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"The Sole Right ... Shall Return to the Authors": Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright

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**“The Sole Right . . . Shall Return to the Authors”:
Anglo-American Authors’ Reversion Rights From
The Statute of Anne to Contemporary U.S. Copyright**

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October 2010

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**“THE SOLE RIGHT . . . SHALL RETURN TO THE AUTHORS”:¹
ANGLO-AMERICAN AUTHORS’ REVERSION RIGHTS FROM
THE STATUTE OF ANNE TO CONTEMPORARY U.S.
COPYRIGHT**

Lionel Bently[†] & Jane C. Ginsburg^{††}

Abstract

This study of author’s reversion rights begins with the Statute of Anne and the debates that led up to the adoption of section 11, which vested in the author a second fourteen-year term, provided he or she was still alive at the end of the initial fourteen-year term. The study then will address the impact of the author’s reversion right on publishing practice and authors’ welfare in the United Kingdom through the eighteenth century to the demise of the reversion right in 1814.² We will suggest that the apparent lack of use of the reversion right by authors in the eighteenth century was a result of a host of factors, including but not limited to the common (but by no means universal) contractual practice which purported to confer on a publisher the entirety of an author’s rights. In addition, we call attention to the multiple and shifting interpretations of what was required by section 11, as well as the social and economic limitations on an author’s capacity to take advantage of the reversion. The second half of this study turns to the law and publishing practices in the United States, where reversion rights have proved more enduring if not always more beneficial to authors.

The study concludes that history and practice suggest at best inconsistent achievement of reversionary rights’ aim to offset the author’s weaker bargaining position by assuring her a future opportunity to make a better deal. Legislators might improve the reversion rights regime, but it is not clear that authors’ lots will accordingly ameliorate. Substantive regulation of contracts of transfer, rather than rights to terminate those transfers, may offer the preferable path to ensuring meaningful and effective protection of authors’ interests in reaping the fruits of their intellectual labors.

1. Act for the Encouragement of Learning, 1710, 8 Ann., c. 19, § 11 (Great Britain.) [hereinafter Statute of Anne].

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2. Parliament reinstated a reversion right in the 1911 Imperial Copyright Act, but the history of that reversion and its adoption in the countries of the British Empire is beyond the scope of this study.

The rise in the seventeenth and eighteenth centuries of a professional class of writers stimulated authors' demands for better remuneration from their writings.³ The increase in authors who sought to live from their work, rather than from patronage or personal fortune, likely provided at least one impulse for the author-protective provisions of the 1710 Statute of Anne. Under the regime of printing privileges that preceded the Statute of Anne, authors generally received from publisher-booksellers a one-time payment,⁴ made when the authors

3. The emergence of a profession of authors in the eighteenth century was recognized by contemporaries. See, e.g., 5 JAMES BOSWELL, BOSWELL'S LIFE OF JOHNSON, TOGETHER WITH BOSWELL'S JOURNAL OF A TOUR OF THE HEBRIDES AND JOHNSON'S DIARY OF A JOURNEY INTO NORTH WALES 59 (G.B. Hill ed., 1934); Oliver Goldsmith, "Letter LXXXIII from Lien Chi Altangi, to Fum Hoam, first President of the Ceremonial Academy at Peking, in China," in OLIVER GOLDSMITH, 2 LETTER FROM A CITIZEN OF THE WORLD TO HIS FRIENDS IN THE EAST 127, 130 (J. & R. Childs pub., Bungay 1820) (1762) ("At present, the few poets of England no longer depend on the great for subsistence; they have now no other patrons but the public, and the public, collectively considered, is a good and generous master, . . ."); Q.R.S., *On the Expediency of Instituting a Literary Society on a Prudential and Permanent Plan*, WESTMINSTER MAG., 1773, at 368, 370 ("literary patronage among the Great has ceased . . . literary property has risen upon its ruins. . ."); Letter from Philistor John Pinkerton to the People of Great Britain, in 58 THE GENTLEMAN'S MAGAZINE: AND HISTORICAL CHRONICLE 125, 126 (London, John Nichols 1788) (describing booksellers as "the sole patrons of literature in this country," and suggesting that some level of patronage by "the Great" might be desirable in order to allow publication of works of high importance even though they would not meet with "public taste"); *On the History of Authors by Profession*, BEE, LITERARY WEEKLY INTELLIGENCER, May 11, 1791, reprinted in 3 THE BEE, OR LITERARY WEEKLY INTELLIGENCER, CONSISTING OF ORIGINAL PIECES, AND SELECTIONS FROM PERFORMANCES OF MERIT, FOREIGN AND DOMESTIC 13 (James Anderson ed., Edinburgh, Mundell and Son) (recognizing shift, but arguing, however, that authors were "subjected to a new dependence," that is, upon publishers); A VINDICATION OF THE EXCLUSIVE RIGHT OF AUTHORS TO THEIR OWN WORKS: A SUBJECT NOW UNDER CONSIDERATION BEFORE THE TWELVE JUDGES OF ENGLAND 38-40 (London 1762) [hereinafter VINDICATION], in PRIMARY SOURCES ON COPYRIGHT (1450-1900) (L. Bently & M. Kretschmer eds., 2008) [hereinafter PSOC], http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22uk_1762b%22.

Historians of literature have confirmed the claim, though with different emphases on the timing and extent of the shift. See, e.g., VICTOR BONHAM-CARTER, AUTHORS BY PROFESSION (1978); RICHARD B. SHER, THE ENLIGHTENMENT & THE BOOK: SCOTTISH AUTHORS & THEIR PUBLISHERS IN EIGHTEENTH-CENTURY BRITAIN, IRELAND, & AMERICA ch. 3 (2006) (acknowledging that "the professionalization of authorship . . . increased dramatically during the eighteenth century" but highlighting that the changes did not represent a simple shift from "aristocratic patronage" to patronage by booksellers or the public); John Feather, *John Nourse and His Authors*, 34 STUD. BIBLIOGRAPHY 205 (1981) ("[I]t was in the eighteenth century that authorship, for the first time, became a viable profession for a substantial number of practitioners."); Dustin Griffin, *The Rise of the Professional Author?*, in 5 CAMBRIDGE HISTORY OF THE BOOK: 1695-1830, at 132 (Michael F. Suarez & Michael L. Turner eds., 2009). See also JAMES G. HEPBURN, THE AUTHOR'S EMPTY PURSE AND THE RISE OF THE LITERARY AGENT (1968) (noting that Alexander Pope "was possibly the first eminent writer earning his living by his pen who was freely able to do so."); Peter Lindenbaum, *John Milton and the Republican Mode of Literary Production*, 21 Y.B. ENG. STUD. 121 (1991) (arguing that Milton began writing within a system of aristocratic patronage, but broke free of it); Peter Lindenbaum, *Author and Publishers in the Late Seventeenth Century, II: Brabazon Aylmer and the Mysteries of the Trade*, 3 LIBR. 32 (2002) [hereinafter Lindenbaum, *Brabazon Aylmer*].

4. In discussing the period prior to 1800, we use the terms "bookseller" and "publisher" interchangeably. See, e.g., Terry Belanger, *From Bookseller to Publisher: Changes in the London Book Trade, 1750-1850*, in BOOK SELLING AND BOOK BUYING: ASPECTS OF NINETEENTH CENTURY BRITISH AND NORTH AMERICAN BOOK TRADE 7 (Richard Langdon ed., 1978); John Feather, *The Commerce of Letters: The Study of the Eighteenth-Century Book Trade*, 17 EIGHTEENTH CENTURY STUDS. 409 n.18 (1984). William Strahan, printer-turned-bookseller, who himself operated no retail outlets, explained to his American correspondent that "[w]hat constitutes a Bookseller is having Property in Copies." R.D. Harlen, *William Strahan: Eighteenth-Century London Printer and Publisher* 236 n.58 (1960) (unpublished Ph.D. thesis, University of Michigan).

surrendered their manuscripts for publication.⁵ Authors whose works enjoyed particularly high demand might negotiate additional payments for new editions or for new printings of a work that had done well,⁶ or they might extract a higher price per sheet for their next work,⁷ but neither law nor custom generally assured authors remuneration reflective of their works' sales. As a result, few authors participated in the continued success of their works.

While many debate the extent to which the Statute of Anne in fact departed from the prior regime of printing monopolies,⁸ one feature of the Act that distinguished it from prior regulatory practices was the vesting of exclusive rights in authors, rather than in publishers.⁹ Moreover, the last clause of the Statute, granting authors a contingent reversionary right, was both unprecedented and, as enacted, manifestly a measure favoring authors. Section 11 stated:

Provided always, [t]hat after the expiration of the said term of fourteen years, the sole right of printing or disposing of copies shall return to the Authors thereof, if they are then living, for another [T]erm of fourteen years.¹⁰

The Statute of Anne thus conditioned the duration of exclusive rights on the author's survival. More importantly, the Statute designated the author as the beneficiary of the additional term of years. In theory, the second fourteen years should have enabled the author

5. The Upcott manuscripts contain at least three relevant documents from before 1710. Additional Manuscripts in the British Library, BL Add. Mss. 38728-38730 [hereinafter BL Add. Mss.], 1 THE UPCOTT COLLECTION, ORIGINAL ASSIGNMENTS OF MANUSCRIPTS BETWEEN AUTHORS AND PUBLISHERS, 1705-1810 (DRAMATIC AUTHORS), BL Add. Mss. 38728 at [204], [120] [hereinafter 1 UPCOTT]; 2 THE UPCOTT COLLECTION, ORIGINAL ASSIGNMENTS OF MANUSCRIPTS BETWEEN AUTHORS AND PUBLISHERS, 1707-1810 (MATHEMATICAL & ELEMENTARY WORKS), BL Add. Mss. 38729, at [110] (Assignment of March 20, 1706/7) [hereinafter 2 UPCOTT]. See also Letter from Tonson to Pope, (Apr. 20, 1706), BL Add. Mss. 4807, fol. 172v.

6. Milton received additional payments for subsequent editions of *Paradise Lost*. Juan Christian Pellicer, *Harleian Georgic from Tonson's Press: The Publication of John Philip's Cyder, 29 June 1708*, 7 LIBR. 185, 187 (2006) (noting a 1707 contract between publisher Jacob Tonson and John Philips's for the latter's poem *Cyder* also providing for the possibility of an eventual second edition, which would have brought him another £10).

7. See, e.g., Peter Lindenbaum, *Authors and Publishers in the Late Seventeenth Century: New Evidence of Their Relations*, 17 LIBR. 250, 262 (1995) (explaining that a bookseller agreed in 1689 to pay John Locke 10s for each sheet of text of his *Essay Concerning Human Understanding*; and in subsequent agreements in 1693/94 and 1699, the booksellers agreed to pay Locke 10s per sheet for any *additional* material he wished to provide for subsequent editions).

8. Compare HARRY H. RANSOM, *THE FIRST COPYRIGHT STATUTE: AN ESSAY ON AN ACT FOR THE ENCOURAGEMENT OF LEARNING, 1710* (1956), and RONAN DEAZLEY, *Commentary on the Statute of Anne 1710* (2008), available at PSOC, *supra* note 3, http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabeCom/%22uk_1710%22 (emphasizing author-oriented aspects of statute); with JOHN FEATHER, *PUBLISHING, PIRACY AND POLITICS: AN HISTORICAL STUDY OF COPYRIGHT IN BRITAIN* (1994) (emphasizing continuity between Statute of Anne and prior regime), and LYMAN R. PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* (1968) (viewing Statute of Anne as a trade regulation device designed to restore order to the book trade);

9. See, e.g., Laura Moscati, *Lo Statuto di Anna e le origini del copyright*, in FIDES HUMANITAS IUS. STUDI IN ONORE DI LUIGI LABRUNA, VI 3671-3688 (2007) (tracing history of author-orientation of Statute of Anne but also emphasizing the Statute's aim to restrain the power of the Stationers Company). Cf. BRAD SHERMAN & LIONEL BENTLY, *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE, 1760-1911*, at ch. 10 (1999) (criticizing the tendency to attribute the "origin" of modern copyright to the Statute of Anne, and preferring to identify the emergence of copyright as part of "modern" intellectual property law in the mid-nineteenth century).

10. Statute of Anne, 1710, 8 Ann., c. 19, § 1 (G.B.).

to grant rights anew from a stronger bargaining position should her work have earned a substantial audience. By focusing on the “encouragement of learned men to . . . write useful books”¹¹ and vesting the “copies” in them, the Statute of Anne shifted the law’s emphasis toward authorship, but in this the law did not entirely innovate: even under the prior regime authors occasionally obtained privileges (which they subsequently transferred to booksellers).¹² By contrast, the Statute broke new ground when it not only gave the author the rights at the outset, but also (providing she survived) “return[ed]” them to her for a second time.

This study of author’s reversion rights begins with the Statute of Anne and the debates that led up to the adoption of section 11. It then will address the impact of the author’s reversion right on publishing practice and authors’ welfare in the United Kingdom through the eighteenth century to the demise of the reversion right in 1814.¹³ We will suggest that the apparent lack of use of the reversion right by authors in the eighteenth century was a result of a host of factors, including but not limited to the common (but by no means universal) contractual practice which purported to confer on a publisher the entirety of an author’s rights. In addition, we call attention to the multiple and shifting interpretations of what was required by section 11, as well as the social and economic limitations on an author’s capacity to take advantage of the reversion. The second half of this study turns to the law and publishing practices in the United States, where reversion rights have proved more enduring if not always more beneficial to authors.

I. THE REVERSION RIGHT IN BRITAIN FROM 1710 TO 1814

A. STATUTE OF ANNE: ORIGINS OF SECTION 11

As is clear now from the many treatments of the subject, relatively little specific detail is known about the passage of the Statute of Anne itself,¹⁴ let alone the circumstances in which section 11 was enacted.¹⁵ In part, this is because the matter of the regulation of the book trade was not considered one of great public interest. It is also because parliamentary debates were not reported systematically until late in the eighteenth century – indeed reporting was a

11. *Id.*

12. See, e.g., SAMUEL DANIEL, THE COLLECTION OF THE HISTORIE OF ENGLAND (1618), available at PSOC, *supra* note 3, http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22uk_1618%22; MARJORIE PLANT, THE ENGLISH BOOK TRADE: AN ECONOMIC HISTORY OF THE MAKING AND SALE OF BOOKS 109 (1939) (giving examples of a 1589 patent to Dr. Bright for works in shorthand and such other works as he might compile, and a 1592 grant to John Norden for *Speculum Britanniae*).

