ARE CONTRACTS ENOUGH? AN EMPIRICAL STUDY OF AUTHOR RIGHTS IN AUSTRALIAN PUBLISHING AGREEMENTS

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A majority of the world's nations grant authors statutory reversion rights: entitlements to reclaim their copyrights in certain circumstances, such as their works becoming unavailable for purchase. In Australia (as in the United Kingdom) we have no such universal protections, leaving creator rights to be governed entirely by their contracts with investors. But is this enough? We investigate that question in the book industry context via an exploratory study of publishing contracts sourced from the archive of the Australian Society of Authors. We identify serious deficiencies in the agreements generally as well as the specific provisions for returning rights to authors. Many contracts were inconsistent or otherwise poorly drafted, key terms were commonly missing altogether, and we demonstrate that critical terms evolved very slowly in response to changed industry

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realities. In response to this new evidence we propose that consideration be given to introducing baseline minimum protections with the aim of improving author incomes, investment opportunities for publishers and access for the public.

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I Introduction: Reversion's Potential

We expect copyright to fulfil a variety of aims. We want it to incentivise investments in the initial creation and production of works, and then in their ongoing availability, so society can benefit from widespread access to knowledge and culture. We also intend copyright to recognise and reward authors for their creative contributions.[1] Yet copyright laws worldwide are under sustained attack for doing a poor job of achieving these aims. Many creators are struggling financially, threatening their ability to continue their creative work. Writers' incomes in particular are in sustained sharp decline throughout the English language world, and it is growing harder to make a

[1] See Rebecca Giblin and Kimberlee Weatherall, 'If We Redesigned Copyright from Scratch, What Might It Look like?' in Rebecca Giblin and Kimberlee Weatherall (eds), *What if We Could Reimagine Copyright?* (Australian National University Press, 2017) 1, 16–18.

living from writing.[2] Many publishers are also struggling to continue in the market, competing with a handful of behemoth rivals that enjoy vastly different economies of scale.[3] The economics of independent print publishing in Australia are particularly unforgiving: a 'bestseller' might shift perhaps 7,000 copies, making it hard even to keep the lights on.[4] If such publishers were to disappear, it would further reduce competition, thereby making it still more difficult for authors to sustain their craft — and reducing the diversity of voices that get to be heard. At the same time, copyright makes certain works, particularly older works, difficult to access. Long copyrights lead to 'orphaning', whereby the owners of works cannot be found to seek permission to use them. Other times rightsholders are ascertainable but uninterested in licensing their catalogues, since transaction costs would outweigh likely revenues. An increasing corpus of evidence also shows that older books can be far less available than equivalents in the public domain, suggesting that copyright sometimes stands in the way of new investments in making works available.[5]

[2] See, eg, David Throsby, Jan Zwar and Callum Morgan, 'Australian Book Readers: Survey Method and Results' (Research Paper No 1/2017, Department of Economics, Macquarie University, March 2017) archived at <https://perma.cc/X2RT-9RRJ>; Martin Kretschmer et al, *UK Authors' Earnings and Contracts 2018: A Survey of 50,000 Writers* (Report, 2019) archived at <https://perma.cc/9379-6L7P>; 'Six Takeaways from the Authors Guild 2018 Author Income Survey', *The Authors Guild* (Web Page, 5 January 2019) archived at <https://perma.cc/NRS4-B9UZ/>; Horizon Research, *Writers' Earnings in New Zealand* (Report, November 2018) archived at <https://perma.cc/7KD8-EK5N>; Writers' Union of Canada, *Diminishing Returns: Creative Culture at Risk* (Income Survey, 2018) archived at <https://perma.cc/9L3Y-T7MT>.

[3] See, eg, Shirley Biagi, *Media/Impact: An Introduction to Mass Media* (Cengage Learning, 12th ed, 2017) 40, noting that '[l]arge publishers are continuing to consolidate, and the number of small publishers is decreasing', and 'because [small publishers] have limited distribution capabilities and don't have the money to invest in e-books, most small presses today are struggling to survive'.

[4] See @MirandaLuby (Miranda Luby) (Twitter, 13 September 2018, 6:23pm AEST) <https://twitter.com/MirandaLuby/status/1040410631986339840>, archived at <https://perma.cc/JD7P-AP2V>.

[5] See, eg, Paul J Heald, 'Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Bestsellers' (2008) 92(4) *Minnesota Law Review* 1031; Paul J Heald, 'How Copyright Keeps Works Disappeared' (2014) 11(4) *Journal of Empirical Legal Studies* 829, 839–44; Christopher Buccafusco and Paul J Heald, 'Do Bad Things Happen when Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension' (2013) 28(1) *Berkeley Technology Law Journal* 1, 13; Jacob Flynn, Rebecca Giblin and François Petitjean, 'What Happens when Books Enter the Public Domain?: Testing Copyright's Underuse Hypothesis across Australia, New Zealand, the United States and Canada' (2019) 42(4) *University of New South Wales Law Journal* 1215. Cf B Zorina Khan, 'Does Copyright Piracy Pay?: The Effects of US International Copyright Laws on the Market for Books, 1790–1920' (Working Paper No 10271, National Bureau of Economic Research, January 2004).

Rights reversion — returning rights in copyrighted works to their creators — is a promising avenue for addressing each of these problems. By freeing up rights to new exploitations, reversion could help recover currently lost culture, give authors new opportunities to financially benefit from their works, and facilitate new investment opportunities.[6] Whilst reversion has interesting potential for many creators, in this article we focus specifically on its potential for authors publishing books.

Madeleine St John's *The Women in Black* usefully illustrates reversion's promise. First published in 1993, it quickly went out of print despite another of St John's novels being shortlisted for the 1997 Booker Prize. Australian independent publisher Text Publishing rediscovered the title, acquired the rights, and republished it as part of its *Text Classics* series in 2012, 19 years after its original release.[7] Since then it has sold over 100,000 copies in physical and digital forms, been developed into a musical and a feature-length film, and translation rights have been sold in Germany, Italy, France and Israel.[8] This book's potential was realised, new creative work was made possible and substantial economic value was unlocked through the rights becoming available for new investment. Of course, not all out of print books will find a new publisher eager to invest. Yet entitlements to reclaim rights to out of print titles create possibilities for new investments, new income, and new access.

Reversion rights predate copyright itself, with the earliest located dated 1694.[9] However, they have not always had the broad potential they have today. In the pre-digital era, high marginal costs of copying and distribution used to mean most books disappeared quickly from sale.[10] Authors might have had legal rights to reclaim their out of print titles, but that meant little unless

[6] Rebecca Giblin, 'A New Copyright Bargain?: Reclaiming Lost Culture and Getting Authors Paid' (2018) 41(3) *Columbia Journal of Law and the Arts* 369, 396–400 ('A New Copyright Bargain').

[7] Madeleine St John, *The Women in Black* (Text Classics, 2012).

[8] 'The Women in Black: Text Classics', *Text Publishing* (Web Page) <https://www.textpublishing.com.au/books/the-women-in-black/>, archived at <https://perma.cc/GM63-3BYJ>; 'Ladies in Black', *Text Publishing* (Web Page) <https://www.textpublishing.com.au/books/ladies-in-black>, archived at <https://perma.cc/7XUF-CFWL>; 'Think Australian' (2018) *Books+Publishing* <https://www.booksandpublishing.com.au/newsletter/think/2018/11/15/*%7CUNSUB%7C*/>, archived at <https://perma.cc/KW25-6483>; Email from Anne Beilby (Rights and Contracts Director, Text Publishing Company) to the authors, 18 November 2019.

[9] Rebecca Schoff Curtin, 'The Transactional Origins of Authors' Copyright' (2016) 40(2) *Columbia Journal of Law and the Arts* 175, 212–13.

[10] *To Amend and Consolidate the Acts Respecting Copyright: Hearings on S 6330 and HR 19853 Before the H and S Comm on Patents*, 59th Cong 117–18 (1906) (Samuel L Clemens [Mark Twain]).

another publisher was interested in making the substantial investments necessary to bring them back to market. Now there are vastly more options. Digital printing makes smaller print runs financially feasible — right down to single copies via print on demand ('POD') — enabling books to be physically available for longer. Further, the marginal costs of digital production and global instantaneous delivery are virtually zero, opening new opportunities for online sales, including in foreign markets, via publishers or author-to-reader direct. Technological advances give rise to new licensing opportunities, too — for example, to public libraries for 'eLending'. This has become big business, with market leader OverDrive facilitating over 185 million ebook loans in 2018 alone.[11] Rapid improvements in AI technologies are also creating new opportunities. While AI-powered translation is not yet close to being substitutable for human expertise, it is already being used to reduce the costs of translating books for foreign language markets.[12] In the audio realm, AI-powered text-to-speech technologies are already on the market,[13] and for those who still want a human reader, high quality online home recording is drastically reducing the costs of audiobook production.[14] All this creates new investment and revenue opportunities, but what if the original publisher controls the rights and is not interested in pursuing them? In that case, taking advantage of these new possibilities depends on appropriately drawn reversion rights.

Reversion's potential is being recognised by lawmakers the world over. The European Union ('EU') has just enacted a directive requiring member states to enact reversion rights entitling creators to recover copyrights that have been assigned but not exploited.[15] In Canada, two parliamentary committees recently recommended a law that would allow creators to terminate their

[11] Rakuten OverDrive, 'Public Libraries Achieve Record Breaking Ebook and Audiobook Usage in 2018' (Press Release, 8 January 2019) <https://company.overdrive.com/2019/01/08/public-libraries-achieve-record-breaking-ebook-and-audiobook-usage-in-2018/>, archived at <https://perma.cc/W8DR-UV69>.

[12] Joanna Penn, 'Tips for Self-Publishing in Translation: Adventures with AI and German', *The Creative Penn* (Blog Post, 22 November 2019) <https://www.thecreativepenn.com/2019/11/22/self-publishing-german-ai/>, archived at <https://perma.cc/S85N-QRWN>.

[13] See, eg, 'Amazon Polly', *AWS* (Web Page) <https://aws.amazon.com/polly/>, archived at <https://perma.cc/R4EC-M8QL>; 'Cloud Text-to-Speech', *Google Cloud* (Web Page) <https://cloud.google.com/text-to-speech>, archived at <https://perma.cc/US8J-6HLS>.

[14] See, eg, the Findaway Voices service, which provides high quality audiobook narration via at-home narrators: *Findaway Voices* (Web Page) <https://findawayvoices.com/narrating-audiobooks/>, archived at <https://perma.cc/KA2E-5LQR>.

[15] *Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC* [2019] OJ L 130/29, art 22(1) ('*EU Directive*').

contracts after 25 years.[16] And a majority of the world's nations already have some form of statutory reversion law benefiting authors or their heirs.[17] Yet common law countries are lagging behind. With the exception of a single narrow right in each of the United States ('US') and Canada,[18] authors in the Anglosphere are legally entitled to recover their rights only if and as their publishing agreements permit. Author advocacy associations have expressed growing concern that such contracts, in their current forms, do not adequately protect author rights. The CREATOR principles adopted by the United Kingdom's ('UK') Society of Authors'[19] and 'Ten Principles for Fair Contracts' of the International Authors Forum[20] both call for fundamental changes to author–publisher contracts, particularly around reversion. By contrast, some rightsholders contend there is nothing to worry about — that author interests are adequately taken care of by their contracts.[21] In this article we explore whether contracts are indeed enough, or whether there is a case for additional statutory rights.

