

COPYRIGHT REVERSION TO AUTHORS (AND THE *ROSETTA* EFFECT):
AN EMPIRICAL STUDY OF REAPPEARING BOOKS

Copyright keeps out-of-print books unavailable to the public, and commentators speculate that statutes transferring rights back to authors would provide incentives for the republication of books from unexploited back catalogs. This study compares the availability of books whose copyrights are eligible for statutory reversion under US law with books whose copyrights are still exercised by the original publisher. It finds that 17 USC § 203, which permits reversion to authors in year 35 after publication, and 17 USC § 304, which permits reversion 56 years after publication, significantly increase in-print status for important classes of books. Several reasons are offered as to why the § 203 effect seems stronger. The 2002 decision in *Random House v. Rosetta Books*, which worked a one-time *de facto* reversion of ebook rights to authors, has an even greater effect on in-print status than the statutory schemes. The estimated positive effect of reversion on the availability (in-print status) of titles in the full sample of 1909 books is 20-23%.

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Many countries around the world provide that an author, or the author's heirs, have an inalienable statutory right to reacquire a copyright previously assigned to a publisher, even if the assignment purported to be for the life of the copyright.¹ One relatively straightforward scheme is found in the 1976 US Copyright Act, which provides that 35 years after the transfer of a work published after January 1, 1978, an author or her heirs has the inalienable right to terminate the transfer.² The media report numerous stories of musicians and writers who have recently recovered valuable copyrights from their publishers under this provision.³ Exercise of the

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¹ See Appendix A (listing the laws of various jurisdictions).

² 17 U.S.C. § 203(a) (“In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license or any other right under copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination . . .”).

³ See “A Copyright Victory: 35 Years Later,” <http://www.nytimes.com/2013/09/11/arts/music/a-copyright-victory-35-years-later.html> (detailing how Victor Willis reacquired the rights to the hit song, “YMCA”); “Legal Landmark: Artists Begin to Reclaim Rights to their Music,”

termination right allows authors or authors' heirs to renegotiate a better deal with their publishers, to seek a new publisher, to self-publish, or to bring an out-of-print work back to the market.⁴

Other countries, and indeed the US, have other sorts of reversion schemes.⁵ In some commonwealth nations, including Canada⁶, a copyright reverts back to the author's heirs 25 years after the death of the author.⁷ The same is true in Spain.⁸ Some European countries have "use it or lose it" provisions which, under various circumstances, permit authors to reacquire a copyright if the work is not being exploited by the transferee.⁹ As a matter of EU law, performers have the right to terminate transfers made to recording studios, if the recordings are not being exploited by the producer 50 years after the recording was first released.¹⁰ In the US, pre-1978 works are governed by a bewildering mix of laws that, for works published before 1950, allowed an author's

<http://variety.com/2013/biz/features/artists-reclaim-rights-to-music-1200334132/>; "Rights Reversion Success Stories," <http://www.authorsalliance.org/category/resources/rights-reversions/tr-successes/> (stories of writers who have regained their copyrights); "Recapturing US Copyright," <https://basca.org.uk/2015/10/06/recapturing-us-copyright/> (recapture of "Video Killed the Radio Star"); and Lisa Alter, *Termination of Transfers Under the US Copyright Act*, 33 SPG ENT. & SPORTS LAW 32, 39-46 (2017) (describing recent cases of musicians recovering their copyrights).

⁴ See Cabrara, et al, "Understanding Rights Reversion: When, Why, and How to Regain Copyright and Make Your Book More Available," at 4-5 <http://www.authorsalliance.org/resources/rights-reversion-portal/rights-reversion-guide/>.

⁵ See Appendix A (collecting provisions from non-US jurisdictions), see also, for example, Maria Lilla Montagnani & Maurizio Borghi, *Positive Copyright and Open Content Licenses: How to Make a Marriage Work by Empowering Authors to Disseminate their Creations*, 12 INT'L J. COMM. L. & POLICY 244, 256 ("The German Copyright Act encompasses a specific provision on termination of contract for non-use relating to all kinds of transfers except contracts for film production. Article 41 provides that two years after the grant of the right, or delivery of the work, whichever is later, the author can revoke the grant if the holder of an exclusive exploitation right does not exercise such a right or, alternatively, she exercises it insufficiently, thereby causing serious injury to the author's legitimate interests.").

⁶ See Canadian Copyright Act § 12(5).

⁷ See Paul Torremans, *Reversionary Copyright: A Ghost of the Past or a Current Trap to Assignments of Copyright?*, 2 INTELL. PROP. Q. 77, 78 (2012).

⁸ *Id.*

⁹ Directorate-General for Internal Policies, *Contractual Arrangement Applicable to Creators: Law and Practice of Selected Member States* 77 (Policy Department—Citizen's Rights and Constitutional Affairs, 2014).

¹⁰ *Id.* at 78. See also Martin Kretschmer, *Copyright Term Reversion and the "Use it or Lose it" Principle*, INT'L J. MUSIC BUS. RES. 2012.

heirs to regain rights at year 28 after publication, *if* the author died before year 28,¹¹ and created another reversion window in year 56 after publication for the estates of authors who survived past year 28¹² and for all works published between 1950 and 1978.¹³ To complicate matters further, if the termination right for pre-1978 works under 17 USC § 304(c) is not exercised in year 56 after publication, then it may under some circumstances be invoked in year 75 after publication.¹⁴

The stated rationale for these various reversionary statutes is overtly paternalistic.¹⁵ Legislators are worried about artists who may have made bad deals with their publishers,¹⁶ or they are concerned about heirs¹⁷ who might not be adequately benefitting from their parents' or

¹¹ See *Stewart v. Abend*, 495 US 207 (1990).

¹² See Lionel Bently & Jane C. Ginsburg, “*The Sole Right . . . Shall Return to the Authors*”: *Anglo-American Authors Reversion Rights From the Statute of Anne to Contemporary U.S. Copyright Law*, 25 BERKELEY TECH. L. J. 1475, 1555-64 (2010); Note, *Copyright’s Unconsidered Assumption: Statutory successors to the Termination Interest (and the Unintended Consequences for Estate Planners)*, 94 NEB. L. REV. 441, 447-452 (2015).

¹³ See 17 U.S.C. § 304(c)(3) (“In the case of any copyright subsisting in either its first or renewal term on January 1, 1978, other than a copyright in a work made for hire, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978 . . . is subject to termination . . . 56 years from the date the copyright was originally secured . . .”).

¹⁴ See 17 U.S.C. § 304(d) (if the right established in section 304(c) is not exercised “termination of the grant may be effected at any time during a period of 5 years, beginning at the end of 75 years from the date the copyright was originally secured”).

¹⁵ See Rebecca Giblin & Kimberlee Weatherall, *WHAT IF WE COULD REIMAGINE COPYRIGHT?* 166 (2017) (“Reversionary rights are putatively designed to provide protection for authors against bad deals.”); Montagnani & Borghi, *supra* note 5 at 262 (referring to reversionary schemes as “legal paternalism”).

¹⁶ See H.R. 1476 (94 Cong., 2d Sess., 1976) at 5741 (“A provision of this sort [section 203] is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work’s value until it has been exploited.”); Pierre B. Pine, “You’re Terminated: Termination and Reversion of Copyrights and the Termination Rights Dilemma,” <http://mcpersonrane.com/articles/youre-terminated-termination-and-reversion-of-copyright-grants-and-the-termination-gap-dilemma/> (“The purpose and rationale of the termination provisions was clearly equitable in nature, to allow authors or their heirs a second opportunity to share in the economic success of their works.”); Shane Valenzi, *It’s Only a Day Away: Rethinking Copyright Termination in a New Era*, 53 IDEA 225, 227 (“One point of view (the ‘authors’ rights view) is that emerging creative authors are in such a poor bargaining position with respect to companies . . . that copyright law must protect authors in some way against ‘unremunerative transfers’.”).

¹⁷ See Giblin, *supra* note 14, at 166-67 (“[reversion] might seem nice for those heirs but lacks any justification related to instrumental or natural property rights.”).

grandparents' labor.¹⁸ From an economic standpoint, these equitable reasons for creating a reversion right are unsatisfactory.¹⁹ Concerns over “bad deals” made by authors clash with traditional deference to freedom of contract, and pity-based motivations for rewarding impoverished heirs is difficult to justify under an efficiency rationale.²⁰

Recently, commentators have advanced wholly different and primarily utilitarian justifications for granting authors a second bite at the apple.²¹ Martin Kretschmer argues that “term reversion could be a key tool for [enabling] artist-led cultural and social innovation.”²² In other words, after a certain period of time, authors may do a better job than publishers of making works available to the public or of creating new derivative works.²³ Reversion may “provide incentives to creators to . . . free back catalogues.”²⁴ If authors or their estates are more efficient in exploiting

¹⁸ See Alan J. Hartnick, *Stanley Rothenberg: Final Thoughts on the Dickens Provision*, 54 COPYRIGHT SOC'Y U.S.A. 565, 567 (2007) (explaining the origin of the reversionary right in the 1911 Imperial Copyright Act as motivated by sympathy for Dickens impoverished heirs); *Stewart v. Abend*, 495 US 207, ___ (1990) (“The evident purpose of [the renewal provision] is to provide for the family of the author after his death.”), *citing* *De Sylva v. Ballentine*, 351 US 570, 582 (1956).

¹⁹ See Valenzi, *supra* note 14 at 227 (describing “the right to contract view” as “the reality that producers and publishers take as many risks as creative authors: copyright law has no business stepping on the toes of simple contract law”).

²⁰ See Giblin, *supra* note 14, at 167 (“rights of termination and reversion are undoubtedly a form of restraint on alienation not normally encouraged in the design of efficient property rights systems.”); Montagnani & Borghi, *supra* note 5 at 261 (“economic analysis points out that introducing compulsory time restrictions in publishing contracts may weaken, instead of enhance, the author’s bargaining position”).

²¹ See Kretschmer, *supra* note 9; Molly Van Houweling, *Authors v. Owners*, 54 HOUS. L. REV. 371 (2016) (reverting rights to authors may lead to more works being available); see Cabrera *et al*, *supra* note 7 at 9 (“Reversions serve the public interest. Society benefits from the widespread access to scholarly works and the preservation of our cultural heritage. Public access to knowledge is restricted when works are out of print . . . Reversions of rights can help authors remedy these problems and increase access to their works.”); Montagnani & Borghi, *supra* note 5 at 264.

²² See *supra* note 9 at 46, see Cabrera *et al*, *supra* note 4 at 9 (encouraging authors to “create new works derived from their books”); Guy A. Rub, *Stronger than Kryptonite? Inalienable Profit-Sharing Schemes in Copyright Law*, 27 HARV. J. L. & TECH. 49, 94 (2013) (describing terminating authors who want to use their works “in a new way, distribute it for free (or not), or dedicate it to the public domain”).

²³ See Giblin & Weatherall, *supra* note 14 at 278 (“[reversion can] afford the creator a second opportunity to exploit the work economically”), Montagnani & Borghi, *supra* note 5 at 264 (“[reversion] does not aim at providing authors with a “second chance” but with the possibility of disseminating their works after a first commercial exploitation”).

²⁴ *Id.* at 4; see also Van Howeling, *supra* note 18 (noting termination of rights can resolve conflicts between authors who want to “revive a work that is no longer disseminated”); see Rub, *supra* note 18 at 94

older works, then utilitarian economics may provide a valid alternate rationale for copyright reversion²⁵ and may even provide a justification for expanding authors' reversionary rights, for example, by shortening the period of time that authors or their heirs have to wait to terminate a prior transfer.²⁶

Because reversionary schemes have been in place for decades, empirical evidence is available to measure what happens to works when rights revert from a publisher back to an author. Given the argument in favor of increased accessibility, the key point of inquiry should be whether reverted works become more or less available to the public after a termination of transfer becomes possible under the applicable statute. In the case of books, for example, one can observe whether in-print status increases or decreases when an author or her heirs are eligible to take control of the underlying copyright. The data presented herein suggests an increase in availability of 20%-23% as measured by in-print status.

Of course, the claim that authors may be more efficient at exploiting works raises an obvious theoretical question: Why would authors do a better job? A recent paper suggests that currently unexploited back catalogs of books would generate approximately \$740 million in revenue and \$460 million in profits in ebook markets alone.²⁷ Why would publishers leave so much potential income on the table for authors to gather up? Smith, Telang, and Zhang suggest that many publishers require a minimum yearly demand of 500-1000 books in order to keep a title

(“termination rights can serve a different group of creators: those whose work is no longer commercially exploited, such as author whose books have gone out of print”); Cabrera, *et al*, *supra* note 4 at 5 (guide to reversions explaining how authors can “bring their out-of-print works back into print”).

²⁵ See Giblin, *supra* note 14, at 327 (“[Reversion would] free up many of those works that had been languishing in the hands of intermediary owners with no further interest in commercially exploiting them, facilitating the transfer of rights to those who value them most.”).

²⁶ *Id.* at 5 (suggesting that after 10 years rights should revert to authors in cases of non-exploitation).

²⁷ See Michael Smith, Rahul Telang, & Yi Zhang, “Analysis of the Potential Market for Out-of-Print ebooks,” Carnegie Mellon University Research Showcase at 1 (2012). <http://repository.cmu.edu/cgi/viewcontent.cgi?article=1383&context=heinzworks>.

in print.²⁸ Such rigid quotas might create inefficiencies that other players in the market, e.g. authors or small publishers, might be eager to exploit, and high transaction costs might explain why the large publishers don't bargain away the rights.²⁹ Principal/agent costs within publishing firms may provide another explanation for inefficiencies. Branding strategies may also play a role. Large publishing houses may cultivate a quality reputation by selling only relatively popular books and leaving smaller book markets to "lesser" firms.³⁰ When a publisher is unwilling to keep a book in print,³¹ then the author or her estate may become a proxy for the public's interest in access.

The work of Ghose, Smith, and Telang, helps explain the value of making a new edition of a book available to the public, even when we generally have access to used copies of the same title.³² After analyzing trends in new and used book sales on Amazon.com, they conclude that "used books are poor substitutes for new books for most of Amazon's customers."³³ They find a very low cross-elasticity of demand between new and used titles³⁴ and determine that "only 16% of used-book sales at Amazon cannibalize new-book purchases."³⁵ New editions also create valuable information spillovers.³⁶ The publisher of a new edition has a financial incentive to advertise the book to consumers and to provide useful information about it, while used, out-of-print books have no such advocates.

²⁸ *Id.* at 2.

²⁹ *See infra* note 18.

³⁰ After all, Prada is not interested in satisfying the entire market for handbags. It leaves the profitable market of selling to Walmart shoppers to others.

³¹ *See* Ian Watson, *Assisting Living Authors in Opening Access to their In-Copyright Works: A Report from Iceland*, 41 BÓKASAFNIÐ 34, 37 (2017) (detailing authors' frustrations in dealing with publishers after their academic works have gone out of print).

³² Anindya Ghose, Michael D. Smith, & Rahul Telang, *Internet Exchanges for Used Books: An Empirical Analysis of Product Cannibalization and Welfare Impact*, 17 INFORMATION SYSTEMS RESEARCH 3 (2006).

³³ *Id.* at 3.

³⁴ *Id.* ("The cross elasticity of new-book demand with respect to used-book prices is only 0.088.").

³⁵ *Id.*

³⁶ Many thanks to former Northwestern professor Albert Yoon for this point.

