies of a work, the author can publish the outstanding copies with another publisher at the expense of the original.[37]

Geographically fragmented landscape

Whereas most of the Member States have some reversion rights in place, there are still countries which support no other provision than the performers' right of revocation required by the Term Directive. Such is the case with Cyprus, Estonia, Ireland, Latvia and Malta. On the other side of

[32] For example, in Croatia the right to terminate an agreement owing to moral rights reasons (parvo opozvati) and the general non-use provision (ukinuće isključivog prava iskorištavanja) are referred to differently. See Zakon o autorskom pravu i srodnim pravima 2003/167/2399 (Croatian Copyright Act) arts 17 and 45.

[33] Austrian Copyright Act s.31.

[34] Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las Disposiciones Legales Vigentes sobre la Materia (aprobado por el Real Decreto legislativo No.1/1996 de 12 de abril de 1996, y modificado hasta el Real Decreto-ley No.17/2020, de 5 de mayo de 2020) (Spanish IP Act) art.62; Lietuvos Respublikos autorių teisių ir gretutinių teisių įstatymas 1999 m. gegužės 18 d. Nr. VIII-1185 (Lithuanian Copyright Act) art.45.

[35] See 1999 évi LXXVI. törvény a szerzői jogról (Hungarian Copyright Act) s.51.

[36] Austrian Copyright Act s.34.

[37] Código do Direito de Autor e dos Direitos Conexos, Decreto-Lei No.63/85—Diário da República No.61/1985, Série I de 14 March 1985 (Portuguese Copyright Act) art.86.

the spectrum are Italy and Spain, whose laws offer a number reversion provisions, all of them applicable to particular types of works or agreements.

While geographical distribution of reversion provisions is mostly random, two interesting regional patterns are visible. The first is in the Nordic countries, where Finland,[38] Sweden[39] and Denmark[40] adopted very similar copyright acts in the 1960s. Since then, the acts have been amended in Finland and Sweden; however, the termination provisions in those countries remain the same. Denmark, on the other hand, adopted a new copyright act in 1995, which has repealed most of the previously existing reversion provisions.[41] Secondly, countries of the former Eastern Bloc (Poland, Romania, Bulgaria, Slovenia, Slovakia, Czechia, Hungary) are quite generous with reversion provisions, especially the general ones. Five countries providing for a general non-use termination (eight countries in the whole EU) and five countries offering a moral rights-based termination (nine countries in the whole EU) are Central-Eastern Member States.

Preference for use-based reversion provisions

The majority of the reversion provisions found in Member States' laws are linked to the exercise of right or use of work. Such provisions allow creators to reclaim their rights when a work is not used at all or is used in an insufficient or inappropriate manner, or when a work is not accepted or completed. The remaining provisions are triggered by the circumstances linked to the parties of an agreement: a creator, with reversion prompted by their moral rights and convictions, or a transferee, with reversion usually connected to their economic condition (e.g. bankruptcy, insolvency, transfer of an entity to a third party).

Currently, only a handful of Member States champion time-based reversion provisions and only the Spanish provision concerning publishing contracts results in termination.[42] The remaining time-based provisions mark the time when an exclusive agreement changes into a non-exclusive one, or when a limitation of creator's freedom to exercise their rights ends. For example, in Lithuania the author is limited in exercising their rights following the publication of work for an additional three years or an alternative time specified in the agreement.[43] This preference for the non-use reversion provisions sets the EU apart from the US[44] and Canada,[45] which only offer

[38] 8 July 1961 Upphovsrättslag 372/2020 (Finnish Copyright Act).
[39] Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk (Swedish Copyright Act).
[40] Lov om ophavsretten til litterære og kunstneriske værker (LBK No.1170 of 21 December 1994).
[41] Lov om ophavsret (LBK No.1144 of 23 October 2014) (Danish Copyright Act).
[42] Spanish IP Act art.69.
[43] Lithuanian Copyright Act art.47.
[44] Pursuant to 17 U.S.C. ss.203, 304 authors can reclaim their rights 35 years after the conclusion of an agreement.
[45] Pursuant to art.14(1) of the Copyright Act R.S.C. 1985, c.42, as amended assignment of copyright is terminated 25 years after author's death.

time-based termination rights. Historically, however, the Spanish IP Act 1879[46] and the UK Copyright Act 1911, which was a binding law for Ireland, Malta and Cyprus,[47] provided for the termination of agreements 25 years after the death of the author, with rights reverting back to their legal successors. Torremans and Otero Garcia-Castrillon refer to those termination rights as "trap provisions", since not many assignees are aware of their existence but they remain applicable to a number of currently binding agreements, concluded during the second half of the 20th century.[48]

The principle of use-it-or-lose-it

Express and implied use obligations

When a creator transfers their rights, they have a reasonable expectation that those rights will be exploited.[49] An obligation to use transferred rights is not, however, a general rule of copyright contract law. Only a handful of Member States' laws include an explicit obligation of a transferee to exploit licensed or assigned rights: Slovakia,[50] Denmark,[51] France,[52] Belgium[53] and Greece.[54] None of them sets out the consequences of breaching the use obligation directly in its copyright legislation, which means in the case of a transferee failing to exploit the work, the creator needs to refer to general contract law.

The use obligation is more often implied, since reversion rights based on the use-it-or-lose-it principle indirectly oblige a transferee to exploit transferred rights. Currently, eight Member States provide for a general reversion right triggered by the lack of use or insufficient use of work. Those provisions follow the same use-it-or-lose-it logic as the right of revocation introduced in art.22 CDSM Directive. While allowing the agreement to be terminated also owing to insufficient use of work, the majority of Member States require as a further condition that it

[46] Ley de 10 de enero de 1879 de propiedad intelectual art.6.
[47] As noted by Elena Cooper, the Copyright Act 1911 applied to Ireland, Malta and Cyprus, as parts of the British Empire in 1911, and remained binding law up until 1976 in Cyprus and 1967 in Malta. See Elena Cooper, "Reverting to Reversion Rights? Reflections on the Copyright Act 1911" (2021) 43 E.I.P.R. 292.
[48] See Paul Torremans and Carmen Otero Garcia-Castrillon, "Reversionary Copyright: A Ghost of the Past or a Current Trap to Assignments of Copyright?" (2012) 2 Intellectual Property Quarterly 77.
[49] See Dusollier, "Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States" (2014), p.446.
[50] Zákon z 1. Júla 2015 Autorský zákon (Slovak Copyright Act) s.70. An obligation to use an exclusive right can be excluded by a contract.
[51] Danish Copyright Act s.54. Assignee's obligation to use rights cannot be derogated from.
[52] Code de la propriété intellectuelle (French IP Code) art.L131-3 para.4.
[53] Code de droit économique (Belgian Economic Code) art.XI.167§1.
[54] Νόμος 2121/1993 Πνευματική Ιδιοκτησία, Συγγενικά Δικαιώματα και Πολιτιστικά Θέματα (Greek Copyright Act) art.13(1).

prejudices the legitimate interests of the author (Slovenia,[55] Romania,[56] Germany,[57] Czechia,[58] Croatia,[59] Austria).[60] Dutch[61] and Slovak[62] laws do not include such an additional requirement. Some Member States limit the exercise of the right in time, prescribing a period of time which needs to lapse before an author can terminate the agreement (i.e. a grace period). It is either two years (Czechia, Germany, Romania, Slovenia) or one year (Slovakia) after the conclusion of an agreement or the delivery of work, whichever happened later. All countries which champion two years' time limitation provide for shorter periods of time for periodical works: three months, six months or one year, depending on frequency of publication.

Temporal aspect of use obligations

The temporal limitation of the right's exercise does not mean that if a work has been subject to exploitation within a grace period, a reversion right cannot be invoked later when the exploitation ceases. Reversion provisions triggered by the lack of use or insufficient use of work imply a continuous exploitation requirement: it remains valid as long as the contractual relationship between the parties lasts. This sets apart those provisions from reversion rights triggered by the lack of initial exploitation, that is, provisions which entitle creators to reclaim their rights in case the exploitation of work has not started within a particular period of time.[63] This period of time can be specified in a reversion provision, prescribed in an agreement or determined on a case-by-case basis, and tends to be calculated from either the conclusion of an agreement or the delivery of the work, whichever happened later. Provisions triggered by the lack of initial exploitation concern only the first stage of the contractual relationship between the parties, which can continue beyond this first phase.