Part II identifies the main types of reversion right and reviews the literature analysing reversion in publishing contracts to date. Part III sets out the method and results of our new exploratory study of publishing contracts, analysing the rights taken, provisions for returning them to authors, and their evolution over time. This makes a vital contribution to the existing literature: such contracts govern author rights in Australia, and without analysing them, we have no way of knowing what those rights are, or when and how they apply. In Part IV, we argue that problems identified in our study suggest that contracts should not be

[16] House of Commons Standing Committee on Canadian Heritage, Parliament of Canada, *Shifting Paradigms* (Report No 19, May 2019) 31 ('*Shifting Paradigms*'); House of Commons Standing Committee on Industry, Science and Technology, Parliament of Canada, *Statutory Review of the Copyright Act* (Report No 16, June 2019) 39 ('*Statutory Review*').

[17] Joshua Yuvaraj, 'Reversion Laws: What's Happening Elsewhere in the World?', *The Author's Interest* (Blog Post, 4 April 2019) <https://authorsinterest.org/2019/04/04/reversion-laws-whats-happening-elsewhere-in-the-world/>, archived at <https://perma.cc/7F3J-4ENW>. See also Rita Matulionyte, 'Empowering Authors via Fairer Copyright Contract Law' (2019) 42(2) *University of New South Wales Law Journal* 681, 700–1.

[18] 17 USC §§ 203, 304; *Copyright Act*, RSC 1985, c C-42, s 14(1).

[19] 'CREATOR: Fair Contract Terms', *The Society of Authors* (Web Page) <https://www.societyofauthors.org/Where-We-Stand/C-R-E-A-T-O-R-Campaign-for-Fair-Contracts>, archived at <https://perma.cc/68BN-DBP4>.

[20] 'Authors: Ten Principles for Fair Contracts', *International Authors Forum* (Web Page) <https://www.internationalauthors.org/wp-content/uploads/2019/01/Authors-Ten-Principles.pdf>, archived at <https://perma.cc/SJX3-M4KZ> ('Ten Principles').

[21] See, eg, Publishers Association of New Zealand, Submission to Ministry of Business, Innovation and Employment, *Review of the Copyright Act 1994: Issues Paper* (5 April 2019) 9 <http://publishers.org.nz/wp-content/uploads/Submission-PANZ-Copyright-Issues-Paper.pdf>, archived at <https://perma.cc/2SBY-DXTB>; *Statutory Review* (n 16) 36–7.

the sole repositories of author rights. We conclude by proposing various potential statutory reversion rights that could benefit authors, publishers and the public, together with the key issues that would need to be resolved if they were to be implemented into law.

II Reversion Rights in Publishing Contracts

Rights reversion can have any number of different triggers. In the Anglosphere, the only existing statutory reversion rights are time based: applying 35 years after transfer in the US and 25 years after the author's death in Canada.[22] Outside these, reversion is left to the contracts. Here we introduce the main types of reversion clause found in book publishing contracts.

A *Reversion Clause Types and Controversies*

1 *Out-of-Print Clauses*

'Out-of-print' clauses are publishing's best known and most controversial reversion rights. Traditionally, out-of-print clauses have entitled authors to reclaim all the rights they have granted under a publishing contract (usually excepting those that have previously been sub-licensed) once the book has gone 'out of print'. Sometimes such clauses operate automatically: for example, by reverting rights after the book has been out of print for more than six months.[23] More commonly however, reversion occurs after the author gives notice that the book is no longer available for purchase, and the publisher fails to re-print.[24] Out-of-print clauses spur publishers to keep works selling, since if they do not, authors might reclaim their rights.[25] Exercise of out-of-print rights can also benefit publishers by freeing up rights to fresh investments, as demonstrated by Text Publishing's experience with *The Women in Black*.[26] Some 50 countries

[22] 17 USC § 203(a)(3); *Copyright Act*, RSC 1985, c C-42, s 14(1).

[23] *The Publishers' Weekly: An American Book Trade Journal* (Office of Publishers' Weekly, 1906) vol 69, 667; *Harper & Bros v M A Donohue & Co*, 144 F 491, 493 (Sanborn J) (ND Ill, 1905).

[24] See, eg, Alexander Lindey and Michael Landau, Thomson Reuters, *Lindey on Entertainment, Publishing and the Arts* (online at 3 May 2020) § 5:109 ('*Lindey*'). Cf Lynette Owen (ed), *Clark's Publishing Agreements: A Book of Precedents* (Bloomsbury Professional, 10th ed, 2017) 57 ('*Clark's 10th ed*').

[25] 'A Publishing Contract Should Not Be Forever', *The Authors Guild* (Web Page, 28 July 2015) <https://www.authorsguild.org/industry-advocacy/a-publishing-contract-should-not-be-forever/>, archived at <https://perma.cc/T3U6-FUKV>; Australian Society of Authors, *Australian Book Contracts* (Keesing Press, 4th ed, 2009) 24.

[26] See above n 8 and accompanying text.

have enacted legislative out-of-print rights,[27] but in Australia, the US, the UK, Canada and New Zealand ('NZ'), they are governed entirely by contracts.

(a) When Will a Title Be 'Out of Print'?

'Out of print' means different things in different publishing industry segments, and its meaning tends to change over time.[28] Accordingly, authors' organisations have long insisted that contracts should provide clear, objective standards for determining print status. In 1968, for example, the UK Society of Authors' model contract defined a book as being out of print if the publisher had 'fifty (50) copies or less in stock'.[29] By 1991, it was recommending that rights should revert if a book was out of print *or* average sales over a two year period had fallen below 250 copies, and the publishers had declined to reprint.[30] At the same time, the US Authors Guild recommended that authors should be allowed to terminate publishing contracts if books were out of print *and* annual royalties did not meet a particular threshold after 10 calendar years.[31] Meanwhile, the Australian Society of Authors' ('ASA') 1994 model contract specified that 'a book shall be deemed to be out of print where the Publisher's stocks are less than fifty (50) or where less than twelve (12) copies are shown as having been sold in any six (6) months accounting period'.[32]

Rather than adopting objective criteria for determining print status, some publishing guides simply replaced outdated 'out of print' language with alternative formulations, like 'off the market', 'out of print in all editions', or 'not available in any edition'.[33] Such formulations require books to be entirely unavailable, including as an ebook or via POD, before authors are entitled to reclaim their rights. In this era of natively digital manuscripts, making a title

27 Yuvaraj (n 17).

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

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

30 Denis De Freitas, 'Copyright Contracts: A Study of the Terms of Contracts for the Use of Works Protected by Copyright under the Legal System in Common Law Countries' [1991] (November) *Copyright* 222, 241 [107].

31 Ibid 250 [166].

32 Australian Society of Authors, *Australian Book Contracts* (Keesing Press, 2nd ed, 1994) 36.

33 Owen (ed), *Clark's 10th ed* (n 24) 54. See also Roy S Kaufman, *Publishing Forms and Contracts* (Oxford University Press, 2008) 19.

available via such media requires relatively little investment — and certainly far less than a fresh print run would require. However, under these 'technical availability' standards, such minimal contributions can be enough to enable publishers to hold on to the rights forever, even if the book stops selling and no royalties are being paid.[34]

That quickly caused new concerns to be raised about the application of out-of-print clauses in the digital context. In 1994, the US National Writers Union argued that out-of-print clauses needed to be 'rethought in the electronic era, when small quantities or even single copies of a work can be reproduced easily and cheaply'.[35] The Union noted that '[t]he real criterion for whether a publisher can retain rights is whether the work is still being actively marketed', although instead of suggesting objective sales or stock-based thresholds it recommended that the publisher should be required 'to notify the author when it has decided that it no longer makes sense to make even minimal efforts to promote the work'.[36] Since then, author associations around the English speaking world have regularly warned their members about the dangers of out-of-print clauses being based on 'technical availability' standards that could be satisfied by ebooks or POD, as early as 2000 (US Authors Guild),[37] 2001 (ASA),[38] and 2006 (UK Society of Authors).[39] As the UK Society of Authors further explained in 2008:

> Publishers will be tempted to argue that a book is 'available' — the term now often used in preference to 'in print' — if it can be supplied as [POD] or as an ebook. It becomes all the more important for authors to ensure that they have the option of reverting rights if sales — preferably in units, but possibly in revenue — fall below figures agreed in the publishing contract.[40]

While there are some variations in the criteria different author associations recommend authors to use, especially the appropriateness of unit sales versus

[34] 'A Publishing Contract Should Not Be Forever' (n 25).

[35] National Writers Union, 'Statement of Principles on Contracts between Writers and Electronic Book Publishers' (Web Page, April 1994) <https://faculty.georgetown.edu/jod/nwu2.html>, archived at <https://perma.cc/66WZ-WGZZ>.

[36] Ibid.

[37] Ed McCoyd, 'Watch Your Out of Print Clauses: They Mean More than Ever' (Spring 2000) *Authors Guild Bulletin* 5.

[38] Australian Society of Authors, *Australian Book Contracts* (Keesing Press, 3rd ed, 2001) 31.

[39] Society of Authors (Winter 2006) *The Author* 129.

[40] Society of Authors (Autumn 2008) *The Author* 94.

dollar amounts,[41] the message of each organisation has long been consistent: that objective criteria are needed to make it possible for authors to reclaim rights where publishers are no longer meaningfully investing in their books' success.[42]

Despite this, our analysis shows that industry practice guides have been slow to adopt objective criteria to define out-of-print clauses. As late as 2010, *Clark's Publishing Agreements* ('*Clark's*'), a leading UK guide to publishing contracts,[43] still recommended that contracts give authors the right to reclaim their rights if their book was 'out of print and unavailable in all editions' and the publisher had not at least commenced a new edition within nine months of having received a written request from the author to do so.[44] It did however acknowledge that the 'main trend' since its 2007 edition was the move to definitions based on objective criteria, and described the question of when a book is 'out of print' as 'one of the significant by-products of the move into the digital/electronic era'.[45] It was not until 2013 that *Clark's* finally recommended permitting the author to reclaim their rights in a work if the work failed to meet a minimum sales threshold based either on quantity of copies sold or royalty value.[46] The 2017 edition noted that setting appropriate levels was an 'inexact science', but that 'authors should be entitled to get their rights back if the

[41] The ASA is comfortable with sales measures: 'Contracts', *Australian Society of Authors* (Web Page, 2020) <https://www.asauthors.org/findananswer/contracts>, archived at <https://perma.cc/PS4F-36ZY>. But the UK Society of Authors recommends that authors only agree to contracts that give them a right to recover their rights when the work is available only in digital/POD editions, or where 'sales have dwindled below an agreed level' (leaving it open whether that is calculated with reference to revenue or copies sold): 'Before You Sign: Getting Your Rights Back', *Society of Authors* (Web Page, 16 February 2018) <https://www.societyofauthors.org/News/Blogs/Before-you-Sign/February-2018/Before-You-Sign-Getting-Your-Rights-Back>, archived at <https://perma.cc/PN8L-24W6> ('Before You Sign'). By contrast, the US Authors Guild is wary of using unit sales as a benchmark: 'Publishers might … be able to game the clause by offering one cent e-books the way they've gamed existing clauses by using e-books and print-on-demand': 'A Publishing Contract Should Not Be Forever' (n 25). It prefers yearly income thresholds (eg US$250–$500), below which authors can terminate the contract and exploit their books via other means.

[42] See, eg, above n 19.

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

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

[45] Ibid 54.