This paper, therefore, will attempt to answer the following question: Do more new editions of books appear when the law facilitates a change in ownership from an initial publisher back to an author or her heirs? After examining three different datasets totaling 1909 titles, I find strong support for the conclusion that the 35-year termination right of 17 USC § 203, along with the 56-year termination provision 17 USC § 304, result in a significantly increased availability of book titles to the public. The data also reveal a strong effect caused by the *de facto* reversion of ebook publishing rights to some authors under an important appellate case, *Random House, Inc. v. Rosetta Books, Inc.*³⁷

Part I briefly examines the evidence that ever-increasing copyright terms have resulted in the diminished availability of book titles to the public and theorizes that reverting rights to authors might help alleviate the problem. Part II sets forth the methodology used to measure the effect of multiple US reversionary schemes. Part III describes the data and sets forth the results. This section also measures for the first time the effect caused by the Second Circuit’s decision in *Random House, Inc. v. Rosetta Books*³⁸ that surprisingly recognized that authors, under certain standard form publishing agreements, controlled digital rights, despite having broadly transferred “all rights” to their works to their original publisher “in book form.” Overall, the various reversionary schemes have increased the availability of books in the 1909 books sample by an estimated 20% to 23%. Part IV offers some caveats and conclusions.

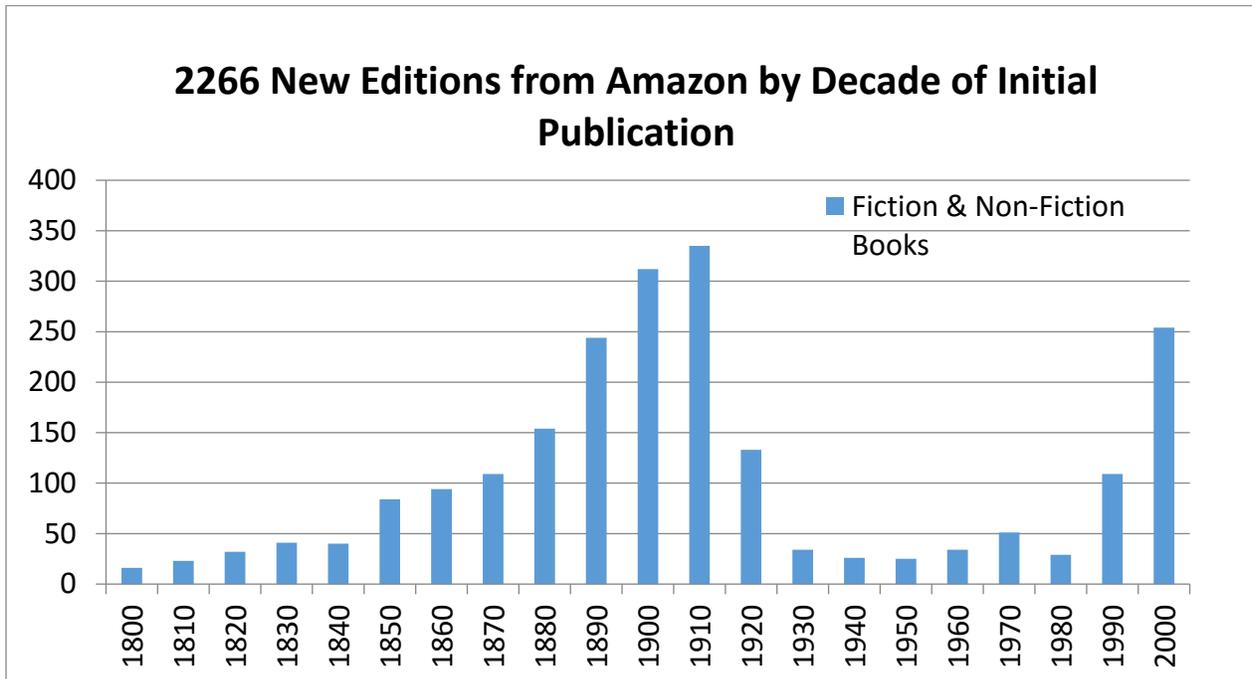
I. THE PROBLEM OF THE DISAPPEARING BOOKS AND A PROPOSED RESPONSE

³⁷ 283 F.3d 490 (2d Cir. 2002).

³⁸ 283 F.3d 490 (2d Cir. 2002) (holding that a publishing contract transferring all rights “in book form” to the publisher did not transfer the right to publish ebooks).

The effect of copyright law on the availability of works is illustrated graphically in Figure 1. A sample of 2266 new editions of books for sale on Amazon.com during the fall of 2012 are grouped below by decade of initial publication of the underlying title.³⁹

Figure 1: Disappeared 20th Century Books



The left column indicates the number of editions of new books for sale in 2012 within the sample. Not surprisingly, a large number of books initially published from 2000-2010 are represented, but the decline in the availability of new books initially published in earlier decades is quite steep, with only 29 titles from the 1980s being available. Another study shows a similar time-sensitive decline in the adaptation of books into movies.⁴⁰ The jump in the availability for

³⁹ See Paul J. Heald, *How Copyright Keeps Works Disappeared*, 11 J. EMPIRICAL LEG. STUD. 829, 839 (2014) (“Each edition was identified by query with a randomly chosen ISBN number. Since some book titles have multiple ISBN numbers, approximately 50 duplicate titles were excluded. Editions are ordered by decade based on the year of original publication of the underlying work. For example, a 2005 edition of Tom Sawyer is included in the decade of the 1870s, as its initial publication date was 1876.”).

⁴⁰ European Intellectual Property Office, “Derivative Use of Film Industry Content: Film Industry Focus,” 13 (2017) (“The likelihood of a book to be used as a basis for film adaptation 12 years after first publication

books initially published in the 1920s and earlier is startling and almost certainly explained by the fact that any book published before 1923 in the US has fallen into the public domain. Any publisher can sell these books on Amazon without obtaining permission or paying royalties, and this stimulates the production of new editions.

Other studies show that a change in copyright ownership from publishers to the public increases the availability of book titles,⁴¹ audiobooks,⁴² and recorded music.⁴³ For example, in 2006, 168 bestsellers initially published from 1923-32 (all still protected by copyright) were in print at a rate of 74%, while 166 bestsellers from the prior decade, 1913-22 (all in the public domain) were in print at a rate of 98%.⁴⁴ A recent update of the study in 2012 showed an even greater disparity in the ebook market for the same 334 titles. Of the public domain titles initially published from 1913-22, 94% percent were available as ebooks 2015, while only 27% of the copyrighted titles from 1923-32 were available as ebooks.⁴⁵ The market for audiobooks recorded from books in the same data set of bestsellers tells a similar story. By 2012, 33% percent of the public domain titles had been made into audiobooks, while only 16% of the copyrighted titles were available in audiobook form.⁴⁶

is already 50% lower than in the first five years following first publication. The odds of adapting a book 70 years after its first publication are 95 % lower than in the first few years that it is available in bookstores.”).

⁴¹ See Heald, *supra* note 25 at ____; Imke Reimers, “Copyright and Generic Entry in Book Publishing,” (2017) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2938072 (studying the US book market and finding “that a copyright significantly limits the availability of work.”).

⁴² See Christopher Buccafusco & Paul J. Heald, *Do Bad Things Happen When Works Enter the Public Domain?* *Empirical Tests of Copyright Term Extension*, 28 BERKELEY TECH. L. J. 1 (2013).

⁴³ Megan MacGarvie, John McKeon, & Jeremy Watson, “It was Fifty Years Ago Today: Recording Copyright and the Supply of Music,” p. 2 (2017) (work-in-progress), available at <http://serci.org/2017/Macgarvie.pdf>.

⁴⁴ See Paul J. Heald, *Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Bestsellers*, 92 MINN. L. REV. 1031, 1040 (2008).

⁴⁵ See Heald, *supra* note 17 at 852.

⁴⁶ See *supra* note 28 at ____.

One recent study attempts to measure the welfare losses caused long copyright terms which keep books out of print. In examining the effect of the 1998 20-year US copyright term extension, Imke Reimers finds “decreases in consumer surplus which are more than four times as large as any increases in profits to copyright holders and publishers.”⁴⁷ Another study provides counterfactual support for Reimers’ research by finding a significant increase in the release of musical tracks once the underlying copyright in the sound recording expired.⁴⁸

These studies suggest that a legislature could solve the problem of access to disappeared works by shortening the term of copyright so that works fell into the public domain sooner. Shortening the term of copyright, however, is not an available option for the 174 countries, including the US, that are members of the Berne Convention⁴⁹ which mandates a minimum term of the life-of-the-author plus fifty years.⁵⁰ The Berne Convention, however, says nothing about copyright ownership, and member states have broad latitude to pass laws affecting who owns works, as long as initial rights are vested in the author.⁵¹ Kretschmer, for example, very sensitive to Berne Convention considerations, proposes the reversion of copyright to authors when the transferee is not exploiting the work ten years after the transfer.⁵²

⁴⁷ Imke Reimers, “Copyright and Generic Entry in Book Publishing,” (2017) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2938072 (studying the US book market and finding “that a copyright significantly limits the availability of work.”).

⁴⁸ See Magarvie, *supra* note 29 at 2.

⁴⁹ The treaty protects “works” and grants rights to “authors,” but does not define who is an author and says nothing about ownership of rights once they have been alienated by the author. See Berne Convention for the Protection of Literary and Artistic Works, http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15. This flexibility allows German law to make copyright ownership inalienable. Authors can only technically grant licenses to users.

⁵⁰ *Id.* at 7(1). See also Kretschmer, *supra* note 7 at 46 (“setting a term that rationally balances underproduction and under-use of copyright works is closed as a policy option as international and European law stands.”).

⁵¹ See Kretschmer, *supra* note 7 at 46 (“Term reversion would be compatible with international and EU law, as the term itself would not be affected.”); Giblin, *supra* note 14 at 326 (“Berne/TRIPS also has little to say about ownership of copyright.”).

⁵² *Id.* at 46.

In theory, then, copyright reversion rules might be used to address the problem of disappearing works *if* authors do a better job than publishers in making older works available to the public. What happens to works when ownership changes is observable, and whether an ownership change is likely to increase availability is a testable hypothesis.

II. METHODOLOGY

Because historical information about the market for books is much easier to gather than information on the market for music,⁵³ the availability of works was measured in terms of in-print status of book titles over time.⁵⁴ As noted above, two distinct reversion schemes exist under US law for works published before and after January 1, 1978. Under 17 U.S.C. § 203, transfers of copyrights in works published after January 1, 1978, can be terminated 35 years after the transfer,⁵⁵ either by the author or her heirs.⁵⁶ Under 17 U.S.C. § 304, transfers of copyrights of books published between January 1, 1950, and January 1, 1978, may be terminated 56 years after publication,⁵⁷ or 75 years after publication, if the opportunity at year 56 went unexploited.⁵⁸ Under both regimes, notice must be given to the original transferee,⁵⁹ and a filing should be made in the

⁵³ Back volumes of BOWKERS BOOKS IN PRINT, establish an historical record tracking each year whether a book is in print or not. No parallel record exists for music. On iTunes, one can determine whether a song from 1934 is available now, but one cannot determine on any database whether the same song was available in 1979 or 2002 or 2016.

⁵⁴ Availability of books in 2017 was measured by availability on Amazon, which contains a greater listing of books in print than does Bowkers.

⁵⁵ See 17 U.S.C. § 203(a) (“In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license or any other right under copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination . . .”).

⁵⁶ *Id.* at § 203(a)(1)

⁵⁷ See 17 U.S.C. § 304(c)(3) (“In the case of any copyright subsisting in either its first or renewal term on January 1, 1978, other than a copyright in a work made for hire, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978 . . . is subject to termination . . . 56 years from the date the copyright was originally secured . . .”).

⁵⁸ See *id.* at § 304(c).

⁵⁹ See 17 U.S.C. § 203(a)(4) & 304(c)(4).

copyright office to perfect the interest of the author or her heirs.⁶⁰ Works published prior to 1950 were subject to termination in year 28 after publication if the author died prior to year 28, but were subject to termination in year 56 after publication, if the author survived.⁶¹

Taking advantage of available data on the in-print status of books, I pose three research questions about the possible effects of the US law of copyright termination:

- 1) Can a portion of the increase in availability of books between 2008 and 2017 be attributed to the 35-year termination rule of 17 USC § 203?
- 2) Can a portion of the increase in availability of books between 2008 and 2017 be attributed to the 35-year termination rule of 17 USC § 203?
- 3) Can a portion of the increase in availability of books between 2008 and 2017 be attributed to holding of *Random House, Inc. v. Rosetta Books*.⁶²

In order to address these questions, three separate datasets were analyzed.

A. Dataset #1: New York Times Bestselling Authors: Testing the Effect of the 56-Year Reversion Rule of 17 USC § 304

⁶⁰ See 17 U.S.C. § 203(a)(4) (“a copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.”) & 304(c)(4) (same).

⁶¹ See *Stewart v. Abend*, 495 US 207 (1990). This paper uses the term “year 28 after publication” to simplify the complex question of precisely how long an author had to live in order for a prior transfer of an interest in the renewal term (a 28-year extension of the original 28-year term made contingent upon filing a renewal document in the Copyright Office) to vest in the original transferee. Courts employed at least three different methods of determining whether an author had lived long enough to see her copyright “renewed.” See JULIE COHEN, ET AL, *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* (4th ed. 2015) at 693 (“an issue arose as to the timing of the vesting of the renewal term, with three possibilities: the beginning of the final year of protection, the date of the filing of the renewal certificate, or the first day of the renewal term.”).

⁶² 283 F.3d 490 (2d Cir. 2002) (holding that a publishing contract transferring all rights “in book form” to the publisher did not transfer the right to publish eBooks).

For a previous article,⁶³ I collected a dataset of 362 authors who had at least one top ten *New York Times* (NYT) bestselling novel from 1895-1969. For the purposes of this study, I selected all 60 authors in the database who died between 1973 and 1999. The copyright in a book published between 1962 and 1978 is not yet eligible for reversion, while the copyright in a book published before 1962 (56 years prior to the time of this study in 2017) is eligible for reversion to the author's estate. The 60 authors were chosen because they were likely to have published books during both time periods, facilitating a comparison between the status of books whose copyrights reverted to authors' estates and those that did not. A total of 819 books were studied.

The research question can be seen clearly by using Scottish author Helen McInnes as an example. Born in 1907, she died in 1985. Copyright ownership of her first bestseller *Assignment in Brittany* (1942), was eligible to be terminated by her heirs in 1998.⁶⁴ On the other hand, *The Snare of the Hunter*, published in 1974, won't be eligible for termination until 2020.⁶⁵ Books in both the termination-eligible and termination-ineligible categories by all sixty authors were identified on Amazon.com and their in-print status in 2017 collected. In addition, their in-print status as of 2008 was collected using bound volumes of Bowker's *Books in Print* at the Library of Congress.

Importantly, the identity of the publisher or both digital and bound volumes of each work as of 2017 was collected. In this study, the term "original publisher" (sometimes "traditional publisher") is used to describe the publisher who initially offered the first edition of the work, most

⁶³ See Paul Heald, Kristofer Erickson, & Martin Kretschmer, *The Valuation of Unprotected Works: A Case Study of Public Domain Images on Wikipedia*, 29 HARV. J. OF LAW & TECH 1, 12 (2015).

⁶⁴ Additional titles published before 1962 include, *Above Suspicion* (1941), *Horizon* (1945), *Friends and Lovers* (1947), *Rest and Be Thankful* (1949), *Neither Five nor Three* (1951), *I and My True Love* (1953), and *Pray for a Brave Heart* (1955).

⁶⁵ Additional titles published after 1962 include: *The Salzburg Connection* (1968), *Message from Malaga* (1971), and seven others.

commonly Random House; Norton; Penguin; Ballentyne; MacMillan; Grove; Simon & Schuster; and Farrar, Giroux, & Strauss. If the original publisher and the current publisher are both well-established firms, e.g. Random House and Penguin (who merged in 2013),⁶⁶ the title is credited as being in-print due to the efforts of the first transferee. In other words, we assume no reversionary right has been exercised if the title is offered by a major publisher, although in theory an author could terminate an initial transfer and stay with the same publisher (or find another major publisher). This assumption will, presumably, diminish any reversion effect that is measured.