The difference between the non-use and the lack of initial use provisions becomes clearer when one compares the provisions of Hungarian and Dutch law. In Hungary, an author is entitled to terminate an exclusive licence in cases where a transferee fails to begin exploitation in

[55] Zakon o avtorski in sorodnih pravicah (Uradni list RS, št. 16/07—uradno prečiščeno besedilo, 68/08, 110/13, 56/15, 63/16—ZKUASP in 59/19) (Slovenian Copyright Act) art.83.
[56] Legea No.8 din 14 martie 1996 privind dreptul de autor și drepturile conexe Publicat în Monitorul Oficial No.489 din 14 iunie 2018 (Romanian Copyright Act) art.48.
[57] Urheberrechtsgesetz vom 9 September 1965 (BGBl. I S. 1273), das zuletzt durch Artikel 1 des Gesetzes vom 28 November 2018 (BGBl. I S. 2014) geändert worden ist (German Copyright Act) art.41.
[58] Zákon ze dne 3 února 2012 občanský zákoník s.2378.
[59] Croatian Copyright Act art.45.
[60] Austrian Copyright Act s.29.
[61] Wet van 23 september 1912, houdende nieuwe regeling van het auteursrecht (Auteurswet 1912) (Dutch Copyright Act) art.25e.
[62] Slovak Copyright Act s.73.
[63] See Закон за авторското право и сродните му (Bulgarian Copyright Act) art.39; Ustawa z dnia 4 lutego 1994r. o prawie autorskim i prawach pokrewnych (Polish Copyright Act) art.57, Danish Copyright Act s.54.

the agreed time, and, if no time was agreed, within a reasonable time in a given situation.[64] This is a reversion right triggered by the lack of initial use of work. In the Netherlands, the general use-it-or-lose-it provision consists of two parts, distinguishing between initial and subsequent use: a creator can terminate the agreement if a work is not exploited within a reasonable time following the conclusion of the agreement and when a work is no longer exploited (to a sufficient extent) following the initial act of exploitation.[65] If the second trigger was not added, the Dutch provision, like the Hungarian one, would be relevant only for the initial phase of exploitation. The second trigger ensures continuous exploitation of work. This shows a qualitative difference between "non-use" and "lack of initial use" provisions.

Reversion provisions triggered by the lack of initial use seem fitting when an agreement concerns a particular exploitation act, for example publication of a single edition of a book, but might not be sufficient when the exploitation ought to extend over the whole term of an agreement. The duration of agreements often exceeds the time needed for a transferee to recover their investment and can last the entire copyright term.[66]

Relevance of temporal aspect for implementation process

The distinction between reversion rights triggered by non-use and those set off by lack of initial use is relevant for the implementation of art.22 CDSM Directive. In Hungary, where the general reversion right is limited to initial use, the implementation draft tabled in May 2020 does not suggest any changes to the current legislation.[67] A number of submissions to the public consultation on the implementation of the CDSM Directive conducted by the Polish Ministry of Culture suggest that there is no need to implement art.22 CDSM Directive since Polish law already provides for the right of revocation.[68] Submissions do not, however, recognise that this right is triggered only by the lack of initial use, and applies only to the contracts envisaging distribution of works.[69]

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[64] Hungarian Copyright s.51(1)(a).
[65] Dutch Copyright Act art.25e(1).
[66] A recent study by García et al demonstrates that the economic viability of sound recordings is remarkably short, and it is a matter of months, not years. See Kristelia García, James Hicks and Justin McCrary, "Copyright and Economic Viability: Evidence from the Music Industry" (2020) 17 Journal of Empirical Legal Studies 696.
[67] The draft text on the implementation of CDSM and CabSat Directives was prepared by the Ministry of Justice and the National Office of Intellectual Property and published on 7 May 2020 available at: https://www.sztnh.gov.hu/sites/default/files/szjt_dsm.satcab_indoklassal_2020.05.07.pdf [Accessed 8 March 2021].
[68] See submissions by ZAPAV, Copyright Polska, REPROPOL, STOART, Kreatywna Polska, Izba Wydawców Prasy, PIIT, IAB Polska, TVN Discovery Polska and Lewiatan available at: https://bip.mkidn.gov.pl/pages/posts/konsultacje-publiczne-3276.php?p=20 [Accessed 8 March 2021].
[69] Polish Copyright Act art.57.

What is curious is the example of Belgium, one of a handful of countries which champion a general obligation of exploitation. The draft bill prepared by the Council for Intellectual Property proposes introduction of a new reversion right, separate from the general exploitation obligation.[70] The new right would allow creators to reclaim their rights, but only when a transferee has not exploited the rights within the agreed period, and if such period was not set, a period fixed in accordance with honest practices of the profession for the type of works concerned. Thus, instead of specifying the consequences of breaching the general use requirement, the draft proposes the introduction of a new right limited to initial use of work.[71]

The right of revocation introduced by art.22 CDSM Directive, like all currently binding non-use provisions, implies a continuous use requirement. This means that its implementation cannot be limited to creation or reference to a currently existing reversion provision triggered by lack of initial use. The principle of use-it-or-lose-it that art.22 CDSM Directive is based on should remain intact throughout the whole term of an agreement, which requires Member States to provide for a general non-use provision in order to give full effect to the new revocation right.

The meaning of "use"

Reversion provisions based on the use-it-or-lose-it principle face two key challenges: the meaning of exploitation and the types of failures which justify termination or alteration of an agreement. The trigger of general use provisions is typically phrased as lack of use or insufficient use of work. The laws of Member States offer little detail about how these requirements should be interpreted. Provisions are designed as all-encompassing: currently no types of works or agreements are explicitly excluded from their scope. Pursuant to art.22 CDSM Directive, Member States, however, will be able to exclude works and other subject-matter which usually include contributions of multiple creators from the scope of the new reversion right.

The provisions concerning specific types of works or agreements name a particular behaviour triggering a reversion right. More often than not, this behaviour corresponds to the main purpose

[70] "Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d'auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE' 97" available at: https://economie.fgov.be/sites/default/files/Files/Intellectual-property/Avis%20Conseils%20Propri%C3%A9t%C3%A9%20intellectuelle/Avis-CPI-19062020.pdf [Accessed 8 March 2021].q

[71] Luxembourg has followed the Belgian example and proposed a new reversion right triggered by lack of initial use in its CDSM Directive implementation draft presented on 10 February 2021 available at: https://gouvernement.lu/content/dam/gouvernement/documents/actualites/2021/02-fevrier/12-consultation-publique/20210204-APL-transposition-directive-2019790-Version-finale.pdf [Accessed 8 March 2021].

of the contract. For example, most of the reversion provisions concerning publishing agreements allow the author to reclaim their rights in cases where a work is not published[72] or copies of work are not produced.[73] Termination of performance agreements is triggered either by the lack of initial performance[74] or by an interruption in performance lasting two or three years,[75] and provisions concerning audiovisual works are set off by either lack of completion of work or lack of distribution or making a work available to the public.[76] Those provisions seem to paint a black and white picture, where a work is either being used in a particular way or it is not.

Most provisions lack detail on how a particular use should be performed. This turns the exploitation of work into a "yes-no" question rather than a quality question. There are, however, some notable exceptions. In Finland and Sweden, a publishing agreement can be terminated not only when a work is not published but also when it is not distributed in the usual manner and is not continuously exploited in a way determined by the market conditions and other circumstances.[77] Slovakia allows termination of licence agreements for publication of works when a work is used in a way which reduces its value[78] and Hungary provides for the termination of an exclusive licence when a work is used in a manner obviously inappropriate or inconsistent with the purpose of the contract.[79] The application of those provisions does involve value judgments and is likely to entail some level of subjectivity, which approximates this type of provisions to revocation rights tiggered by moral rights and convictions of the creator, which are inherently subjective.