[46] Lynette Owen (ed), *Clark's Publishing Agreements: A Book of Precedents* (Bloomsbury Professional, 9th ed, 2013) 54–5.

publisher is not properly supporting the book'.[47] *Clark's* now states that termination clauses based on minimum sales or minimum income 'have become the norm';[48] however, some publishing guides still do not reflect that today.[49]

As of 2019, the leading author advocacy associations in the US, UK and Australia report that, whilst objective criteria have finally now been adopted by all or almost all major trade publishers, they *still* see new contracts with 'out of print' defined by technical availability standards rather than objective criteria (particularly from academic publishers and small trade presses).[50]

2 *Other 'Use-It-or-Lose-It' Rights*

'Out-of-print' rights are the main form of a 'use-it-or-lose-it' provision, but there are others. For example, contracts might take rights in multiple territories or languages, but then provide for their return if the publisher fails to exploit them within a certain period.[51]

[47] Owen (ed), *Clark's 10th ed* (n 24) 56.

[48] Ibid 34.

[49] See, eg, Mark A Fischer, E Gabriel Perle and John Taylor Williams, Wolters Kluwer, *Perle, Williams & Fischer on Publishing Law* (4th ed), vol 1 (at May 2019) § 2.16 ('*Perle*'); *Lindey* (n 24) §§ 5:14 cl 16, 5:109, 5:110, 5:117, 5:118, 5:163; Leon Friedman, 'Book Publishing' in Doug Nevin (ed), LexisNexis, *Entertainment Industry Contracts: Negotiating and Drafting*, vol 3 (at Release 93) form 41-1 cl 15(b) ('*Entertainment Industry Contracts*').

[50] See, eg, Email from Bryony Hall (Contracts Advisor, UK Society of Authors) to the authors, 12 August 2019: 'Yes, very much so. This is the case for all academic/professional contracts, but I do see it for trade titles too sometimes'; Email from Umair Kazi (Staff Attorney, US Authors Guild) to the authors, 13 August 2019: 'Yes, we do see the old OOP clauses "not available in any edition."'; Email from Juliet Rogers (CEO, ASA) to the authors, 13 August 2019: 'The problem emerges in the less traditional contracts and the small publishers, where the publisher has either failed to keep their contract current or has deliberately left a broad out of print clause in, without explaining to authors that availability in digital format or licensed format will prevent them from terminating. There is no doubt, however, that this issue occurs frequently enough for us to continue to have to educate authors about the need for this clause to be correctly defined/drafted.'

[51] For instance, a template contract from 'Big Five' publisher Random House in *Lindey* allows the author to revoke the publisher's rights to license the work in the British Commonwealth (except Canada), South Africa and the Republic of Ireland if those rights have not been exercised within 18 months of the work first being published in the United States: *Lindey* (n 24) § 5:14 cl 1(b). A further right of revocation is included for the 'right to license in all foreign languages and all countries' if no license or option is granted three years after the book is first published in the United States: *Lindey* (n 24) § 5:14 cl 1(c). See also *Perle* (n 49) § 2.10(C); *Entertainment Industry Contracts* (n 49) form 41-1 cl 1.

Some countries enshrine 'use-it-or-lose-it' rights in national legislation.[52] In the major English language markets however, such rights are governed entirely by contract. The UK Society of Authors has observed that '[m]any publishers will agree' to such mechanisms on request.[53] However, not all authors know to negotiate for 'use-it-or-lose-it' rights to be included in their contracts, and many simply agree to whatever terms they were originally offered, particularly early in their writing careers.[54] If 'use-it-or-lose-it' clauses can be included on request, but not by default, that risks disproportionately disadvantaging emerging and less well resourced authors.

3 *Liquidation Rights*

Publishing contracts may also contain clauses allowing authors to reclaim their rights if publishers go into bankruptcy or liquidation. Such clauses regularly appear in publishing contracts, though their enforceability under domestic legislation depends on jurisdiction and phrasing.[55] Publishing rights and earnings due to authors are corporate assets, and since liquidators have legal obligations to maintain value,[56] they may be unable to return them to authors absent a legal obligation to do so. *Clark's* states that '[p]rovision should always be made' for the publisher's going out of business, and recommends that contracts be automatically terminated and rights returned upon entry into

[52] For example, rights to reclaim unexploited language rights after five years: *Law on Copyright and Related Rights* (Lithuania) 18 May 1999, No VIII-1185, art 45(3); *Revised Law on Intellectual Property, Regularizing, Clarifying and Harmonizing the Applicable Statutory Provisions* (Spain) 12 April 1996, art 62(3) [tr International Bureau of the World Intellectual Property Organization, 'Revised Law on Intellectual Property, Regularizing, Clarifying and Harmonizing the Applicable Statutory Provisions', *WIPO Lex* (Web Document) <https://wipolex.wipo.int/en/text/126674>]. See also the right to reclaim digital rights in books that publishers have failed to exploit: *Code de la propriété intellectuelle* [*Intellectual Property Code*] (France) art L132-17-5 ('*Intellectual Property Code*').

[53] 'Before You Sign' (n 41).

[54] Martin Kretschmer, 'Copyright and Contracts: A Brief Introduction' (2006) 3(1) *Review of Economic Research on Copyright Issues* 75, 80–1; Lucie Guibault, 'Relationship between Copyright and Contract Law' in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar, 2009) 517, 519; David Caute, 'Publish and Be Damned: A Comparative Survey of Book Contracts Issued by 60 British Publishers' (13 June 1980) *New Statesman* 892.

[55] In Australia, 'ipso facto' stay provisions in the *Corporations Act 2001* (Cth) ('*Corporations Act*') prevent parties from terminating a contract in the event that one party goes into insolvency (as opposed to liquidation): see, eg, at ss 415D(1), 451E(1). See also 11 USC §§ 363(l), 541(c)(1). Cf at §§ 365(c), (e).

[56] See, eg, *Corporations Act* (n 55) s 420A(1).

liquidation.[57] Most other guides make similar recommendations for authors to be able to terminate their contracts in such situations.[58]

B *Previous Studies of Contractual Reversion Practice*

Various empirical studies have previously investigated contractual reversion rights. Andrew Shapiro and David Caute respectively documented the types of provisions publishers were using in their standard publishing contracts.[59] Shapiro looked at contracts 'currently in use by the more active houses in New York City',[60] while Caute looked at 'standard printed contracts issued by 60 British book publishers'.[61] Both criticised the drafting of some out-of-print clauses, for example for only requiring publishers to exercise 'minimal effort' to keep books in print,[62] or for giving publishers overly generous (3–5 year) periods to decide whether to reprint.[63] Caute also found five publishers requiring authors to repay unearned parts of their advances to exercise out-of-print rights, and three publishers requiring authors to buy back all plant (such as moulds and engravings) made for the work at half their original cost.[64] He was unconvinced by the reasons publishers gave for including such clauses in their boilerplate:

> One of [the publishers'] comments that he invariably strikes out this clause [requiring repayment of the advance]. Good — but why not eliminate the clause from the printed contract?[65]

Additionally, Denis De Freitas' 1991 study spanning contracts and contract templates for publishing, film, broadcasting and music in the US, UK and Australia found examples of reversion clauses that implemented objective criteria promulgated by the US and UK author organisations.[66] However, he also identified clauses in US model contracts that simply made termination

[57] Owen (ed), *Clark's 10th ed* (n 24) 54–5.

[58] *Lindey* (n 24) § 5:14 cl 20; Kaufman (n 33) 34; *Perle* (n 49) § 2.17; *Entertainment Industry Contracts* (n 49) form 41-1 cl 27.

[59] Shapiro (n 29); Caute (n 54).

[60] Shapiro (n 29) 135.

[61] Caute (n 54) 892.

[62] Shapiro (n 29) 165.

[63] Caute (n 54) 898.

[64] Ibid.

[65] Ibid.

[66] De Freitas (n 30) 250 [167], [169].

contingent on books going 'out of print' without further definition.[67] In contrast to his lengthy surveys of material from the US and the UK, he did not comment on book publishing contracts in Australia.[68] He only highlighted the similarities between songwriter–publisher contracts in Australia and the UK, extrapolating from this that it would be 'reasonable to assume that in other sectors of the copyright field contractual practices in Australia are similar to those in the United Kingdom'.[69]

Reversion clauses have also been studied in the context of academic publishing contracts. These have some key differences to general trade book publishing contracts,[70] but reversion clauses are also common. Baumol and Heim found examples of out-of-print clauses that had objective criteria (referring to minimum stock and sales figures that publishers needed to meet to 'continue selling copies out of stock … [or] reprinting … the volume').[71] However, some clauses did not state that rights reverted to authors when the book went out of print, and 'even fewer' stated how long publishers had to reprint and make available out of print works.[72] Finally, in her 1991 study of 68 standard form academic publishing contracts, Stephenson found that some 30% had no out-of-print clause at all.[73]

These studies help capture publishing industry practice in relation to out-of-print clauses at given points in time. However, the time span of contracts they studied were limited. Only Caute (1968–80)[74] and De Freitas (1971–90)[75]

[67] Ibid [167]–[168], citing Donald C Farber (ed), LexisNexis, *Entertainment Industry Contracts: Negotiating and Drafting Guide*, vol 2 (at 1990) form 41-1 cl 14 and Alexander Lindey and Michael Landau, Sweet & Maxwell, *Lindey on Entertainment, Publishing and the Arts*, vol 1 (2nd ed) 216 cl 16.

[68] De Freitas (n 30) 246 [140].

[69] Ibid.

[70] For example, academic contracts tend to involve assignments of copyright to the publisher rather than exclusive licences: see Anne Fitzgerald and Amanda Long, 'A Review and Analysis of Academic Publishing Agreements and Open Access Policies' (Report, February 2008) 12; Elizabeth Gadd, Charles Oppenheim and Steve Probets, 'RoMEO Studies 4: An Analysis of Journal Publishers' Copyright Agreements' (2003) 16(4) *Learned Publishing* 293, 295.

[71] William J Baumol and Peggy Heim, 'On Contracting with Publishers: Or What Every Author Should Know' (1967) 53(1) *American Association of University Professors Bulletin* 30, 45. This study was later updated in Martin Shubik, Peggy Heim and William J Baumol, 'On Contracting with Publishers: Author's Information Updated' (1983) 73(2) *American Economic Review* 365, 381.

[72] Baumol and Heim (n 71) 45–6.

[73] Helen Stephenson, 'Negotiating the Bottom Line: A Closer Look at University Press Contracts' (1991) 29(4) *Perspectives on History*.

[74] Caute (n 54) 894.

[75] De Freitas (n 30) 261–2.

specified the dates of the documents they surveyed. The others appear to have been limited to contracts being offered to authors around the time of the studies. Further, the most recent of these studies took place in 1991. With rapid developments in technology making books widely distributable in other formats (eg ebooks, audiobooks, POD), there is a need to understand whether and how reversion clauses have changed over time to reflect these developments.

III Exploratory Study into Australian Publishing Contracts

The above discussion shows a disconnect between what authors' organisations have long advocated for in terms of reversion rights, and industry practice (as reflected in model publishing agreements and identified in previous studies). That led us to ask — are author rights adequately taken care of by the contracts, or is there a case for additional minimum rights?

A *Research Questions*

We investigate that umbrella question via three distinct research questions:

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

We address these questions by analysing contracts sourced from the archive of the ASA.

B *Methods*

1 *Data Selection*

The contracts in the archive were provided to the ASA by authors between 1960 and 2014 to obtain advice on their provisions. The contracts are likely to have been supplied by Australian authors or authors living in Australia, without agent representation (otherwise, their agents would have provided that advice). They usually (but not always) involved Australian publishers. We looked at the contracts within the archive on conditions of strict confidentiality. We did not

collect or use personal information. We conducted our research independently of the ASA and our results do not necessarily reflect its views.