The term “independent publisher” is the term chosen by smaller, newer presses (usually established after 2000)⁶⁷ to describe themselves. Most of them are less than 20 years old, and they stand outside the mainstream publishing industry, often focusing on niche books or emerging digital markets. Virtually all, with the exception of some university presses,⁶⁸ were established after the newest book in the data set was first published. No publisher denominated as “independent” published the original edition of any of the titles. When a title is published by an independent press, the original publisher is assumed to be disinterested in making the book available. Few authors are likely to abandon a prestigious firm like Random House to throw in their lot with a new, unproven press. Some authors may, however, and crediting availability of titles published by independent presses to termination pressure may offset the effect, noted just above, of assuming that no titles offered by traditional publishers were stimulated by a threatened termination by an author.

⁶⁶ See “Penguin and Random House Complete Merger,”

<http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/media/10152247/Penguin-and-Random-House-complete-merger.html>

⁶⁷ The most important of these presses, Open Road Media, which captures a plurality of the independent ebook market, was established in 2009. See https://en.wikipedia.org/wiki/Open_Road_Integrated_Media.

⁶⁸ A small number of university presses bring back into print authors of special interest to their community, e.g. the University of Mississippi Press re-printing editions of Eudora Welty’s works.

Finally, several books in the data set were published after 1978, and these are governed by the 35-year rule of section 203. For example, Helen McInnes's last two books, *Prelude to Terror* (1978) and *Hidden Target* (1980), were eligible for reversion at year 35 after publication, because they were published after January 1, 1978. Only 42 of the 819 books fell into this post-1978 publication category, and they are omitted from the analysis.⁶⁹

It should also be noted that although all of the 60 authors in the dataset had at least one bestseller, by no means were all of their 819 novels bestsellers. Several authors were one-hit wonders, so the data contains both bestsellers and those which were most likely merely notable. The second dataset, described below, consists of entirely of bestselling novels.

B. Dataset #2: New York Times Bestselling Books: Testing Sections 203 and 304

The second database consists of 268 books that at some point in time make the weekly *NYT* fiction bestsellers list from 1956-59 and from 1963-66, and 421 books *NYT* fiction bestsellers from 1974-81 and 1983-86. This data set differs in two significant ways from that described above. First, many more authors are represented, which should reduce any author-specific effects.⁷⁰ Second, all of the books achieved the minimum status of top-10 bestseller. The influence of reversion measured in this set of titles may be affected by the popularity of the works. An analysis of these titles allows a direct comparison of the section 304 and the section 203 regimes.

Books initially published from 1956-59 are governed by the 56-year-after-publication termination rule of section 304, while the titles from 1963-66 are not yet subject to termination. To illustrate, Alan Drury's *Advise and Consent* was first published in 1959, and section 304

⁶⁹ Seven of the titles were initially published before 1950 with the author dying with 28 years of publication. These titles would have reverted to the author's estate 28 years after publication, rather than 56. These titles were omitted from the analysis.

⁷⁰ For example, some authors may have more alert agents advising them of their reversion rights. Indeed, authors may share an agent, thereby compounding the effect.

permitted his estate to reacquire its copyright in 2015. A new bound edition of *Advise and Consent* is available from WordFire Press, an independent press founded in 2011 by science fiction author Kevin Anderson.⁷¹ On the other hand, his novel *A Shade of Difference* was published in 1963 and will not be subject to termination until 2019. New bound volumes of *A Shade of Difference* are not available. Comparing the present availability of works from 1956-59 with works from 1963-66 potentially may reveal patterns reflecting the effect of changes in copyright ownership.

The four years of bestsellers from 1978-81 are governed by the 35-year termination regime of section 203, and all transfers of copyright in those books were terminable by their authors or the authors' estates by 2017. The availability of those works 30 years after publication (five years before reversion) was compared with their availability in 2017, and the publisher of each edition available in 2017 was identified. Finally, eight years of bestsellers from 1974-77 and 1983-86 formed a control group of titles not yet subject to reversion, and the change in their availability from 2009⁷² to 2017 was measured for the purposes of comparison with the bestsellers from 1978-81. The identity of the 2017 publisher of each title was collected, and denominated "original/traditional" or "independent" as described above.⁷³

C. Dataset #3, *New York Times* Reviewed Books: Testing the Effect of 17 USC § 203

The third source of data consists of a sample of 464 books reviewed by the *New York Times Book Review* (NYTBR) from 1978-84. These titles had been gathered for a previous research project,⁷⁴ and they present attractive objects of study for two reasons. First, the dataset does not

⁷¹ See <http://www.wordfire.com/wordfire-press/>. See also https://www.huffingtonpost.com/phil-simon/classic-politics-the-work_b_5403779.html ("International bestselling author Kevin J. Anderson, the publisher of WordFire Press, acquired the rights to Drury's entire library after he personally intervened and helped with the literary estate.").

⁷² See *infra* note ____.

⁷³ See *supra* note 58-60 and accompanying text.

⁷⁴ See Heald, *supra* note ____ at ____.

contain merely bestselling works or works by bestselling authors. Some of the works studied did crack the *New York Times* (*NYT*) bestseller list, but vast majority did not. On the other hand, the titles are not obscure. At one time, each work was considered significant enough to be reviewed by the most prestigious source for literary commentary in the US. Since the other two datasets focus exclusively on bestselling fiction titles or bestselling fiction authors, the *NYTBR* data permit observation of a reversionary effect in a broader universe of titles. Not only are the titles relatively modest in terms of their popularity, but the dataset also contains a mixture of fiction and non-fiction titles not present in the second and third datasets.

Within the *NYTBR* data set, the books published from 1978-81 were subject to the section 203(a) termination right from 2013-2016. Books initially published in 1982 were ignored because the 35-year termination right for these works began in 2017, the year the data was collected, and it was unclear when rights might technically be transferred. Books published from 1983-84 have not yet been subjected to the termination right, and the sample of works from those years was enlarged to balance out the number of those from 1978-81. The entire sample consists of books initially published in: 1978 (53), 1979 (63), 1980 (59), 1981 (62), 1983 (106), 1984 (111). As set forth above, the identity of the 2017 publisher of each title was collected, and denominated “original/traditional” or “independent” as described above.⁷⁵

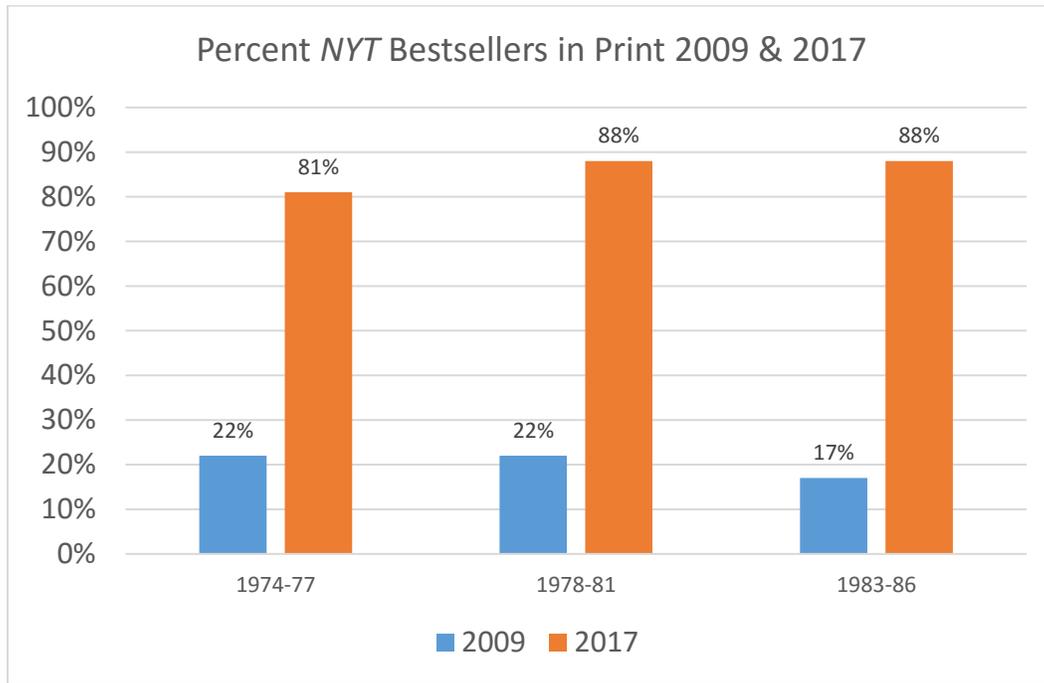
III. RESULTS AND DATA ANALYSIS

Subject to the caveats discussed in Part IV, the data suggest that sections 203 and 304 have a significant positive effect on the availability of books. A third reversion-like phenomenon, denominated the *Rosetta* effect and described below, also seems to have a significant positive effect on the availability of titles, albeit in ebook form only.

⁷⁵ See *supra* note 58-60 an accompanying text.

A good place to begin the story can be found in the recent willingness of publishers to bring older bestsellers back into print. Among the most famous older books, at least, the problem of the disappearing books seems to be ameliorating.

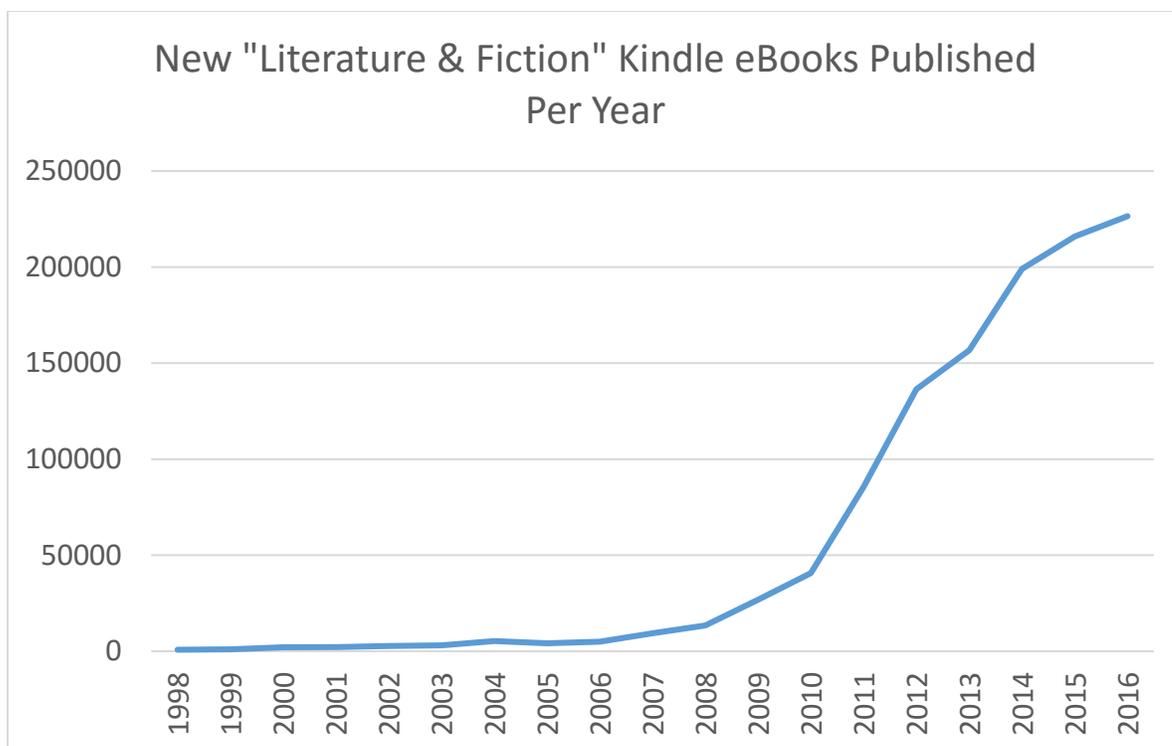
Figure 2: Bestselling Titles Coming Back into Print



If one viewed the titles from 1978-81 in isolation, one might be tempted to ascribe the significant increase in availability to the fact that all of the titles became eligible for reversion from 2013-2016; however, the availability of the non-reversion-eligible titles from 1974-77 and 1983-86 increase in much the same way.

The increase seems likely to be related to the growth of ebook publishing during the same period.

Figure 3: Growth of eBook Market from 1996-2016



Almost certainly, the rise of digital publishing has facilitated the reappearance of many older bestselling novels. The question remains, however, whether eligibility for rights reversion under section 203, section 304, or *Rosetta* may have motivated the exercise of the new digital publishing power or may have stimulated new bound volumes to appear.

A. Dataset #1: *NYT* Bestselling Authors, the *Rosetta* Effect, and the Contribution of the 56-Year Rule of Section 304

Analysis of 819 books written by authors who in their careers placed at least one title on the *NYT* end-of-year, top-10 bestsellers list suggests two relevant motivations for the reappearance of formerly out-of-print works. First, the data reveal an important reversion-like effect associated with the 2002 decision in *Random House, Inc. v. Rosetta Books*,⁷⁶ which held that a form agreement granting all rights “in book form” to a publisher failed to alienate an author’s independent right to publish ebooks. In 2002, authors who assumed that they had signed away all

⁷⁶ 283 F.3d 490 (2d Cir. 2002).

their rights found that the ebook right had unexpectedly “reverted” back to them. Second, the 56-year termination right found in section 304 seems to have independently spurred the republication of a further set of titles.

1. Uncovering the *Rosetta* Effect

When this project was initially formulated and data collection began, the focus was exclusively on the operation of the 56- and 35-year reversion rules of sections 304 and 203. *Rosetta* was not on the radar screen, and the first broad comparison of titles revealed little about reversion. The initial analysis was conducted on the largest data set, 819 novels by 60 bestselling authors (not the data set of bestselling novels presented above in Figure 2). Copyrights to 521 of the 819 books published were eligible for reversion in year 56 after publication.⁷⁷ These 521 titles were in print at a rate of 40% in 2017. The 248 titles⁷⁸ ineligible for reversion were in print at a rate of 46%. The slightly greater availability of the reversion ineligible books (median publication date 1968) may be due to age of the reversion eligible sample (median publication date 1946).

Although this rough cut analysis above was evidenced no positive effect of reversion eligibility on availability, the data revealed what may be an important artifact of a well-known case decided in 2002, *Random House Books, Inc. v. Rosetta Books*, which worked a reversionary-like effect in the market for ebooks. The effect of the case can be seen by taking a more granular look at the sub-set of books in this database available in digital format.⁷⁹

As noted above, the sub-set of 248 books not yet subject to reversion were in print at a rate of 46% (113/248), which seemed quite high for books with a median publication date of 1968, nearly 50 years ago.⁸⁰ Of those 248 books, 53 of them were published as solo ebooks (e.g., they

⁷⁷ The dates of initial publication of these works varies from 1923 to 1961.

⁷⁸ The dates of initial publication of these works varies from 1962 to 1977.

⁷⁹ 283 F.3d 490 (2d Cir. 2002).

⁸⁰ Remember the majority of these books never cracked a weekly top-10 *NYT* bestsellers list.

had no corresponding print volume for sale). This percentage was also unusually high in light of prior research.⁸¹ Strikingly, of the 53 solo ebooks, 45 were offered by independent publishers, not by the original copyright transferee. Keep in mind that none of the copyrights to the 248 books were eligible for statutory termination by the authors' estates. With the original publisher presumptively still controlling the copyright, the natural question was why 18% (45/248) of the entire aging sample was in print only in digital format and not from the original publisher?

A clue was be found in the business model descriptions found on the web sites of the independent publishers' offering these 45 titles. By the far the most prominent, Open Road Media, explains:

We are committed to bring back the backlist, making reverted titles and works that have never been converted to digital format widely available as ebooks . . . This program is for authors whose rights have reverted, whose titles have not previous been digitized, or who are looking to have their works available as ebooks.⁸²

Open Road does not publish bound volumes of books, but sells ebooks exclusively. And, as the quote suggests, it obtains rights from authors and estates, not from other publishers. A number of other prominent independent publishers of ebooks follow a similar model, intentionally targeting books that major publishers are no longer making available.⁸³

⁸¹ *Id.* (26/950 NYT reviewed books available solely in ebook format with no corresponding print volume).

⁸² See <https://web.archive.org/web/20160603181238/http://www.openroadmedia.com:80/distribution/>.