The breach of obligations linked to the exercise of transferred rights, but not involving the use of work itself, only exceptionally justifies termination. Here, France supports a unique solution for termination of publishing agreements. The provisions introduced in 2016 allow an author to terminate an agreement when they do not receive due royalties[80] or statements of accounts.[81] As mentioned earlier, the lack of payment and reporting were among the triggers considered

[72] Slovenian Copyright Act art.92; Romanian Copyright Act art.57; Spanish IP Act art.68.
[73] Portuguese Copyright Act art.86; Belgian Economic Code art.XI.196(1).
[74] Slovenian Copyright Act art.98.
[75] Belgian Economic Code art.XI.201; French IP Code art.L132-19; Romanian Copyright Act art.60; Finnish Copyright Act s.30(1).
[76] Finnish Copyright Act s.40; Swedish Copyright Act s.40; Legge 22 aprile 1941 n.633 Protezione del diritto d'autore e di altri diritti connessi al suo esercizio (Italian Copyright Act) art.50; Portuguese Copyright Act art.136; Hungarian Copyright Act s.66; Polish Copyright Act art.72.
[77] Finnish Copyright Act s.33; Swedish Copyright Act s.33.
[78] Slovak Copyright Act s.75.
[79] Hungarian Copyright Act s.51(1)(b).
[80] French IP Code art.L132-17-3-1.
[81] French IP Code art.L132-17-3.

during the CDSM Directive legislative process but did not make their way to the final text of the CDSM Directive.

Digital use of works

What is clearly lacking in the reversion provisions is a consideration of the development of digital technologies and the new forms of exploitation they offer. Only two types of provisions explicitly address the digital use of works. First, Croatia and Romania directly tackle the matter of ebooks, granting publishers priority to publish (or rather to make an offer to publish) a book in an electronic form. This applies to the book of an author already contracted for the analogue format.[82] Secondly, French provisions on the termination of publishing agreements, in the case of lack of permanent and ongoing exploitation of a work, clearly distinguish between print and digital forms of exploitation.[83] Termination due to lack of exploitation in a digital format does not affect the part of the contract concerning exploitation of the work in print and vice versa.

The consideration of digital exploitation of works is also missing in the out-of-print and the lack of subsequent publication provisions. When the national law specifies what an "out-of-print" or "exhausted edition" is, it refers to a number of copies of books. For example, Romania,[84] Slovenia[85] and Spain[86] deem a work to be out of print when the number of unsold copies is less than 5% of copies in an edition, and in any case, if fewer than 100 copies are available. The digital distribution of works is not reflected in those clauses. The lack of consideration for digital uses is common both to reversion provisions dating back to the beginning of the 20th century and to those adopted during the last decade.

With digital uses not explicitly addressed by the revocation provisions, uncertainties persist. Does keeping a work or a performance available online qualify as an exploitation? The 2020 report on the Dutch Copyright Contract Law, which introduced the general use-it-or-lose-it provision to the Dutch Copyright Act in 2015, argues that online availability is nowadays common, but by itself does not amount to sufficient exploitation.[87] It suggests permanent findability, and bringing a work to the public's attention in a continuous manner in all ways are and will be reasonably possible as markers of sufficient exploitation. Similar suggestions are included in a 2018 report on the implementation of the Term Directive, which recommends that

[82] Croatian Copyright Act art.65; Romanian Copyright Act art.53.
[83] French IP Code art.L132-17-2.
[84] Romanian Copyright Act art.57.
[85] Slovenian Copyright Act art.92.
[86] Spanish IP Act art.68.
[87] Stef van Gompel et al, "Evaluatie Wet Auteurscontractenrecht Eindrapport" (2020), p.48 available at: https://www.rijksoverheid.nl/documenten/rapporten/2020/11/18/tk-evaluatie-acr-eindrapport [Accessed 8 March 2021].

the requirement of "offering copies of the phonogram for sale in sufficient quantity" linked to performers' revocation right, should be interpreted as making the performance available online in a manner which "satisfies the reasonable needs of the public, taking into account the nature and aim of the phonogram".[88] This report, however, makes a distinction between popular services such as Spotify and Deezer, where the upload itself would be sufficient, and websites with smaller audiences, such as those of independent record producers, which without additional promotion on third-party services would not meet the use requirement.

In the context of the implementation of art.22 CDSM Directive, performers themselves caution against equating online availability with exploitation of works. The guidelines on the implementation of the CDSM Directive prepared by the Fair Internet Coalition, a group of European performers' organisations, argue that if online accessibility is understood as a sufficient exploitation, art.22 CDSM Directive will have no use for performers. They urge law-makers in Member States to make a link between lack of exploitation and lack of promotion.[89] Considering the number of uncertainties surrounding the application of the current reversion provisions in the digital environment, it is ironic that the CDSM Directive, a directive intended to address the rapid technological development and changing business models in creative industries, provides no indication on how to interpret exploitation in the digital context.

The challenges facing creators

The clarity of reversion rights' triggers is important for creators, as, pursuant to the laws of Member States, the action of an author or a performer is usually required to bring any change to the contractual relationship between the parties. Automatic termination or alteration of an agreement is a rarity. A creator needs to know when they can act, especially since the use of a reversion right carries a future risk of "blacklisting", an unspoken practice of no longer contracting work from troublesome creators.[90]

The actions required from a creator vary, but they often involve such acts as: (1) a notification of creator's intention to terminate or change an agreement; (2) a call to begin or continue exploitation of a work (e.g. publication of a second edition of a book); (3) the setting of

[88] Ana Ramalho and Aurelio Lopez-Tarruella, Implementation of the Directive 2011/77/EU: Copyright Term of Protection (Policy Department for Citizens' Rights and Constitutional Affairs Directorate General for Internal Policies of the Union, 2018), p.49.
[89] Fair Internet, Coalition Joint Guidelines for the Implementation of the 2019 Copyright Directive (2019), p.26 available at: http://www.aepo-artis.org/usr/files/di/fi/9/FAIR-INTERNET-Campaign-joint-guidelines---Implementation-of-the-2019-Copyri_202012151620.pdf [Accessed 8 March 2021].
[90] Dusollier et al, "Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States" (2014), p.23.

an additional time to use a work; and (4) a notification of termination or change of an agreement. Sometimes, the action of a creator is simply to perform an act they were previously not authorised to do, such as the re-publication of a contribution to a periodical,[91] concluding an agreement with a different publisher[92] or authorising another producer to adapt a work for the screen.[93] The mechanism envisaged in art.22 CDSM Directive follows the dominant pattern since the decision whether to reclaim their rights lies with a creator.

In the case of general non-use provisions, the majority of Member States require that a creator sets a reasonable additional time for a transferee to use the work, and only after this term lapses are they able to terminate or alter the agreement. None of the national laws prescribes this additional time by a specific number of years or months. Provisions simply refer to an appropriate extension (Germany), reasonable term (Netherlands, Slovakia, Austria, Czechia), or adequate time (Slovenia), leaving it to the judgment of the creator. For comparison, the reversion provisions applicable to publishing agreements, triggered by lack of publication of a next edition, always indicate a period of time when the next edition should be published (between one and three years), leaving the creator no discretion.[94]

The requirement of reasonable time is included in art.22 CDSM Directive, as a creator needs to set an appropriate deadline before they are allowed to exercise their rights. This requirement shows that exploitation of work is the ultimate goal of non-use reversion provisions. If case a transferee takes up exploitation within the prescribed time, a creator is no longer entitled to reclaim their rights. Thus, as long as a transferee is interested in and delivers on the exploitation of works, the contractual relationship between the parties is preserved and the transferee's interests are safeguarded. The creator does have a discretion in reclaiming their rights and setting deadlines but their rights can be curtailed by a transferee's action.