The archive was the only practicable way of obtaining contracts spanning the time horizon in which we were interested. However, it had some limitations. First, it was not complete. In 2016, the ASA destroyed a large portion of its archive due to space constraints. In deciding which contracts to retain, it aimed to keep contracts spanning its full history (commencing in 1960), for a variety of different forms of writing (books, plays and television shows) and for a variety of publisher types (trade fiction and non-fiction, educational, children's and academic), but not for the culled collection to be representative of the original. Second, there were few contracts available in the archive for earlier years relative to later ones. Third, the contracts are not representative of the overall publishing industry as they are more likely to be from authors without other access to contractual advice. Accordingly, the contracts in the archive are not independently and identically distributed from the population of all book contracts in Australia.

Our primary interest was to conduct an exploratory study of the archive identifying actual terms offered to book authors from a diverse range of publishers between 1960–2014, and to examine their evolution over that period. The aims and exploratory nature of this study, the limitations of the archive, and our conditions of access led us to adopt a non-probability sampling framework using purposive sampling to select contracts for inclusion. Purposive sampling requires researchers to use their judgment to determine the subjects which 'best fit the criteria of the study'[76] based on their 'knowledge of and/or experience' with the focus of empirical inquiry.[77] It is 'not intended to offer a representative sample but rather to hone in on particular phenomena and/or processes'.[78]

Our sample ultimately included 145 book contracts spanning the years 1960–2014 (average 2.8 per year, minimum one, maximum six). Most earlier years had fewer contracts available for selection; where only one or two were available we selected all of them, and included six contracts from 1969 to partly offset the deficit. We increased the number of contracts to four per year from 2008–10 to better examine how the shift to ebooks was reflected in contractual practice. We excluded contracts for movie rights, plays and television shows. We sought to include contracts from a variety of publishers. We excluded

[76] *Oxford Dictionary of Sports Science & Medicine* (3rd ed, 2006) 'purposive sampling'.

[77] Rebecca S Robinson, 'Purposive Sampling' in Alex C Michalos (ed), *Encyclopedia of Quality of Life and Well-Being Research* (Springer, 2014) vol 1, 5243, 5244.

[78] Ibid. Cf Michael P Battaglia, 'Purposive Sample' in Paul J Lavrakas (ed), *Encyclopedia of Survey Research Methods* (Sage Publications, 2008) vol 2, 645, 645–7.

contracts with confidentiality clauses. These became more common in later years and meant only one eligible contract was available for 2013. We included an additional 2012 contract to partly offset that lack.

This sampling approach was well suited to the task. As is appropriate for an exploratory study, it enables us to 'gain initial insights and ideas' about the terms offered to book authors in Australia, and to 'identify [in greater detail the] variables associated with those problems'.[79] The main limitation of our sampling approach is the inability to generalise the findings to a larger population, for which reason we do not conduct statistical significance testing on our results. However, the nature of the archive meant we could not draw inferences from the sampled contracts to book publishing contracts in the archive or in Australia at large in any event. As an additional safeguard, we have provided drafts of this paper to various expert organisations and individuals,[80] and their feedback confirms that our results do not paint a 'misleading or untypical picture'.[81] Accordingly, the insights from this study usefully assist us to evaluate the appropriateness of using publishing contracts as the sole repositories of author rights.

While our study is limited to contracts involving authors, our findings have broad relevance throughout the English language world. The above explanation of reversion rights in publishing contracts was international for good reason: the English language publishing industry transcends borders. While there are certainly structural differences between UK- and US-based publishers,[82] many publishers are multinational. That, combined with the general absence of statutory rights for authors in English language countries, helps promote similar contractual practice to ensure that contractual practice is multinational too. For example, publishing contracts throughout the Anglosphere have out-of-print clauses, and the versions we found in Australia have the same phraseology (and problems) as elsewhere. In our exploratory study, we found examples requiring authors to repay any unearned portion of their advance and half the cost of plant, various of the *Clark's* formulations (from 1st to 8th edition) and the current *Lindey* formulation.[83] Thus, while our study is limited to

[79] Wing Hong Chui, 'Quantitative Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2017) 46, 50.

[80] For example, the US Authors Guild, the UK Society of Authors and the ASA.

[81] See De Freitas (n 30) 224 [8].

[82] John B Thompson, *Merchants of Culture: The Publishing Business in the Twenty-First Century* (Polity Press, 2nd ed, 2012).

[83] We found variations of the formulations used in the following texts: Charles Clark (ed), *Publishing Agreements: A Book of Precedents* (George Allen & Unwin, 1980) 23; Owen, *Clark's 8th ed* (n 44) 55; *Lindey* (n 24) § 5:109.

contracts involving Australian authors, our findings have broad relevance throughout the English language world.

2 *Data Coding*

Following detailed testing we developed a codebook which was used to code the contracts using content analysis.[84] Questions from the codebook are listed at Table 1.

Table 1: Contract Coding Matrix

Category		Description
Contract year	1	What year was the contract signed? (Or, if unsigned, what year was it dated/provided for advice?)
Rights assigned	1	What were the territories over which the publisher was granted rights to print, publish and/or license the use of the work?
	2	What were the languages in which the publisher could print, publish and/or license the use of the work?
	3	If the languages in which the publisher could print, publish and/or license the use of the work are not specified, is the publisher granted translation rights?
	4	Were the rights assigned or licensed to the publisher? If licensed, what kind of licence was it?
Duration of grant	1	How long was the publisher granted rights to print, publish and/or license the use of the work?
	2	Were there any term restrictions on the use of subsidiary or overseas rights?
Reversion clauses	1	Did the contract have an out-of-print clause?
	2	If the contract had an out-of-print clause, what was the standard within the clause to determine whether the work was out of print?
	3	What category did the standard for determining the work's out-of-print status fall into? (Technical availability, publisher's discretion, objective criteria)

[84] Joshua Yuvaraj and Rebecca Giblin, *Codebook for Exploratory Study into Contracts from the Australian Society of Authors Archive* (Codebook, 20 February 2020) <https://doi.org/10.26180/5de4b48e0840f>.

Category	Description
	4 Did the author have to give the publisher notice to reprint once the work was out of print? How long?
	5 Did the author have to wait an additional period after the work went out of print before regaining their rights or commencing procedures to regain their rights? How long?
	6 Did the author have to wait a period after the book's initial publication before regaining their rights or commencing procedures to regain their rights? How long?
	7 Did the author have to terminate the contract and/or regain their rights by giving notice to the publisher once the book met out-of-print criteria? How long?
	8 Was the author required to make a financial contribution as a condition of reclaiming their rights? If yes, how was it calculated?
	9 Do unused rights revert to the author after a period of time? How long?
	10 Was the author allowed to terminate the contract if the publisher went into liquidation or bankruptcy?

3 *Reliability Testing*

To test the reliability of the coding, an external coder used the codebook to code data from a random sample of 30 contracts (21%).[85] We used Scott's pi[86] and Landis and Koch's benchmark to measure inter-coder agreement, using the following result descriptors:

1 <0.00 = 'Poor'

2 0.00–0.20 = 'Slight'

3 0.21–0.40 = 'Fair'

[85] There is no set rule as to sample size. Hall and Wright recommend choosing 'at least 10% of the sample or thirty, whichever is less': Mark A Hall and Ronald F Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96(1) *California Law Review* 63, 113 n 203. As 10% of the sample would only give us 15 contracts we chose 30 contracts to give us a greater indication of reliability, following Hall and Wright, who coded 32 of their 134 subjects: at 113 n 203.

[86] William A Scott, 'Reliability of Content Analysis: The Case of Nominal Scale Coding' (1955) 19(3) *Public Opinion Quarterly* 321; Kevin Wombacher, 'Intercoder Reliability Techniques: Scott's Pi' in Mike Allen (ed), *The SAGE Encyclopedia of Communication Research Methods* (Sage Publications, 2017) vol 2, 753, 753.

4 0.41–0.60 = ‘Moderate’

5 0.61–0.80 = ‘Substantial’

6 0.81–1.00 = ‘Almost Perfect’[87]

The results at Table 2 also include the per cent agreement, which is useful because Scott’s pi ‘over corrects for chance agreement … especially [where] there are few options on a variable and when the [coder] … choose[s] … one of those options very frequently’.[88] That explains why, for example, Q15 had a relatively low score despite the coders agreeing 96.7% of the time. All variables except Q3, Q4, Q7, and Q15 had ‘substantial’ or greater scores. Question 3’s lower score is attributable to five related disagreements at Q2 (eg the coder selected ‘all languages’ in Q2 and therefore automatically selected ‘N/A’ for Q3). Question 4’s score is due to five disagreements about whether a transfer had the nature of ‘assignment’ or ‘exclusive licences’, which makes sense since, as a matter of law, they can be difficult to distinguish.[89] Question 7’s score can be attributed to the fact that out-of-print clauses came with many tiny variations, which made them difficult to categorise. There were nine differences of opinion between coders. However, there was substantial agreement for the related Q8, which asked coders to categorise out-of-print clauses at a higher degree of abstraction. For Q15, there was only one disagreement, apparently caused by two clauses having very similar wording. Overall, this gives us a strong degree of confidence in the reliability of our results.

Table 2: Reliability Scores

No	Variable	π	%	Reliability
Q1	Territories	0.862	96.7	Almost perfect
Q2	Languages	0.671	80	Substantial
Q3	If the languages were not specified, was the publisher granted translation rights?	0.217	83.3	Fair
Q4	Type of grant	0.475	83.3	Moderate

[87] J Richard Landis and Gary G Koch, ‘The Measurement of Observer Agreement for Categorical Data’ (1977) 33(1) *Biometrics* 159, 165; Robert T Craig, ‘Generalization of Scott’s Index of Intercoder Agreement’ (1981) 45(2) *Public Opinion Quarterly* 260, 263.

[88] W James Potter and Deborah Levine-Donnerstein, ‘Rethinking Validity and Reliability in Content Analysis’ (1999) 27(3) *Journal of Applied Communication Research* 258, 278.

[89] See *Wilson v Weiss Art Pty Ltd* (1995) 31 IPR 423, 433 (Hill J).

No	Variable	π	%	Reliability
Q5	Duration	0.79	90	Substantial
Q6	Term of subsidiary/overseas rights	1.0	100	Almost perfect
Q7	Specific type of out-of-print clause	0.635	70	Substantial
Q8	Broad category of out-of-print clause (technical availability, publisher's discretion, objective criteria)	0.77	90	Substantial
Q9	Notice period for the publisher to reprint the work	0.88	90	Almost perfect
Q10	Waiting period after the work has gone out of print	0.91	96.7	Almost perfect
Q11	Waiting period after the work is first published	0.901	93.3	Almost perfect
Q12	Did the author have to give notice to terminate the contract once the work met out-of-print criteria?	0.88	93.3	Almost perfect
Q13	Did the notice periods 'stack up'?	0.887	93.3	Almost perfect
Q14	Did the author have to make a financial contribution to regain their rights?	0.785	96.7	Substantial
Q15	Do unused rights revert to the author after a period of time?	0.487	96.7	Fair

We could not test the reliability of the coding of variables which depended on extracting the whole contract (year of contract, book type, publisher type, whether the contract had an out-of-print or liquidation clause). However, the contracts have been reviewed multiple times over three visits to the archive to ensure all pertinent data have been collected.

4 *Exclusions*

In this article we focus exclusively on the circumstances in which the sampled contracts expressly permit authors to reclaim their rights after the book is published, and where such a right would not necessarily also be implied under the general law. We do not examine the publishing industry norms and

practices that can sometimes result in authors recovering their rights outside the circumstances provided for by the contracts.[90] Nor do we consider rights authors might have to terminate under the general law of contract, including rights to terminate where the publisher fails to publish the book within a specific time,[91] or fails to pay royalties or provide royalty statements.[92] Finally, we do not consider any rights to have the contract rescinded (for example, for some impropriety that impacted its formation).