13. Parliament reinstated a reversion right in the 1911 Imperial Copyright Act, but the history of that reversion and its adoption in the countries of the British Empire is beyond the scope of this study.

14. RANSOM, *supra* note 8, at ch. 7; MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 42-48 (1993); John Feather, *The Book Trade in Politics: The Making of the Copyright Act of 1710*, in PUBLISHING HISTORY 8, 19-44 (1980).

15. Patterson, for example, merely cites section 11 and then proceeds to argue that the Statute was a “trade regulation statute.” PATTERSON, *supra* note 8, at 146. John Feather takes this argument further asserting that the Act “says nothing and implies little about the rights of authors,” characterizing section 11 merely as providing for an extension of term on re-registration. FEATHER, *supra* note 8, at 5, 62, 70. In fact, there is nothing in the section about re-registration.

matter of “parliamentary privilege” and therefore required prior authorization.¹⁶ Thus we are left to work from the skeletal offerings of the *Journals of the Lords and Commons*,¹⁷ as well as some surviving bills, tracts,¹⁸ and commentaries,¹⁹ particularly those of the writer and keen supporter of the Bill, Daniel Defoe.²⁰

The introduction of the 1710 Bill followed a petition to the House of Commons in December 1709 by a group of booksellers, headed by Henry Mortlock, and the case was backed up with a further petition to Parliament the following February from printers and bookbinders.²¹ The Bill, the preparation of which was entrusted to Edward Wortley, Samuel Compton and Craven P(e)yton, was introduced into the Commons in January 1709/10.²² At this stage, the Bill did not contain any clause similar in nature to section 11 – in fact, it contained no clause at all relating to term.²³ Prepared with the interests of the major booksellers in mind, the Bill offered perpetual protection. But this was not acceptable to either of the Houses of Parliament.²⁴ Consequently, during passage through the Commons – probably at the Committee stage, which Compton chaired – the broad assertion of a perpetual property was replaced with a fixed term: in the case of extant works of twenty-one years, and for those created after the Act would come into force a period of only fourteen

16. For an overview, see Jason Peacey, *The Print Culture of Parliament, 1600-1800*, 26 PARLIAMENTARY HIST. 1, 1-16 (2007). For an example of publication authorized by Parliament, see Tomas Gomez-Arestogui on *Tonson v. Baker* in this issue. BTLJ to supply appropriate cross-reference in production phase.

17. 16 H.C. JOUR. (Jan. 11, 1709/10) 260 (First Reading), (Feb. 9, 1709/10) 300 (Second Reading), (Feb. 21, 1709/10) 332 (Committee); 19 H.L. JOUR. (Mar. 16, 1709/10) 109, (Mar. 24, 1709/10) 123, (Mar. 30, 1710) 134, (Apr. 3, 1710) 138-39, (Apr. 4, 1710) 140-41.

18. See, e.g., JOHN HOW, SOME THOUGHTS ON THE PRESENT STATE OF PRINTING AND BOOKSELLING (London 1709) (proposing protection of booksellers based on registration, though he also proposed protection for prints, maps, charts, pictures and sculptures).

19. 2 LUCUBRATIONS OF ISAAC BICKERSTAFF, Nov 29, 1709, at 264 (complaining about “pirates” and the affect on authors’ remuneration, noting that he himself could obtain more from “palmistry and astrology” than from writing); TATLER, Dec 1709. The passage of the Act is reported in the *London Gazette*, Tuesday, April 4, 1710 and an abridged version was included in the issue for May 2, 1710.

20. See the articles in *Review of the State of the British Nation*, December 6, 1709, Thursday, February 2, 1710 (praising the proposed law to prevent “barbarity and piracy” and famously describing the book as “the author’s property, ‘tis the child of his inventions, the brat of his brain”), Saturday, February 11, 1710 (reviewing criticisms of the bill that it would raise the price of books), and February 18, 1710; On Defoe, see MAXIMILLIAN E. NOVAK, DANIEL DEFOE: MASTER OF FICCTIONS 278 (2001) (“one of the Act’s most enthusiastic supporters”); See generally RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH-CENTURY BRITAIN (1695-1775), at ch. 2 (2004) (discussing Defoe’s writings on literary piracy).

21. FEATHER, *supra* note 8, at 60.

22. Prior to the 1760s, the calendar year formally began on Lady Day, March 26. So, formally December 1709 was followed by January, February and March 1709, and April 1710. However, it was also common to refer to the first three months of the year by a joint reference, and it is that convention that we follow here. In today’s terms, therefore, the Bill was introduced in January 1710. A copy of the Bill is held at Lincoln’s Inn Library. See Bodleian Library Manuscript, Bodleian MS Rawl D.922. fols. 380-386.

23. A Bill for the Encouragement of Learning, and for the Securing the Property of Copies of Books to the Rightful Owners Thereof, available at PSOC, *supra* note 3, http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22uk_1710a%22. In December 1709, Daniel Defoe had proposed an Act with only two clauses, the effect of which would also have been to create a perpetual right. See DEAZLEY, *supra* note 20, at 35-36.

24. 16 H.C. JOUR. (1709/10) 260 (First Reading).

years.²⁵ When the Bill went to the Lords, a second term of fourteen years was added,²⁶ in what the literary historian Harry Ransom referred to as “perhaps the most significant amendment.”²⁷ Who proposed the amendment is unknown.²⁸ In the manuscript version of the Act, section 11 is physically “tacked on” to the Bill.²⁹

1. *The purpose of the contingent reversion*

What was the purpose of the clause? Why have two terms of fourteen years rather than a single term of twenty-eight years (as would be adopted, fifty-seven years later, for engravings)? Various possible explanations have been suggested by modern commentators.³⁰ Frank Curtis speculates that the term “return” was intended to mean “recur” and that “the failure to mention assigns in the second-term proviso was an inadvertent lapse by the Lords in amending the basic legislation drafted by the Commons.”³¹ For Curtis, the clause was not meant to protect the author from his assignee, but merely to confer a second term, should he be living, at the end of the first term.³² But why, then, have two periods? Curtis sees this as a reflection of a desire to ground the right in the act of composing the work: the term was only to be extended “if the source of such rights and the primary beneficiary of Parliament’s largesse” was still alive.³³ While Curtis may be right to see the framing of the clause as consistent with the framework that Parliament had adopted, it would have been equally consistent to simply extend the term from fourteen to twenty-eight years, the author being the source of those rights.

Mark Rose has argued that the bifurcated term reflected the perceived need to align the term of protection with that in the Statute of Monopolies, which was the source of the fourteen-year limit in the first place. This 1624 law limited the powers of the Crown to grant monopolies, but created an exception relating to any “manner of new manufacture” as long as the monopoly did not exceed a specified limited term: twenty-one years for extant grants; fourteen years for future grants.³⁴ When the Commons looked for a suitable period to which

25. 16 H.C. JOUR. (1709/10) 332 (Committee).

26. 19 H.L. JOUR. (1710) 140-41 .

27. RANSOM, *supra* note 8, at 96; ROSE, *supra* note 14, at 46-47.

28. W. Cornish, *The Statute of Anne 1709-10: Its Historical Setting*, in GLOBAL COPYRIGHT: THREE HUNDRED YEARS SINCE THE STATUTE OF ANNE, FROM 1709 TO CYBERSPACE 22 (L. Bently, U. Suthersanen & P. Torremans eds., forthcoming 2010) (“How exactly this provision found its way into the Act is far from clear . . .”).

29. PSOC, *supra* note 3.

30. Frank R. Curtis, *Protecting Authors in Copyright Transfers: Revision Bill § 203 and the Alternatives*, 72 COLUM. L. REV. 799, 802 (1972) (“The meagre legislative history of the Statute does not reveal why the Lords added a separate second term instead of simply lengthening the original term.”).

31. *Id.* at 803. Some support for this interpretation can be found in the decision of Yates, J., in *Millar v. Taylor*, (1769) 98 Eng. Rep. 201, where the term “recur” is used to describe the effect of the section.

32. To similar effect, see FEATHER, *supra* note 8, at 5, 62, 70; John Draper, *Queen Anne’s Act: A Note on English Copyright*, 36 MODERN LANGUAGE NOTES 146, 147 (1921) (“The copyright was vested in the author or his assigns for fourteen years with the right of extension to twenty eight.”).

33. Curtis, *supra* note 30, at 802 (“In weighing the need for protection against the costs of the copyright monopoly, the Lords evidently concluded that a further period of protection was needed, but only if the source of such rights and the primary beneficiary of Parliamentary largesse – the author himself – were still alive.”)

34. Statute of Monopolies, 1624, 21 Jac., c.3 (Eng.). See, e.g., CHRISTINE MACLEOD, *INVENTING THE INDUSTRIAL REVOLUTION: THE ENGLISH PATENT SYSTEM, 1660-1800*, at 15 (1988) (discussing Statute of Monopolies).

to limit the rights of authors, the Statute of Monopolies was an obvious model to which to turn.³⁵ When the Lords wanted to lengthen the term, Rose argues “they were reluctant in the light of the Jacobean Statute of Monopolies’ provision against any monopoly terms longer than fourteen years simply to declare a longer term.”³⁶

Although there is a startling parallel between the terms in the Statute of Monopolies and those of the Statute of Anne, what is less clear is what we can infer from this about the Lords’ extension. Were the two terms of fourteen years chosen to pay lip-service to the established model, or chosen because it was believed to be problematic to confer a longer term? There seems to be a number of problems with Rose’s analysis. First, the regulation of the book trade, even via printing patents, had been exempted from the Statute of Monopolies.³⁷ Even had the legislators conceived of the Statute of Anne as conferring a “standing patent for authors,” as Lord Chancellor Hardwicke would later put it,³⁸ this was a “standing patent” over printing and reprinting particular books and technically would have fallen outside the Statute of Monopolies. Second, the Statute of Monopolies was just that – a statute – and could have been repealed, implicitly or explicitly, by a later statute, such as the Statute of Anne, with respect to its application to monopolies over particular books. The 1624 Act did not create some sort of constitutional norm. Almost two hundred years later, in 1814,³⁹ when the statutory term of copyright was extended to twenty-eight years, or, if the author survived, for his or her life, not a single person raised the question of compatibility with the 1624 statute.⁴⁰ Third, the legislature clearly regarded it as open to grant longer terms, as it did on a number of occasions in relation to mechanical inventions.⁴¹ The Statute of Monopolies may have been a precedent from which the Commons were working in 1710, but it was certainly not a straitjacket.

Rose also acknowledges that the Lords’ amendment might have been influenced by the philosopher John Locke’s “suggestion that, after first publication, the right to reprint should revert to the author.”⁴² Rose here relies on Raymond Astbury,⁴³ who claims that Locke

35. ROSE, *supra* note 14, at 45.

36. *Id.* at 47. See also DAVID FOXON, POPE AND THE EARLY EIGHTEENTH-CENTURY BOOK TRADE 238 (1991) (“the [Statute of Monopolies] must have provided the framework of regulation underlying the 1709/10 Act”).

37. Statute of Monopolies, 1624, 21 Jac., c. 3, § 10 (Eng.).

38. See *Millar v. Taylor* (1769) 98 Eng. Rep. 211 (reporting Lord Hardwicke’s characterization). See also DANIEL DEFOE, AN ESSAY ON THE REGULATION OF THE PRESS 21 (London 1704) (“The Clause in the Law is a Patent to the Author . . .”).

39. 54 Geo 3, c. 156, § 4 (G.B.). See also INFORMATION FOR ALEXANDER DONALDSON AND JOHN WOOD 58 (1773), available at PSOC, *supra* note 3, http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22uk_1773b%22 (“a standing universal patent”).

40. Nor indeed did anyone raise this issue in 1767 when the term of copyright for engravers was made 28 years. See 7 Geo. 3, c. 38 (G.B.).

41. *E.g.*, Act for the Encouragement of a New Invention by Thomas Savery for Raising Water and Occasioning Motion to All Sortes of Mill Worke by the Impellant Force of Fire, 1699, 10 Will. 31. (Eng.) (extending standard 14 year patent, No 356 of July 5, 1698, by a further 21 years). See also James Watt’s Fire Engines Patent Act, 1775, 15 Geo. 3, c. 61 (Eng.), the lobbying for which is carefully analyzed in Eric Robinson, *Matthew Boulton and the Art of Parliamentary Lobbying*, 7 HIST. J. 209 (1964).

42. ROSE, *supra* note 14, at 45-46.

43. Raymond Astbury, *The Renewal of the Licensing Act in 1693 and Its Lapse in 1695*, 33 LIBR. 296, 313 (1978) (citing a letter from Locke to Freke dated Mar. 18 1695). The letter is available at Bodleian MS Locke b. 4, fol. 78.

suggested during a discussion in 1695 of the proposed legislation that would replace the Licensing Act in 1695, that authors should have the sole right to reprint a work “for a certain number of years after the publication of the first edition.” Astbury argues that this idea “anticipated the terms” of the Statute of Anne. However, a closer look at Locke’s text suggests that Astbury, and, in turn, Rose may be making too much of this. Locke wrote:

And be it farther enacted that noe book[s] pamphlet[s] pourtraiture or paper printed with the name of the Author or publisher upon it shall within ___ years after its first edition be reprinted with or without the name of the Author to it without Authority given in writeing by the Author or Somebody intituled by him, for soe doeing under the penalty of the forfeiture of all that shall be soe reprinted to the Author his Executors Administrators or Assignes.⁴⁴

Even if we assume that Locke’s manuscript comments circulated widely enough to have influenced the formulation of the Statute of Anne,⁴⁵ it is by no means obvious that Locke was proposing a *reversion* to the author here. The proposal envisages consent to reprinting being given not only by the author but by “somebody intituled,” and the benefit of the remedy is conferred not just on the author but also his or her “Assignes.” Moreover the consent is only required if the proposal is to reprint the work *within* a period of time. Even if understood as empowering the author, the author is given that power only *for* a limited number of years, rather than, as with the reversion, *after* a given number of years.