⁸³ See Mysterious Press, <http://mysteriouspress.com/about-us/> ("The books offered by MysteriousPress.com are currently out of print but protected by copyright, and will take advantage of digital reading formats to bring classic fiction to new audiences."); Rosetta Books, <https://www.rosettabooks.com/about-us/> ("The company launched in 2001 with a list of 100 preeminent digital backlist titles. Today the company's 800-plus title list includes classic eBooks of every category"); Crossroad Press, <http://crossroadpress.com/about/> ("The original intent was simply to bring my own out of print books to Kindle and other eReaders . . . We are now a growing, widely distributed digital publishing company with over 1600 titles"); eNet Press, <https://www.enetpress.com/#!/about> ("eNet Press was created by the sons of C.S. Forester, George and John Forester, in 2011. Their first effort was to publish all 12 volumes of the Hornblower Saga . . . Today, eNet Press focuses on publishing the works of other great authors, such as: Taylor Caldwell, John Collier, Richard Bissell, Samuel Shellabarger and Thorne Smith to name a few"); Valancourt, <http://www.valancourtbooks.com/our-history.html> ("Valancourt Books is an independent small press specializing in the rediscovery of rare, neglected, and out-of-print fiction..");

This exploitation of authors' backlists is, of course, precisely what Professor Kretschmer hoped would be the result of the adoption of more aggressive reversion statutes.⁸⁴ In this particular case, however, sections 203 and 304 are not doing the work. Instead, the Second Circuit's opinion in *Random House Books, Inc. v. Rosetta Books* is likely to have stimulated an ebook market that seems to be responsible for 18% of the titles in the sample. A brief description of the case shows how it functions to establish a type of rights reversion to authors.

In the late 1990's, before major book publishers were fully exploiting the market for ebooks, Rosetta books contacted Kurt Vonnegut and William Styron and offered to market digital versions of their most famous works. Despite the fact that both authors had previously signed away the rights to their works "in book form" to Random House, they contracted with Rosetta to publish ebook versions of their works. Random House, arguing quite persuasively that ebooks should be considered to be "in book form" under their contracts with Vonnegut and Styron, sought an injunction to prevent Rosetta from publishing the titles. In 2001, the district agreed with Rosetta, finding, perhaps counterintuitively, that an ebook was probably not a work "in book form" and denying injunctive relief.⁸⁵ In 2002, the Second Circuit refused to overturn the district court,⁸⁶

Jabberwocky Literary Agency, <http://awfulagent.com/ebooks> ("We've been working to make some of our clients' books available as e-books. In some cases, these are hard-to-find, out-of-print titles that we'd hate to see forgotten, and in other cases we've partnered with our clients to publish e-book exclusives."); Wildside Press, <http://wildsidepress.com/estates/> (listing estates represented by the press); Endeavor Press, <http://www.endeavourpress.com/about-us/> ("We have had a great deal of success in bringing out . . . ebook editions of out of print books."); *see also* Great Northern Books, <https://www.gnbooks.co.uk/>; House of Stratus, <http://www.houseofstratus.com/>; Fifth Star Press, <https://fifthstarpress.wordpress.com/>; and Odysseyy Press, <http://www.theodysseypress.com/about-us/>.

⁸⁴ *See supra* note ____.

⁸⁵ 150 F. Supp. 2d 613 (S.D.N.Y. 2001).

⁸⁶ 283 F.3d 490 (2d Cir. 2002).

creating the opportunity for Rosetta, and a host of others,⁸⁷ to seek out other living authors and the estates of deceased authors, who wanted to exploit their back catalogs of books.

At the time, *Variety* reported that “The [*Rosetta*] case . . . electrified literary circles.”⁸⁸ Some authors may have assumed that the language of their publishing contracts would not be interpreted to include ebooks; however, given precedent in the Second Circuit at the time, this assumption seems unlikely. Just four years earlier, the Second Circuit had concluded that Disney, not the estate of Igor Stravinsky, owned the rights to record the *Rite of Spring* as it appeared in a new technology: the video cassette version of the movie *Fantasia*.⁸⁹ The decision, which also surely gave Disney control over the Stravinsky’s music as it appears in digital versions of *Fantasia* on DVD, seemed clearly to signal that a broadly worded agreement would usually inure to the benefit of the original publisher of the work, not the author. Video cassette and digital technology did not exist when Disney acquired its license from Stravinsky in 1939 for use in a traditional film meant for theaters. The unexpected advance in technology did not prompt the court to find that unforeseen changes benefitted the author instead of its transferee. The video cassette and digital markets were not foreseen by the parties, and the court placed the burden on the author to show that forms of the work embodied in new technology were not transferred in the original agreement.⁹⁰

Given the *Disney* case, it’s unlikely that too many authors or their agents confidently assumed that the existence of a new technological means to read a book meant that prior broadly

⁸⁷ See *supra* note 72.

⁸⁸ Jonathan Bing, “Inside Moves,” *Variety* 8 (July 16, 2001).

⁸⁹ *Boosey & Hawks Music Publishers v. Walt Disney Company*, 145 F.3d 481 (2d Cir. 1998).

⁹⁰ *Id.* at 487 (“The words of Disney’s license are more reasonably read to include than to exclude a motion picture distributed in video format. Thus, we conclude that the burden fell on Stravinsky, if he wished to exclude new markets arising from subsequently developed motion picture technology, to insert such language of limitation in the license, rather than on Disney to add language that reiterated what the license already stated.”).

worded contracts with publishers could be ignored. *Rosetta* was likely a surprise and shock to the market,⁹¹ and the case worked a functional reversion of rights to authors, a chance for them to renegotiate, switch publishers, self-publish, or revive their back catalogs, exactly as predicted by advocates of aggressive statutory reversion schemes. Even a brief perusal of the business models of active independent ebook publishers⁹² sees numerous authors taking advantage of this new bite at the apple.

The most famous authors, of course, did not need *Rosetta* to revive their back catalogs. Vonnegut and Stryon's bound volumes were in print with Random House, who would surely have eventually gotten around to publishing digital version of their works. Few authors, however, have the staying power of Kurt Vonnegut, and *Rosetta* gave lesser known authors the ability to find independent publishers willing to bring their books back into print in ebook form.

The data strongly suggests a *Rosetta* effect—of the 102 ebook editions identified in the data set of 248 non-reverted books, 45 (44%) were produced by an independent publisher and exist as the sole edition available on the market. The lack of companion bound editions of these 45 ebooks suggests that authors who were unable to convince disinterested publishers to bring a title back into print used *Rosetta* to cut an ebook-only deal with a new publisher or to self-publish.⁹³

From a statistical standpoint, the effect of “reversion” under *Rosetta* has a significant effect on the analysis of the entire data set. In the initial analysis of the 56-year reversion rule described above, publishers were credited with keeping the titles in print at a rate of 46%. However, that rate included the 45 *Rosetta* books, all of which seem to be in print due to the efforts of authors

⁹¹ Need *New York Times* references to the case as it was decided.

⁹² See *supra* sources listed in footnote 37.

⁹³ For example, a search on Amazon on December 4, 2017, for Kindle books published by Open Road Media returns 3047 editions. The data reveal very little evidence of self-publishing in this data—John Hersey is an outlier.

rather than their original publishers. If we subtract those 45 books from the publishers' total, then the in-print rate for the publisher-controlled books drops to 27% (68/248), a rate that is statistically significantly lower than the 40% rate for 521 reversion eligible titles subject to author control.⁹⁴

2. Availability of Books Under the 56-year Reversion Rule

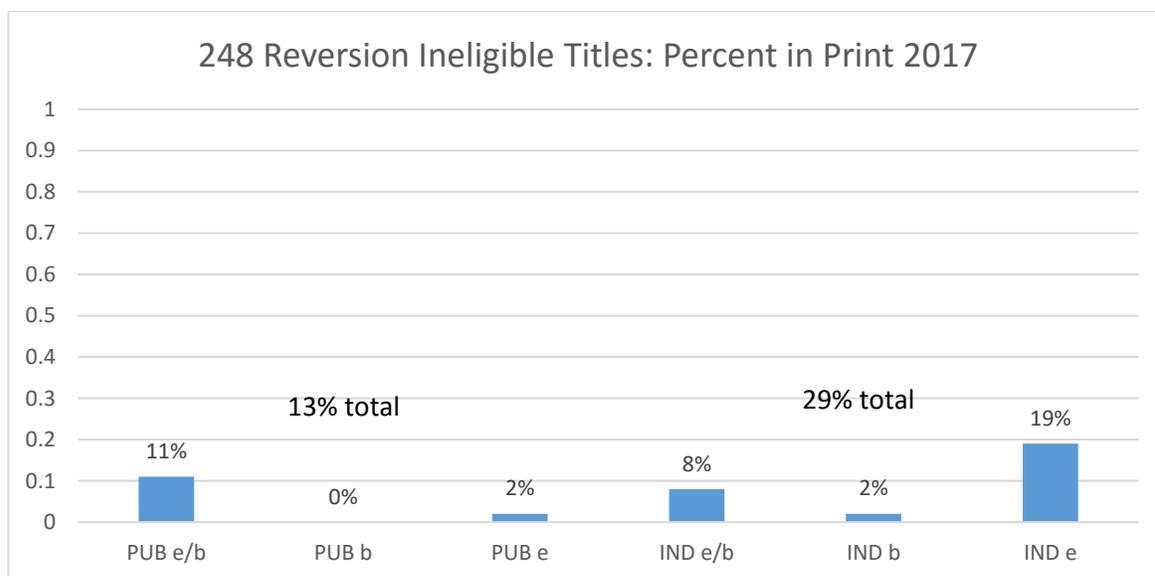
The fruitfulness of the inquiry into the origin of the 45 solo ebooks among the 248 reversion ineligible titles discussed above prompted an analysis of the publishers of all 819 titles. Each book, whether reversion eligible or reversion ineligible, was categorized as:

- PUB e/b (ebook and bound volume offered by original publisher)
- PUB b (bound volume only offered by original publisher)
- PUB e (ebook only offered by original publisher)
- IND e/b (ebook and bound volume offered by independent press)
- IND b (bound volume only offered by independent press)
- IND e (ebook only offered by independent press)

Figure 4, below, sets forth the status of only the 248 reversion ineligible titles and permits calculation of the total percent of in-print titles offered by the original publisher (including successor firms) or by a new, independent press.

Figure 4: Titles Not Eligible for Reversion under the 56-Year Rule

⁹⁴ The chi-square statistic is 11.4169. The p-value is .000728, and the result is significant at $p < .05$.



The first finding worth noting is that the original publishers keep only approximately 13% of the titles in print in 2017, while newer independent publishers (listed in footnote 68) keep 29% of the titles in print. The column labeled “IND e” represents the “Rosetta” books in the data set (19%), the likely result of authors being freed to find a new independent publisher willing to bring their work back in print as an ebook.

One especially interesting finding is the 8% of titles published by independent publishers that are available in both digital and bound form (IND e/b). None of the books in the data set are reversion eligible, and bound volumes are not affected by *Rosetta*, so what would explain the movement of bound volume publishing from the original publisher to an independent press? It is possible that the rights were purchased, but these independent presses not acknowledge purchasing rights, but rather emphasize their direct relationships with authors, as opposed to other publishers, and their taking advantage of rights reversion. The best explanation may be a “nudge”⁹⁵ provided by impending rights reversion. Under section 304, an author can send official notice to the original

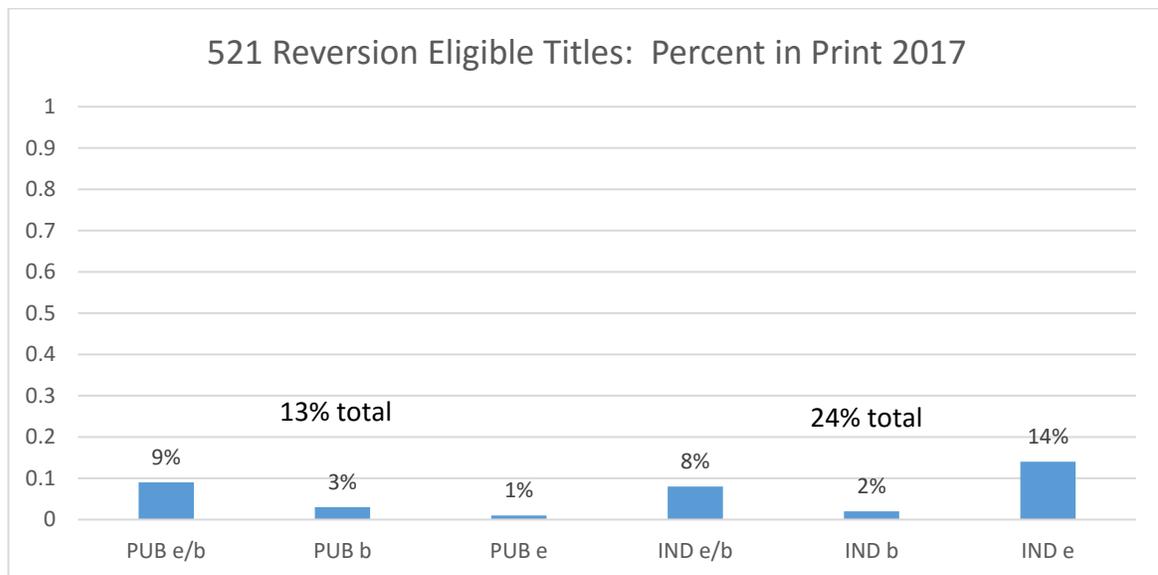
⁹⁵ See RICHARD THALER & CASS SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

transferee up to ten years before an upcoming termination date.⁹⁶ Publishers with no intention of bringing old titles back into print may be willing to acquiesce to early republication by another party.

The “nudge” provided by written notice to the original publisher might also explain some of the titles in the “PUB e/b” category. When confronted with formal notice, the original publisher may reconsider the market for a book and make one of three responses. First, if the market for the title looks inadequate under the publisher’s business model, the publisher may refuse to bring the book back into print and may also refuse to acquiesce to publication by others. Second, the publisher may acquiesce to third-party publication. Third, nudged by the notice, the publisher may regain interest in the book and bring it back into print. Under this third scenario, a section 304 nudge may be responsible for some of the availability of the titles in the “PUB e/b” category.

The story seems much the same when one looks at the larger data set of 521 reversion eligible works.

Figure 5: Titles Eligible for Reversion Under the 56-Year Rule



⁹⁶ See 17 USC § 304(c)(4)(A).

The first thing to notice is that original publishers seem interested in keeping the same number of works in print as in Figure 4, about 13%. This probably establishes a baseline level of interest in books from this era under the business model of the typical traditional publisher. Presumably publishers are choosing to keep in print the most desirable titles, leaving the rest for independent publishers. And, almost certainly, the traditional, original publishers get first choice of titles. When Random House calls and says that it would like to bring a book back into print, it seems unlikely that the response will frequently be, “No, thanks, I’ll switch to a new press without the massive reputation, resources, and prestige of Random House.” Nonetheless, some of the “IND e/b” titles might represent defectors whose books would have been offered by their original publisher even in the absence of reversion eligibility.

The percentage of reversion eligible books offered by independent presses drops slightly, from 29% to 24%, still a significantly higher percentage than offered by the original publisher. Some of the digital versions of these works may have appeared before reversion eligibility as a result of *Rosetta*, but disentangling the *Rosetta* effect from a section 304 effect is difficult. Since *Rosetta* does not affect bound volumes, one can assume that the 8% of “IND e/b” titles and the 2% of “IND b” titles were prompted by rights reversion. However, for the 14% of titles (IND e) where no bound volume accompanies the ebook, one can only guess whether the existence of the digital version is due to the formal statutory reversion of rights or informal “reversion” under *Rosetta*. What prompted the ebook cannot be accurately discerned, but the prominence of ebook-only volumes remains constant in all of the upcoming analyses.