C *Results*

1 *Publishers Took Extremely Broad Rights*

Determining the rights that the publishers were granted is critical, because reversion clauses are less important to narrower contracts than broader ones. The contracts we studied overwhelmingly took broad and long-lasting rights, typically covering all languages and all territories worldwide.

(a) Contracts Were Exceptionally Long

As shown in Figure 1, just 7% (n=10) of contracts took rights for less than the entire copyright term.[93] Sixty-four per cent (n=92) of the contracts took rights to publish, print and/or license the book for the entire term. An additional 19% (n=27) specifically took rights for any additional term that would exist if the copyright was extended. Such phrasing has paid off for publishers, who have obtained the benefits of copyright in literary works having been extended by 20 years after most of those contracts were signed.[94] However, it raises questions about whether those future transfers were properly bargained (and paid) for, given the typical disparity of bargaining power between publishers and authors.[95]

[90] Interview with author association staff member A (7 November 2018).

[91] See, eg, *Perle* (n 49) § 2.08; Jonathan Kirsch, *Kirsch's Guide to the Book Contract: For Authors, Publishers, Editors and Agents* (Acrobat Books, 1999) 173.

[92] See, eg, *Lindey* (n 24) § 5:83.

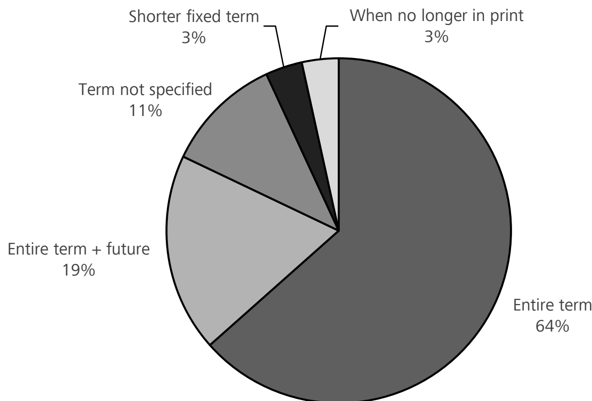
[93] These shorter periods, and the dates of the corresponding contract(s), were as follows: one year (1980), three years (2001), 10 years (2014), 15 years (2008), three years from the date the book becomes available in print format — automatically renewed unless the agreement is discontinued (2012), and so long as the book is in print (1986, 2002, 2008, 2010, 2014).

[94] *Copyright Act 1968* (Cth) s 33(2) ('*Copyright Act*'), amended by *US Free Trade Agreement Implementation Act 2004* (Cth) s 120.

[95] See, eg, Europe Economics, Lucie Guibault and Olivia Salamanca, *Remuneration of Authors of Books and Scientific Journals, Translators, Journalists and Visual Artists for the Use of Their Works* (Final Report, 2016) 121.

Strikingly, the remaining 11% (n=16) of contracts did not specify any term for printing, publishing and/or licensing rights in a work at all. That omission introduces a substantial element of uncertainty for authors. Under Australian law, where no time is stipulated, the contract will be implied to last a reasonable period.[96] However, determining what is 'reasonable' in these circumstances — where author associations strongly and consistently advocate for shorter terms, publishers usually insist on very long ones, and the contract is silent — may be slow and expensive, and prevent authors from understanding or enforcing their rights. The silence of so many contracts on such a crucial point may also suggest that not all publishers have had the input of expert legal advice in the drafting of their contracts.

Figure 1: How Long Do Publishing Contracts Last?



(b) Contracts Overwhelmingly Took Exclusive Licences — and Sometimes Even Entire Copyrights

In publishing contracts, rights are usually granted via licences.[97] Licences may be exclusive (where only one licensee is entitled to exercise the rights), non-exclusive (where multiple licensees are able to exercise them) or, much less commonly, sole (where one licensee plus the copyright owner are entitled to exercise the rights).[98] Alternatively, copyrights may be permanently

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

[97] Hugh Jones and Christopher Benson, *Publishing Law* (Routledge, 4th ed, 2011) 76.

[98] See, eg, Nicholas Caddick, Gillian Davies and Gwilym Harbottle, *Copinger & Skone James on Copyright* (Sweet & Maxwell, 17th ed, 2016) vol 1, [5-213].

transferred, either in whole or in part, rather than licensed.[99] Again, we were interested in assessing the type of rights granted because the broader the transfer or licence, the more important robust reversion rights become.

Seventy-nine per cent of contracts (n=115) granted the publisher exclusive rights to publish and print the work (often with additional subsidiary rights, such as translation rights). Three 1970s-era contracts granted the publisher a non-exclusive licence to publish, enabling competition from other publishers.

Two others (dated 1993 and 2013) granted the publisher the 'sole right' to publish the work. Sole licences are much rarer than exclusive or non-exclusive ones. As noted above, a sole licence entitles both the copyright owner and the licensee to exercise the right. This would allow the author to compete with the publisher. We suspect this was not what the publishers intended, and it may further indicate a lack of legal input in the drafting of their contracts.

The remaining 17% of contracts (n=24) purported to take the entire copyright (including where the publisher's name followed the copyright symbol). Some were for educational and academic books, for which such practice is not uncommon.[100] However, we also found 11 examples of full copyright transfer of children's (n=3), trade non-fiction (n=7) and trade fiction (n=1) titles. This contradicts the belief of some industry insiders in the trade publishing industry that publishers only ever take licences, and not entire copyrights.[101] Copyright-extracting contracts spanned almost the entire time span (1964–2012).

Contracts purporting to extract entire copyrights sometimes seemed to lack understanding about the legal effects of doing so. One 1964 contract superfluously gave the publisher both the copyright and the exclusive licence to print, publish and sell the book — superfluous because the latter rights would not be necessary if the publisher already owned the copyright. Another 2002 contract stated that the copyright was the property of the publisher, but the contract then displayed two copyright symbols, one indicating copyright in the text belonged to the author; the other, to the publisher. There was evidence of confusion about how licences worked, too. One 2012 contract granted the publisher an irrevocable, perpetual exclusive licence, but then stated it was

[99] *Copyright Act* (n 94) s 196.

[100] See Australian Society of Authors, *Educational Publishing in Australia: What's in It for Authors?* (Report, 2008) 2, archived at <https://perma.cc/2PU9-5WMP>; *Lindey* (n 24) § 5:163 cl 3; Stephenson (n 73).

[101] Rebecca Giblin, 'Does Australia *Really* Need Author Rights? A Response to Industry Pushback', *Overland* (Article, 8 March 2019) <https://overland.org.au/2019/03/does-australia-really-need-author-rights-a-response-to-industry-pushback/>, archived at <https://perma.cc/M55E-YYNG> ('Does Australia *Really* Need Author Rights?').

terminable on 10 working days' notice. The licence must either be irrevocable or terminable — it cannot be both. These inconsistencies suggest that some publishers lack understanding about the legal impact of their own contractual terms, and again may indicate a lack of legal assistance in drafting.

(c) Most Contracts Took Rights across All Territories

Territory rights can be granted over anything from a single country to the entire world. As above, the more territories over which rights are granted, the more critical it is to provide mechanisms for returning unexploited rights to authors.

Eighty-three per cent (n=120) of the contracts took worldwide rights to publish, print and/or license the work without requiring the author's further approval. As explained above, contracts in the archive were likely provided by non-'agented' authors. Agents often prefer to sell world rights directly themselves, and so will often seek to withhold them where possible, especially if the publisher does not have a successful track record in the international rights market.[102] We expect that the proportion of contracts taking worldwide rights would have been lower in a sample drawn from a mix of agented and non-agented authors.

Other contracts restricted the licence or grant to the publisher to Australia and NZ (7%; n=10), Australia and NZ alongside an 18-month worldwide licence (0.7%, n=1), Australia, NZ, and the UK (0.7%; n=1), the British Commonwealth at the date of the contract (1.4%; n=2), the world except NZ (0.7%; n=1), and the world except the US (3.5%; n=5). The remaining five contracts failed to specify the territories in which rights to print, publish and/or license the work were granted to the publisher.

(d) Most Contracts Took Rights in All Languages

The more languages that are licensed, the more critical reversion rights become. Nearly half (n=72) of the contracts took rights in all languages. This included where the rights to print, publish and/or license the work were in English, but the publisher was granted the right to sell translation rights without requiring the author's further consent. A further 7% (n=10) granted the publishers rights to print and publish books in all languages but required the author's approval for the sale of translation rights. Thirteen per cent (n=19) took rights in English only. We again expected that the proportion of contracts taking rights in all languages was higher than it would have been if our sample included contracts from agented authors.

[102] Interview with literary agent A (29 May 2019).

We identified numerous ambiguities within the contracts around language rights. Two contracts were too unclear for us to discern the languages in which the publisher had been granted printing, publishing and/or licensing rights. An additional 29% (n=42) did not even attempt to specify the languages in which the publisher could print, publish and/or license the book. However, 60% (n=25) of those then gave the publisher translation rights without requiring the author's approval.

(e) These Broad Grants Stacked Up

All this shows that, for the sampled contracts, publishers took extremely broad and long rights across a wide swathe of territories and languages. These broad grants stacked up. Seventy-nine per cent (n=114) took exclusive rights (including assignments of copyright) for at least the entire copyright term. Sixty-six per cent (n=95) took term-long exclusive rights worldwide. And a total of 44% (n=63) took term-long exclusive rights, worldwide, in all languages.

2 *Out-of-Print Rights Were Common — but Slow to Evolve*

So how did those contracts then provide for rights to be returned to authors? In the following paragraphs we report on:

(a) The frequency with which out-of-print reversion rights appeared in the contracts;

(b) The different varieties of out-of-print clauses (including whether they were based on technical availability or objective criteria), and their evolution over time;

(c) How long it takes for rights to revert (including any notice periods that have to be served); and

(d) Other circumstances in which authors can reclaim their rights (eg in the case of unexploited language and territory rights; when the publisher enters liquidation).

(a) Most Contracts Gave Authors Out-of-Print Reversion Rights

Eighty-seven per cent (n=126) of the contracts had some form of out-of-print reversion clause. Six of the 19 contracts without out-of-print clauses were for educational and academic works, and that absence is consistent with known

practice.[103] Educational works in particular raise different issues than trade books as they can be originated by publishers (rather than authors) and intended to be revised over time, rendering out-of-print rights less appropriate.[104] However, 53% (n=10) of the contracts without out-of-print clauses were for trade non-fiction books. This suggests that out-of-print clauses are less universal than some in the publishing industry believe them to be.[105]

(b) Out-of-Print Status (Nearly Always) Determined by Technical Availability Criteria

Despite the efforts of author organisations to resist out-of-print status being determined by technical availability,[106] such standards remained prevalent in our sample of contracts dated 1960–2014 (see Figure 2). Just 7% (n=9) of contracts with out-of-print clauses utilised objective criteria. Eighty-eight per cent of contracts with out-of-print clauses used some form of technical availability criteria. The most common formulations of this standard were 'out of print and not available in any edition' (n=54), 'out of print in all editions' (n=21), 'out of print' (n=18) and 'out of print or off the market' (n=10). Additionally, six contracts gave publishers the power to determine when a title was out of print, by, for example, declaring that demand or changed conditions do not justify further publication.