Whatever the source of the author-centric orientation of section 11, the text of the Statute supports the inference that the purpose of the additional contingent term was to assist authors. Were the objective otherwise, for example to prolong the printer’s monopoly, there would be no point dividing the “sole right” into two periods, nor tying the second to the author’s survival, much less designating the author as the person to whom the exclusive right shall “return.” Both Harry Ransom and the copyright historian Ronan Deazley agree that the provision was, in fact, designed to benefit the author.⁴⁶ Harry Ransom, writing in 1957, referred to section 11 as

part of a systematic attempt in Parliament to further the interest of the writer as distinguished from that of the bookseller Fourteen years would demonstrate the value of a book. If it failed, the author could either improve its usefulness by revision or quietly forget it. If its value had grown meanwhile, the author could sell the copyright a second time.⁴⁷

44. 5 THE CORRESPONDENCE OF JOHN LOCKE 795 (Esmond Samuel de Beer ed., 1976-1989) [hereinafter CORRESPONDENCE OF LOCKE] (transcribing John Locke, Printing 94/5: Amendments to the Draft Bill (Mar. 18, 1695)) (unpublished manuscript) (the original of which is held at the Bodleian Library in Oxford, Bodleian MS Locke b. 4, fol. 78).

45. Clearly, Locke’s now famous proposal on term (“for those who purchase copies from the Author that now live and write it may be reasonable to limit their property to a certain number of years after the death of the Author or the first printing of the book as suppose 50 or 70 years”) was not so influential. See John Locke, Printing 94: Criticisms of the Licensing Act of 1662 (Dec. 1694) (unpublished manuscript) (held at the Bodleian Library, Oxford, MS Locke b. 4, fol. 75-6, *transcribed in* 5 CORRESPONDENCE OF LOCKE, *supra* note 44, at 785-91.

46. DEAZLEY, *supra* note 20, at 43; Deazley, *supra* note 7. Cf. Zechariah Chafee, Jr., *Reflections on Copyright Law: II*, 45 COLUM. L. REV. 719, 722 (1945) (“It could not have been the object of the Statute of Anne, because the renewal privilege there belongs to the *owner* of the copyright who was almost always a bookseller.”).

47. RANSOM, *supra* note 8, at 97, 104.

Deazley is in accord:

Had [the Lords] simply chosen to introduce a longer term, this would, in practice, have meant control of the work remaining with the [owner of the book, who would more than likely be a bookseller]. Rather, the use of the divided term, albeit reminiscent of the earlier statute, was designed to ensure that the control of the work would in fact return to the author if still alive. Given that this was the only section within the final Act to make reference solely to the author, it seems likely that the [Lords fully] intended to benefit the author and only the author.⁴⁸

This understanding that section 11 was intended to protect writers is also consistent with what we know about the extra-parliamentary attitudes and behaviour of some of those involved in the Lords' amendments. For example, the President of the Council, Baron John Somers, who was also in the Lords Committee charged with the Bill,⁴⁹ was described by writer Jonathan Swift as "a great Patron of Learning."⁵⁰ Indeed, many writers during this period dedicated their works to him, including Swift himself. The dedication in Swift's *Tale of a Tub*, for example, was that he would not "desire any other Help, to grow an Alderman, than a Patent for the sole Privilege of dedicating to your Lordship."⁵¹ It seems plausible, then, that Somers might well have been involved in the addition of section 11 to the Bill.

One contemporary account, at least, supports the Deazley-Ransom interpretation.⁵² In the issue dated February 11, 1710,⁵³ the journal *The Observer* discussed a proposal to protect authors through the journalistic device of a dialogue between the "Observator" and his "Countryman," Roger. The Countryman referred to a suggested amendment of the Bill (then in the Commons), "which is design'd as a Kindness to us Authors," namely

That the Bookseller shall have a Property in the Copy only for a limited Time, after which it shall revert to the Author or his Assignees. This they say will be an Encouragement to Learning, and a Security to Authors against being ill treated or impos'd upon by Booksellers, who run away with the Profits of their Labours . . . ; so that Authors not being able to foresee this, because Copies are like Ships put to Sea, whose prosperous or unfortunate Voyage is not to be foreseen, they have nothing more than their first Copy-Money, let the Book sell ever so well.⁵⁴

The "Observator" responded by criticizing this well-meaning proposal, predicting that it would in fact be "detrimental to [authors]."⁵⁵ It argued that the bookseller, given such a limited right, would offer less to authors, and, if the book proved successful the bookseller

48. DEAZLEY, *supra* note 20, at 43.

49. 19 H.L. JOUR. (1710) 138.

50. WILLIAM L. SACHSE, LORD SOMERS: A POLITICAL PORTRAIT 198 (1975).

51. For a discussion of Somers literary connections, see SACHSE, *supra* note 50, at ch. 10.

52. Although Deazley does not refer to these, it was he who first drew our attention to them. See Ronan Deazley, *What's New About the Statute of Anne? Or Six Observations in Search of an Act*, in GLOBAL COPYRIGHT, *supra* note 28, at 46-47.

53. OBSERVATOR (LONDON), Feb. 11, 1710 (accessible electronically via 17TH AND 18TH CENTURY BURNEY COLLECTION NEWSPAPERS). In an earlier issue, *The Observer* indicated its support for statutory protection of books. *Id.* Wednesday, February 1, 1710 (approving the Bill and describing piracy as "as unjust robbing on the High-way, or breaking up our Houses, and carrying off our Goods and Provisions, that should accommodate and maintain us and our Families.>"). OBSERVATOR (LONDON), Feb. 1, 1710.

54. OBSERVATOR (LONDON), Feb. 11, 1710.

55. *Id.*

would “print so many before his Time expire, as will make the [r]everision of little or any Profit to the Author or his Assignees.”⁵⁶ In any case, the *Observer* argued that it was open to authors who wished to achieve the same effect, to restrict the sale of the copyright or “agreeing for so much for every future impression.”⁵⁷

These discussions preceded, and clearly foreshadowed, the Lords’ amendment, effected in early April 1710, that became section 11. The significance of the comments in *The Observer* lies in the fact that they indicate that the idea of a provision protecting authors was already in circulation, and that providing for “reversion” was one way of achieving this end.

2. *Why a reversion right rather than regulation of author-publisher contracts?*

An alternative strategy which the Lords could have taken would have been to amend the Bill to extend the copyright term to twenty-eight years, while protecting the author by providing that no assignment that purported to transfer such a right would be effective in so far as the term of the contract exceeded fourteen years. Contractual limitations were known in English law, both at common law and under statute. The formalities for entering certain contracts, for example those relating to the sale of land, were regulated by the Statute of Frauds,⁵⁸ and a contract that failed to comply with the standards it set were treated as void or unenforceable.⁵⁹ Similarly, the terms of certain contracts were controlled by laws setting prices of bread,⁶⁰ wages,⁶¹ and limits on interest.⁶² Moreover, courts of equity would intervene to protect borrowers from onerous terms in mortgages,⁶³ while courts of law held

56. *Id.*

57. *Id.*

58. An Act for the Prevention of Frauds and Perjuries, 1677, 29 Car. 2, c. 3 (Eng.). Rather like the Statute of Anne, there has been much debate over the proper dating of the Statute of Frauds. See G.P. Costigan, *The Date and Authorship of the Statute of Frauds*, 26 HARV. L. REV. 329 (1913).

59. The original purpose of the statute was to provide evidence of contracts and to reduce the temptations of perjury. See, e.g., G.H.L. Fridman, *The Necessity for Writing in Contracts Within the Statute of Frauds*, 35 U. TORONTO L.J. 43 (1985); Lionel Summers, *The Doctrine of Equitable Estoppel Applied to the Statute of Frauds*, 79 U. PA. L. REV. 440 (1931).

60. An Act to Regulate the Price and Assize of Bread, 1710, 8 Ann., c. 18 (G.B.) (the Act directly preceding the Statute of Anne in the statute book); 1714, 1 Geo., c. 26 (G.B.) (continuing and modifying the rules on the pricing of bread). The assize of bread was abolished in London in 1815, and nationwide in 1836. For background and commentary, see Sidney Webb & Beatrice Webb, *The Assize of Bread*, 14 ECON. J. 196 (1904).

61. Statute of Artificers, 1563, 5 Eliz., c. 4 (Eng.). Act for Regulating Journeymen Tailors, 1720, 7 Geo., c. 13 (Eng.) (setting hours of work and wages of tailors). See also R. KEITH KELSALL, WAGE REGULATION UNDER THE STATUTE OF ARTIFICERS (1938) (describing wage regulation primarily through setting maximum wage); R. Keith Kelsall, *A Century of Wage-Assessment in Herefordshire*, 57 ENG. HIST. REV. 115 (1942); MASTERS, SERVANTS AND MAGISTRATES IN BRITAIN AND THE EMPIRE, 1562-1955 81 (Douglas Hay & Paul Craven eds., 2004) (wage regulation continued in many parts of the country until the middle decades of the eighteenth century).

62. An Act to Reduce the Rate of Interest Without Any Prejudice to Parliamentary Securities, 1713, 13 Ann., c. 15 (G.B.) (setting permitted interest rate at 5%. Any claim above this rendered the contract void and would have rendered the lender vulnerable to a penalty of three times the value of the loan). The usury laws were not repealed until 1854 (1854) 17 & 18 Vic. c. 90 (G.B.), though various legal devices had long been deployed to avoid their impact). Coincidentally, the 1713 Act was sometimes referred to as “the Statute of Anne.” See e.g. M. M. Long, “Trends in Usury Legislation – Current Interest Overdue,” 34 U. MIAMI L. R. 326, 327.

63. Bruce Wyman, *The Clog on the Equity of Redemption*, 21 HARV. L. REV. 459 (1908) (describing Equity’s recognition of a right to redeem a mortgage as having emerged in the seventeenth century and calling it a

void and unenforceable agreements in restraint of trade.⁶⁴ Indeed the Statute of Anne itself limited the ability of the author or proprietor to grant licences to reprint the book by requiring the author or proprietor's consent in writing signed by two witnesses, and by containing "price control" provisions.⁶⁵ In short, as of 1710, there was no ideological reason preventing Parliament, had it desired to do so, from protecting writers by interfering with their contracts with publishers. In fact, twenty-seven years later, a Bill was circulated which proposed that no assignment of copyright should be valid in so far as it purported to last for more than ten years.⁶⁶ Although the Bill was not passed, its circulation indicates that regulation of contractual terms was considered a plausible legislative response to the informational asymmetries and differences in bargaining power that informed author-publisher relations. And, if regulation of contracting was a plausible strategy, why did the House of Lords choose not to limit the term of the contract to protect the author rather than creating a second reversionary term? Why did they choose a "proprietary" technique rather than a "contractual" one?

One explanation might be that at the time the Act was being passed the potential object of regulation, that is, "publishing agreements" between authors and publishers, was not a sufficiently stable category of business relations to make such regulation readily conceivable.

"violent . . . interference with the rights of parties to a mortgage to agree as they please"). For a recent assessment of English law, see M.P. Thompson, *Do We Really Need Clogs?*, 65 CONVEYANCER 502 (2001).

64. In fact, a key development in the doctrine of restraint of trade occurred only a year after the enactment of the Statute of Anne. In *Mitchel v. Reynolds*, Lord Macclesfield introduced the distinction between general restraints and partial (or geographically restricted) restraints, the former being automatically void, whereas the latter were valid if reasonable. *Mitchel v. Reynolds*, (1711) 24 Eng. Rep. 347. See, e.g., JOHN DYSON HEYDON, *THE RESTRAINT OF TRADE DOCTRINE* 1-36 (1971); MICHAEL J. TREBILCOCK, *THE COMMON LAW OF RESTRAINT OF TRADE* 9-16 (1986); Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 629-46 (1960).

65. 1710, 8 Ann., c. 19, § 1 (G.B.) ("without the consent of the proprietor or proprietors thereof first had and obtained in writing signed in the presence of two or more credible witnesses").

66. An Act for the Encouragement of Learning (Draft) 9 (1737), available at PSOC, *supra* note 3, http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22uk_1737b%22:

And forasmuch as the true Worth of Books and Writings is, in many Cases, not found out [until] a considerable Time after the Publication thereof, and Authors, who are in Necessity, may often be tempted absolutely to sell and alienate the Right, which they will hereby have to the original Copies of the Books which they have composed, before the Value thereof is known, and may there[fore] put it out of their Power to alter and correct their Compositions, upon maturer Judgment and Reflection; Therefore, be it enacted by the Authority aforesaid, That from and after the said Twenty fourth Day of Junne, One thousand, seven hundred and thirty seven, no author shall have power to sell, alienate, assign, or transfer, except by his last Will and Testament, the Right hereby vested in him to the original Copy of any Book, Pamphlet, or Writing, to any Person or Persons whatsoever, for any longer Time than Ten Years, to commence from the Date of such Sale, Alienation, Assignment, or Transfer; and all Sales, Alienations, Transfers, Assignments, and all Covenants for any Sale, Alienation, Assignment or Transfer, for any longer Time, or to commence from any future Date, and all Bargains and Covenants for Renewal of the same, before the first Term is expired, shall be utterly void and of none effect.

The Bill is discussed by Ronan Deazley, *Commentary on the Booksellers' Bill (1737)*, available at PSOC, *supra* note 3, esp. at n.59 (speculating about the possibility that the revolutionary 10 year term was Swift's suggestion). See also James McLaverty, *Pope and Copyright*, in FOXON, *supra* note 36, at 245, 245.