Conclusions

As this article has shown, the current EU reversion rights framework is highly fragmented, but the preference for use provisions over time-based termination is visible. The continuous use requirement enshrined in art.22 CDSM Directive is not a substitute for existing obligations. It brings them together under the umbrella of a use-it-or-lose-it principle, a guiding principle over the whole term of an agreement. The distinction between reversion rights triggered by non-use and those set off by lack of initial use is relevant for the implementation of art.22 CDSM Directive.

[91] German Copyright Act s.38(1).
[92] Lithuanian Copyright Act art.47.
[93] German Copyright Act. s.88.
[94] Bulgarian Copyright Act art.52; Italian Copyright Act art.124; Finnish Copyright Act s.34.

As demonstrated, the current implementation process makes no distinction between those two provisions, with some Member States transposition proposals limiting use obligation to the initial phase of exploitation.

As the review of the EU reversion rights framework has demonstrated, whereas the dominance of use-based provisions is clear, the understanding of "use" is vague. The implementation of the new revocation right calls for sufficient clarity and flexibility in determining what "use" is, so that the provision remains applicable to the relevant subject-matter, but parties to an agreement are clear on when the creators' rights are triggered. Considering that the creative and cultural industries are highly diversified, it seems impossible for the law to explicitly address all non-use situations. It is possible, however, building on already existing work and agreement-specific provisions, to formulate guidelines. One way would be for Member States to provide a list of factors which should be taken under consideration when assessing whether a work is being used, such as the lack of remuneration, or promotion and findability of work, which could then be adjusted to particular sectors.

A second important pattern needs to be addressed. The exploitation of works captured by the currently binding provisions is largely analogue, requiring an urgent update to take account of digital reality and contemporary business models. The "yes-no" exploitation question, posed by many of the reversion rights based on the use-it-or-lose-it principle, including the art.22 CDSM Directive provision, makes a sharp distinction between use and lack of use of a work, which is not appropriate to the digital environment where works can be technically available at the switch of a virtual button. A strict application of the non-use trigger, equating availability of a work with its exploitation, could lead to the revocation right losing any practical value for creators. The economic viability of works is limited in time and, when it is no longer beneficial for a transferee to actively exploit it, going beyond sustaining continuous availability in digital format, a creator should be able to seek another forum of exploitation.

Reverting to reversion rights? Reflections on the Copyright Act 1911

Elena Cooper*

Published in European Intellectual Property Review (E.I.P.R.) 2021, 43(5), 292-297

Abstract

With reversion rights on the legislative agenda of EU Member States (owing to art.22 Copyright in the Digital Single Market Directive) this article uncovers the legislative history of reversion in the UK Copyright Act 1911 (which applied also to the British Empire). Reversion related to controversies surrounding the significant increase in the copyright term in 1911 (to the author's life plus 50 years). A significant post-mortem term was intended to enable authors to make meaningful provision for their families but this would be undermined if "rich publishers" could take an assignment for the full term. Accordingly, reversion was an essential part of the legislative package which facilitated significant term extension in 1911. The 1911 debates were also the occasion for the consideration of a proposal for reversion in the event of an assignee's bankruptcy. This article concludes by reflecting on the implications of the debates of 1911 for how we think about reversion and copyright policy today.

The reversion of copyright—the right of authors and performers to "reclaim" copyright that has been assigned or exclusively licensed—is now a topical subject for discussion. EU Member States are obliged to implement the Copyright in the Digital Single Market Directive (2019/790) by 7 June 2021.[1] While the implementation of other articles of the Directive has been subject to much attention,[2] little consideration has been given to art.22, which obliges EU Member States to

* Leverhulme Early Career Fellow, CREATe, University of Glasgow. The author wishes to thank Rebecca Giblin and Martin Kretschmer for reviewing an earlier draft of this article.

[1] Directive 2019/790 on copyright and related rights in the Digital Single Market [2019] OJ L130/92.

[2] For a detailed resource page about the CDSM Directive, including an overview of the legislative process, debates on key issues and a summary of the academic evidence concerning the Directive's provisions on the press publishers right, text and data mining and filtering, please see the CREATe resource page available at: https://www.create.ac.uk/policy-responses/eu-copyright-reform/ [Accessed 8 March 2021].

A further resource page tracking the national implementation of the Directive by all EU Member States and links to key discussions surrounding the implementation of art.17, please see "Copyright in the Digital

provide a reversion right or "right of revocation": authors and performers who have transferred their rights on an exclusive basis will be able to revoke that transfer where there is "a lack of exploitation" on the part of the transferee (often termed a "use-it-or-lose-it" provision).

CREATe, the Research Council-funded centre for copyright research at the University of Glasgow (to which this author is affiliated) has recently co-ordinated an Open Letter to the European Commission and relevant authorities of all EU Member States, which is published in full in the opinion in this issue of the E.I.P.R.[3] In a bid to foster public debate around the implementation of art.22, the Open Letter presents this as "an historic opportunity" to create "meaningful new rights for creators", especially as a counter to practices of "rights grabbing" (transfers of rights away from creators that are exceptionally broad, e.g. all economic rights, worldwide and for the full term of copyright).[4] CREATe research to date includes a detailed mapping of current and historical reversion rights from the national laws of all EU Member States, conducted by the postdoctoral researcher Ula Furgał and published as a CREATe Working Paper, "Reversion Rights in the European Union Member States",[5] with its conclusions published as an article in this issue of the E.I.P.R.[6] Further, in 2019, another article about reversion rights was published in this journal: "Why Were Commonwealth Reversionary Rights Abolished (and What Can We Learn Where They Remain)?" by Joshua Yuvaraj and Rebecca Giblin, as part of The Author's Interest Project.[7]

Single Market Directive—Implementation: An EU Copyright Reform Resource" available at: https://www.create.ac.uk/cdsm-implementation-resource-page/ [Accessed 8 March 2021].

[3] Martin Kretschmer and Rebecca Giblin, "Getting Creators Paid: One More Chance for Copyright Law" (2021) 43 E.I.P.R. 279.

[4] Indeed, the proper place of reversion rights in copyright laws generally is an aspect of CREATe's current research agenda, in its contribution to the Australian Research Council funded The Author's Interest Project led by Rebecca Giblin at the Intellectual Property Research Institute of Australia, University of Melbourne, which investigates ways better to take seriously the author's interest in copyright, so as to benefit both creators and broader society (see The Author's Interest webpage available at: http://www.authorsinterest.org [Accessed 8 March 2021]).

[5] U. Furgał, "Reversion Rights in the European Union Member States", CREATe Working Paper 2020/11 (2020) available at: https://zenodo.org/record/4281035#.YDTdsZP7Qk4). An interactive digital resource page on reversion rights in EU Member States is available at: https://www.create.ac.uk/reversion-rights-resource-page/ [Both accessed 8 March 2021].

[6] Ula Furgał, "Interpreting EU Reversion Rights: Why 'Use-it-or-lose-it' Should Be the Guiding Principle" (2021) 43 E.I.P.R. 283.

[7] J. Yuvaraj and R. Giblin, "Why Were Commonwealth Reversionary Rights Abolished (and What Can We Learn Where They Remain)?" (2019) 41 E.I.P.R. 232, 232–240. Other important scholarship on reversion rights includes L. Bently and J. Ginsburg, "The Sole Right Shall Return to the Authors: Anglo-American Authors Reversion Rights from the Statute of Anne to Contemporary US Copyright" (2019) 25 Berkeley Tech. L.J. 1475; P. Heald, "The Impact of Implementing a 25-Year Reversion/Termination Right in Canada", University of Illinois College of Law Legal Studies Research Paper No.20-18 (2018); and P. Heald, "Copyright Reversion to Authors (and the Rosetta Effect): An Empirical Study of Reappearing Books" (2017), SSRN available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3084920 [Accessed 8 March 2021].