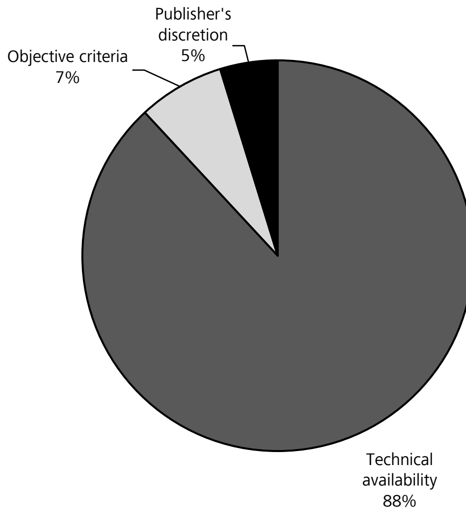
[103] See, eg, World Intellectual Property Organization, *WIPO Guide on the Licensing of Copyright and Related Rights* (Guide, 2004) 24 ('*WIPO Guide*'); Stephenson (n 73).

[104] See, eg, *WIPO Guide* (n 103) 24.

[105] Giblin, 'Does Australia *Really* Need Author Rights?' (n 101).

[106] See above Part II(A)(1)(a).

Figure 2: What Standard Determines whether a Book Was Out of Print?

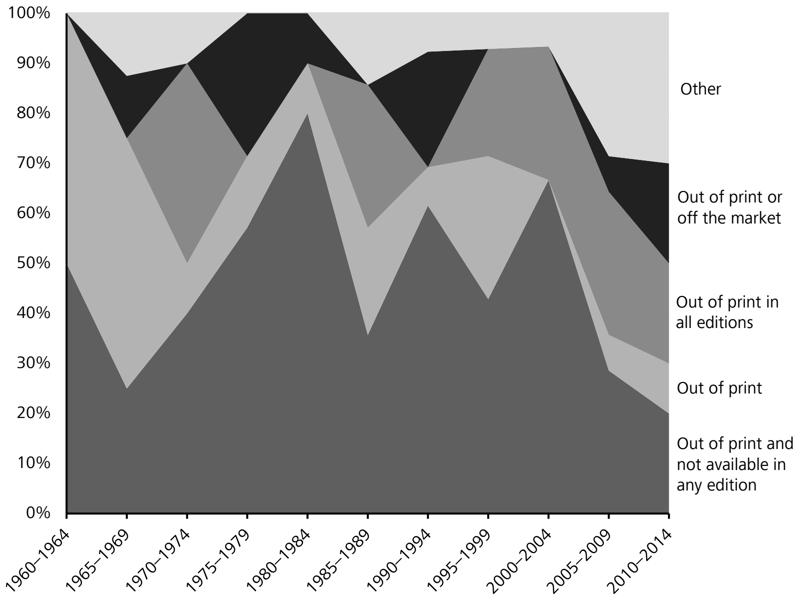


(c) We Observed Reduced Consensus about What 'Out of Print' Means

We then traced the evolution of the different forms of words used to determine out of print status. In five-yearly increments from 1960–2014 we tracked each formulation that had three or more instances in our sample that were not 'objective criteria' (n=103); the rest are collectively depicted as 'Other' (n=14).[107]

[107] These categories were: 'declared by publisher to be out of print', 'out of print and it is mutually agreed that the Work's potential both as a book and with subsidiary rights has been fully exploited', 'not for sale in any edition', 'not held in stock in saleable quantities', 'out of print and off the market', 'declared by publisher and not available for purchase including electronically', 'off the market and not available in any edition', 'publisher can terminate and discontinue at their sole option', 'off the market', and 'unavailable for sale'.

Figure 3: How the Phrasing of 'Out of Print' Has Changed over Time



The results show that, in the contracts we analysed, the 'out of print and not available in any edition' formulation gained popularity from the 1980s relative to the other common formulations. *Clark's* suggests that the shift in wording from 'out of print' to 'available' may be indicative of the transition to digital media: that is, it was a deliberate shift to capture digital and POD editions.[108] We also see that, in the early 2000s, there was a splintering in the words used to describe the circumstances in which an author can reclaim their rights for lack of exploitation: the most common formulations all became less frequent, and 'other' formulations spiked. By 2009–14, there was no clear frontrunner formulation, and 'other' formulations had increased to over 25%. This may suggest that publishers are developing their own solutions to the problem of defining 'out of print', rather than developing an industry consensus. The variety of formulations, and the lack of clarity as to how they differ from one another, seem likely to cause confusion for authors seeking to understand and exercise their out-of-print rights.

[108] Owen (ed), *Clark's 10th ed* (n 24) 56.

(d) Objective Criteria Were Mostly Based on the Number of Copies Sold

As already explained, the shift to digital forms of publication led to calls to change the way out-of-print status was calculated: from being calculated on mere 'availability' to using more objective measures like sales and royalties. We reported above that just 7% (n=9) of the contracts with out-of-print clauses utilised such objective measures. As shown in Table 3, these were mostly based on the number of copies sold.

Table 3: Objective Criteria Used in Out-of-Print Clauses to Determine when a Book Was 'Out of Print' or 'Unavailable', by Year

Year	Criteria for when a book was considered 'out of print' or 'unavailable'
1987	When the publisher's stocks were under 200, and when royalties in a six-month accounting period were under $50.00.
1990	Where royalties for 'each of two … successive accounting periods are below the equivalent of … $25.00'.
2006	Where at 'the end of the fifth or any subsequent accounting period after release', the publisher holds no physical stock of the Work and 'fewer than 100 copies in all formats have been sold over two consecutive accounting periods'.
2008	Where the publisher's stocks were under 50 or where fewer than 12 copies were sold in any six-month accounting period.
2009	Where under 50 copies were sold in two accounting periods.
2013	When the royalties paid for 'gross combined sales of print and ebook' sales in the preceding 12-month royalty period is under $100.00.
2014	Where fewer than 12 copies were shown to be sold in any account statement.
2014	Where the title is not for sale in print or electronic editions, or is available but with fewer than 250 'royalty generating sales' across 'four consecutive royalty periods'.
2014	If a) 'gross sales in two consecutive accounting periods' were less than 50 copies; or b) if fewer than 10 copies in book form (as distinct from electronic form) were sold in 'two consecutive accounting periods'; or c) the ebook in all e-formats sells fewer than 10 copies in 'two consecutive accounting periods'.

These examples are striking for the variation between the clauses, but also for the early dates at which some of them appear. Notably, the earliest such contract was dated 1987, and five were dated 2009 or earlier. This makes sense, given that authors' societies had been campaigning for the use of objective criteria to determine out-of-print status from at least 1968.[109] That renders particularly stark our finding about how few contracts utilised objective criteria at all. It is striking that the vocally expressed concerns of authors over uncertain and inadequate out-of-print rights were so long and widely ignored.

The low number of out-of-print clauses based on objective criteria may also have been influenced by poor drafting. Four contracts (dated 1991, 1993, 1994, 2007) defined 'out of print' using objective criteria (less than 10 copies in stock) as well as technical availability criteria (requiring titles *also* to be unavailable in any edition). If the title was out of print because it had fewer than 10 copies in stock but *was* available in some edition (such as an ebook), this clause would not operate. This may not have been what the drafters intended — or else why define 'out of print' with objective criteria at all?

(e) Some Authors Are Still Required to Pay to Reclaim Their Rights

Consistent with modern practice,[110] most out-of-print rights were exercisable at no cost to the author. However, six contracts (dated 1964–1998) required authors to pay to reclaim rights, contributing to the cost of plant used to print the book, repaying any unearned portion of their advance, or both.[111] Variations of such formulations date back to at least 1744,[112] and had been recommended by leading publisher Stanley Unwin until 1960 in regular editions of his *The Truth about Publishing*.[113] Yet the 1976 edition described that advice as of only historic interest, since photolithography had by then so dramatically reduced the costs of production.[114] It is striking, then, that we found contracts that still had such superseded formulations. Even if such clauses had been appropriate at the time they were drafted, given the dramatic changes to the economics of publishing in the succeeding decades, they no

[109] See above 9.

[110] *Lindey* (n 24) § 5:109.

[111] In contracts from 1964, 1966, 1973, 1976, 1977 and 1998.

[112] Lionel Bently and Jane C Ginsburg, '"The Sole Right … Shall Return to the Authors": Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary US Copyright' (2010) 25(3) *Berkeley Technology Law Journal* 1475, 1512–13.

[113] Stanley Unwin, *The Truth about Publishing* (George Allen & Unwin, 2nd ed, 1926) 104–5; Sir Stanley Unwin, *The Truth about Publishing* (George Allen & Unwin, 7th ed, 1960) 93–5, recommending the author arrange for the new publisher to cover those costs.

[114] Sir Stanley Unwin, *The Truth about Publishing*, rev Philip Unwin (George Allen & Unwin, 8th ed, 1976) 68.

longer are. Notably, since these contracts lasted the entire term of copyright, they still endure today (unless some reversion clause has been exercised or they have otherwise been terminated).

3 *Authors Typically Face Long Waits before They Can Reclaim Their Rights*

Rights to four out of print titles reverted automatically to authors once they gave notice to publishers to reclaim them. In all other cases, authors had to go through various waiting and notice periods. We identified up to three different delays 'baked in' by the contracts: (a) a period after initial publication, (b) a period after the book goes out of print, and (c) a period for the publisher to reprint the book.

Such periods are intended to strike a balance between publishers' needs for opportunities to recoup and profit from their investments, and authors' interests in reclaiming rights to works that are no longer meaningfully being exploited. Too short, and they may disincentivise publishers from investing in new titles. Too long, and they may prevent authors taking advantage of emerging opportunities. We examine the extent to which these three waiting periods appear in the sampled contracts, their duration, and how the length of notice to publishers has evolved over time.

(a) Some Contracts Required Authors to Wait after Initial Publication

Twenty-one per cent of contracts with out-of-print clauses (n=27, 1966–2014) required authors to wait a specified period after initial publication before they could begin activating their out-of-print rights. The shortest required delay was one year after publication, and the longest was seven (average 41.3 months, median 36 months). One further contract required the author to wait two years from the date of the book's most recent (as distinct from first) publication.

(b) Books Must Sometimes Be Long Out of Print before Authors Can Initiate the Reversion Process

Sometimes authors were required to wait a specified period after the book went out of print before they could begin to exercise their out-of-print rights (n=10, 1964–2011). These periods ranged from six months to 36 months (average 14.4 months; median 12 months).

(c) Most Contracts Required Notice to Reprint Books

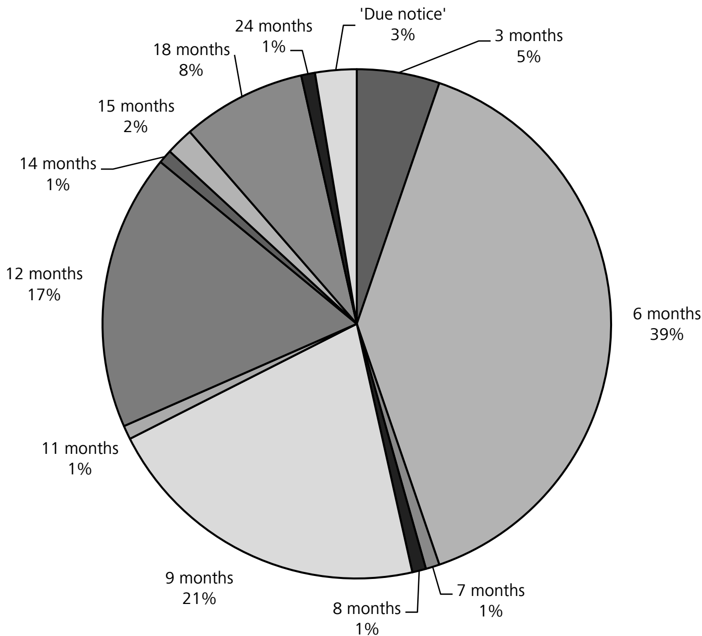
Ninety-three per cent of contracts with out-of-print clauses (n=117) had a requirement for authors to give publishers notice to reprint their book once it went out of print, with the rights reverting to the author only when the publisher failed to do so. These clauses usually stated that publishers must

reprint a new edition of the book before the expiry of the notice period. However, on 19 occasions the contracts indicated that the notice period was for publishers to *commence* the process of republication. To equivalise the figures we added six months to the stated notice period in the latter cases, assuming it to be a reasonable time for the publisher to finalise reprinting.