Although we know that authors did enter into arrangements with publishers transferring “copies” before 1710,⁶⁷ the exact legal basis for such contracts was unclear. Indeed, the Stationers’ supposed “rights” in copies were in large part founded on entry in the Stationers’ Company’s register, rather than on consensual derivation of the copy from the author.⁶⁸ It was only as a consequence of the Statute of Anne that the foundation of the publishers’ properties was clarified, for future works, as authorship (i.e. composition of the text, rather than mere possession of the manuscript).⁶⁹ Consequently, the idea of regulating contracts between authors and publishers would not have suggested itself to the legislature in 1710 before the Statute of Anne because it was only as a consequence of the Statute that publishing contracts became *legally* necessary. Indeed, it is interesting to observe that the Statute contained a provision regulating the granting of consent to print and publish a work, but made no specific provision for transfer or assignment of the statutory right itself. In short, the Statute of Anne was primarily concerned with establishing and securing a “property,” and thus was a logical precursor to “contract.” Author-protective sentiments thus found expression more easily through the grant of additional, contingent, proprietary rights, rather than through controlling contract terms.

Two more mundane (but perhaps more persuasive) explanations can be suggested for the preference of a reversionary term over the regulation of contracts. First, the idea of a reversionary term was already circulating and thus readily available to legislature seeking to offer additional protection to writers. Certainly, the limited evidence that survives does not suggest that the idea of contractual limitations had been raised, whereas the idea of the second reversionary term was had been discussed publicly in *The Observer* while the Bill was moving through the Commons.⁷⁰ Secondly, a reversionary term could be easily incorporated within the structure of the Bill that had passed through the Commons; modifying the Bill by adding a contingent reversion was in fact achieved, as we have seen, by way of a simple proviso. In contrast, adding provisions regulating contractual assignments would likely have required considerable restructuring; after all, the Bill did not even address the question of formalities necessary to transfer copies. The property approach, then, interfered less with the Bill that had been passed through the Commons than a contractual one would have. In light of the fact that the consideration of the Bill in the Lords came very close to the end of the

67. See *supra* notes 6, 7 & 8.

68. MARJORIE PLANT, *THE ENGLISH BOOK TRADE: AN ECONOMIC HISTORY OF THE MAKING AND SALE OF BOOKS* 117 (2d ed. 1965); Astbury, *supra* note 43, at 297. But see Lindenbaum, *Brabazon Aylmer*, *supra* note 3, at 255-56 (deducing from a surviving document under which the publisher Joseph Watts paid John Milton’s widow, Elizabeth, for permission to republish Milton’s works, that mere entry in the register book could not have been regarded as sufficiently to secure the rights in a work).

69. Cf. PATTERSON, *supra* note 8, at 69-70 (claiming stationers recognized rights of authors in manuscript).

70. Of course, this begs the question why contemporaries had only developed “proprietary” rather than “contractual” solutions to the problem of providing authorial protection. It may be that the emphasis on the effects of piracy on the welfare of authors and their families, evident in the petitions that preceded the legislation, made various devices for protecting landed families from creditors more obvious models than the laws that regulated the prices of bread, wages or interest rates. For discussion of such family-protecting rules, see Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385 (2006).

session,⁷¹ the ready availability and ease of incorporation of such a provision may have taken on particular importance.

B. IMPACT OF SECTION 11 ON AUTHORS AND BOOKSELLERS

If the 1710 Act was, as the evidence suggests, intended as an author protective measure, what was its impact? Did publishers, as *The Observer* predicted, merely attempt to get around the restriction? Were assignments couched to assign the second term? Were they effective in achieving that result? If not, were writers able to take advantage of the additional bargaining power offered by the reversion? Were authors able to negotiate improved deals with their existing publisher or offer their works to other publishers on more favourable terms?

The conventional wisdom is that the reversion right was ineffective to secure additional rewards to writers (and composers) because the dominant practice was the ritual assignment to publishers of copyright in perpetuity and for a single lump sum. Book historian Harry Ransom, for example, wrote that “[t]he true intention of this proviso was ignored from the start: authors continued to sell their books outright.”⁷² Additionally, music historian Nancy Mace argues that the booksellers (and music-sellers, with whom she is primarily concerned) invariably took assignments and assumed these applied to both the initial term and the reversionary period.⁷³ Legal historians Bill Cornish and Ronan Deazley also reiterate this orthodox view that writers assigned the reversionary term when they agreed to publish lost any power to renegotiate in the event of a work selling well and received no additional remuneration beyond the lump sum paid by the bookseller for the right to publish the work.⁷⁴

While the conventional wisdom that writers and composers did not benefit substantially from the introduction of the reversion right is probably correct, the mechanisms by which the intent of the reversionary term was nullified are much more complex than the conventional account supposes. In the first place, one may doubt the claim that all writers ritually assigned copyright in perpetuity. The historical archive, which comprises a substantial body of post-1710 author-publisher documents, reveals a much more diverse set of

71. The Parliamentary session ended on April 5, 1710. The Bill was brought up from the Commons and given its first reading in the Lords on March 16, 1709/10, receiving its second reading on March 24. The Report from the Committee, proposing amendments, took place on April 4, 1710, the day before the session came to an end. On the final day of the session, the House of Commons had to decide whether to accept the Lords’ amendments. It did so with one exception: the Lords had proposed to remove the provision regulating book prices, and the Commons regarded this as important. In order to reach an agreement a committee was formed to draw up an explanation for the disagreement, and this was conveyed to the House of Lords. In turn, it was reported that “[t]he Lords do not insist upon their Amendment.” See 19 H.L. JOUR. (Mar. 16, 1709/10) 109, (Mar. 24, 1709) 123, (Apr. 4, 1710) 140 16 H.C. JOUR. (Apr. 5, 1710) 394-96.

72. RANSOM, *supra* note 8, at 104. See also Griffin, *supra* note 3, at 134 (“as any careful historian of copyright observes, eighteenth-century authors almost always immediately sold their owner’s right to a bookseller”).

73. Nancy Mace, *Charles Rennett and the London Music Sellers in the 1780s: Testing the Ownership of Reversionary Copyright*, 129 J. ROYAL MUSICAL ASS’N 1, 2 (2004).

74. Cornish, *supra* note 28, at 22 (“initial contracts between author and entrepreneur tended expressly to include a grant of rights for both periods”); Deazley, *supra* note 52, at 48 (“For the most part, however, booksellers would simply purchase an author’s copyright outright, including the author’s reversionary interest set out within s.11 of the Statute of Anne.”).

practices.⁷⁵ Secondly, even if such assignments dominated, the effect of such assignments on the reversionary term depended on how the legal operation of that reversion was understood. More specifically, the effect of such assignments depended on whether the law regarded the reversionary term to be assignable, and, if so, by what mechanisms. Prior to the decision in *Millar & Dodsley v. Taylor* in 1765, and even perhaps right through to the 1780s, this was a matter of legal speculation.⁷⁶ After 1785, and the decisions in *Rennett v. Thomson*, *Rennett v. Longman* and *Carnan v. Bowles*,⁷⁷ it seems, the better view was that the reversionary term could be assigned by express terms only.⁷⁸ In light of this, we can safely say that only some – certainly not all – of the surviving author-publisher documents would have been effective in transferring the reversion.⁷⁹

The conclusion that not all documents would have been regarded as effective to transfer copyright, however, leads us to the third component of this complex reality: whether writers were conscious of their legal rights, and, if they were, their practical capacity to take advantage of the reversion. The evidence here suggests that, whatever their legal rights may have been, few writers in fact took advantage of their reversionary rights.⁸⁰ In part, this can be explained by reference to the fact that few works would have had a substantial market fourteen years after first publication, and, in a good number of those that did attract continued demand, the author may well not have survived the first fourteen year term.⁸¹ But, in the few cases in which the reversion right related to works for which there remained continuing demand, the right would only have had value if a writer were conscious of his or her legal rights and able to interest other publishers in such rights. With regard to consciousness, it seems likely that many writers would have looked to the literal terms of their contracts with publishers for guidance, rather than to the 1710 Act. Consequently, they likely would not have appreciated their legal rights under section 11. Moreover, some writers may have shared the view, widely advocated by publishers after the 1740s, that copyright was really a matter of common law and that it existed in perpetuity, therefore their rights had been assigned effectively in perpetuity as well (whatever the Statute may or may not have said).⁸² Furthermore, particularly after 1774 (when it came to be understood that rights in published works were determined wholly according to the terms of the 1710 Act),⁸³ one may doubt how much scope there might have been for using the reversionary term to negotiate

75. See *infra* Part I.B.1. For similar views, see JAMES RAVEN, *THE BUSINESS OF BOOKS: BOOKSELLERS AND THE ENGLISH BOOK TRADE* 242, 316-17 (2007) (pointing out that there were many cases of author-publication, profit-sharing and single-edition contracts).

76. See *infra* Part I.B.2.b (discussing perceptions prior to the unreported case of *Millar & Dodsley v. Taylor* in 1765 and the uncertain status of that decision).

77. See *infra* Part I.B.2.e.

78. See *infra* Part I.B.2.e (discussing *Carnan v. Bowles*, (1785) 29 Eng. Rep. 45 (Ch.)).

79. See *infra* Part I.B.1.

80. See *infra* Part I.B.2.

81. Some famous examples serve to illustrate the point: James Thomson, author of the poem *Liberty*, published by Andrew Millar in 1735, died in 1748; Henry Fielding, author of *Joseph Andrews* (published in 1742) and *Tom Jones* (published in 1748-49) died in 1754; Oliver Goldsmith, author of *The Vicar of Wakefield*, which was published in 1766 died in 1774; Samuel Johnson, author of *Lives of the Poets*, published between 1779 and 1781 died in 1784.

82. See *infra* Part I.B.2.

83. See *infra* Part I.B.2.d.

better terms, either with the existing publisher or a new publisher. Some writers would likely have been bound to their publisher through more than a single deal, and the ability to utilize the reversion to negotiate with other booksellers would have been circumscribed by the realities of a continuing, and frequently positive, relationship.⁸⁴ Even where this was not the case, there is considerable evidence that the book market remained relatively uncompetitive even after the House of Lords decision in 1774 in *Donaldson v. Beckett*⁸⁵ (rejecting the booksellers' claim to a perpetual right at common law) and possibly well into the nineteenth century.⁸⁶ It is unclear what, if any, scope authors would have had in practice to switch publishers, and thus to renegotiate the terms of the original publishing agreement.

1. *Contractual Practice After 1710*

The main assumption that underpins Ransom's claim as to the irrelevance of the reversionary right is that, even after the passage of the Statute of Anne, writers continued to assign all rights in full, and that this practice effectively assigned the reversion.⁸⁷ In this section, we suggest that the evidence indicates that while outright assignments were common, they were by no means the universal practice. Moreover, as it is unclear that such purported assignments would have been regarded as effective to assign the reversion, a closer analysis of contractual practice is warranted.

In order to make any assessment of contractual practice, it is first necessary to say something about the evidence available from which we can work. There is a surprising amount of surviving documentation relating to author-publisher relationships in the eighteenth century. For this study, we have analysed over three hundred British author-publisher documents. The most substantial collection of such documents is *The Upcott Collection*, compiled by William Upcott (1779-1845), an antiquary and autograph collector, and currently held at the British Library. In addition, there are also some collections of documents relating to individual publishers, including eleven contracts with bookseller Robert Dodsley, from 1743 to 1753,⁸⁸ as well as archives, collections of correspondence, and

84. Richard Sher gives many examples of authors who had continuing relationships with specific publishers, and circumstances where publishers would "compensate" authors for bad bargains with additional gratuitous payments or increased payments on later works. SHER, *supra* note 3, at 244-45.

85. *Donaldson v. Beckett*, (1774) 98 Eng. Rep. 257; 17 COBBETT'S PARLIAMENTARY DEBATES 998 ff. (1774) (House of Lords).

86. RAVEN, *supra* note 75, at 232 ("changes before the 1774 pronouncement and continuities after it suggest less a 'watershed' than a point in a much longer and more complex course of development . . . [C]heap reprinting had flourished for several decades . . . and leading booksellers' de facto extended copyright continued as securely as ever . . ."); Michael Suarez, *To What Degree Did the Statute of Anne (8 Anne, c. 19, [1709]) Affect Commercial Practices of the Book Trade in Eighteenth Century England? Some Provisional Answers About Copyright, Chiefly from Bibliography and Book History*, in GLOBAL COPYRIGHT, *supra* note 28, at 60 ("Even after *Donaldson v. Beckett*, the established London trade continued to conduct its business in many of the same ways it had in the 1680s, behaving in 1800 largely as if copyright was perpetual").

87. The limited surviving evidence of contractual practice before 1710 reveals a similar trend.

88. These are contained in the Egerton Manuscripts at the British Library, BL Eg. Mss. 738. See also THE PUBLISHING FAMILY OF RIVINGTON 60-61, 57ff (Septimus Rivington ed., London, Rivington, Percival & Co. 1894); CHARLES WELSH, A BOOKSELLER OF THE LAST CENTURY: BEING SOME ACCOUNT OF THE LIFE OF JOHN NEWBERY, AND OF THE BOOKS HE PUBLISHED, WITH A NOTICE OF THE LATER NEWBERYS 52-53 (Cambridge Univ. Press 2010) (1885).