Discussions over reversion rights with relevant author and performer organisations reveal an assumption that the UK experience on this topic is unhelpful: UK law is thought to be rooted in the principle of freedom of contract, which generally precludes legally imposed constraints on contractual transfers like reversion rights.[8] However, as readers of the E.I.P.R. may know, the UK Copyright Act 1911 included reversion rights (in the proviso to s.5(2)),[9] where the author either assigned or made a "grant of any interest" in copyright "otherwise than by will" (i.e. any formal written licence),[10] copyright would automatically revert to the author's estate on the author's death, for the last 25 years of the copyright term (then, the term was life plus 50 years). Any contractual agreement to the contrary was "null and void".[11] There were two exceptions, where reversion rights did not apply: works where the author was not the first owner of copyright (e.g. works created by an employee in the course of employment);[12] and collective works (e.g. encyclopaedias, dictionaries, newspapers and magazines).[13] The reversion rights regime introduced in 1911 remains in force today, under the Copyright Designs and Patents Act 1988, in respect of copyright transfers made after the passing of the 1911 Act, but before the entry into force of the Copyright Act 1956 (which abolished reversion rights, but only prospectively).[14]

The UK has indicated that, in view of its exit from the EU, it does not intend to implement the Digital Single Market Directive. In any event, the provision in art.22 of the Directive clearly differs from that contained in the 1911 Act. Under the 1911 Act, reversion was automatic, after the passage of a particular period of time (25 years after the author's death). By contrast, while the expiry of a particular period of time may be relevant under art.22, the Directive envisages a "use-it-or-lose-it" provision that must be activated by the creator serving notice on the assignee or licensee.[15] Notwithstanding these differences, understanding the UK's historic

[8] On exceptions to this principle stemming from contract law, e.g. undue influence and unconscionability, see Yuvaraj and Giblin, "Why Were Commonwealth Reversionary Rights Abolished?" (2019) 41 E.I.P.R. 232, 232; and M. Kretschmer, E. Derclaye, M. Favale and R. Watt, "The Relationship between Copyright and Contract Law", Intellectual Property Office Research Paper No.04 (2010), SSRN available at: https://ssrn.com/abstract=2710614 [Accessed 8 March 2021].

[9] Reversion rights were also included in the first copyright Act—s.11 of the Statute of Anne 1710—but abolished in 1814. See Bently and Ginsburg, "The Sole Right Shall Return to the Authors" (2019) 25 Berkeley Tech. L.J. 1475.

[10] See the commentary at para.5-119 of G. Davies, N. Caddick and G. Harbottle, Copinger and Skone James on Copyright, 17th edn (London: Sweet & Maxwell, 2016).

[11] 1911 Act Proviso to s.5(2).

[12] 1911 Act Proviso to s.5(2) and s.5(1)a.

[13] 1911 Act Proviso to s.5(2) and s.35(1). On the 19th-century history of the protection of collective works, see E. Cooper, "Copyright in Periodicals in the Nineteenth Century: Genre and Balancing the Rights of Contributors and Publishers" (2018) 51 Victorian Periodicals Review 661, 661–678.

[14] Copyright Designs and Patents Act 1988 Sch.1 para.27. On removal by the 1956 Act, see Yuvaraj and Giblin, "Why Were Commonwealth Reversionary Rights Abolished?" (2019) 41 E.I.P.R. 232, 234.

[15] See art.22(1), (2) and (3) CDSM Directive. Under art.22(3), Member States are obliged to provide that revocation can only be exercised "after a reasonable time following the conclusion of the licence or transfer". Further, under art.22(2)(b), Member States may provide that revocation "can only apply within a

approach to reversion rights is useful both to thinking about the position of reversion rights in copyright laws generally, as well as to understanding aspects of the history of reversion rights in EU Member States that were part of the UK or the British Empire in 1911, and to which the 1911 Act applied: Cyprus,[16] Ireland[17] and Malta.[18]

In this article, I uncover the legislative history of reversion rights in 1911 and draw reflections for policy-making today. In doing so, I address a question left open by Yuvaraj and Giblin in their 2019 E.I.P.R. article. Yuvaraj and Giblin uncovered the history of the abolition of reversion rights stemming from the 1911 Act, in the UK, Australia and New Zealand, and their retention in Canada, but described the precise origins of the 1911 Act provision as "mysterious" and unexplained by readily available sources.[19] This article fills this gap and, in that way, furthers our understanding of the history of the place of reversion rights in copyright law.

Setting reversion rights in context—the term extension debates of 1911

The inclusion of reversion rights in the 1911 Act was tied to one of the most controversial aspects of copyright reform at this time: the extension of the term of copyright. By 1911, copyright in the UK was governed by numerous subject specific statutes, passed during the course of the 18th to early 20th centuries, and these applied different terms of protection to different subject-matter. For instance, literary works were protected from publication by the Literary Copyright Act 1842 for whichever was longer of 42 years or life plus seven years;[20] paintings, drawings and photographs were protected from creation for life plus seven years under the Fine

specific time frame" but that must be "duly justified by the specificities of the sector or the type of work or other subject matter concerned". Another difference between the Directive and the 1911 Act is that art.22(5), unlike the 1911 Act (which declared all contractual derogations to be null and void), also allows for contractual derogation where that is based on a collective bargaining agreement.

[16] The Copyright Act 1911 applied in Cyprus by virtue of an Order in Council (1912 No.912) passed in June 1912. When Cyprus became independent in 1960, the Republic of Cyprus adopted the 1911 Act as its own copyright law, and this remained in force until 1976. See A. Demetriades and N. Epaminonda, "Cyprus" in B. Lindner and T. Shapiro, Copyright in the Information Society: A Guide to National Implementation of the European Directive, 2nd edn (Cheltenham and Massachusetts: Edward Elgar, 2019), p.254, para.7.01-02.

[17] The Copyright Act 1911 applied to Ireland as part of the UK. The question of whether the Act applied also to the Irish Free State, created in 1922, was decided by the Irish Supreme Court and then appealed to the Judicial Committee of the Privy Council in Performing Rights Society v Bray Urban District Council [1930] I.R. 509 but the political difficulties of accepting a ruling of the Privy Council led to the introduction of new legislation by the Irish Free State: the Copyright (Preservation) Act 1929, which stated that the 1911 Act, and all Orders made thereunder as at December 1921, were deemed to always have had and to continue to have, full force and effect in the Irish Free State. See T. Mohr, "British Imperial Statutes and Irish Law: Imperial Statutes Passed before the creation of the Irish Free State" (2010) 31 Journal of Legal History 299, 309–310.

[18] The Copyright Act 1911 applied to Malta until its repeal in 1967. See P.M. Grimaud and S.L. Azzopardi, "Malta" in Lindner and Shapiro, Copyright in the Information Society (2019), p.633, para.21.03.

[19] Yuvaraj and Giblin, "Why Were Commonwealth Reversionary Rights Abolished?" (2019) 41 E.I.P.R. 232, 233.

[20] Literary Copyright Act 1842 (5&6 Vict. c.45) s.3.