The specified notice periods for reprinting ranged from two to 24 months. Three contracts did not specify a period, but simply required authors to give publishers 'due notice'. In such cases the Australian common law implies an obligation for the author to give a reasonable amount of notice.[115] While this lack of precision is not legally problematic, the absence of clear timelines may hamper authors in understanding their rights.

Figure 4 plots the frequency with which each notice period appears in the sample. We excluded three other contracts specifying notice periods from our analysis (dated 1977, 1987, 2014) because they were too unclear for us to generate single number results from them.

Figure 4: Period of Notice for Publishers to Reprint



[115] Robertson and Paterson (n 96) 497 [23.55].

We then tracked the length of notice periods and their evolution over time. Over the past decades, *Clark's* has revised its recommended notice period downwards. In 1980, it gave no specific recommendation but simply noted that publishers generally require at least 12 months' notice.[116] In the 1988 edition, it recommended authors be required to give 12 months' notice, then in 2010 reduced that to nine months.[117] In the most recent 2017 edition, *Clark's* recommends that authors give the publisher one 'full accounting period' for the publisher to make a specified number of sales.[118] Accounting periods in trade publishing are typically six months.[119]

Nothing in those *Clark's* commentaries explains its reduction in the recommended term of notice. We hypothesise that it is most likely attributable to publishing industry changes. It has become cheaper and faster to print books, including small runs of 50–100 copies that used to be financially infeasible.[120] Over the same period, BookScan has revolutionised publisher understanding of which books are selling and where. Digital stock management technologies have also made it far easier, faster and cheaper for publishers to determine how many books are held by booksellers.

All this would suggest publishers require less notice to reprint books than has been the case in the past. Notably though, we observed an upward trend in the notice to reprint by an average of almost four months over the 50 years of contracts (see Figure 5).[121] We make no claim that this is representative of Australian publishing contracts as a whole (nor that this is statistically significant), but it is a striking observation which encourages us to examine notice periods closely in our subsequent work.

[116] Clark, *Clark's 1st ed* (n 83) 22.

[117] Charles Clark (ed), *Publishing Agreements: A Book of Precedents* (Unwin Hyman, 3rd ed, 1988) 36–7 ('*Clark's 3rd ed*'); Owen (ed), *Clark's 8th ed* (n 44) 55, 88.

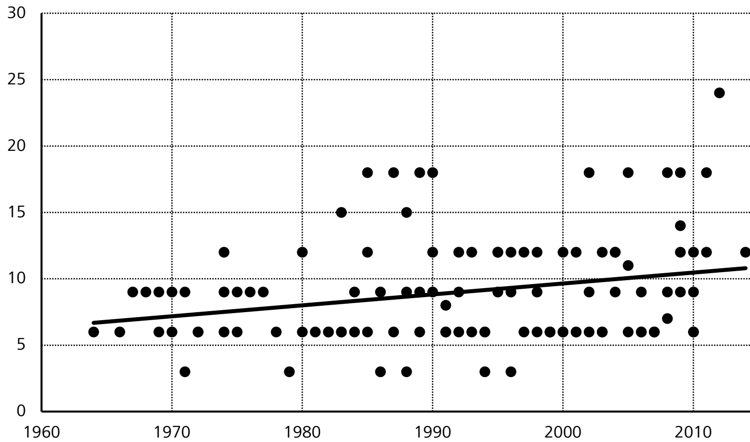
[118] Owen (ed), *Clark's 10th ed* (n 24) 57.

[119] Text communication from literary agent A to the authors (19 August 2019).

[120] Patrick Henry, 'Book Production Technology since 1945' in David Paul Nord, Joan Shelley Rubin and Michael Shudson (eds), *A History of the Book in America* (University of North Carolina Press, 2009) vol 5, 55, 70.

[121] This chart contains 111 of the 117 contracts with notice periods for the publisher to reprint. The others required 'due notice' to be given or were too unclear to generate single number results from them.

Figure 5: Notice to Reprint (Period in Months over Time)



(d) The Different Types of Notice Could Stack Up Too

Contracts sometimes required two or even all three kinds of notice. Sixteen per cent of contracts with out-of-print clauses (n=20) required the author to wait after the work was first or last published before giving the publisher notice to reprint, and 5% (n=6) did the same with waiting periods after the book went out of print. One 2011 contract imposed all three types of waiting periods: the author needed to wait 12 months after the book was first published, then 12 months after the book went out of print, and then give the publisher 12 months to reprint the work. The rights would revert only once all three periods expired, making it a lengthy and complicated process. If new opportunities emerged for authors to exploit out of print titles, such delays may well make it infeasible for them to take advantage of them.

4 *Other 'Use-It-or-Lose-It' Reversion Clauses*

In addition to out-of-print rights, some contracts provided for the return of unexploited language and territory rights (n=8). However, these were rare. Three contracts (dated 1980, 1986, 2008) reverted overseas territory rights if no overseas sales were made within a specified period. A further two (dated 1997, 1998) reverted unsold publishing rights outside of Australia and NZ six months after the Australian publication date. One (dated 2014) reverted subsidiary rights including translation rights and the right to sell the book in English overseas 'if no sales have been made during the previous three years'. The last two contracts (dated 2000, 2005) provided for unused rights to be reverted, but

also gave the publisher the opportunity to prevent attempted reversions if they were making reasonable progress towards selling those rights.[122] The widespread absence of use-it-or-lose-it clauses was particularly striking given the emphasis that author associations put on such provisions.[123]

5 *Reversion in the Event of Liquidation*

As discussed above,[124] clauses providing for reversion in the event of the publisher's going out of business are a common and important part of publishing contracts. Seventy per cent of the contracts (n=101) provided for rights to return to authors in the event of the publisher going out of business (eg entering liquidation). The 30% of contracts without liquidation clauses (n=44) spanned the entire sample, from 1960 to 2014.

Missing reversion clauses in the event of liquidation are particularly problematic, because liquidators have legal obligations to maintain the value of corporate assets for creditors,[125] and may not have the ability to return them contrary to the terms of the contract (even if industry norms would be to do so).

IV Discussion

A *Publishing Contracts Do Not Adequately Safeguard Author Interests*

Outside the time based reversion rights in the US and Canada, the rights of Anglosphere authors are determined entirely by their publishing contracts. Our analysis suggests it is not appropriate to rely so heavily on contracts as repositories of author rights. There are four main reasons why.

First, publishing contracts (and industry practice guides) do not universally incorporate even the most commonly accepted reversion rights. Thirteen per cent of the contracts we reviewed lacked out-of-print clauses. There may sometimes be valid reasons for this (eg in the case of publisher-originated,

[122] The first, dated 2000, reverted non-exclusive rights outside Australia to the author, only 'if in the reasonable opinion of *both* the Author and Publisher satisfactory progress has not been made on international sales'. The second, dated 2005, reverted publishing, sale, and various other rights 'if they were unexploited after two (2) years from first publication in Australia', but required the author to 'agree … to extend the periods referred to above if the Publisher provides satisfactory evidence that it is actively pursuing publication of the Work in that territory or that language'.

[123] See above nn 19–20.

[124] See above Part II(A)(3).

[125] *Corporations Act* (n 55) s 420A(1).

regularly revised educational titles), but they were missing from trade contracts too, and in one instance even from a model trade agreement.[126] Thirty per cent also lacked a liquidation clause. This absence is particularly difficult to defend, since liquidators may not have discretion to return rights absent a contractual obligation to do so. Further, hardly any contracts (and few practice guides)[127] incorporated use-it-or-lose-it rights covering unexploited languages and territories, despite author groups holding such rights up as a core plank of fair contracting. This is an especially stark omission given the broad rights taken by publishing contracts in our sample — often for all languages and/or all territories worldwide. Use-it-or-lose-it provisions are especially important in the current era, where, courtesy of ebooks, POD and the Internet, there are more options for exploiting rights, including overseas, than there have ever been before. It may well be that well-informed and well-advised authors are able to negotiate such rights into their contracts, but that begs the question — why then are such protections not simply included by default? These omissions can make it harder for authors to financially benefit from their works, block other publishers from new investment opportunities, and lead to worse access for the public.

Second, our analysis suggests that publishing contracts can be inordinately slow to evolve in response to changing industry norms. We found clauses requiring authors to pay to reclaim rights to out of print titles long after such formulations had been rendered obsolete.[128] And, despite consistent advocacy by author organisations for the use of objective criteria to determine out-of-print status from as early as the 1960s, nearly all of the contracts we analysed still used outdated formulae based on technical availability criteria.[129] Various present-day publishing guides also used such formulations,[130] and author organisations report regularly still seeing such formulations today (despite most larger publishers having finally made the shift to objective criteria).[131] Slowness to adapt to changing circumstances might also explain the paucity of use-it-or-lose-it clauses, which were less important in the pre-digital era when authors had fewer options for exploiting their rights.

Third, contracts can be ambiguous and poorly drafted, making it time-consuming and expensive for authors to ascertain and enforce their rights. We

126 *Lindey* (n 24) § 5:118.

127 See above n 51 and accompanying text.

128 See above Part III(C)(2)(e).

129 See above Part III(C)(2)(b).

130 See above nn 37–42.

131 See above n 50 and accompanying text.

found examples of publishers imposing terms apparently without understanding their legal significance, such as when they (superfluously) took a licence after already extracting the author's entire copyright. On many occasions we found it difficult to determine how long an author needed to wait before they could regain their rights. Some contracts appeared to suffer from 'cut-and-paste' syndrome, whereby clauses from different eras were sewn together, betrayed by inconsistent fonts or language. While such updates may well reflect well-intentioned attempts to respond to changing practice, they left some contracts uncertain or unworkable. Other times core terms were omitted altogether, such as the length of the contract or languages taken. No doubt these problems were exacerbated by the fact that some of the contracts we examined came from small presses, who are less likely to have access to expert legal input. Yet the sheer number of such presses make it even more important to ensure authors have certain minimum protections outside the contracts as a safeguard against uninformed or careless drafting.