Other collections, which we have not consulted, or have not consulted systematically, for the purposes of this paper, are (i) the Longman archive, University of Reading, which contains at least two

biographical accounts of individual authors.⁸⁹

Three caveats are worth noting about the usefulness of these sources. First, they tend to relate primarily to the authors who were regarded retrospectively as successful. Secondly, the surviving contracts represent only a limited number of publishers (and the bulk of them come from before 1770). This presents problems particularly in relation to tracking the evolution of contractual practice, because the main sources for particular periods are frequently just one or two publishers. Thirdly, the archives contain a range of author-publisher documents. About two thirds of the surviving documents take the form of receipts, that is, acknowledgments of money received from a publisher. About one quarter of the documents are more formal, purporting to assign copyright from authors, or, in the case of married women, their spouses,⁹⁰ or occasionally descendants,⁹¹ to publishers; while one in twelve documents is an agreement to write, compile or translate a work. The variety of documents makes generalization hazardous. One particular difficulty in having many receipts is inferring whether there would have been a lengthier, more formal contract accompanying such a receipt, or whether these rudimentary written documents operated in lieu of such formal documents. We know that there are cases where both receipts and more formal documentation exist in relation to the same transaction,⁹² but there are good reasons to believe that in many cases (particularly relating to transactions of lower value), the surviving receipts were the only documents. Indeed, some of such receipts specifically provide that further documents will be entered if necessary – implying that the receipt was

contracts (assignment of copyright by Sir James Steuart to Andrew Millar for *Inquiry into Principles of Political Oeconomy*, June 15, 1767, MS 1393/26/2 (d), University of Reading Library; contract between Alexander Adam and Strahan, Cadell, and Creech, June 30, 1794, Ms 1393, 26/8); (ii) the Strahan Archive in the British Library (which contains a contract between Blair and the three publishers Creech, Strahan & Cadell, 1780, in Strahan Archive, BL Add. Mss. 48901, fol. 20); (iii) the archives of George Robinson, publisher, held at Manchester Public Library (on which, see G.E. Bentley, Jr., *Copyright Documents in the George Robinson Archive: William Godwin and Others 1713-1820*, 35 *STUD.* 67, 67-110 (1982)); (iv) the collection of music contracts of the firm in BL Add MS 63814; (v) the Murray Archive in the National Library of Scotland; (vi) the Houghton Library collection at Harvard University; and (vii) the examples in the Osborne manuscripts in the Beinecke Library at Yale. Another source that we have not utilized systematically is surviving court records.

89. Often the archives or originals are in private hands, but printed transcriptions are available. *See, e.g.*, JEAN MARTEILHE, *THE MEMOIRS OF A PROTESTANT CONDEMNED TO THE GALLEYS OF FRANCE FOR HIS RELIGION* xv (Oliver Goldsmith trans., 1895) (receipt for sale from Goldsmith to Edward Dilly, January 11, 1758, relating to translation of the work); JAMES PRIOR, *THE LIFE OF OLIVER GOLDSMITH, M.B. FROM A VARIETY OF ORIGINAL SOURCES* (London, 1837); TOBIAS G. SMOLLETT, *LETTERS OF TOBIAS SMOLLETT* 26, 64-66 (Edward S. Noyes ed., 1926); Receipt for sale of rights from Adam Ferguson to Cadell for Ferguson's *Essay on the History of Civil Society* (Apr. 10, 1767), (on file with Beinecke Library, Yale), *reprinted in* 1 ADAM FERGUSON, *THE CORRESPONDENCE OF ADAM FERGUSON* 71-72 (Vincent Merolle ed., 1995); Memorandum from Adam Ferguson to Strahan, Cadell & Creech (Feb. 28, 1782) (on file with CE French Papers, Massachusetts Historical Society), *reprinted in* 2 FERGUSON, *supra*, at 576.

90. *E.g.*, 2 UPCOTT, *supra* note 5, at [31], [35].

91. *E.g.*, RIVINGTON, *supra* note 88, at 60-61; 1 UPCOTT, *supra* note 5, at [37], [119].

92. Note, for example, the range of documents that survive in relation to Milton's works. For the post 1710 period, see, e.g., the various documents relating to Goldsmith's *Natural History*, including the agreement to write the work, receipts for payments on delivery of various volumes, and an assignment of the copyright, in 2 PRIOR, *supra* note 89, at 200-01 (referring to an agreement dated 29 February 1769 with William Griffin that Goldsmith would write eight volume *Natural History*), 218 (receipt), 340 (referring to assignment as in same terms as contract).

the only document.⁹³ Moreover, in some of the litigation in the 1780s, music publishers seemed to admit that they relied on such receipts to transfer all rights (including the reversionary interest) – importantly, for our purposes, indicating that there frequently would be no other documents evidencing the terms of a transaction.⁹⁴

There are a host of documents that appear to say nothing about copyright at all.⁹⁵ Of the 130 or so documents in volume 1 of *The Upcott Collection*, for example, eighty take the form of receipts. Of these, about fifty specify they are for the “copyright” or “copy” or “property,” but around thirty do not specify that the consideration was paid for the property, as opposed to permission to publish or services provided. Many of the surviving receipts for transactions involving publisher Edmund Curll, for example, say nothing about the “copy.” One signed by Thomas Foxtton, dated January 1, 1725, mentions “being in full for translating *Laus Ululae* or the Praise of Owls,”⁹⁶ while another, three months later, signed by Thomas Cooke, is expressed to be “in full for writing *Mr Marvell’s Life*, procuring some of his letters & publishing his works.”^{97,98} The same is true for a host of the receipts that Oliver Goldsmith signed for his publishers in the 1760s.⁹⁹ Moreover, a number of the contracts in

93. 1 UPCOTT, *supra* note 5, at [32], [110] (stating “I promise to assign the above mentioned copy over to John Watts on Demand,” March 3, 1732 between John Watts and Wm Havard); 2 UPCOTT, *supra* note 5, at [172] (explaining how on June 12, 1723, Thomas Marshall gave receipt to Hook and promised “to sign a Bill of Sale for the same upon demand”).

94. See Answer of Samuel Thompson, Ann Thompson and Peter Thompson, E112/1705/3808 (1785) (which can be found at the National Archive, Kew) (“it has always been the usage and custom in the purchase of such kind of Musical Compositions to take a Receipt from the Author or Composer thereof which was meant or expressed to be in full for the purchase of all the Right Interest and Property whatsoever of such Author or Composer in or to such Work or Composition”). In *Millar v. Taylor*, C33/426, fol. 60r-v (Ch. 1765) (also at the National Archive) the co-plaintiff, James Dodsley, relied on receipts signed by Edward Young to Robert Dodsley from 1743 and 1744 in order substantiate his claim, perhaps suggesting that no other documents existed. There is no suggestion in the summary of the court that a separate assignment had occurred but that the document had not survived.

95. OLIVER GOLDSMITH, *THE COLLECTED LETTERS OF OLIVER GOLDSMITH* 73 & n.3 (Katherine C. Balderston ed., 1928) (referencing a receipt from Goldsmith relating to payment by James Dodsley “for writing and compiling” his *History of England*, August 8, 1764); 1 UPCOTT *supra* note 5, at [52], [56], [102], [103], [121], [196].

96. 1 UPCOTT, *supra* note 5, at [102].

97. 2 UPCOTT, *supra* note 5, at [52]. According to the English Short Title Catalogue, *Laus Ululae* was written by Conradus Goddeus, and the translation by Foxtton appeared in volume 2 of Curll’s *Miscellanea* in 1725. ENGLISH SHORT TITLE CATALOGUE [hereinafter ESTC], available at <http://estc.bl.uk/>. The Catalogue also includes a 1726 edition of *The Works of Andrew Marvell*, published by Curll, and edited by Thomas Cooke.

98. See, e.g., Receipt from Goldsmith for payment by John Newbery for *Plutarch’s Lives* in 1 PRIOR, *supra* note 89, at 392; receipt from Goldsmith for payment by John Newbery for *Life of Nash*, in *id.* at 407; contract between Goldsmith and James Dodsley for the *Chronological History of the Lives of Eminent Persons*, in *id.*; and other receipts for payments from Newbery in 1763, in *id.* at 465, 473, 488, 490; receipt from Goldsmith for payment by James Dodsley relating to his *History of England*, August 8, 1764, in GOLDSMITH, *supra* note 95, at 73 n.5. Cf. PRIOR, *supra* note 89, at 397 (receipt from Goldsmith for payment by John Newbery “in full for the copy of *The Chinese Letters*”); and the receipt for sale from Goldsmith to Edward Dilly, January 11, 1758, relating to translation of Jean Marteilhe’s *Memoirs of a Protestant Condemned to the Gallies of France for His Religion*, which is for “his third share of my translation” in Henry Dobson, *Introduction*, in MARTEILHE, *supra* note 89, at xv.

99. Compare 1 PRIOR, *supra* note 89, at 388, 392, 397, 407, 473, 490, 2 PRIOR, *supra* note 89, at 130 (receipts for money received from John Newbery); and 1 PRIOR, *supra* note 89, at 465 (contract between Goldsmith and James Dodsley for the *Lives of Eminent Persons*) with 1 PRIOR, *supra* note 89, at 397 (receipt from Goldsmith for payment by John Newbery for “the copy” of *The Chinese Letters*), and 2 PRIOR, *supra* note 89, at 131 (receipt for

the small collection relating to the bookseller Robert Dodsley also say nothing about rights.¹⁰⁰ An example is the agreement dated October 15, 1748 with historian John Campbell (1708-1775). Campbell agreed to write a book *The Geography, Natural History and Antiquities of England & Wales* between sixty and eighty sheets in length within a period of ten months, and for Dodsley to pay him two guineas per sheet and to print the work. No reference was made in the agreement at all about the transfer of the “copy” (i.e. copyright). The same is true of an agreement Dodsley entered into on August 22, 1749 with Thomas Salmon (1679-1767) to write *The Tradesman’s Directory*,¹⁰¹ and with Joseph Wharton, on March 7, 1749-50, to translate Virgil’s *Georgicks*.¹⁰² Yet other Dodsley contracts, with Henry Baker, Fellow of the Royal Society, (1698-1774) and William Duncan, Professor of Philosophy at the University of Aberdeen (1717-1760), are quite specific on the matter of copyright.¹⁰³ These documents suggest that the assumption that after 1710 copy was universally assigned from authors to publishers in full upon the initial sale of the manuscript, is something of an exaggeration. Moreover, individual biographical studies reinforce this sense that authors sometimes retained copyright in their works.¹⁰⁴ Some cases were ones of self-publication, with booksellers being offered a commission on sale, while others involved limited licenses to print only the first edition. In the 1750s, for example, scientist James Ferguson (1710-1776) adopted the former strategy, publishing his *Astronomy Explained* in 1756 before assigning copyright to Andrew Millar in 1758,¹⁰⁵ while Oliver Goldsmith published his translation of *Memoirs of a Protestant*.¹⁰⁶ By contrast, philosopher David Hume (1711-1776) retained copyright in his *History of England*, initially permitting Midwinter to publish only a single edition, before he later chose to sell the copyright to publisher Thomas Cadell and printer-publisher William Strahan.¹⁰⁷ There is some suggestion that the London publishers particularly resented the former strategy, and that Tobias Smollett (1721-1771) “incurred the hostility of several important publishers by retaining the whole of the copyright to *Peregrine Pickle*” in 1751.¹⁰⁸ However, many of the London publishers in fact facilitated such activities, for example by printing and selling the works. In any case, such hostility did not prevent

payment for “the copy”), 218 (receipt for payment by William Griffing coupled with promise to assign copyright).

100. BL Eg. Mss. 738, *supra* note 88.

101. BL Eg. Mss. 738, *supra* note 88, fol. 8 (describing the payment as “copy money”). The ESTC, *supra* note 97, contains no such book of that title either being published by Dodsley or written by Salmon.

102. The ESTC, *supra* note 97, contains no record of this.

103. See *infra* note 163. Many of these arrangements where there is no reference to copyright relate to translations, and one possibility is that it might have been assumed that no copyright subsisted. Having said this, Lintot’s famous contract with Alexander Pope related to Pope’s translation of Homer. On the latter, see note 118.

104. RAVEN, *supra* note 75, at 242, 316-17; SHER, *supra* note 3, at Ch. 3 (both pointing out that there were many cases of author-publication, profit-sharing and single-edition contracts).

105. JOHN R. MILLBURN, WHEELWRIGHT OF THE HEAVENS: THE LIFE AND WORK OF JAMES FERGUSON, FRS 90 (1988); SHER, *supra* note 3, at 217.

106. Henry Dobson, *Introduction*, in MARTEILHE, *supra* note 89, at xiv (Goldsmith published himself).

107. SHER, *supra* note 3, at 240-41. See also 2 UPCOTT, *supra* note 5, at [144] (where author had published work himself and sold copies and “right of re-printing” to bookseller).

108. Harlen, *supra* note 4, at 67; LEWIS M. KNAPP, TOBIAS SMOLLETT: DOCTOR OF MEN AND MANNERS 118-19 (1949) (stating that the advertisement for the 1758 edition explained that certain booksellers had tried to stifle the novel at birth, and speculating that this was because “they disapproved of Smollett’s independent reservation of the whole copyright”); SHER, *supra* note 3, at 218-19 n.53.

authors from continuing to self-publish, often with success. In the 1760s, Vinerian Professor of Civil Law, William Blackstone (1723-1780), arranged for Oxford University Press to print his *Commentaries*, only selling the copyright to William Strahan, the bookseller, after the book had been in print for eight years; while in the 1790s James Boswell (1740-1795) famously retained copyright in his *Life of Johnson*.¹⁰⁹

Even so, Ransom is correct that, in the majority of cases, a publisher would purport to take an assignment of the rights in the “copy.” However, as we will see, the details of these documents vary rather dramatically. This variety may well have had much greater significance than Ransom recognized. This is because considerable uncertainty surrounded the question of whether the reversionary right was capable of assignment at all, and, if so, by what means. The former question would be resolved in 1765 and again in the 1780s by a series of cases (the most famous of which is *Carnan v. Bowles*¹¹⁰) which held that the reversionary term could be assigned by a transaction effected during the initial term.¹¹¹ But those cases did not resolve, at least with any clarity, the question of *precisely what was required* to assign the reversion. Here, at least two matters deserve careful attention. First, what was the required *form* of the document: was a deed required, or at least writing attested to by two credible witnesses, or would any writing do? Second, precisely what form of expression would be effective to indicate an agreement to transfer the reversion: would a mere transfer of the copy or copyright be sufficient, or would that be regarded as effective only to assign the first term? Would the reversionary term be transferred by assignment forever, or was it necessary to refer, explicitly, to the reversion? Was it necessary to express an intention to over-ride the protective aims of the statute, or would some indication that the author was to retain no claim or interest be effective?¹¹² While many of these matters remained undecided right until the repeal of the reversion right in 1814, the precise form and content of the contract was clearly all important— a matter which Ransom and others have frequently failed to recognize.

a) Formalities

The Statute of Anne said nothing about transferring the first term of copyright, let alone the reversionary term. The Act did, however, indicate formalities for which any licensee would have to satisfy to escape an accusation of infringement by the author or proprietor: the licensee would need to demonstrate his or her consent in writing, signed, and witnessed by two credible witnesses.¹¹³ Presumably, given that the legal effect of an assignment is more significant than the grant of a licence, an effective transfer of the first term required compliance with at least the same formalities. Moreover, given its author-protective intent,

109. Boswell made £1555 profit on the first edition. THE CORRESPONDENCE OF JAMES BOSWELL WITH DAVID GARRICK, EDMUND BURKE AND EDMOND MALONE 410 (George M. Kahrl ed., 1986); SHER, *supra* note 3, at 220-24.