B. 689 NYT Bestsellers: Testing the Effect of Section 304, Section 203, and *Rosetta*

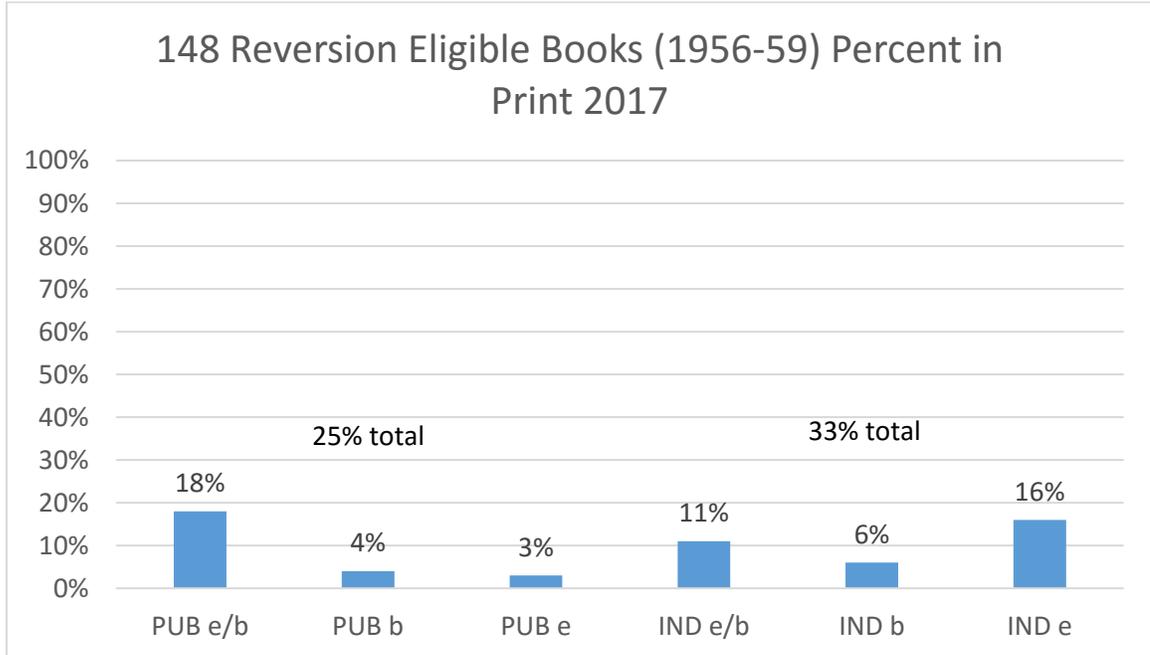
The second data set allows for a neat comparison of all three types of rights-shifting regimes. Five groups of *NYT* bestselling titles were initially published from 1956-59, 1963-66,

1974-77, 1978-81, and 1983-86. The copyrights in the books published from 1956-59 were subject to reversion 56 years after publication (from 2012-2015) under section 304. Books published from 1963-66 are not reversion eligible. The copyrights in the books published from 1978-81 were subject to termination in year 35 after publication under section 203 (from 2013-2016), and those titles are sandwiched by works from 1974-77 (reversion ineligible) and from 1983-86 (reversion ineligible). All reversion ineligible titles were examined for a *Rosetta* effect. In 2017, the books were in-print at the following rates: 1956-59 (63%), 1963-66 (69%), 1974-77 (81%), 1978-81 (88%), and 1983-86 (88%). This continuous rise in availability, regardless of reversion eligibility, may be due to a recency effect or to the fact that the older titles were less likely to have been originally embodied in digital form, i.e. mechanically typeset. In other words, books published in the 1980's should be cheaper to bring back into print if the publisher can find a digital file to work from, as opposed to scanning and reformatting an old bound volume, which must be done with works from the 1950's and 1960's.

1. 269 NYT Bestsellers Published from 1956-59 & 1963-66 and Section 304 Redux

All 148 *NYT* bestsellers originally published between 1956-59 were reversion eligible under the 56-year reversion rule of section 304, which created the opportunity for authors' estates to take control of the copyrights from 2012-2015. Figure 6 below sets forth the distribution by publication type.

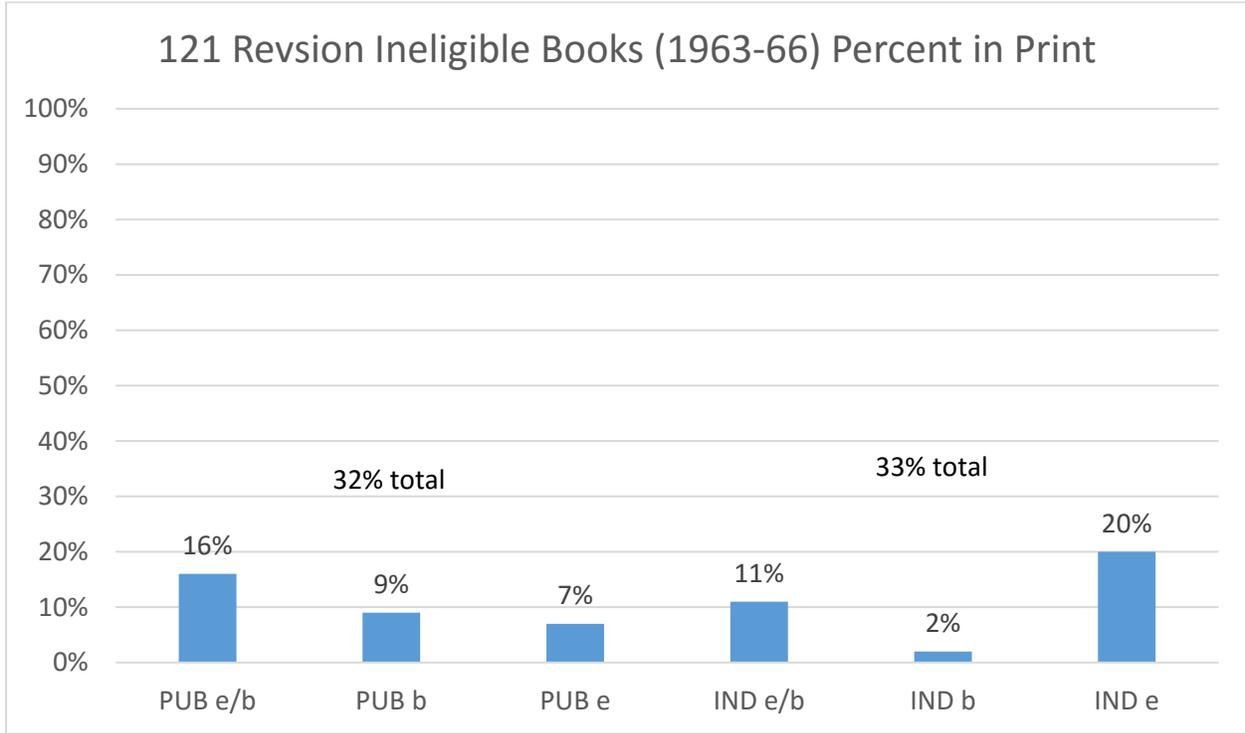
Figure 6: Bestsellers Eligible for Reversion Under 56-Year Rule



Original publishers kept 25% of the reversion eligible titles in print in 2017, while independent presses were responsible for 33% of the availability. Independent publishers offered 17% of the titles in the form of a bound volume, indicating that section 304 reversion is at work, because in the absence of reversion, the copyright would in bound volumes would be retained by the original publisher (or its corporate descendants). Once again, it's difficult to know how many of the digital-only titles offered by independent publishers were prompted by statutory reversion or by *Rosetta*.

Figure 7 turns to the books, four years newer on average, that were not yet subject to reversion under section 304 in 2017.

Figure 7: Bestsellers Ineligible for Reversion Under 56-Year Rule



The number of reversion ineligible works offered by original publishers rises to 32%, with independent publishers making 33% available. Once again, a reversion nudge might be seen in the 11% of titles made available as both bound volumes and ebooks by independent publishers, an indication that the original publisher may have acquiesced. In addition, a clear *Rosetta* effect can be found. Of the reversion ineligible titles from 1963-66, 20% were solo ebooks offered by independent publishers, i.e. *Rosetta* books. If we subtract these 22 books from the total, then the in-print rate for the reversion ineligible 1963-66 books drops to a significantly lower rate than that for reversion eligible sub-set in Figure 6.⁹⁷ Interestingly, the percentage of *Rosetta* books in the entire sample of 121 non-reverted books is 20%, similar to the 18% rate shown in Figure 4 books in the first data set.

2. NYT Bestsellers Published from 1974-77, 1978-81, & 1983-86 and Section 203

⁹⁷ The chi-square statistic is 3.6673. The p-value is .055491. The result is *not* significant at $p > .05$.

All 129 books published between 1978-81 were all eligible for termination under the 35-year rule of section 203. They are neatly sandwiched between two sets of reversion ineligible works originally published between 1974-77 (122 titles) and 1983-86 (170 titles). The works from 1978-81 are in print at a rate of 88%, while the aggregate in-print rate of the 1974-77 & 1983-86 books is 85% (248/292), an insignificant difference. Once again, however, we see a significant *Rosetta* effect on the in-print rate. Of the 292 non-reverted titles, 48 (16%) are solo ebooks offered by independent publishers, very similar to the rates of 20% and 18% calculated in the prior sections. If the availability of are not counted as reversion ineligible, then the in-print rate for the 1974-77 & 1983-86 books drops to 68%, which is significantly lower than the 88% rate for the reversion eligible works.

A more granular look at all three data sets, contained in Figures 8, 9, and 10 below, confirms most of the trends that we have already identified.

Figure 8: Bestsellers Ineligible for Reversion Under 56-Year Rule

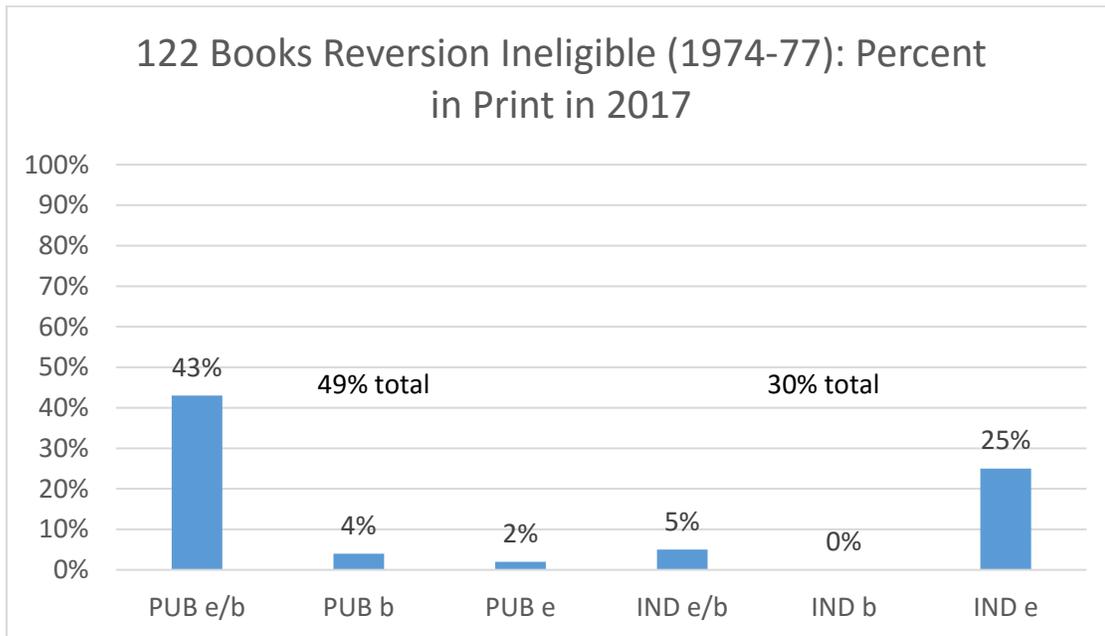
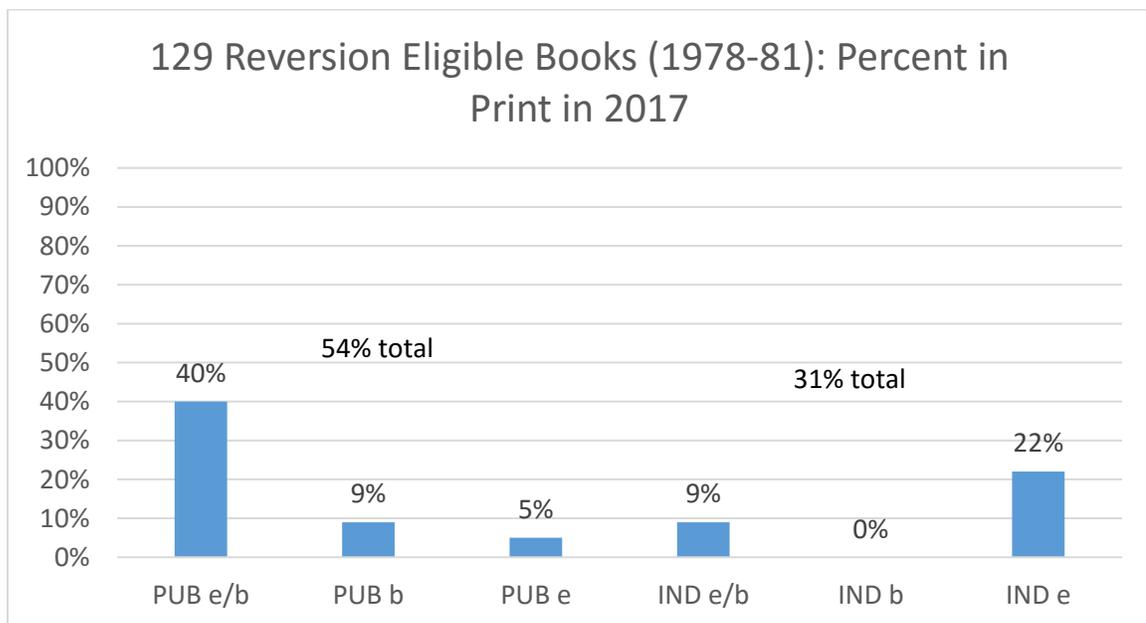


Figure 8 shows the increasing interest publishers show in keeping this newer set of titles in print

(49%), for the first time surpassing the percent that independent publishers offer (which remains quite steady at 30%). This data set shows the most significant *Rosetta* effect, with 25% of the titles being offered only as ebooks by independent publishers. The reversion nudge is smaller here, only 5% “IND e/b” titles, perhaps because the oldest of the titles in the dataset will not be subject to termination until 2030 ($1974 + 56 = 2030$), meaning no termination notices have yet been sent. Authors can, of course, ask for their rights back at any time.

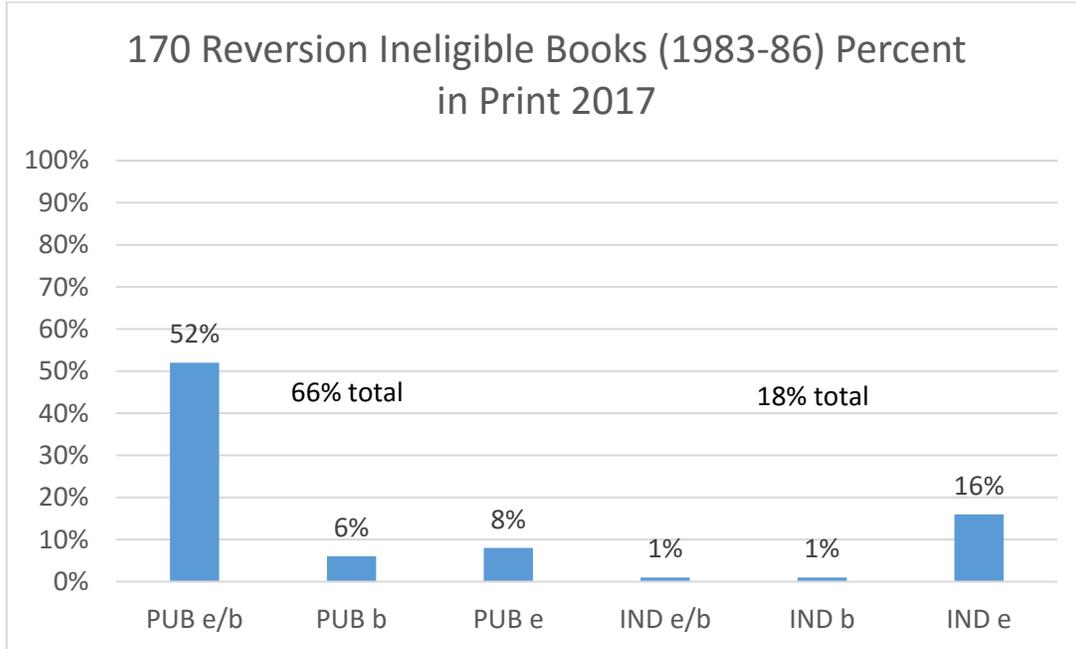
Figure 9 below provides the first look at the effect of the 35-year reversion rule of section 203.