Finally, even if none of the above deficiencies existed, the sheer length of contracts makes them inappropriate repositories for author rights. Not even the most prescient publisher can write contracts that will adequately deal with the social, technological and industry realities that will exist 50 or 100 years after their execution. Contracts signed by young authors in good health today might endure until 2150 or beyond. By then, those contracts will look as quaint and outdated as late-19th century contracts do to us today. We cannot expect the drafters of today's contracts to predict what tomorrow's world will look like, but by making them the sole source of author rights that is effectively what we are asking them to do. Extremely long terms also increase the likelihood of contracts being misplaced, creating situations where authors seek to reclaim their rights, but their entitlement to do so cannot be ascertained.[132]

B *These Problems Could Be Ameliorated by Introducing Minimum Author Reversion Rights*

We would propose new minimum reversion rights for authors to be enshrined in legislation, with contracts able to strengthen (but not detract from) those minimums. A soft law approach such as an industry code of conduct is unlikely to be sufficiently effective, given the number of publishers in existence, their general lack of legal support, and the poor state of so many of the contracts we analysed. In those circumstances, mandating minimum rights that apply

[132] See, eg, Brianna Schofield, 'Joseph Nye: A Rights Reversion Success Story' *Authors Alliance* (Article, 22 January 2016) <https://www.authorsalliance.org/2016/01/22/joseph-nye-a-rights-reversion-success-story/>, archived at <https://perma.cc/D2YK-Q3RX>.

regardless of the contract's terms is likely to be the most effective solution, as well as being the most cost efficient for publishers themselves. More than half the world's nations already give authors statutory reversion rights, in a rich variety of forms.[133] Some statutes restrict the duration of transfers and licences.[134] Provisions also exist to allow authors to reclaim rights when their books go out of print,[135] where their publisher fails to exploit particular language rights[136] or pay royalties,[137] or where it enters liquidation.[138] While Australia currently has no such author protections, they are not unknown in its law. Australia (like the UK and NZ) used to automatically return rights to heirs

[133] Yuvaraj (n 17).

[134] In some countries, time limits apply whether or not the parties agree a longer term: see, eg, *Law on Copyright and Neighbouring Rights* (Bulgaria) 29 June 1993, art 37(2) ['Law on the Copyright and Related Rights', *WIPO Lex* (Web Document) <https://wipolex.wipo.int/en/text/280106>]; *Copyright Act*, RSC 1985, c C-42, s 14(1); *Copyright Act 1912* (Eswatini) s 7(2); *Federal Law on Copyright* (Mexico) 15 June 2018, art 33; 17 USC §§ 203, 304 (2020). In some other countries, restrictions apply only where parties have not specified a contractual term in their contracts: see, eg, *Copyright and Neighboring Rights Protection Proclamation* (Ethiopia) No 410/2004, s 24(3) (five or 10 years depending on whether the contract in question involves a lease or assignment, respectively); *Copyright Act 1957* (India) s 19(5) (five years); *Copyright Act BE 2537* (Thailand) 9 December 1994, s 17 (10 years).

[135] See, eg, *Law No 032-99/AN on the Protection of Literary and Artistic Property* (Burkina Faso) 22 December 1999, art 56 [tr World Intellectual Property Organization, 'Law No 032-99/AN on the Protection of Literary and Artistic Property', *WIPO Lex* (Web Document) <https://wipolex.wipo.int/en/text/188420>]; *Act on Copyright in Literary and Artistic Works* (Sweden) No 1960:729, art 34 ['Act on Copyright in Literary and Artistic Works', *WIPO Lex* (Web Document) <https://www.wipo.int/edocs/lexdocs/laws/en/se/se124en.pdf>]. In some instances, this depends on the publisher not meeting a pre-existing contractual arrangement to publish a second edition of the book: see, eg, *Copyright Law* (Peru) Legislative Decree No 822, art 102(b) [tr International Bureau of the World Intellectual Property Organization, 'Copyright Law', *WIPO Lex* (Web Document) <https://wipolex.wipo.int/en/text/129300>].

[136] See above n 52.

[137] See, eg, *Ordinance No 03-05 of 19 Joumada El Oula 1424 Corresponding to 19 July 2003 on Copyright and Neighboring Rights* (Algeria) JO, 23 July 2003, art 97 ['Copyrights and Neighboring Rights Act, July 19, 2003 Algeria', *Saba IP* (Web Document) <https://www.sabaip.com/wp-content/uploads/2018/04/Algeria-Copyright-Law.pdf>]; *Law 23 of January 28 1982 on Copyright* (Colombia) art 132 [tr World Intellectual Property Organization, 'Law No 23, of January 28, 1982, on Copyright', *WIPO Lex* (Web Document) <https://www.wipo.int/edocs/lexdocs/laws/en/co/co012en.pdf>].

[138] Or related circumstances: see, eg, *Loi du 18 avril 2001 sur les droits d'auteur, les droits voisins et les bases de données* [Law of April 18 2001 on Copyright, Neighbouring Rights and Databases] (Luxembourg) art 17; *Law No 1328/1998 on Copyright and Related Rights* (Paraguay) art 99 ['Law No 1328/98 on Copyright and Related Rights', *WIPO Lex* (Web Document) <https://wipolex.wipo.int/en/text/129427>]; *Law on Copyright* (Venezuela) 14 August 1993, art 85 ['Law on Copyright', *WIPO Lex* (Web Document) <https://wipolex.wipo.int/en/text/130135>].

25 years after the author's death.[139] Some might object to such protections on the basis that they interfere with freedom of contract, but of course countries regularly decide to do this, and the prevalence of such laws elsewhere demonstrates that these are appropriate conditions in which to do so.

Consistent with copyright's aims, the intent of minimum reversion rights should be trifold: to give authors fresh opportunities to financially benefit from and decide the future of their works, to open new investment opportunities up to publishers and other investors, and to promote books' ongoing availability to the public. To effectively achieve all three aims, appropriately scoped reversion rights would need to be developed in consultation with all industry stakeholders. Industry involvement is vital to understand the economic and practical impacts of any new rights, which must be carefully factored in given book publishing's tight financial realities. And, since the publishing industry is in such flux, any baseline author rights should be designed to be regularly updateable to reflect evolving norms and practice. In Australia, for example, that may mean enshrining the entitlement to the rights in the *Copyright Act 1968* (Cth), but placing the rights themselves in more readily updateable regulations.

Further research and consultation with stakeholders is necessary to appropriately scope any new reversion rights, but below we set out some preliminary thoughts about possibilities to explore together with some of the issues that would need to be addressed if modern author protections were to be enacted into law. Variations on everything we propose below can already currently be found in the contracts of knowledgeable and reputable Australian publishers.

1 *Rights to Revert Where a Book Is No Longer Being Meaningfully Exploited*

Our results suggest a need for a clear out-of-print right. Careful consideration would need to be given to the criteria triggering the right to reclaim. There might be more than one: for example, where publishers fail to satisfy demand for copies within a certain period *or* where a minimum threshold of royalties has not been reached, as is the case under French law.[140] Consideration would need to be given to how long after publication the entitlement should arise,[141] whether it would be appropriate to require authors to give notice of their intent

[139] Joshua Yuvaraj and Rebecca Giblin, 'Why Were Commonwealth Reversionary Rights Abolished (and What Can We Learn Where They Remain)?' (2019) 41(4) *European Intellectual Property Review* 232, 233.

[140] *Intellectual Property Code* (n 52) art L132-17-4.

[141] See, eg, *EU Directive* (n 15) art 22(3).

to revert, and if so, how long the period should be.[142] Thought must also be given to whether any categories of work should be the subject of exclusions.[143] For example, it may not be desirable to give authors of publisher-originated works that are intended to be regularly revised (most commonly educational or reference works) the same reversion rights as trade authors.

2 *'Use-It-or-Lose-It' Rights*

Comprehensive 'use-it-or-lose-it' rights should also be considered given their potential to unlock new investment and revenue opportunities. Inspiration might come from existing laws and practice, covering unexploited languages (eg Spain and Lithuania),[144] territories (as in some of the contracts and publishing guides we analysed)[145] and formats (eg ebooks or audiobooks, as provided by the French law entitling authors to reclaim unused digital rights).[146] Consultation would be necessary to determine how long publishers should have to exploit works before authors can exercise the right, whether authors should be required to give notice of their intention to do so, and if so, how long that should be.

3 *A Right to Revert When the Publisher Enters Liquidation*

Consistent with standard industry practice, consideration should be given to authors having a right to reclaim rights in the event a publisher enters liquidation. This would need to be made consistent with domestic insolvency laws to fairly balance the interests of authors, publishers and creditors. Thought should be given as to whether any types of book should be excluded (such as books originated by the publisher, eg in the educational context).

4 *Reversion for Failure to Pay Royalties or Provide Reasonably Transparent Royalty Statements*

We also urge consideration of rights around royalties and royalty statements. None of the reversion rights canvassed above can be particularly effective unless authors also receive adequate information about how their works are being exploited, including all revenue sources and territories. Authors today have no guarantee of this. In recognition of that reality, the EU recently imposed a transparency obligation requiring assignees and licensees to provide

[142] See, eg, ibid.

[143] See, eg, *EU Directive* (n 15) art 22(2)(a).

[144] See above n 52.

[145] See above n 51.

[146] *Intellectual Property Code* (n 52) art L132-17-5.

> relevant and comprehensive information on the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights, or their successors in title, in particular as regards modes of exploitation, all revenues generated and remuneration due.[147]

We should investigate introducing a similar obligation in Australia, with authors given the ability to reclaim their copyrights if their publisher fails to provide reasonably transparent and timely statements.

We should further consider recognising an express right for authors to terminate their contracts if the publisher fails to pay royalties within a specified period, as is already the case in countries including Colombia and Algeria.[148] Such a term would already be implied into publishing contracts, but the absence of an express time stipulation would make it difficult for authors to exercise the right without risking unlawfully repudiating the contract themselves.[149]

5 *Reversion after Time*

Finally, consideration should be given to whether authors should be entitled to reclaim copyrights after a certain period. This is already the case in countries including the US and Canada,[150] and consistent with calls from author advocates concerned that writers are often required to sign away rights for the entire copyright term before anyone knows their worth.[151] Such limits would do much to address problems caused by outdated and missing contracts. Nothing would prevent an author from immediately entering into a new contract with the same publisher, and they may choose to do so if that publisher was doing the best job of maximising revenues and reaching audiences. However, the author might alternatively enter into an agreement with a different publisher or take advantage of a new distribution model that does not even exist today, if that promised better remuneration or availability. Time based reversions could be designed to occur only at the instigation of the author (as under the current US law)[152] or automatically (as in Canada).[153] In the latter

[147] *EU Directive* (n 15) art 19(1).

[148] See above n 137.

[149] *Louinder v Leis* (1982) 149 CLR 509, 526 (Mason J).

[150] See above n 18.

[151] 'Ten Principles' (n 20).

[152] 17 USC §§ 203, 304.

[153] *Copyright Act*, RSC 1985, c C-42, s 14(1). See also the recent recommendations to award a new right that would entitle creators to revert rights 25 years after transfer (in addition to the existing right that applies automatically 25 years after the author's death): *Shifting Paradigms* (n 16) 31; *Statutory Review* (n 16) 4.

case however, steps should be taken to reduce the risk of 'orphaning' works in the event their authors do not claim them. Giblin has suggested the possibility of putting a public trust in place to manage such abandoned works, with licence revenues directly supporting new authorship via grants, fellowships and prizes.[154]

V Conclusion

Our analyses of publishing contracts and industry practice guides suggest there are real reasons to doubt the appropriateness of contracts as such important repositories of author rights. The contracts we analysed took very broad rights while rarely satisfying best practice for returning them to authors in the event they were not being meaningfully exploited. Publishers were slow to update their contracts to reflect evolving practice, and they could be riddled with ambiguities and inconsistencies. These practices combine to make it harder for authors to financially benefit from their books, for publishers to make new investments, and for the public to access our literary heritage. And, even if they had none of these problems, they would still not be appropriate repositories for minimum author rights; since publishing contracts can last a century or longer, even contracts that reflect best practice at time of signing will almost certainly become obsolete before their scheduled end.

Our results suggest there are good reasons for Anglosphere nations to consider developing minimum reversion rights. In a financial environment that is tough for authors and publishers alike, appropriately tailored reversion rights would potentially increase the size of the pie and help copyright more effectively achieve its aims. Rather than asking whether publishers and policymakers should support such reforms, a better question might be — can they afford not to?

[154] Giblin, 'Copyright Bargain' (n 6) 401.