Arts Copyright Act 1862;[21] and engravings and sculptures were protected for a maximum of 28 years from publication (under the Engraving Acts and the Sculpture Copyright Acts respectively).[22] In 1908, the Berlin Revision of the Berne Convention introduced an international standard for the term of protection: the author's life plus 50 years,[23] which reflected the approach taken by a majority of Union countries.[24]

In the UK, the Berne standard was seen as a significant extension of the copyright term and was of a length which the UK had not previously contemplated granting.[25] The "lengthy" nature of this term extension was noted in the report of the Gorell Committee on Copyright in 1909[26] (which reported on the implementation of the 1908 Revision) and repeatedly mentioned in the parliamentary process culminating in the 1911 Act. In a confidential memorandum to the Cabinet (now held at The National Archives, London) the Bill's architect, Sydney Buxton MP, the President of the Board of Trade, referred to term extension as the "most important proposal" in the Berlin Revision of the Berne Convention, commenting that while "at first sight this period may seem somewhat excessive", with appropriate safeguards against "the abuse of a long term of copyright" (to which safeguards I return below) "it should, I think, be adopted".[27] In the parliamentary debates, the length of the term of life plus 50 years was a subject for criticism. For example, in the House of Commons, the proposed term was referred to as "very excessive",[28] as "a very great extension … that is too long"[29] and, in the House of Lords, as a "term of copyright

[21] Fine Arts Copyright Act 1862 (25&26 Vict. c.68) s.1.
[22] 1735 Engraving Act (8 Geo. II c.13) s.1; Engraving Act 1767 (7 Geo. III c.38) s.7; Sculpture Copyright Act 1798 (38 Geo. III c.71) s.1; Sculpture Copyright Act 1814 (54 Geo. III c.56) ss.1 and 6.
[23] Berne Convention (Berlin Revision) 1908 art.7(1). Article 7(2) provided that, where countries of the Berne Union did not to provide this term, protection would be regulated by the law of the country where protection was claimed, but that term would not exceed the term of the country of origin.
[24] As at 1908, when the Berlin Revision was concluded, there were a variety of different approaches to term among Berne Union states: the longest term was set by Spain, at life plus 80 years, but a majority of Union members adopted life plus 50 years (Belgium, Denmark, France, Luxemburg, Monaco, Norway, Tunis, Sweden, though the latter only granted life plus 10 years for works of art). Other approaches to term by other Union countries were as follows: life plus 30 years granted by Germany, Switzerland and Japan; life or 40 years whichever is longer plus a royalty for 40 years was granted by Italy; life of the author and the widow or life and 20 years in favour of children or life and 10 years in favour of other heirs granted by Hayti.
[25] In the UK, the 19th century saw many failed proposals for copyright reform, and the longest term which had been put forward was the life of the author plus 30 years. See, for example, the proposals of the Royal Commission on Copyright: Copyright Commission: The Royal Commissions and the Report of the Commissioners, P.P. 1878 C-2036, C-2036-1 XXIV.163, 253, para.40.
[26] Report of the Committee on the Law of Copyright, P.P. 1909 Cd.4976 (the Gorell Committee Report), p.15.
[27] Confidential Memorandum from Sydney Buxton MP to the Cabinet, CAB 37/103 (London: National Archives, July 1910), pp.7 and 8–9.
[28] Hansard, HC Vol.23, col.2621 (7 April 1911), Mr Joynson-Hicks MP (who had been a dissenting member of the Gorell Committee).
[29] Hansard, HC Vol.28, col.1906 (28 July 1911), Mr Booth MP.

that is enlarged and lengthened",[30] "too long a period",[31] a "serious matter",[32] as a "great extension"[33] and as a "considerable change" to the length of copyright.[34]

Two concerns were repeatedly articulated about term extension: first, that it was not in the public interest; and secondly, that it favoured assignees of copyright, not the author's interests. These two points, and the provisions introduced to address them, are now considered in turn.

Increase in term and the public interest

In the debates culminating in the 1911 Act, term extension was repeatedly expressed to be damaging to the public interest, particularly the interests of the public in having access to cheap public domain works.[35] For instance, in the House of Commons, Mr Booth MP argued that opposition to term extension was a "battle of the poor and of freedom": "while this Bill is in progress, I had communications from all over the country, from working men, who properly consider" term extension to be "an attack on their right and privilege to enjoy cheap literature".[36] Similar concerns were raised in the House of Lords debates, that "the length" of the copyright term would "militate against the ready publication of cheap books".[37] Lord Courtney, for example, pointed to "the extreme inconvenience to which the reading public of the future would be exposed" by term extension: "The reading public of the future would be unable to find that access to literature which we and our fathers before us have enjoyed until a much longer period has elapsed."[38] Indeed, in the House of Lords, reference was made to the "oratory" of Lord Macaulay "on a great occasion similar to this".[39] Thomas Babington Macaulay MP (who was also a popular writer in the 19th century) had famously opposed term extension in parliamentary debates culminating in the Literary Copyright Act 1842, presenting copyright as a "monopoly" and a form

[30] Hansard, HL Vol.10, col.46 (31 October 1911), Viscount Haldane (who took charge of the Bill in the Lords).
[31] Hansard, HL Vol.10, col.48 (31 October 1911), Lord Gorell. Lord Gorell's report had advocated adopting the term of life plus 50 years. Here he was referring to the provisions (discussed below) that limit "the benefit of the copyright" for the full term, which he explained as "may be owing to the view that fifty years is too long a period".
[32] Hansard, HC Vol.28, col.1906 (28 July 1911), Dundas White MP, referring to the proposed term as "a very great extension … that is too long".
[33] Hansard, HL Vol.10, col.50 (31 October 1911), Lord Courtney.
[34] Hansard, HL, Vol.10, col.127 (14 November 1911), by Lord Courtney.
[35] For a discussion of the public interest in the debates of 1911 more generally, see I. Alexander, Copyright and the Public Interest (Oxford: Hart Publishing, 2010), Ch.7.
[36] Hansard, HC Vol.28, col.1903 (28 July 1911).
[37] Hansard, HL Vol. 10, col.133 (14 November 1911), Lord Gorell (summarising the argument made by the Bill's critics).
[38] Hansard, HL Vol. 10, col.128 (14 November 1911), Lord Courtney.
[39] Hansard, HL Vol. 10, col.52 (31 October 1911), Viscount Midleton.

of "taxation" on the reading public.[40] There was also a colonial dimension to these arguments: representatives of the self-governing dominions (Canada, Australia, New Zealand, South Africa and Newfoundland), as well as minsters representing the India Office and Colonial Office, had been consulted at a Colonial Copyright Conference in 1910, and their consent to increased term was "conditional on the enactment of some provision" to ensure "that after the death of the author the reasonable requirements of the public be met as regards the supply and terms of publication of the work and permission to perform it in public".[41]

To meet these concerns, two compulsory licensing provisions were included in the 1911 Act. The first, contained in s.4 and stemming from 1910 Bill (drafted immediately after the 1910 Colonial Conference) made compulsory licences available at any time after the author's death where a complaint was made to the Judicial Committee of the Privy Council that the copyright owner had refused to republish or allow public performance of the work, and that "by reason of such refusal the work is withheld from the public". The terms of the licence would be set by the Judicial Committee of the Privy Council.[42] The second provision, also presented to Parliament as guarding against the danger of works being "withheld from the public" and to avoid "an attempt to keep up the price at a monopoly figure",[43] but drafted so as to be available in all cases, was contained in the proviso to s.3: copyright would "not be deemed to be infringed" during the final 25 years of the copyright term by the "reproduction of works for sale" so long as the person reproducing the work gave prior written notice of such reproduction and paid a royalty rate of 10 per cent on sale to the copyright owner.[44] As a confidential Government memorandum from 1911 explains, a precedent for compulsory licensing was provided by s.5 of

[40] See C. Seville, Literary Copyright Reform in Early Victorian England (Cambridge: Cambridge University Press, 1999), pp.60 and 65. The 1842 Act increased the term of protection for literary copyright to the life of the author plus seven years or 42 years from publication, whichever was longer. Prior to this, under the Copyright Act 1814, the term of literary copyright was 28 years from publication, or the author's lifetime if this was longer. Macaulay proposed a life term, with a minimum term of 42 years, which could be enforced by the author's family if the author were to die before this. See Seville, Literary Copyright Reform in Early Victorian England (1999), pp.6 and 66–67.

[41] Imperial Copyright Conference, Memorandum of Proceedings, Cd. 5272 (July 1910), para.7(e). An "effective provision" of this nature was expressed to be "essential" in view of the significant increase in term. Seville, Literary Copyright Reform in Early Victorian England (1999).

[42] 1911 Act s.4. For an earlier draft see Copyright Bill 1910 (P.P. 1910 Bill 282) cl.2 but this allowed for complaints also to be made to an authority in the self-governing dominions, in respect of reproduction in that dominion. The Gregory Committee reported in 1952 that no applications under s.4 were ever made: see Report of the Committee: 1951–52, Cmd.8662 (the Gregory Committee Report), para.22.

[43] Hansard, HL Vol.10, col.131 (14 November 1911), Viscount Haldane.