110. *Carnan v. Bowles*, (1785) 29 Eng. Rep. 45 (Ch.). See case discussion, *infra* Part I.B.2.e.

111. See case discussion, *infra* I.B.2.e.

112. These questions also came to be posed in the U.S. caselaw. See discussion *infra* text accompanying Notes 384, 423-6..

113. 1710, 8 Ann., c. 19, § 1 (G.B.).

this must have been all the more the case with the reversionary term. Certainly, some thought a deed was necessary.¹¹⁴

Of the surviving cache of documents, only a small proportion is under seal,¹¹⁵ while most are merely written and signed by the author alone. There are seventeen contracts under seal, signed by two witnesses, in volume 1 of *The Upcott Collection*, and ten in the second volume. Of these, most (thirteen) related to transactions with printer-turned-publisher John Watts.¹¹⁶ Two sealed transactions have only one witness.¹¹⁷ Most of the remaining documents are merely signed, but not witnessed: only seven are also witnessed (one by two witnesses).¹¹⁸ It is perhaps of significance that of the deeds, the majority were created in the 1720s and 30s, and only five derive from after 1750, suggesting, possibly, that the perceived need to comply with statutory formalities faded as belief in common law copyright became more widespread.¹¹⁹ However, assignments by deed also survive in the Strahan Archive, relating, inter alia, to Hugh Blair's *Sermons* (dated December 21, 1780) and William Buchan's *Preventive Medicine* (dated March 5, 1781).¹²⁰

One response to the uncertainty over formalities was to include within the contract an agreement *to do* anything necessary at any stage to perfect the title of the transferee. A good example is provided by an agreement, dated March 15, 1734, between actress and writer, Eliza Haywood (1693-1756), and two publishers, Francis Cogan and John Nourse, relating to Haywood's *The History of British Theatre*.¹²¹ The agreement recites that in return for £16 and four shillings, Haywood acknowledged that she had

sold unto the said Francis Cogan & John Nourse, the Copy Right . . . & at the request of the said Francis Cogan & J Nourse the said Eliza Haywood shall immediately assign over to them all her the said Eliza Haywood's Right Title Interest Claim Demand or preference whatsoever to the Copy and Copy Right of

114. See *infra* Part I.B.2.a (describing view of Alexander Pope).

115. For example, consider those between Pope and Lintot. See discussion, *infra* Part I.B.1.e.

116. 1 UPCOTT, *supra* note 5, at [43], [45], [142], [146], [148], [150], [152], [155], [169], [161], [200], [206], [210] (dating from between 1727 and 1744).

117. 1 UPCOTT, *supra* note 5, at [29] (dating from 1731); 2 UPCOTT, *supra* note 5, at [28] (dating from 1742).

118. 2 UPCOTT, *supra* note 5, at [40], [56], [152], [208].

119. In addition, three surviving Pope contracts, all with Bernard Lintot, were made under seal. BL Eg. Ch. 128 (over translation of *The Iliad*), ch. 129 (relating to a collection of Pope's Works, this contract from 1717 was witnessed by Henry Lintot and William Fortescue and bears the signature of Lintot, but not that of Pope), BL Eg. Ch. 130 (relating to a proposed translation of Homer's *The Odyssey*, dated February 18, 1723). The Dodsley dealings also include some in the form of deeds. *E.g.*, BL Eg. Mss. 738, *supra* note 88, fol. 2, (agreement under seal dated June 3, 1744 between Henry Baker and Robert Dodsley, relating to publication of *A Treatise on Microscopes*).

120. Strahan Archive, BL Add. Mss. 48901A, *supra* note 88, at fol. 20 (Blair), fol. 22 (Buchan).

121. 1 UPCOTT, *supra* note 5, at [112]; 2 Upcott, *supra* note 5, at [20] (containing a contract, dated January 4, 1733, in similar terms with Theodore Barlow for the publication of a legal treatise on the Duty and Office of a Justice of Peace. See also 1 UPCOTT, *supra* note 5, at [192] (noting a contract between John Shebbeare and John Nourse, dated Jan 22, 1754, where Shebbeare undertook "to secure to [Nourse] said Property against all persons who may have pretensions" to it); 2 UPCOTT, *supra* note 5, at [28] (indicating a contract between Nourse and Barlow, dated August 8, 1744). Poet James Thomson's agreement with Andrew Millar for the poem *Liberty*, dated December 16, 1734, contains an undertaking to do "all and every such further and other lawfull and reasonable act and acts thing and things assignments and assurance whatsoever." JAMES THOMSON: LETTERS AND DOCUMENTS 89 (A. McKillop ed., 1958).

the said Book for ever by such instrument *as they shall be advised is proper & sufficient for the purpose*.¹²²

A measure of this sort would, on its face, have enabled the purchaser to call for the perfection of an assignment (including an assignment of the reversionary interest), should that have proved necessary.¹²³ Less elaborate clauses, requiring the author to “execute an assignment of the . . . copy on demand,” can be found in quite a number of documents, including some that are agreements to write works, and some that acknowledge receipt of payment.¹²⁴ A further strategy was to require the author to refrain from doing anything that would undermine the effect of the agreement.¹²⁵ This, it was hoped, would have prevented an author from taking advantage of any flaws in the title conferred on the publisher, for example by assigning the rights to a third party publisher or even giving another publisher consent to republish. In so far as such devices were attempts to undercut the statutory policy underpinning both the requirement of formalities, and section 11, it must have been unclear whether the courts would have enforced them.

b) Interest Transferred

The precise language used to indicate what, if anything, was transferred from author to bookseller varied significantly. Over the century under review, a range of terms are used: “right,” “title,” “property,” “interest,” “copy,” and “copy right,” either alone or in combination (as, for example, “whole and sole right and property”).¹²⁶ During the thirty years following the Statute of Anne, the language of “sole right and title to the copy” appears in over one quarter of the documents.¹²⁷ In the following thirty years, from 1740 to 1770, the term “copy right” is used to identify the subject of the transfer in over one third of the documents we have examined.¹²⁸ More elaborate variations on the language of “right and

122. 1 UPCOTT, *supra* note 5, at [112] (emphasis added).

123. *See infra* Part II.E.2.c.

124. 1 UPCOTT, *supra* note 5, at [32], [110] (stating “I promise to assi[g]n the above mentioned copy over to John Watts on Demand,” contract between John Watts and Wm Havard, dated March 3, 1732). 2 UPCOTT, *supra* note 5, at [200-1] (referring to an agreement dated February 29, 1769 with William Griffin that Goldsmith would write eight volume *Natural History*), [218] (receipt of £500 for five volumes of *Natural History* with promise to assign), [432] (receipt for £250 in relation to *History of Greece* coupled with promise to assign).

125. *E.g.*, 2 UPCOTT, *supra* note 5, at [140] (featuring a contract between John Hill and Thomas Osborne, dated Dec 21, 1752, in which Hill undertook not to do anything “whereby it may in any way [b]e a [p]rejudice to this [u]ndertaking.”).

126. For examples of “the copy,” see 1 UPCOTT, *supra* note 5, at [157] (between Curll and Charles Molloy (d. 1767), dated April 23, 1718, for the play *The Coquet*). *See also id.* at [37], [102], [49], [163], [38]. For “right and property,” see, *e.g.*, *id.* at [189], a contract between John Watts and George Sewell, dated January 9, 1718, for a Tragedy entitled *Sir Walter Raleigh*).

127. *E.g.*, 1 UPCOTT, *supra* note 5, at [120] (relating to a play entitled *The Tragedy of King Henry the Fourth of France*, and a translation of *Rapin’s Xtm*, a contract between Curll and Charles Beckingham, dated Nov. 13, 1710). *See also id.* at [185], [34], [41], [187], [127], [188], [197]; Agreement Between Jacob Tonson and Matthew Prior (1718), in RIVINGTON, *supra* note 88, at 58-59.

128. The publishing contracts entered by John Nourse and Thomas Lowndes frequently merely indicate the transfer of the “copy” or “copyright.” 2 UPCOTT, *supra* note 5, at [79] (featuring a contract dated March 21, 1746 between John Nourse and James Dodson for “the whole and entire Copy & all his Right and Title [?] of the first Volume of a Work called and entitled *The Mathematical Repository*”). *See also* 1 UPCOTT, *supra* note 5, at [113], [192]; 2 UPCOTT, *supra* note 5, at [80], [158], [172] (featuring a contract dated June 12, 1723 between Hook and Thomas Marshall “for the Copy right of Juvenal & Persius with notes by me”).

title”, such as “whole right, title and property” or “right, title and claim” also become more prevalent. Henry Fielding’s agreement with Andrew Millar for *Joseph Andrews*,¹²⁹ dated April 13, 1742, transferred “all his Title Right and property” for £199 6 s, and his agreement for *Tom Jones*, dated June 11, 1748 for £600 was in similar terms (though it did indicate the transfer was “for ever”).¹³⁰ In two agreements in 1743 and 1744 with bookseller Robert Dodsley,¹³¹ Henry Baker purported to:

[S]ell transfer and assign to the said Robert Dodsley the said Book Copy or Treatise . . . together with all the **right property Benefit and Interest** of the said Henry Baker of and in and to the same To Hold the same to the said Robert Dodsley his Executors Administrators and Assigns as his and their own proper Goods and Chattles [sic] for ever more.

Others were more extensive still, such as that dated December 21, 1752, according to which John Hill, in return for £472,

Granted, Bargained, Sold, Assigned, Transferred and set over . . . unto . . . Thomas Osborne his Executors Administrators & Assigns **all that the Copy Right or Priviledge** of Printing reprinting Publishing Vending & Selling in any Volumes and under any Title whatsoever of all those Books compiled or written by the said Dr John Hill Entitled *A General Natural History* . . . and **all Benefit Profit Gain and advantage of the said** Several Books and Every of them or to be had or made by them & Every of them and **also the Estate Right Title Interest Property Claim & Demand whatsoever both at Law and in Equity or otherwise howsoever of him the said John Hill of in and to the said Copy Right of the said Books** and Every of Them. To have & to hold the said Copy Right or Priviledge of Printing Vending or Selling the said Books and Every of Them and all benefit or advantage to be had or made thereby unto the said Thomas Osborne his Executors Administrators and Assigns to & for his and their own proper use and Benefits and as his and their own Proper Goods & Chattels **from henceforth for ever**.¹³²

However, while some documents use every conceivable term to describe the interest being transferred, many – indeed most – are more rudimentary. These various formulae may, in law, have had more significance than contemporaries appreciated. Were a court to demand evidence of a “specific intent” to convey the reversionary interest, as opposed to

129. The contract is contained in the Forster Collection at the V&A Museum in London. See Austin Dobson, *Fielding and Andrew Millar*, 7 LIBR. 177 (1916).

130. G.M. GODDEN, HENRY FIELDING: A MEMOIR 183, 304-05 (1910); Dobson, *supra* note 129, at 184 (citing a letter from Horace Walpole to George Montagu (May 18, 1749), in 2 HORACE WALPOLE, THE LETTERS OF HORACE WALPOLE, FOURTH EARL OF ORFORD 160 (London, Richard Bently & Son pub., 1891)). The Appendix to Dobson’s article contains a transcription of the formal contract, dated 25 March 1749, which is in the JP Morgan Library in New York.

131. BL Eg. Mss. 738, *supra* note 88, fol. 2 (June 3, 1744, *A Treatise on Microscopes*), fol. 3 (August 22, 1743, *An Attempt Towards A Natural History of the Polype*). According to the ESTC, *supra* note 97, Dodsley published three works on microscopes by Baker: *Microscope Made Easy* (1742, 1743, 1744, 1754, 1769), *Employment For the Microscope* (1735?, 1753, 1764) and *Of Microscopes* (1760, 1785), as well as *The Polype*. In a further agreement, Will Duncan agreed to translate *Caesar’s Commentaries*, “the Property of the said Book shall be vested in the said Robert Dodsley and his Heirs for ever.” BL Eng. 738, *supra* note 100, fol. 6. The ESTC, *supra* note 97, lists this as published by Dodsley, J & R and Tonson and S. Draper in 1753.

132. *Id.* at [140] (emphasis added). The ESTC, *supra* note 97, indicates that the book was published by Thomas Osborne in parts between 1748 and 1752. Hill had issued a proposal for a subscription in 1746, a copy of which remains in the Wellcome Institute.