Figure 9: Bestsellers Eligible for Reversion under 35-Year Rule



Once again, the in-print rate of titles offered by independent publishers remains steady at approximately 31%, while the percentage of title offered by original publishers continues to rise, to 54%. As we have seen in every figure so far, the number of solo ebooks offered by independent publishers is considerably higher than solo ebooks offered by traditional publishers. One can only estimate, however, which ones prompted by section 203 or by *Rosetta*.

Figure 10: Bestsellers Ineligible for Reversion under 35-Year Rule



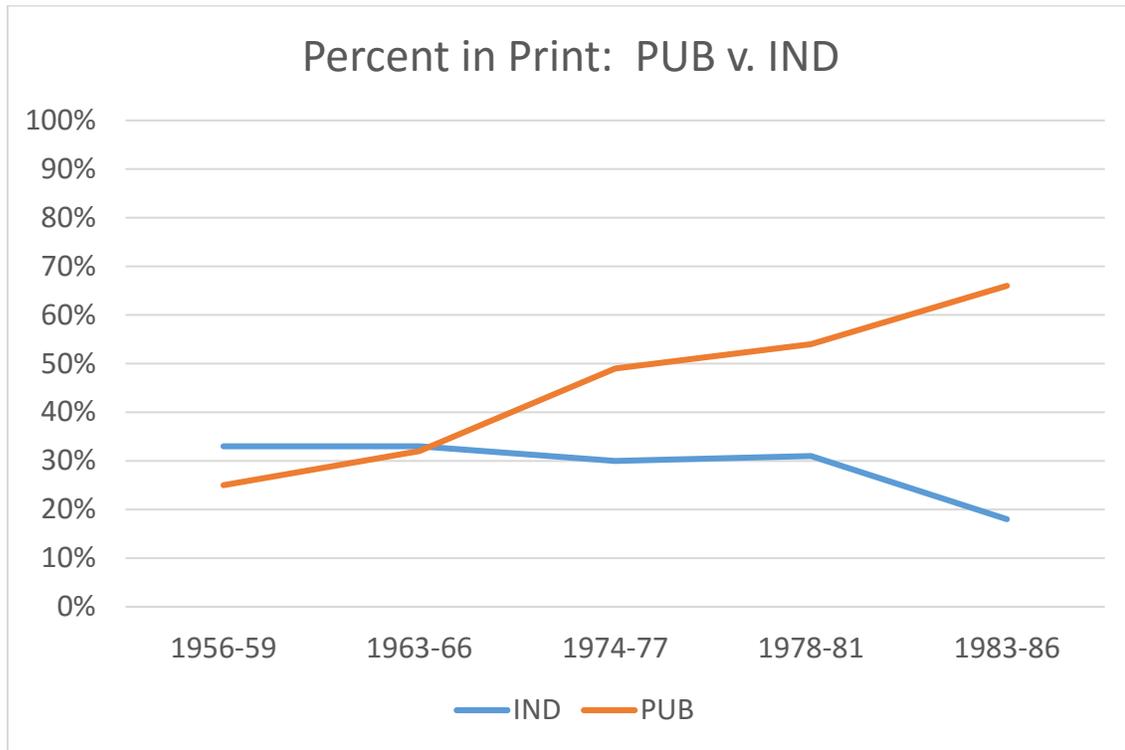
The most interesting data points in Figure 10 affirm the increased interest in publishers in making the most recent books available, which reaches a point where titles made available by independent publishers (18%) begin to be crowded out. Of course, a downward trend in the critical “IND e” category may be due to original publishers writing broader contracts to include the potentially foreseeable market for digital books. In other words, independent publishers relying on *Rosetta* may have found fewer authors from the 1983-86 era who signed contracts that could not be reasonably construed to cover ebooks in addition to bound volumes.

C. Comparing the 56-year and 35-year Rules

Policy makers considering employing some form of reversion as a tool for increasing the availability of out-of-print works may be curious as to the comparative effectiveness of the two US statutory schemes. Intuitively, one would think that the shorter rule might be more effective. One way to assess each rule is to consider the share of the market of available books it captures. It seems clear from the data that the original publisher really takes the first bite at the apple. If

Random House wants to keep a book in print or bring a book back into print, few authors are likely turn their backs and run to an independent publisher. Traditional publishers seem to take the cream of the crop, as suggested by Figure 10 below.

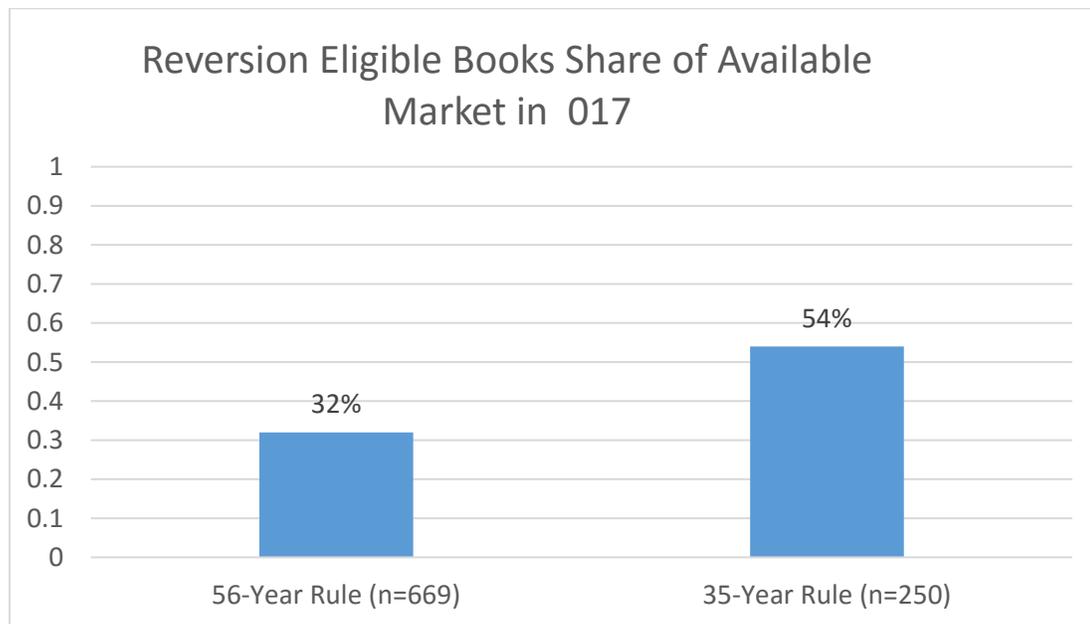
Figure 10: Comparative Market Share of Bestsellers by Traditional and Independent Publishers



Publishers gain no greater rights over this period of time. In fact, given *Rosetta*, their position arguable weakens; yet, their market share continually grows in a way that is consistent with the assumption that more recent books retain more value and are therefore more desirable to publish. Traditional publishers seem to get first choice, leaving a diminishing share of the market available to independent presses.

Figure 11 below illustrates what percentage of the 2017 market is occupied by independent presses offering reversion-eligible books under the 56-year rule and what percentage of the market is occupied by those publishing reversion-eligible books under the 35-year rule. The “market” is defined as those titles left unexploited traditional publishers.

Figure 11: Bestsellers Eligible for Reversion under the 56- and 35-Year Rules



The result is not surprising. Those seeking to exercise their rights under section 304(c) must wait 21 years longer than those exercising rights under section 203. In addition, under section 203, the author will frequently benefit directly from the reversion, with the mostly likely alternative beneficiaries including a sole spouse or the children of the author. A single author or childless widow/widower face no coordination problems in exercising the termination right. Children may face some difficulties under section 203, but they are likely to be fewer in number than those faced by multiple generations of heirs who will more frequently be the beneficiaries under section 304. Coordinating heirs may pose serious difficulties under the complicated rules of section 304.⁹⁸

⁹⁸ See 17 USC 304(c)(2) (“Where an author is dead, his or her termination interest is owned, and may be exercised, as follows: **(A)** The widow or widower owns the author’s entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author’s interest. **(B)** The author’s surviving children, and the surviving children of any dead child of the author, own the author’s entire termination interest unless there is a widow or widower, in which case the ownership of one-half of the author’s interest is divided among them. **(C)** The rights of

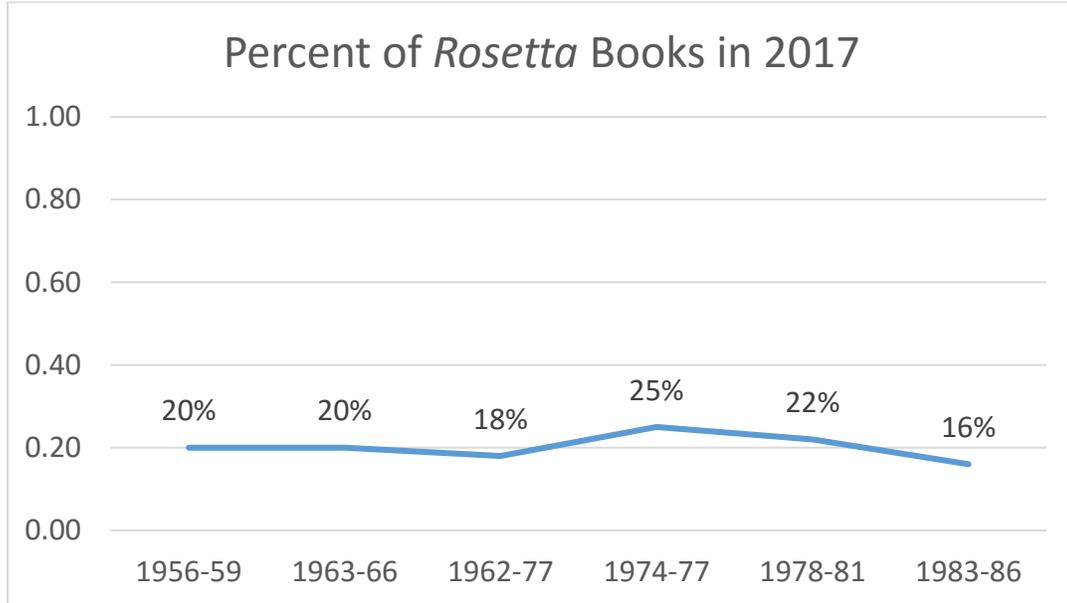
In addition, works that are only 35 years old at the time of reversion may, in general, retain more value than works that are 56 years old. Increased value may provide increased incentives to bring a work back into print. Finally, the extra 21 years may exacerbate notice problems. The longer one has to wait for a benefit, more likely one will lack the notice necessary to take advantage of it.

Finally, the coordination, value, and notice factors discussed above may explain the consistently positive effect of the *Rosetta Books* decision. *Rosetta* effected a vast class of living authors, and for books of deceased authors, the benefit flowed to whomever was in control of the literary estate, a beneficiary typically more clearly identified in the author's will than by the complex provisions to heirs in sections 203 and 304. Rights coordination is not a problem. The decision was rendered in 2002, just at the beginning of the first decade of significant commercial digital distribution, and it came as a one-time exogenous shock to the market.⁹⁹ The case itself was well-known in the literary community. At a minimum, authors with agents would have been quickly apprised of their rights. Figure 12 below show the *Rosetta* effect over time.

the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of such author's children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them. **(D)** In the event that the author's widow or widower, children, and grandchildren are not living, the author's executor, administrator, personal representative, or trustee shall own the author's entire termination interest.")

⁹⁹ See <https://en.wikipedia.org/wiki/E-book>.

Figure 12: The Rosetta Effect On Several Book Populations

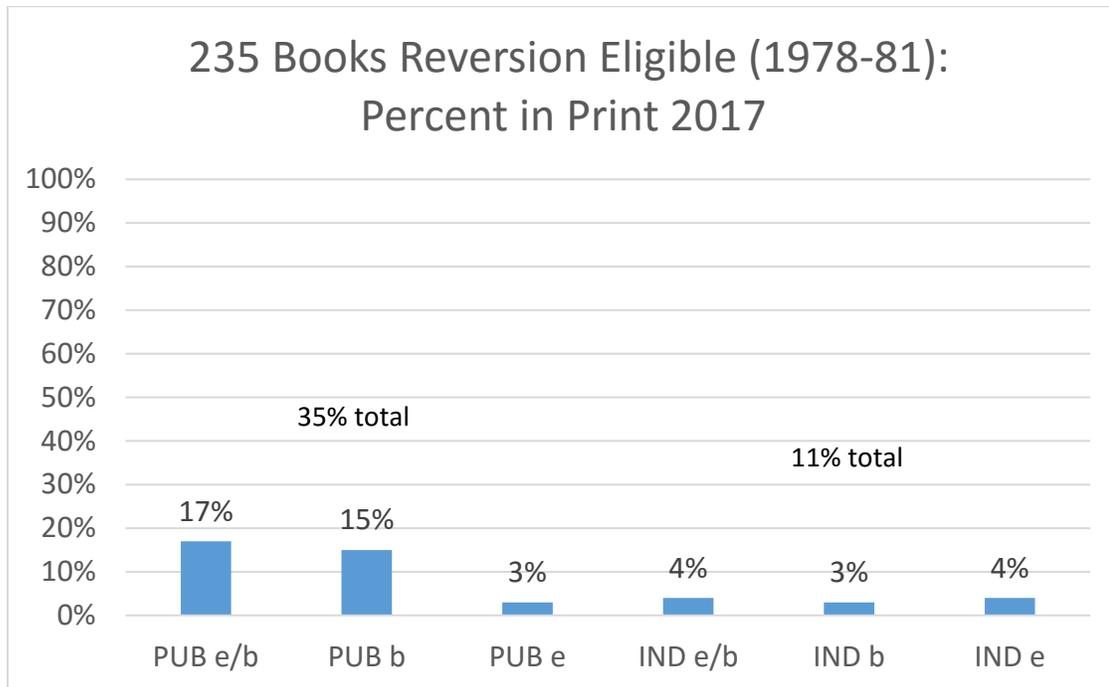


The *Rosetta* share of the market is quite consistent, with a declining trend for mid-seventies titles, which might be explained by publishers having written broader contracts that could be more easily interpreted to claim ebook rights, leaving fewer titles vulnerable to the *Rosetta* decision.