[44] 1911 Act s.3 Proviso. This provision was introduced when the Bill was debated in the Standing Committee of the House of Commons in May 1911: see Report from Standing Committee: A on the Copyright Bill with the Proceedings of the Committee, P.P. 1911 (13 July 1911), p.22 proposed by Sydney Buxton MP; and Copyright Bill (as amended in Standing Committee A) (P.P. 1911 Bill 296) cl.3.

the Literary Copyright Act 1842[45] and, as Catherine Seville has shown, the latter was introduced following Macaulay's "show-stopping speech" expressing concern at the "dangers of the suppression of works, hinting darkly of civil turmoil".[46] The objections to term increase raised by Macaulay in his famous parliamentary oratory of the early 1840s, then, continued to have a resonance in 1911.

Term extension and the author's interest

The second concern raised by term extension was that it would in fact benefit publishers—who would take an assignment of the full term of copyright—and not authors. As Lord Courtney argued, on the second reading of the Bill in the House of Lords:

> No case has been made out for this great extension, nor do I think it will operate as a rule to the advantage of authors. The authors will have sold their copyright to the publisher, who are the people really interested in this matter.[47]

This was a problematic argument for proponents of the Bill. Viscount Haldane, who took charge of the Bill in the Lords, noted the great benefit of the Bill to publishers, who were "getting protection and advantages under this Bill of a new kind", including an "enlarged and lengthened" term.[48] Yet, one of the arguments in favour of term extension was to enable authors to make meaningful provision for their families. As Sydney Buxton MP had argued in his speech introducing the Bill into the House of Commons on its second reading, the advantage of the term of life plus 50 was that it "covers the full life" of the author's "immediate descendants and children, who ought to have consideration".[49] A similar point was made by Viscount Haldane in presenting the Bill to the Lords: where books had only become famous in the final years of an author's life, the then current term (in the case of books, possibly lasting only seven years after the author's death) "does not enable adequate provision" to be made for the author's family.[50] Accordingly, as one member of the Gorell Committee, Henry R. Clayton, noted in his

[45] "Confidential: Copyright Bill: Differences between Bill and Existing Law", BT 209/474 (London: The National Archives, 18 May 1911).
[46] Seville, Literary Copyright Reform in Early Victorian England (1999), pp.31 and 231. Section 5 of the 1842 Act empowered the Judicial Committee of the Privy Council to grant compulsory licences after the death of the author, on such terms it thought fit, where a complaint was made that a book had been "withheld from the public".
[47] Hansard, HL Vol.10, col.50 (31 October 1911), Lord Courtney. See also Hansard, HL Vol.10, col.49 (31 October 1911), Lord Courtney: "I believe that this change in the law will not be found to operate at all to the advantage of authors, speaking broadly. It will be found to operate to the advantage of publishers only, who will get an extended period of the copyright in the books which they publish." For further concerns about ensuring that term increase did not simply further "the interests of the rich publisher and dealer", see the speech of Mr Booth MP (debating an amendment relating to transitional provisions): Hansard, HC Vol.29, col.2153 (12 August 1911), Mr Booth MP.
[48] Hansard, HL Vol.10, col.46 (31 October 1911), Viscount Haldane.
[49] Hansard, HC Vol.23, col.2598 (7 April 1911), Mr Buxton MP, President of the Board of Trade.
[50] Hansard, HL Vol.10, col.43 (31 October 1911), Viscount Haldane.

"reservation" to the majority report: "the suggestion in favour of prolonging the period of copyright" was "for the author's benefit" and this would require a means of "adjusting, where necessary, the respective rights of the author and the assignee".[51] These concerns explain the inclusion of reversion rights in the proviso to s.5(2) of the 1911 Act.[52]

Accordingly, the combined effect of the reversion right (in the proviso to s.5(2)) and compulsory licensing provision (in the proviso to s.3, considered above) was that, in respect of "reproduction of the work for sale", the 10% royalty payable in the last 25 years of the copyright term would be payable to the author's estate and not to an assignee (or other transferee). As Lord Haldane explained the interrelation of the two provisions, after again noting the criticism that the Bill was "making the term of copyright too long":

> ... so far as publication is concerned, the only thing that remains [in the last 25 years of the copyright term] is a right to receive royalties and the only question ... is whether that right to receive royalties should go to the publisher or to the author; and with every respect to the publisher we think he has enough when he has an absolute right for life and twenty-give years after the author's death. It is the author's descendants we are trying to help.[53]

In this context, as Viscount Haldane continued, the object of reversion rights was "simply that the author is not to be allowed to contract himself out of what we think a fair standard of rights".[54]

Reversion rights on bankruptcy

Interestingly, and forgotten to us today, the 1911 debates were an occasion for debate of another type of reversion right: reversion on bankruptcy of an assignee. This was proposed by Sir Gilbert Parker, a Member of Parliament who was also a popular novelist,[55] in the following terms:

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[51] Gorell Committee Report (1909), p.30. Clayton concluded that this was "impracticable' and would "seriously affect the continuity of publications".

[52] This provision was introduced when the Bill was debated in the Standing Committee of the House of Commons in May 1911: see Report from Standing Committee: A on the Copyright Bill with the Proceedings of the Committee (19110), p.26 proposed by the Solicitor General; and Copyright Bill (as amended in Standing Committee A) (P.P. 1911 Bill 296) cl.5(2).

[53] Hansard, HL Vol.10, col.159 (14 November 1911), Lord Haldane.

[54] Hansard, HL Vol.10, col.159 (14 November 1911). Reversion rights of a different nature were considered by Parliament in the legislative process culminating in the 1842 Act. In 1838. Sergeant Talfourd, the Bill's chief advocate, proposed a retrospective clause preventing assignees from obtaining the benefit of term extension. However, this was strongly opposed by the book trade. Accordingly, the final compromise regarding the Act's retrospective application (contained in s.4 of the 1842 Act) was that an author or author's personal representative and the publisher could enter into a written agreement whereby both parties would "accept the benefit" of the Acts in respect of a particular book, thereby providing some opportunity for a renegotiation of that contract. See, further, Alexander, Copyright and the Public Interest (2010), p.95. On reversion rights in the Statute of Anne 1710 s.11, see Bently and Ginsburg, "The Sole Right Shall Return to the Authors" (2010) 25 Berkeley Technology Law Journal 1475, 1480–1541; and Yuvaraj and Giblin, "Why Were Commonwealth Reversionary Rights Abolished?" (2019) 41 E.I.P.R. 232, 232.

[55] D. Atkinson, "Parker, Sir (Horatio) Gilbert George, baronet (1860–1932)" in Oxford Dictionary of National Biography (Oxford: Oxford University Press, 2011).

> In the case of an assignee of copyright becoming bankrupt the royalties due under the agreement to the author shall continue to be paid to the author by any purchaser of the rights of such assignee if the work is thereafter published, and if not thereafter published, the copyright shall at once revert to the author.[56]

The particular hardship raised by Sir Gilbert Parker was that illustrated by the case of Re Grant Richards Ex p. Deeping, decided by the High Court in 1907.[57] An author, Warwick Deeping, had assigned copyright in his book Uther and Igraine to a publisher, in consideration for the payment of royalties on sale of the work. Bingham J held that, on bankruptcy of the publisher, the copyright vested in the trustee in bankruptcy who could "do with it what he pleased" in carrying out his duties. The only recourse that Mr Deeping had was to bring an action for breach of contract for the trustee's failure to pay royalties for the sales during the period that the trustee was carrying on the publisher's business.[58] Referring to this case, Sir Parker reported to the House of Commons that the purchaser of the copyright (from the trustee in bankruptcy) was not bound to pay the royalties to the author under the original publishing agreement. Sir Gilbert Parker expressed this to be a "great injustice to the author", "a serious grievance … which ought to be put right", and his own view was that copyright law should instead provide that, on bankruptcy of an assignee, copyright would automatically revert to the author.[59] Sir Gilbert Parker's amendment was supported by another MP, and the Government's representative, the Solicitor General Sir J. Simon, expressed "a good deal of sympathy" for the issue, particularly in view of the "actual hardship" caused in the case of Mr Deeping. However, it was not addressed in the Bill because it was seen as "quite outside the scope of a Copyright Bill".[60] Therefore, Sir Parker's views were not reflected in the Bill, not because there was a substantive objection to the principle of reversion to the author on the bankruptcy of a publisher, but because the proper place for such a proposal should instead be a bankruptcy measure.