“general words,”¹³³ there would have been significant doubt over whether and, if so, which, of these less elaborate verbal formulae sufficed. As we will see, one possibility was that the term “interest” indicated an intent to convey the expectancy as opposed to the vested right (which would have been included in the term “right” or “property”. But only about one in ten documents used that term to describe the subject of the transfer.

c) Duration of Transfer

Most surviving documents that refer to the transfer of the “copy” purport to transfer rights “for ever.” For example, the deeds between Bernard Lintot and Alexander Pope (to which we will return), as well as between publisher Jacob Tonson and the poet Matthew Prior (1664-1721), indicate that they had intended to transfer rights “for ever.”¹³⁴ Contracts purporting to convey rights “for ever” continued to be common throughout the century.¹³⁵ Some documents seem to confer the same open-ended power in a different way, for example, by conferring on the grantee the right to reprint the work as many times as he (it usually was a man) “thinks fit.”¹³⁶

Nevertheless, a significant number of documents say nothing about the term of any transfer, typically referring merely to the transfer of the “copy,”¹³⁷ or the “copy right.”¹³⁸ It could not have been completely clear that such transfers indicated an intent to transfer both terms of protection, and it was certainly not obvious that the courts would interpret them in such a way.

d) Exclusion of Statute

133. See discussion of the interpretation of *Carman v. Bowles* (1785), *infra* Part I.B.2.e.

134. RIVINGTON, *supra* note 88, at 57-59, sets out the agreement between Jacob Tonson and Matthew Prior, 1718 (“to have and to hold all the said Copy of the said Poems . . . unto the said Jacob Tonson his heirs and assigns for ever”) and between John Gay and Bernard Lintot and Jacob Tonson, Jan 28, 1719 (“He the said John Gay doth hereby promise and agree to assign unto the said Bernard Lintot and Jacob Tonson the copy of all and singular the several new pieces which shall be printed in this edition to go equally share and share and alike unto the said Bernard Lintot and Jacob Tonson their heirs and assigns for ever.”).

135. 2 UPCOTT, *supra* note 5, at [135]. See also, for example, the arrangement between the writer Thomas Stackhouse (d. 1750) and the bookseller Stephen Austein, relating to Stackhouse’s commentaries on the Bible, dated 1740, set out in *Information for Messrs John Hinton et al 2-3* (1773), available at PSOC, *supra* note 3, [http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/"uk 1773a](http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/)". One peculiar agreement attempted to transfer the rights for “the life” of the author, the idea presumably being to give the benefit of the remainder to the author’s family. 1 UPCOTT, *supra* note 5, at [37], (Feb. 17, 1718-19) (“of Mr Curll Full Satisfaction for a Copy of a Novel called *The German Atlantis*, or *Hanover Tales for the life of the Author*. Robert Busby.”)

136. As was the case with James Thomson’s contract with Andrew Millar for “Spring” signed on Jan 16, 1729/30. Houghton Library, Harvard, reproduced in JAMES THOMSON, *supra* note 121, at 69.

137. E.g., 1 UPCOTT, *supra* note 5, at [157] (between Curll and Charles Molloy, dated April 23 1718, for the play *The Coquet*). See also *id.* at [37], [38], [49], [102], [163].

138. E.g., 2 UPCOTT, *supra* note 5, at [172] (June 12, 1723 between Hook and Thomas Marshall “for the Copy right of Juvenal & Persius with notes by me”). In 1724, Edmund Curll contracted with Ann Browne for her husband’s translation of a French story entitled, *The German Apothecary*. The contract conveyed “all my own right, Property and Interest to and in the following Copies” which “shall for the future be invested in the said Mr Edm: Curll, and his Assigns.” 1 UPCOTT, *supra* note 5, at [37] (dated March 3 1724/5).

Some contracts explicitly sought to negate the reversionary effect of the second term by providing for the transfer of all interests “any statutory provision to the contrary.”¹³⁹ For example, the printer-turned-bookseller John Watts started to use contracts which stipulated that his authors give over full and sole rights to their work “for ever, any Law or Statute to the contrary thereof in any wise notwithstanding.”¹⁴⁰ The first of these is a contract dated February 5, 1727, over poet and playwright John Gay (1685-1732)’s comic ballad opera, *The Beggar’s Opera*. Here, Watts combined with Jacob Tonson to purchase the rights, with John Gay giving them:

all the sole Right & Title of in and to the Copys & Copy Right of Two books[, *Fifty Fables* and *The Beggars Opera*,] with Copys & Copy Right of the said two Books . . . equally share & share alike & to their heirs and assigns equally share & share alike **for ever any Law in being now to the Contrary notwithstanding.**¹⁴¹

The only law that might have been conceived as “to the Contrary” was section 11 of the Statute of Anne. Such contracts, then, without explicitly referring to any reversionary right, appear to have recognized such right, or “expectancy,” and attempted to exclude its operation. Interestingly, perhaps, this language does not appear in all the documents in the manuscripts that involve Watts in this period: some just refer to the “whole and sole right in the copy.”¹⁴² This perhaps suggests a targeted use of the clause. It is also worth observing that while Watts was the first to use this device, a few other publishers used similar clauses, though they are rare after the middle of the century.¹⁴³ Whether a court would regard such a clause as effective to nullify the author-protective effect of section 11 of the Statute must have been anything but clear.

e) Explicit Reference to the Reversionary Term

Only three surviving author-publisher documents from the first three quarters of the eighteenth century make explicit reference to the reversionary term, in each case seeking then to override its operation. All three contracts involved the poet Alexander Pope and the publisher Bernard Lintot: the first related to Pope’s agreement to translate Homer’s *Iliad*,¹⁴⁴

139. (Citation)

140. 1 UPCOTT, *supra* note 5, at [43] (citing a contract between Watts and Colley Cibber, on September 14, 1727, for *The Provok’d Husband*, or, *A Journey to London* by Sir John Vanbrugh and Colley Cibber). *See also id.* at [29], [45], [142], [146], [148], [150], [152], [155], [159], [161], [200], [206].

141. *Id.* at [107] (emphasis added).

142. *Id.* at [110] (with William Havard, March 3 1732 for the “whole & sole right of the copy of a Tragedy call’d Scanderberg”). *See also id.* at [32], [41], [52], [104], [121], [126], [181], [199].

143. *Id.* at [129] (citing a contract dated November 25, 1735, the bookseller John Gray purchased the copyright in a play, *The London Merchant, or the History of George Barnwell*, by George Lillo (1693-1739) for £105).

144. BL Eg. Ch. 128. The contract has been transcribed by James McLaverty, *The Contract for Pope’s Translation of Homer’s Iliad: An Introduction and Transcription*, 15 LIBR. 206 (1993). This one is less explicit in its reference to the Statute than the next two. Pope grants “the sole and absolute property” to Lintot

for and during all such time terme and termes of yeares and in as large ample and beneficiall manner to all intents and purposes as he the said Alexander Pope his Executors or Administrators or any or either of them may can might or could have use or enjoy the Same

Id.

Although there is no reference to the reversionary term as such, the document is alluding to the Statute of Anne in its reference to “such time term and *termes of years*.” *Id.* The contract purports to assign all Pope’s rights,

the second, dated December 28, 1717, underpinned publication of a collection of Pope's works that had previously been individually published by Jacob Tonson and Lintot;¹⁴⁵ and the third, dated February 18, 1723, related to a proposed translation of Homer's *The Odyssey*.¹⁴⁶

The second contract is the most explicit in its reference to the reversion of term in the Statute of Anne, exclaiming:¹⁴⁷

Whereas by an Act of Parliament made in the Eighth year of the reign of Her Majesty Queen Anne It is enacted that the Author of any Book or Books his Assignee or Assigns shall have the sole Liberty of Printing and Reprinting such Book or Books for the Term of fourteen years to commence from the first Day of publishing the same And that after the Expiration of the said Term of fourteen years the sole Right of printing and disposing of Copys shall return to the Authors thereof if they are then living for another Term of fourteen¹⁴⁸

The deed purports so far as is permissible to convey both statutory terms. The rights are assigned:

for and during the Terme of fourteen years next ensuing (?) the publication of the said book for all and every other term or terms as far as the said Alexander Pope now hath or hereafter may have any Right Power and Authority by the said Act of Parliament or otherwise to grant and sell the same.¹⁴⁹

Moreover Pope undertook, for himself, his heirs, executors and assigns, both not to sell the rights to anyone else,¹⁵⁰ and more positively, should he be alive at the end of fourteen years, to transfer the reversionary right to Lintot.¹⁵¹

These three contracts, then — uniquely amongst all those seen from before 1774 — reference the fact that the statutory assignable term was, on its face, only fourteen years. The contracts attempt to ensure that any subsequent term, statutory or otherwise, is also conveyed. At the same time they recognize that there may be limitations on an author's ability to convey these terms and include language to attempt to secure such assignments.

Much later in the century, contracts referring to the fourteen-year term make a revival. The Strahan archive contains a number of deeds, dating at least from 1780, in which the author undertakes that were they to be living at the end of fourteen years from publication,

present or future (through the language “may can might or could have”). *Id.* See also FOXON, *supra* note 36, at ch. 2.

145. BL Eg.Ch. 129. The document is sealed, witnessed by Henry Lintot and William Fortescue and bears the signature of Lintot, but not that of Pope.

146. BL Eg. Ch.h. 130. The contract is reproduced in GEORGE SHERBURN, *THE EARLY CAREER OF ALEXANDER POPE* 313-16 (1934). McLaverty observes that it shows “specific awareness of the Queen Anne Act.” FOXON, *supra* note 36, at 241.

147. McLaverty refers to it as “the strangest” of Pope's agreements. FOXON, *supra* note 36, at 240.

148. BL Eg.. Ch. 129.

149. *Id.*

150. Pope undertook that he would “not at the end of the fourteenth year next after the publishing of the said book nor at any time or times whatsoever here after grant or sell the Liberty or Priviledge of printing reprinting or selling the said book or any of the poems or works therein contained (except as before excepted) to any person or persons whatsoever other than to him the said Bernard Lintott.” *Id.*

151. *Id.*

they will “assign and set over such further rights and property in and to the said work as by any Law Custom or Use the said [author] shall be entitled to do.”¹⁵²

f) Other Aspects of Contracts

The majority of surviving documents involved a flat fee,¹⁵³ though the payments varied enormously in size.¹⁵⁴ In the early decades, at least from the evidence in *The Upcott Collection*, few payments are above double figures. The first payment was in 1727, from John Watt to Colley Cibber (1671-1757) for *The Provok'd Husband*. After the middle of the century, payments (at least at the upper end) increased significantly. David Hume received £1200 from Gavin Hamilton and John Balfour for agreeing to the publication of a single edition of his *History of Great Britain*.¹⁵⁵ For some time, this was regarded as the high-water mark of payment.¹⁵⁶ However, in the late 1760s the publisher William Strahan started paying record prices for historical works.¹⁵⁷ In 1768, the Scottish historian William Robertson (1721-1793) received £3400 for his *History of Charles V*;¹⁵⁸ in 1772, William Blackstone was paid £2000 for

152. BL Add. Mss. 48901, *supra* note 120, fol. 20 (contract dated 1780 between Blair and Creech, Strahan & Cadell).

153. See also ROBERT DODSLEY, *THE CORRESPONDENCE OF ROBERT DODSLEY 1733-1764*, at 30-34 (James Tierney ed., 1988).

154. Letter from David Garrick to Jean Baptiste Antoine Suard (Mar. 7, 1776), in David Garrick, *THE LETTERS OF DAVID GARRICK* 989 (David M. Little & George M. Kahrl eds., 1963) (a dramatists “profits, with his copy-moey, have sometimes risen to 8 or 9 hundred, and sometimes a thousand pounds”).

155. DAVID HUME, *LETTERS OF DAVID HUME TO WILLIAM STRAHAN* 15, 33 (G.B. Hill ed., Oxford, Clarendon Press 1888); 2 SAMUEL JOHNSON, *JOHNSONIAN MISCELLANIES* 349 n.7 (G.B. Hill ed., 1897) (receiving £1940 for the first two volumes of the *History of England*).

156. It should be contrasted with the 60 guinea fee that John Newbery paid Oliver Goldsmith for *The Vicar of Wakefield*. See ELIZABETH E. KENT, *GOLDSMITH AND HIS BOOKSELLERS* 68 (1933); WELSH, *supra* note 88, at 58.

157. Letter from James Beattie to Sylvester Douglas (Aug. 14, 1775), in 2 *THE CORRESPONDENCE OF JAMES BEATTIE* 308-09 (Roger Robinson ed., 2004) (recognizing Strahan’s generosity).

158. JAMES A. COCHRANE, *DR JOHNSON’S PRINTER: THE LIFE OF WILLIAM STRAHAN* 40 (1964); HUME, *supra* note 155, at 15 (Hill’s analysis); Stewart J. Brown, *William Robertson (1721-1793) and the Scottish Enlightenment*, in *WILLIAM ROBERTSON AND THE EXPANSION OF EMPIRE* 7, 28 (Stewart J. Brown ed., 1997) [hereinafter ROBERTSON] (putting figure at £3500 plus another £500 if the book went into a second edition); Harlen, *supra* note 4, at 102 (putting price at £4000); Richard B. Sher, *Charles V and the Book Trade: An Episode in Enlightenment Print Culture*, in ROBERTSON, *supra*, at 164, 165 (stating that “the eighteenth century equivalent of a six-figure deal, worth at least £200,000 or \$300,000 in late twentieth century British and American currencies”). For the view that Robertson was unusually successful, see Letter from Hume to Morellet (July 10, 1769), in 2 *THE LETTERS OF DAVID HUME* 203 (J.Y.T. Greig ed., 1934) (“the greatest price that was ever known to be given for any book”); Letter from John Douglas to Alexander Carlyle (Apr. 6, 1771) (on file with Edinburgh University Library, Dc 441 no 19), *cited in* Sher, *supra*, at 166. Sher tells us that Strahan shared the copyright with Cadell and John Balfour, and that the publishers earned something like £15,000 from the sale of five editions. *Id.* at 178. Henry Brougham had put the figure at £50,000. 1 HENRY BROUGHAM, *LIVES OF MEN OF LETTERS AND SCIENCE WHO FLOURISHED IN THE TIME OF GEORGE III* 210 (Kessinger Publishing 2006) (1846).