D. Dataset #3: 450 NYT Reviewed Books and the 17 USC § 203 Termination Right

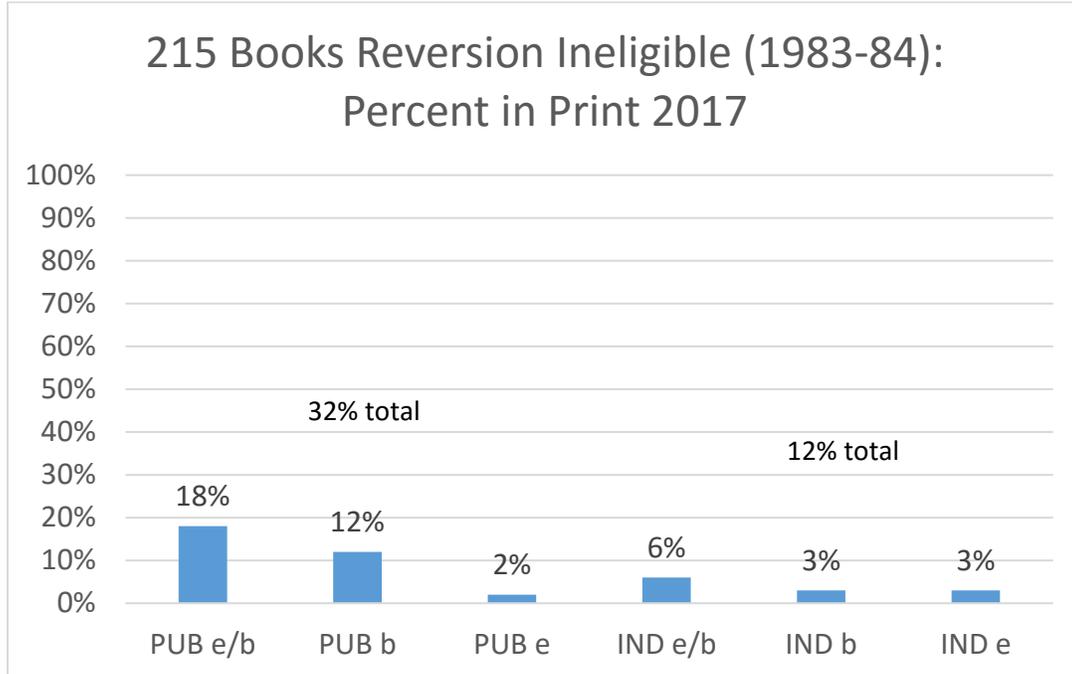
The final dataset contains fewer popular books and fewer bestsellers, yet each book was notable enough to be reviewed in the *New York Times Book Review*. Fiction titles constitute 170 of the total, while non-fiction books constitute the remaining 280 titles. Of the 450 sampled books, 235 had initial publication dates between 1978-81, making them reversion eligible. The reversion ineligible sample reviewed from 1983-84 consists of the remaining 215 titles.

Figure 13: NYT Reviewed Books



In this market, the original publisher offers 35% of the reversion eligible titles for sale, while independent publishers make an additional 11% available. If demand for all of these titles is indeed lower than in the prior two data sets, then the sub-set of titles in which major publishers seem to have no interest may be undesirable even to small, independent presses with scavenging business models.

Figure 14: NYT Reviewed Books



The sample of reversion ineligible books follows the same basic publication pattern as the reversion eligible books. Interestingly, the *Rosetta* books, categorized as “IND e,” are significantly fewer than the titles categorized as “IND e/b” which may well be in-print due a reversion “nudge,” given that the original publisher could theoretically still exercise control over the copyright in the bound volume.

E. Conclusion: Final Estimate

One can estimate the aggregate effect of both statutory schemes and *Rosetta* by combining the number of reversion-eligible titles published by independent presses with the number of reversion-ineligible titles published in ebook form only by independent presses (*Rosetta* books). Over the entire sample of 1909 books canvassed above, independent presses keep in print 239 (13%) of reversion-eligible titles. Independent presses keep in print a further 135 (7%) reversion-

ineligible titles in ebook form only, an opportunity almost certainly created by *Rosetta*.¹⁰⁰ Although one cannot know precisely what a world without reversion would look like, a total of 20% of the 1909 books may be available due to statutory reversion and *Rosetta*. One might further consider the 69 (3%) reversion-ineligible titles published by independent publishers as bound volumes. If this books are available as the result of a reversion “nudge,” then one might credit the various reversion schemes with keeping in print a total of 23% of the total sample.

IV. SUMMARY AND CAVEATS

As evidenced in APPENDIX A, numerous reversion schemes exist around the world, making it dangerous to draw universally applicable conclusions from the data presented. Several tentative observations and caveats may nonetheless be offered.

A. Effect of Key Assumptions

In the absence of querying all the authors (or heirs) and firms in the data set, the discussion above assumes that the identity of the publisher in 2017 conveys valuable information about why a book is in print. If a title is in print with a traditional publisher, then the work is assumed to be immune from any statutory reversion effect, even if it came back into print immediately before the relevant reversion period. Such a book, however, may be in print because the author has written a letter providing the required statutory copyright termination notice to the publisher (the window for authors is 10 years before the termination date).¹⁰¹ At this point, the publisher, nudged by the termination notice, may take a new look at the market and decide to bring the book back in print. The threat of a *Rosetta* digital edition of a work may similarly prompt the original publisher to bring a title out of print.

¹⁰⁰ See discussion at fn. - and accompanying text.

¹⁰¹ See 17 USC 304(c).

On the other hand, the assumption that no titles currently offered by independent publishers would be offered by traditional publishers may magnify the reversion effect. As seen in Figure 10 above, it seems fairly clear that major publishers get the first choice to publish the most desirable books; nonetheless, some authors might feel disserved by traditional publishing models and deliberately choose an independent publisher. Or an independent publisher could theoretically purchase a title from a publisher who would otherwise make the title available, although the web sites of the independent presses give no clue that purchasing copyrights is part of their business models. In addition, some authors might convince their original publishers to relinquish a copyright outside of any reversion scheme. If all titles published by independent publishers are assumed to be in-print as the result of *Rosetta*, reversion eligibility, or a reversion nudge, then the overall effect is a 23% increase in availability of the entire sample of 1909 books. This assumption, which may magnify the reversion effect, may offset (or more than offset) the assumption that credits all books published by traditional publishers as immune from any reversion threat. Not counting titles in the “reversion nudge” category, reduces the effect to a 20% increase in availability.

B. Do Works Fall Out of Print After the Statutory Termination Date?

One should consider the possibility that the threat of reversion caused some books to go out of print. Perhaps publishers, knowing that their rights would be subject to termination, let some titles go out of print. Or after rights reversion, some author-beneficiaries may have failed to keep their books in print. The data shows little evidence of this. Of the 129 *NYT* reversion eligible bestsellers in print 30 years after publication, all were still in print 2017. And of the 181 *NYTBR* reversion eligible books in the first data set,¹⁰² only one was in print in year 30 and out of print in

¹⁰² See *infra*

2017.¹⁰³ When rights are eligible to pass from publisher to author, no evidence suggests that books begin to disappear. All movement appears to be in the other direction.

C. Failure to File

Under both sections 203 and 304, an author seeking to perfect her termination right is required to notify the transferee of the copyright¹⁰⁴ and to make the proper filing with the copyright office.¹⁰⁵ In reality, authors seldom bother to pay the \$105 filing fee required by the Copyright Office.¹⁰⁶ The failure to file may be rational. Once the transferee publisher has been notified, it typically acquiesces in writing to the author or the author's heirs. Large publishers are repeat players and understand that their rights are subject to termination,¹⁰⁷ and many of the reclaimed rights involve works that are no longer in print and of little interest to the publisher. A return letter acquiescing in the termination provides plenty of comfort to an author or heirs, who then proceed to republish, often through an independent press. After all, an author or an author's heirs have no other entity who might sue them for infringement as they proceed to exploit the reclaimed work.¹⁰⁸

The Author's Alliance, a professional organization representing authors, maintains a rights reversion portal on its web site¹⁰⁹ and presents rights reversion "success stories" of authors who have regained their rights and republished their works.¹¹⁰ Not surprisingly, a search of Copyright Office records reveals that none of the featured authors had bothered to make the proper filing in order to perfect the termination of their original transfer.¹¹¹ To confirm the failure-to-file

¹⁰³ See Humphrey Lyttelton, *THE BEST OF JAZZ* (1979).

¹⁰⁴

¹⁰⁵ 17 USC § 203

¹⁰⁶ See <https://www.copyright.gov/fls/s104d.pdf>.

¹⁰⁷ They will fight on work for hire ground, however.

¹⁰⁸ They should worry about creditors of the transferee!

¹⁰⁹ See Author's Alliance Rights Reversion Portal, <http://www.authorsalliance.org/resources/rights-reversion-portal/>.

¹¹⁰ <http://www.authorsalliance.org/category/rights-reversions/rr-successes/> (interviewing 6 authors).

¹¹¹

phenomenon, I checked the Copyright Office records for all 129 bestsellers initially published from 1978-1981, all of which were potentially subject to section 203 termination. The copyrights in only 8 of 129 of those valuable books had been formally terminated via filing with the Copyright Office; yet, the same set of books saw an increase in availability of 43% at year thirty after publication to 88% in 2017. The data suggest that many authors take advantage of the termination right and bring books back into print without taking the final step of filing their interest.

D. The Thor Power Tool Effect

As noted in Figure 2 above, only 24% of 129 bestsellers from 1978-81 were available in bound volumes thirty years after their initial publication. This is a strikingly low number, given the fact that each title spent time on the *NYT* bestsellers list. One possible explanation for this figure--which obviously plays a role in the dramatic magnitude of the increase in availability to 88%--may well lay in a 1979 tax case, *Thor Power Tool v. Commissioner*.¹¹²

Without diving too deeply into the details of the case, the Court in *Thor Power Tool* clarified the application of rules governing the tax treatment of certain kinds of inventory, like books, that often have an actual value lower than their present sales price. At issue in *Thor Power Tool* was the tax treatment of old spare parts which might be offered for sale at \$100, but in reality may have only had a scrap value of \$10. The holding of the case, as far as it was relevant to book publishers, stated that any economic depreciation of the inventory could only be claimed when goods were finally disposed of, instead of being taken proportionally on a yearly basis. The case provided strong incentives for book publishers to lower their prices or to more rapidly dispose of their book inventory,¹¹³ and the titles initially published before the case was decided may have

¹¹² 439 U.S. 552 (1979).

¹¹³ See Kevin O'Donnell, Jr., "How Thor Power Hammered Publishing," <http://www.sfwa.org/2005/01/how-thor-power-hammered-publishing/>.

gone out-of-print more quickly as a result of the decision.¹¹⁴ Of course, in today's era of print-on-demand publishing, when publishers need not keep large inventories, the distorting incentive of *Thor Power Tool* presumably has a significantly diminished impact.

E. Potential Downside of *Rosetta* and a Random Sample

The *Rosetta Books* decision has so far been portrayed as an unalloyed good, a means by which authors have gained access to their back catalogs and brought works back into print. It is possible, however, that the case might sometimes have a negative effect on the market for bound volumes of a work. Imagine the publisher of a paperback edition of a book that is barely making a profit suddenly facing competition from a digital version of the same book published by the author or by an independent publisher licensed by the author. Could the ebook reduce the original publisher's profit margin so that the bound volume goes out of print? A cautionary tale might be books by Harold Robbins, one of the bestselling authors of the 20th century,¹¹⁵ whose books are for sale only in ebook form by Rosetta Publishing.¹¹⁶ Did Robbins' ebooks, published by Rosetta, destroy the market for bound volumes?

Several factors suggest that *Rosetta* has had a minimal effect on the market for hard copy editions. Yes, a new competing digital version of a book will presumably decrease the sales of a bound volume if it were previously the only edition on the market. However, once the text of a bound volume is formatted and prepared for market, virtually all of the production costs are sunk. The marginal cost of printing an additional copy for the market is extremely low, and in the current

¹¹⁴ Marcia Anderson, *et al*, *The Thor Inventory Ruling*, 17 THE SERIALS LIBRARIAN 191 (1990) ("Plenum Press destroyed 322,000 books in order to claim a tax deduction.").

¹¹⁵ https://en.wikipedia.org/wiki/Harold_Robbins.

¹¹⁶ *See, e.g.* Harold Robbins, *THE CARPETBAGGERS* (1961), at https://www.amazon.com/Carpetbaggers-Harold-Robbins-ebook/dp/B00AJGNIL8/ref=sr_1_8?s=books&ie=UTF8&qid=1503592509&sr=1-8&keywords=harold+robbins (Kindle version is the only new edition of this mega-bestseller available on Amazon).

era of print-on-demand production, a publisher can wait for an individual order before printing a book. In other words, publishers save very little money by taking a bound edition out of print.

Second, the publisher of the bound edition of a book (usually the original transferee of the copyright) has a vested interest in also being the publisher of the digital version. The publisher knows the author and has expended resources in promoting the author and his or her books. Unless the author is dissatisfied with the publisher for some reason, an author should prefer to stay with his present transferee. In other words, the first publisher has an advantage in exploiting the digital market and preventing damaging competition by being the sole purveyor of the title. It is possible that the original publisher may be outbid by someone else in the market, but this seems unlikely except in cases of very famous novelists, e.g. Kurt Vonnegut.¹¹⁷ Of course, in cases where the author's works are already out of print, one would expect no damage to the initial publisher from the appearance of a digital version.

Finally, an attempt at measuring the *Rosetta* effect in a random sample underlines its significance. I picked a year at random, 1987, and attempted to conduct a survey on Amazon of all novels in ebook form claiming that year of publication in order to determine what percent were solo ebooks published by an independent publisher. Using the Amazon advanced search function, I entered "1987" as the year of publication, "ebook" as the format, and "literature and fiction" as the subject matter category. The search produced a total of 209 editions meeting the criteria. After double-checking for the actual date of initial publication of each identified title, I determined that only 77 of the 209 were published sometime during the decade of the 1980s.¹¹⁸ Taking these 77 books as a sufficiently random sample, I identified 11 of the 77 editions as solo ebooks that were

¹¹⁷ All of whose books are available in bound volumes.

¹¹⁸ Most data on Amazon is self-reported by publishers, and they typically report the year the current edition was published, not the year of initial publication. For example, the first book identified by Amazon as a 1987 publication was PETER PAN, initially published in 1911.

self-published or published through an independent press. If 14% (11/77) of pre-2002¹¹⁹ fiction ebooks constitute titles that would be unavailable but for *Rosetta*, then the case is doing substantial work and demonstrates how a mere change in ownership can directly and positively affect markets. Given three prior measurements of the *Rosetta* effect (15%, 18% or 19%), the 14% figure for a sample not targeting bestsellers or *NYT* reviewed books seems especially credible.

CONCLUSION

The lack of availability caused by long terms of copyright protection cannot be solved by decreasing the length of protection. Nearly universal membership in the Berne Convention means that a minimum term of life-of-the-author plus fifty years is here to stay. This study suggests, however, that shifting the ownership of a copyright from the initial transferee/publisher may, under the proper circumstances, result in the republication of out-of-print books. Of the sample of 1909 books collected, an estimated 20% to 23% of the titles are currently in print due to statutory reversion/termination statutes or the *Rosetta* case. Other studies will have to be conducted to estimate the optimal timing for rights reversion, but the US experience provides some support for schemes that are easily understood by authors and that are short enough to prevent the fragmentation of rights and dissipation of value as works lay fallow in the hands of the original transferee. Given the wide variety of reversionary schemes around the world, the data necessary to craft an optimal regime may be just a few new studies away.

¹¹⁹ With the advent of the digital age, and spurred by *Rosetta*, publishers changed their agreements to make it clear that they obtain rights in all print and digital version of new works.