Conclusion

This article has revealed that the inclusion of reversion rights, in the proviso to s.5(2) of the 1911 Act, was not an isolated measure. Rather, reversion rights were closely related to the debate of one of the most controversial aspects of copyright reform at this time: the increase of the term of copyright to the author's life plus 50 years. In the debates of 1911, an important argument in favour of term extension was that a post-mortem term of 50 years would enable authors to make proper provision for their families. However, the Bill's critics pointed out that in practice this

[56] Hansard, HC Vol.29, col.2135 (17 August 1911), Sir Gilbert Parker MP.
[57] Re Grant Richards Ex p. Deeping [1907] 2 K.B. 33 KBD.
[58] Re Grant Richards Ex p. Deeping [1907] 2 K.B. 33 KBD at 35.
[59] Hansard, HC Vol.29, col.2136 (17 August 1911), Sir Gilbert Parker MP. It was suggested that the position in Warwick Deeping's case might have been different if the purchaser had notice of the publishing contract.
[60] Hansard, HC Vol.29, col.2137 (17 August 1911), Sir J. Simon MP.

would merely benefit assignees, like publishers, who would take an assignment of the full term of copyright. Reversion rights were a means of meeting this criticism, and making the significant increase of the copyright term palatable, by suggesting that the interests of authors were promoted.

In fact, as many readers of this article will know, the drafting of the reversion rights provision in the 1911 Act was such that, in practice, little protection was provided for authors and their descendants. The proviso to s.5(2) stated that, on the death of the author, the reversionary interest would "devolve" on the author's "legal personal representatives as part of his estate".[61] Accordingly, under the 1911 Act, the reversionary interest was an asset which an author's personal representatives would, in most cases, usually sell to pay off the author's debts or to wind up the estate generally. As the authors of Copinger Skone James on Copyright note, in practice, the amount that a purchaser would pay for reversionary rights upon death of the author "was not likely to have been very large": the rights would not accrue until 25 years later and even then, the same work could be reproduced (under the compulsory licence proviso to s.3) at a royalty of 10%.[62] In view of this, it is perhaps unsurprising that the abolition of reversion rights by the 1956 Act (on a prospective basis only)[63] did not occasion much debate; abolition was recommended by the Gregory Committee on Copyright in 1952 with little specific discussion, presented as a simple consequence of the proposed removal of the compulsory licensing proviso to s.3 (which was clearly incompatible with art.7 of the Brussels Revision of the Berne Convention concerning the term of protection).[64] Indeed, while the 1956 Act and the Copyright

[61] In Peer International Corp v Termidor Music [2006] EWHC 2883 (Ch); [2007] E.C.D.R. 1, Lindsay J held that the words of the Proviso to s.5(2) meant that title to the reversionary interest could only be acquired where there had been a grant of probate to personal representatives in the UK. In absence of this, title vested in the public trustee under s.9 of the Administration of Estates Act 1925; a declaration of copyright ownership could not be granted on the basis of an assumed equitable right derived from the author's descendants.

[62] Davies, Caddick and Harbottle, Copinger and Skone James on Copyright (2016), para.5-126. The authors of Copinger describe the benefits of reversion rights, in this context, to be of an "illusory nature". There are also reports of widespread ignorance on the part of the personal representatives of authors' estates, who often "simply did not realise" that the reversionary interest existed. See S. Edwards, J. Love and M.A. Manger, "Regaining Ownership of Copyright: Traps for the Unwary in UK and US Copyright Law" (15 March 2018), Reed Smith Client Alerts available at: https://www.reedsmith.com/en/perspectives/2018/03/regaining-ownership-of-copyright-traps-for-the-unwary [Accessed 8 March 2021].

[63] Copyright Act 1956 Sch.7 para.28(3). For litigation within recent memory where the claimant's title derived from the reversionary interest under the proviso to s.5(2) of the 1911 Act, see the litigation from the 1980s involving Redwood Music: Chappell & Co Ltd v Redwood Music Ltd [1980] 2 All E.R. 817; [1981] R.P.C. 337 HL; Redwood Music Ltd v Chappell & Co Ltd [1982] R.P.C. 109 QBD.

[64] Gregory Committee Report (1952), para.15. The Report states at para.23: "the advantages of continued adherence to the Union and to the latest Convention are overwhelming, and greatly outweigh any possible advantages which might flow from the repeal of the provisions in the existing law" (referring to compulsory licences in the Provisos to ss.3 and 4). The Report continues: "The omission of the proviso to Section 3 of the Act would appear to involve the omission also of the proviso to Section 5(2), which would seem to have

Designs and Patents Act 1988 preserved reversion rights under the 1911 Act retrospectively (i.e. in respect of transfers between 1912 and 1957), their implications for assignees have been lessened by the fact that these later Acts are understood to permit authors to assign the reversionary interest during their lifetime.[65]

Notwithstanding the specifics of the proviso to s.5(2), recounting the legislative history of the 1911 Act is beneficial to us today. History reminds us that the long term of protection that copyright works enjoy today—now life of the author plus 70 years[66] —is far from timeless or inevitable. As Viscount Haldane, who took charge of the Bill in the House of Lords expressed it, "the most minute consideration" had been given to term increase, and the approach taken "was arrived at only after a great deal of discussion and negotiation".[67] In these negotiations, ensuring that a measure was included which at least purported to ensure term extension benefitted authors, not assignees (like publishers) was a pre-requisite for the acceptance of term extension by legislators in 1911. Accordingly, in this context it was fully accepted that fetters on freedom of contract were appropriate to safeguard authors' interests. Further, reversion rights were considered also in circumstances other than those enacted in the proviso to s.5(2): reversion to the author on bankruptcy of an assignee was also debated, and while this approach was not adopted, no substantive objection was raised to the inclusion of such a measure as a matter of principle. In this way, history takes us away from the assumption that the approach in the UK (as well as common law EU Member States like Cyprus, Malta and Ireland to which the 1911 applied) has always been simply one of freedom of contract and may free us to think again today about whether copyright truly serves authors' interests and, if so, whether contractual restrictions on exploitation might appropriately redress that balance.

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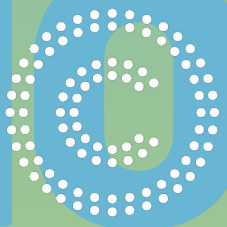
been inserted so as to give the royalty under Section 3 to the personal representatives of the author." For a critique of this approach, see Yuvaraj and Giblin, "Why Were Commonwealth Reversionary Rights Abolished?" (2019) 41 E.I.P.R. 232, 234–235.

[65] Patten J in Novello & Co Ltd v Keith Prowse Music Publishing Co Ltd [2004] EWHC 766 (Ch); [2004] E.M.L.R. 16 held that, after the entry into force of the 1956 Act, the author could dispose of the reversionary interest by assignment and this decision was upheld on appeal: [2004] EWCA Civ 1776; [2005] E.M.L.R. 21. An express statutory provision, allowing for the author to dispose of the reversionary interest by assignment after 1 August 1989, is included in the Copyright Designs and Patents Act 1988 Sch.1 para.27(2).

[66] Copyright Designs and Patents Act 1988 s.12, implementing the EU Term Directive 93/98 harmonizing the term of protection of copyright and certain related rights [1993] OJ L290/9.

[67] Hansard, HL Vol.10, col.130 (14 November 1911).



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UK Copyright and Creative Economy Centre
School of Law / University of Glasgow
10 The Square
Glasgow G12 8QQ
www.create.ac.uk

2021/5 DOI: 10.5281/zenodo.4727099

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