APPENDIX A: NON-US LAW OF COPYRIGHT REVERSION AND TERMINATION

Country	Statute	Reversion OR “Use It Or Lose It”	Notes from Authorities
United States	17 USC § 203(b)	Reversion	
Australia	<p>OLD: See Copyright Act of 1911, section 5(2) (U.K.); Copyright Act of 1912 s 8 (No. 20, 20 Nov. 1912) (Austral.) [where the Australian Act sets out that the British Copyright Act is in force in the Commonwealth]</p> <p>NEW: Copyright Act of 1968 § 239(4) (Austral.)</p>	Time-limited Reversion	<ul style="list-style-type: none"> • “There are two situations in the Copyright Act where copyright will revert to an author or to the author’s estate after assignment or other such transfer. It is important to note, however, that these reversions only apply to “old” copyrights subsisting at the time the Copyright Act 1968 came into operation on May 1, 1969. It is necessary to distinguish two periods: the first between July 1, 1912, and May 1, 1969, when the Copyright Act of 1911 was in force; and the second before the 1911 Act came into force on July 1, 1912.” 1-AUS International Copyright Law and Practice AUS § 4 (2016) • “In South Africa, the right applies to grants made by the author on or before September 10, 1965, and in Australia the right is available for grants made by the author on or before May 1, 1969.” Lisa A. Alter, British Reversionary Right (3d ed., 2012)
Austria	§ 29(1) UrhG 1936 (Austria)	“Use It Or Lose It”	“In Austria and Germany, the right of revocation of a grant for non-exercise is not applicable to the

			right granted to the film producer.” Pascal Kamina, Film Copyright in the European Union 212 (Cambridge Univ. Press, 2d ed., 2016)
Belgium	Code de droit économique art. XI.167, XI.196 (Belg.)	“Use It Or Lose It”	“There is no general rule in Belgian law allowing copyright transfers to lapse automatically or providing for a form of automatic reversion of rights to the author. However, in the case of publishing contracts, rights automatically revert to the author (1) if the publisher fails to comply with his obligation to publish within the contractually stipulated deadline, or within whatever deadline fair practice would dictate if none is stipulated, and (2) if the publisher is not able to give a legitimate reason for the delay.” 1-BEL International Copyright Law and Practice BEL § 4 (2016)
Canada	Copyright Act § 14(1) (Can.)	Reversion	“Canada retains the UK’s 1912 to 1957 structure for all transfers— even current ones.” David M. Given, US Copyright Termination: Re-monetization’s Final Frontier, 11 J. Intell. Prop. L. & Prac. 826, 828 (2016)
Denmark	Consolidated Act on Copyright 2014 ch. 3, art. 54 (Den.)	“Use It Or Lose It”	“In Denmark, Finland and Sweden, the author may cancel the agreement if the assignee has not exploited the work within a reasonable time or at the latest five years after the date when the agreement was performed by the author.” Pascal Kamina, Film Copyright in the European Union 212 (Cambridge Univ. Press, 2d ed., 2016)
Finland	Copyright Act 1961, art. 33-34 (Fin.)	“Use It Or Lose It”	“In Denmark, Finland and Sweden, the author may cancel the agreement if the assignee has not exploited the work within a reasonable time or at the latest five years after the date when the

			<p>agreement was performed by the author.”</p> <p>Pascal Kamina, Film Copyright in the European Union 212 (Cambridge Univ. Press, 2d ed., 2016)</p>
France	<p>Code de la propriété intellectuelle art. 121-4 (Fr.)</p>	“Use It Or Lose It”	<p>“Article L. 121-4 of the French CPI includes two very specific provisions on the right to withdraw from an agreement or change the work: droit de retrait and droit de repentir. Such rights form part of the moral rights of authors and are not as such a contractual protection of the author, but might have the same result as the reversion right known in other legislations. They enable an author to depart from the terms of an assignment agreement for intellectual, aesthetic or moral reasons. The rights to withdrawal (droit de retrait) and modification (droit de repentir) give the author the ability to correct or retract a work even after publication.”</p> <p>Séverine Dusollier et al., Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States 78 (Citizens’ Rights and Constitutional Affairs, Policy Department ed., 2014)</p>
Germany	<p>Copyright Act of 9 Sept. 1965, BGBl. I at 3037, § 41 (Ger.)</p>	“Use It Or Lose It”	<ul style="list-style-type: none"> • “In Germany and Poland, an author may terminate a contract if his work no longer reflects his beliefs, or if exploitation is made contrary to their fundamental interest.” • David M. Given, US Copyright Termination: Re-monetization’s Final Frontier, 11 J. Intell. Prop. L. & Prac. 826, 828 (2016) • “‘Use it or lose it’ provisions are currently in force in some EU Member States

			<p>for authors' rights (Belgium, Germany and Spain among those surveyed in the present study, and additionally Austria, Luxemburg, Nordic Countries and Portugal.”</p> <p>Séverine Dusollier et al., Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States 77 (Citizens’ Rights and Constitutional Affairs, Policy Department ed., 2014)</p> <ul style="list-style-type: none"> • “Authors have an unwaivable right, in Germany and Hungary, to revoke the exploitation rights if the transferee does not exploit the rights transferred. Some differences exist between the time limits and procedures set to exercise this right. In Germany the author cannot exercise her ‘revocation’ right before the expiration of two years from the transfer of the exploitation right; the same happens in Hungary for long term contracts.” <p>Séverine Dusollier et al., Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States 77 (Citizens’ Rights and Constitutional Affairs, Policy Department ed., 2014)</p> <ul style="list-style-type: none"> • “In Germany, however, the author is required to indemnify the person affected by the revocation if and to the extent
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			<p>required by equity.” Séverine Dusollier et al., Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States 77 (Citizens’ Rights and Constitutional Affairs, Policy Department ed., 2014)</p> <ul style="list-style-type: none"> • “In Germany for instance, authors are entitled to terminate the contract earlier if the work no longer reflects their convictions or if the rightholder does not exercise the right or only does so insufficiently and this significantly impairs the author's legitimate interests. In these two cases, the author will have to compensate the transferee if and insofar this is fair and equitable. A similar system applies in Poland.” Séverine Dusollier et al., Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States 77-78 (Citizens’ Rights and Constitutional Affairs, Policy Department ed., 2014) • “[T]he copyright law of Germany, governing German rights where protection is sought in Germany, does not recognize any renewal term or reversion.” 2-GER International Copyright Law and Practice GER § 3 (2016) • “German law does, however, provide for
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			<p>special author-protective rules, some mandatorily applying to German contractual exploitation.”</p> <p>2-GER International Copyright Law and Practice GER § 3 (2016)</p>
Hong Kong	<p>Competition Ordinance, Cap. 619 L.H.K., effective December 14, 2015 (H.K.)</p> <p>(See Copyright Ordinance, Sched. 2, para. 26) (H.K.)</p>	Historical Reversion	<p>“The Copyright Ordinance lacks any right of reversion. But the U.K. Copyright Act 1911, which applied to Hong Kong until 1972, does provide for reversion in limited cases. The relevant provision in Section 5(2) of the 1911 Act remains effective in Hong Kong as regards assignments made before December 12, 1972. In such cases, an assignment made by an author who was the first owner of copyright—that is, not an employee—reverts to that person’s personal representative 25 years after his death; however, this rule does not apply to collective works.”</p> <p>2-HK International Copyright Law and Practice HK § 4 (2016)</p>
Hungary	<p>Act LXXVI of 1999 on Copyright, art. 51-54 (Hung.)</p>	“Use It Or Lose It”	<p>“Authors have an unwaivable right, in Germany and Hungary, to revoke the exploitation rights if the transferee does not exploit the rights transferred. Some differences exist between the time limits and procedures set to exercise this right. In Germany the author cannot exercise her ‘revocation’ right before the expiration of two years from the transfer of the exploitation right; the same happens in Hungary for long term contracts.”</p> <p>Séverine Dusollier et al., Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States 77 (Citizens’ Rights and Constitutional Affairs, Policy Department ed., 2014)</p>
Italy	<p>Decreto Legislativo</p>	“Use It Or Lose It”	Fifty years after publication of a

	<p>21 febbraio 2014, n.22 art. 84-ter, G.U. March 11, 2014, n.57 (It.)</p>		<p>musical work (the Italian text uses the word <i>fonogramma</i>), performers can withdraw from a contract if the producer of the work, within one year of a request by the performer, doesn't sell enough copies of the work or does not make it sufficiently available to the public.</p> <p>Italian "use it or lose it" law is limited to protection of performers ("Actors, singers, musicians, dancers and other persons who play, sing, recite or Perform in any manner, intellectual works, whether protected or in the public domain, shall be considered performers."). See Diritto d'autore, Legge 22 aprile 1941, n.633, art. 80-85, G.U. July 16, 1941, n.166 (It.). That is, <i>is does not apply to authors</i>. (I contend that the 2008 article* is dated and DOES NOT apply to current "use it or lose it" copyright law in Italy.)</p> <p>*Maria Lillà Montagnani & Maurizio Borghi, Postive Copyright and Open Content Licences: How to Make a Marriage Work By Empowering Authors to Disseminate Their Creations, 12 Int'l J. Comm. L. & Pol'y 244 (2008)</p>
Luxembourg	<p>Loi du 18 avril 2001 sur les droits d'auteur, les droits voisins et les bases de données, art. 16 (Lux.)</p>	"Use It Or Lose It"	<p>"'Use it or lose it' provisions are currently in force in some EU Member States for authors' rights (Belgium, Germany and Spain among those surveyed in the present study, and additionally Austria, Luxemburg, Nordic Countries and Portugal)."</p> <p>Séverine Dusollier et al., Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States 77 (Citizens' Rights and Constitutional Affairs, Policy Department ed., 2014)</p>

Netherlands	<p>Wet van 30 juni 2015, Stb. 2015, 257, art. 25e (Neth.)</p>	“Use It Or Lose It”	<ul style="list-style-type: none"> “In the Netherlands, the Amendment Act of June 30, 2015 on copyright contracts introduced a right for the author to cancel the agreement if the assignee does not sufficiently exploit the copyright to the work within the reasonable period.” <p>Pascal Kamina, Film Copyright in the European Union 212 (Cambridge Univ. Press, 2d ed., 2016)</p> <ul style="list-style-type: none"> “Article 25e gives the author a right to reclaim his rights in the case where they are not properly exploited. For the music industry this rule is now codified, as a similar rule was <u>already applied</u> by the Dutch courts based on general contract law (art. 6:265 BW).” <p>Karlijn van den Heuvel, What Does the New Dutch Copyright Law Have to Offer?, Kluwer Copyright Blog, Jan. 13 2016.</p>
New Zealand	<p>OLD: Copyright Act 1962, sch. 1, cl. 36(3) (N.Z.)</p> <p>NEW: Copyright Act 1994, sch. 1, cl. 38 (N.Z.)</p>	Time-limited Reversion	<p>“In New Zealand, the reversionary right is available for grants made by the author on or before April 1, 1963.”</p> <p>Lisa A. Alter, British Reversionary Right (3d ed., 2012)</p>
Poland	<p>Act of 4 February 1994 On Copyright and Related Rights, art. 57 § 1 (Pol.)</p>	“Use It Or Lose It”	<ul style="list-style-type: none"> “In Germany and Poland, an author may terminate a contract if his work no longer reflects his beliefs, or if exploitation is made contrary to their fundamental interest.” <p>David M. Given, US Copyright Termination: Re-monetization’s Final</p>

			<p>Frontier, 11 J. Intell. Prop. L. & Prac. 826, 828 (2016)</p> <ul style="list-style-type: none"> “In Germany for instance, authors are entitled to terminate the contract earlier if the work no longer reflects their convictions or if the rightholder does not exercise the right or only does so insufficiently and this significantly impairs the author's legitimate interests. In these two cases, the author will have to compensate the transferee if and insofar this is fair and equitable. A similar system applies in Poland.” <p>Séverine Dusollier et al., Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States 77-78 (Citizens’ Rights and Constitutional Affairs, Policy Department ed., 2014)</p>
Portugal	CÓDIGO DO DIREITO DE AUTOR E DOS DIREITOS CONEXOS, art. 49? (Port.)	“Use It Or Lose It”	Pascal Kamina, Film Copyright in the European Union 212 (Cambridge Univ. Press, 2d ed., 2016)
Romania	Law on Copyright and Neighboring Rights, art. 56(3) (M. O. Pt. I No. 60 / March 26, 1996) (Rom.)	“Use It Or Lose It”	<p>“In Denmark, Finland and Sweden, the author may cancel the agreement if the assignee has not exploited the work within a reasonable time or at the latest five years after the date when the agreement was performed by the author. The same duration applies in Romania.”</p> <p>Pascal Kamina, Film Copyright in the European Union 212 (Cambridge Univ. Press, 2d ed., 2016)</p>
South Africa	OLD: See Copyright Act of 1911, section 5(2) (U.K.) ; Patents,	Time-limited Reversion	“In South Africa, the right applies to grants made by the author on or before September 10, 1965, and in

	<p>Designs, Trade Marks, and Copyright Act of 1916 § 143 (S. Afr.) [where the South African Act sets out that the British Copyright Act is in force in the Commonwealth]</p> <p>NEW: Copyright Act of 1978, § 43 (S. Afr.)</p>		<p>Australia the right is available for grants made by the author on or before May 1, 1969.”</p> <p>Lisa A. Alter, British Reversionary Right (3d ed., 2012)</p>
Spain	<ul style="list-style-type: none"> • Intellectual Property Law art. 69 (B.O.E 1996, 97) (Spain) • Intellectual Property Law art. 68(1) (B.O.E 1996, 97) (Spain) 	<p>“Use It Or Lose It”; Time Limited Reversion</p>	<ul style="list-style-type: none"> • “In Spain, a publishing contract is automatically extinguished 10 years after its execution if payment is fixed as a flat fee.” David M. Given, US Copyright Termination: Re-monetization’s Final Frontier, 11 J. Intell. Prop. L. & Prac. 826, 828 (2016) • “‘Use it or lose it’ provisions are currently in force in some EU Member States for authors’ rights (Belgium, Germany and Spain among those surveyed in the present study, and additionally Austria, Luxemburg, Nordic Countries and Portugal).” Séverine Dusollier et al., Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States 77 (Citizens’ Rights and Constitutional Affairs, Policy Department ed., 2014) • “Under Spanish legislation, the publishing contract is automatically extinguished ten years after the signature if remuneration has been fixed in the form of flat fee.”

			<p>Séverine Dusollier et al., Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States 78 (Citizens’ Rights and Constitutional Affairs, Policy Department ed., 2014)</p> <ul style="list-style-type: none"> • Automatic reversion at year 25 after author’s death. Torremans
Sweden	<p>3 ch. 33 § Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk (Svensk författningssamling 1960:729) (Swed.)</p>	“Use It Or Lose It”	<ul style="list-style-type: none"> • “In Sweden, it is explicitly stated that in the case of termination for lack of exploitation, remuneration obtained by the author is kept by her and in case damage occurs she has to be additionally compensated.” Séverine Dusollier et al., Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States 77 (Citizens’ Rights and Constitutional Affairs, Policy Department ed., 2014) • “In Denmark, Finland and Sweden, the author may cancel the agreement if the assignee has not exploited the work within a reasonable time or at the latest five years after the date when the agreement was performed by the author.” Pascal Kamina, Film Copyright in the European Union 212 (Cambridge Univ. Press, 2d ed., 2016)
UK	<p>OLD: Copyright Act of 1911, section 5(2) (At the time, applied to</p>	Time-limited Reversion	<ul style="list-style-type: none"> • “In the UK, transfers made between July 1912 and June 1957 automatically

	<p>all parts of the British Empire)</p> <p>NEW: Copyright, Designs and Patents Act 1988, Sched. 1, para. 27</p>		<p>revert to the author’s estate 25 years after the author’s death. Australia, New Zealand and South Africa have similar time-limited reversion laws”</p> <p>David M. Given, US Copyright Termination: Re-monetization’s Final Frontier, 11 J. Intell. Prop. L. & Prac. 826, 828 (2016)</p> <ul style="list-style-type: none"> • “In other countries, such as the UK, there are no specific provisions in the Copyright Law regarding reversion, but authors may terminate the contract in application of Contract Law.” <p>Séverine Dusollier et al., Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States 78 (Citizens’ Rights and Constitutional Affairs, Policy Department ed., 2014)</p> <ul style="list-style-type: none"> • “The current legislation contains no provision under which rights in works created after June 1, 1957, may revert to the author or his estate. But it preserves the right given by the Copyright Act 1911, Section 5(2), in respect of works created before June 1, 1957, which were assigned between the passing of that Act and June 1, 1957. This provision renders the assignment void as against the author’s personal representatives insofar as it extends to the period of copyright that commences 25 years from the author’s
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			death.” 2-UK International Copyright Law and Practice UK § 4 (2016)
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