In 1759, Robertson had received £600 from Andrew Millar and Thomas Cadell for his debut book, *History of Scotland During the Reigns of Queen Mary and King James VI till His Access to the Crown of England*. Letter from Robertson to John Jardine (Apr. 20, 1759), *reprinted in* 1 BROUGHAM, *supra*, at 278-79 (“more than was ever given for any book except David Hume’s”); Letter from W. Robertson to Andrew Fletcher and Lord Milton (Apr. 10 1758) (on file with Saltoun Papers, MS 16707, fol. 98-99, NLS), *cited in* Stewart J. Brown, *William Robertson (1721-1793) and the Scottish Enlightenment*, in ROBERTSON, *supra*, at 7, 19; Jeffrey Smitten, *Robertson’s Letters and the Life of Writing*, in ROBERTSON, *supra*, at 36, 41; BL Add. Mss. 48800, *supra* note 88, at

copyright in the *Commentaries on the Laws of England* (which had been first published in 1765);¹⁵⁹ while in 1773, journalist and essayist John Hawkesworth (1720-1773) received £6000 for the *Voyages of Captain Cook*.¹⁶⁰ The historian Edward Gibbon was paid £726 by William Strahan and Thomas Cadell for the right to publish the first edition of his *Decline and Fall of the Roman Empire* in 1776, the publishers only finally securing the copyright in the first three volumes, for £4000, in 1780; and for the same sum, in 1787, for the final three volumes.¹⁶¹ These payments were, of course, for tried-and-tested authors. Many contracts offered the writer a fee based on the number of sheets in the published volume.¹⁶² The rates varied, but the eventual income was not always insignificant: Tobias Smollett, for example, who was paid by publisher James Rivington at a rate of three guineas per sheet, may have received over £1000 for his four-volume *A Complete History of England*.¹⁶³

107, cited in Harlen, *supra* note 4, at 101. According to Robertson, Strahan and Cadell made £6000 from it, though Sher indicates that Millar and Cadell made these profits, whilst Strahan benefited from the printing work. 3 BOSWELL, *supra* note 3, at 334.

In 1777, Strahan, Cadell and Boswell contracted with Robertson for rights in his *History of America*, on the same terms as *Charles V*. Harlen, *supra* note 4, at 207. Overall, Richard Sher claims Robertson's publishing income was "more than £700,000 or well over \$1 million in early twenty-first century money." SHER, *supra* note 3, at 214.

159. Strahan nevertheless made profits from the work to the tune of £1768. BL Add. Mss 48800, *supra* note 88, at B, and BL Add. Mss. 48889, *id.*, cited in Harlen, *supra* note 4, at 189.

160. JOHN HAWKESWORTH, AN ACCOUNT OF THE VOYAGES UNDERTAKEN BY THE ORDER OF HIS PRESENT MAJESTY FOR MAKING DISCOVERIES IN THE SOUTHERN HEMISPHERE (1773). Hawkesworth was appointed by the Government to write the account in 1771 and supplied with the journals of the relevant ships, but was permitted to retain "the property of the work." *Id.* He sold this to Strahan and Cadell (in preference to Thomas Becket, seemingly at the cost of Hawkesworth's friendship with David Garrick). 2 BOSWELL, *supra* note 3, at 247 n.5; JOHNSON, *supra* note 155, at 349; JOHN LAWRENCE ABBOTT, JOHN HAWKESWORTH: EIGHTEENTH-CENTURY MAN OF LETTERS 147 (1982) ("the largest payment of its kind during the whole of the century"). According to Abbott, Strahan complained to Hume that he had overpaid. Letter from Strahan to Hume (Apr. 9, 1774), in HUME, *supra* note 155, at 283-84 ("the event of which purchase, if it does not cure Authors of their delirium, I am sure will have the proper effect upon booksellers"). See Letter from Hawkesworth to Garrick (May 6, 1773), BL Add Ms 28, 104 fol. 45-46, reprinted in DAVID GARRICK, THE PRIVATE CORRESPONDENCE OF DAVID GARRICK WITH THE MOST CELEBRATED PERSONS OF HIS TIME 535 (James Boaden ed., London, Colburn & Bentley 1831).

161. EDWARD GIBBON, THE MEMOIRS AND LIFE OF EDWARD GIBBON 194-95; SHER, *supra* note 3, at 259 n.161 (Gibbon received over £9000 for *The Decline and Fall*); BL Add Mss 44805 "G", *supra* note 158, and BL Add Mss 48809 at 49, cited in Harlen, *supra* note 4, at 203-04; Letter from E. Gibbon to T. Cadell (Dec. 16, 1786 & Feb. 24, 1787), in EDWARD GIBBON, 3 THE LETTERS OF EDWARD GIBBON (J.E. Norton ed., 1956) [hereinafter GIBBON LETTERS] (commenting on the fact "that so important a transaction will have been concluded in the first instance by three minutes of conversation, and in the second by three lines of a letter, a memorable example in the annals of authors and booksellers"); BL Add Mss 34887, *supra* note 158, ff. 5, 10.

162. See, e.g., the following contracts entered by bookseller Robert Dodsley: BL Eg. Mss. 738, *supra* note 88, fol. 2 (June 3, 1744 with Henry Baker for *A Treatise on Microscopes*, 1 guinea per sheet), fol. 4 (August 22, 1743 with Henry Baker for *An Attempt Towards A Natural History of the Polype* at 2 guineas a sheet), fol. 4 (October 15, 1748 with John Campbell for *The Geography, Natural History and Antiquities of England & Wales* at 2 guineas a sheet); fol. 6 (with Will Duncan for translation of Caesar's Commentaries at £111s and 6d per printed sheet), fol. 8 (August 22, 1749 with Thomas Salmon of Temple for *The Tradesman's Dictionary* at 1.5 guineas/sheet). SHER, *supra* note 3, at 215 (speculating that Duncan must have realized several hundred pounds from his dealing with Dodsley).

163. SHER, *supra* note 3, at 215.

Many contracts included an entitlement to copies of the printed book,¹⁶⁴ and in some cases these could be quite valuable. The agreement between the poet Alexander Pope and his publisher Bernard Lintot on March 23, 1713(/14), whereby Pope undertook to translate Homer's *The Iliad* into English (to be published in six volumes) gave Pope a fee of £1290 (200 guineas per volume), as well as 750 copies of each volume which Pope intended to sell by subscription.¹⁶⁵ Lintot was to allow Pope one month in which he could dispose of the copies free of any competition, whereafter Lintot could print and sell the work. Pope made a fortune from the deal.¹⁶⁶ Another example is the contract between the publishers Thomas Longman, John Nourse and Dr. William Lewis (1708-1781), dated January 16, 1746. Lewis would prepare a book *A New English Dispensatory* in which the booksellers would gain copyright, in return for which Lewis would receive £105 and one hundred copies.¹⁶⁷ Four years later, Nourse entered an agreement to publish a work by James Dodson (d. 1757) entitled *The Accountant Method of Bookkeeping*, paying £12 and 12 shilling and "fifty printed copies" for the copyright.¹⁶⁸ William Robertson, the historian, said he chose to publish his history of *Charles V* with Strahan rather than Becket, who had been recommended by Garrick, in part because Strahan included in the arrangement twenty-five copies, worth £75.¹⁶⁹ Similarly, the 1774 contract between Captain Phipps and bookseller John Nourse relating to Phipps' voyages involved a payment of £200 and "as many copies for [sic] in sheets as he shall want not exceeding eighty."¹⁷⁰

Not infrequently, an additional fee was made conditional upon the sale of a specified number of copies,¹⁷¹ or on a reprinting.¹⁷² In one agreement, dated May 1, 1752, between the

164. E.g., 1 UPCOTT, *supra* note 5, at [188] (between Curl and Robert Samber, dated February 20, 1723 whereby Samber received 4 Guineas and 12 copies). See also SHER, *supra* note 3, at 220 (describing William Buchan's arrangement with publishers Cadell, Strahan, Creech and Balfour, under which Buchan was to receive £50 or 100 copies of any new edition of *Domestic Medicine*).

165. COCHRANE, *supra* note 158, at 39; MAYNARD MACK, ALEXANDER POPE: A LIFE 267 ff (1985). The agreement was varied by the parties by a deed dated February 10, 1715, in relation to the second edition: Lintot was entitled to the subscription money on the 750 copies, in return for giving Pope a lump sum of £200 (over and above the contractual 200 guineas for the second volume). See BL Eg. Mss. 1951, fol. 3 (witnessed by William Waters and John Dighton).

166. According to Peter Quennell the contract "laid the foundations of a modest personal fortune" for Pope. PETER QUENNELL, ALEXANDER POPE: THE EDUCATION OF GENIUS 1688-1728, at 99 (1968). The contract turned out to be an unfortunate one for Lintot, and he even considered a legal action with a view to extricating himself from it. REGINALD H. GRIFFITH, ALEXANDER POPE: A BIBLIOGRAPHY 41-42, 121-22 (1922); WILLIAM WARBURTON & JOHN KNAPTON, POPE'S LITERARY LEGACY: THE BOOK-TRADE CORRESPONDENCE OF WILLIAM WARBURTON AND KNAPTON WITH OTHER LETTERS AND DOCUMENTS, 1744-1780, at lv (Donald W. Nichol ed., 1992).

167. 2 UPCOTT, *supra* note 5, at [152]. The work went into numerous editions, Nourse reprinting the 1753 work in 1765 ("second edition with large additions"), 1770, 1781, 1785 (a fifth edition carefully revised and improved after the authors death), and Nourse's successor adding a further edition in 1799. *Id.*

168. 2 UPCOTT, *supra* note 5, at [80]. The ESTC, *supra* note 97, contains only one edition published by Nourse in 1750 under the title *The Accountant*. See 2 UPCOTT, *supra* note 5, at [53], [81], [82].

169. GARRICK, *supra* note 160, at 535.

170. 1 UPCOTT, *supra* note 5, at [177].

171. See, e.g., 1 UPCOTT, *supra* note 5, at [157], [198]; 2 UPCOTT, *supra* note 5, at [12].

172. See, e.g., 1 UPCOTT, *supra* note 5, at [38], [125], [147], [183]; 2 UPCOTT, *supra* note 5, at [54], [55], [132], [161], [164], [197], [206], [208], [231]; BL Eg. Mss. 738, *supra* note 88, fol. 2 (June 3, 1744 between Henry Baker and Robert Dodsley, *A Treatise on Microscopes*, whereby Baker was to receive 1 guinea/sheet on a first edition of 1000 copies, and half a guinea/sheet on each subsequent edition of 1000), f. 3 (August 22, 1743 between Henry

bookseller Joseph Pole, and the surgeon George Aylett, relating to *The Gentleman's Farriery or Treatise on the Diseases of Horses*, the latter assigned copyright for £10, with a further sum of £10 payable once 750 copies were sold, with a further proviso that:

[I]f the said Book come to a second or third Impression Seven hundred & Fifty copies & no more [?] to be printed of the first & second edition of the said book, the said Geo Aylett is to receive the like sum of Ten pounds in books in manner as above mentioned for his Receiving & Allowing each of the said second and third edition the Copy right of the said Book on the [?] of these Conditions being and recognising at all times the sole Right and Property of the said Jos Pole his Executors etc.¹⁷³

Frequently, provision for further payment was conditional upon the author updating the work for issuance as a second edition. An example is an agreement dated July 23, 1753 between William Lewis and publisher John Nourse relating to Lewis's two volume treatise, *New Practice of Physick*. Lewis agreed to "assign over the Copy right of the said Work" to Nourse for £157, with Nourse agreeing "to pay to W. Lewis thirty one pound ten shillings, in case he shall print a second edition of the above mentioned work, twenty one pound upon a third seventy one pound upon a fourth edition. Each edition to consist of one thousand copies."¹⁷⁴

In some circumstances, an early form of the "out of print" clause appears: the author purporting to retain rights to reprint the work should the bookseller choose not to issue a second edition. For example, on June 3, 1744 the publisher Robert Dodsley agreed to publish Henry Baker's *A Treatise on Microscopes*.¹⁷⁵ Their contract purported to transfer the copyright "for ever more," with Baker to receive a payment on any new edition.¹⁷⁶ The contract went on to provide that:

[I]n case the said Robert Dodsley shall not reprint the same within two years next after the Sale of the books of the first impression Then the Sole Property of the said Copy or Treatise shall at the Expiration of such Two years revert to and be reinvested in the said Henry Baker his Executors Administrators or Assigns and upon being paid by him or them one half of the charge that he the said Robert Dodsley shall have been at for the said Copper plates and engraving thereof reassign the said Book and Plates to him or them and all the property and Interest of the said Robert Dodsley in and to the same.¹⁷⁷

Thirty years later, in 1774, Captain Constantine John Phipps (later Lord Mulgrave) (1744-92) agreed that John Nourse should publish the *Voyage towards the North Pole*, allowing

Baker and Robert Dodsley relating to *An Attempt Towards A Natural History of the Polype*, whereby Baker was to receive 5 guineas for each new impression), f. 6 (between Dodsley and Will Duncan for his translation of *Caesar's Commentaries* according to which Duncan was to receive 10 shillings & 6d per sheet for a second edition). Where such arrangements did not specify the size of an edition, publishers may have been tempted to print greater numbers than normal. See SHER, *supra* note 3, at 220 (describing very large editions of William Buchan's *Domestic Medicine*).

173. 2 UPCOTT, *supra* note 5, at [12]; See also *id.* at [54], [164].

174. *Id.* at [161]; See also *id.* at [26] (15 June 1734, payment from Francis Cogan & John Nourse to Theodore Barlow for revising *Parish-Law*).

175. BL Eg. Mss. 738, *supra* note 88, fol. 2.

176. *Id.*

177. *Id.*

Nourse “to make an impression of 1500 copies at his own risque & charges upon such paper & type as shall be approved of” and giving him a right of printing a second Edition “in all respects equal to the first edition.”¹⁷⁸ Phipps also specified that “If upon the first Impression being out of print or rising in price & J. Nourse declines to publish a second Edition Captain Phipps reserves to himself a power of giving to any other person such 2nd Edition.”¹⁷⁹

Occasionally, a contract will provide for profit-sharing between author and publisher,¹⁸⁰ or involve assignment of only a portion of the copyright.¹⁸¹ A good example is the agreement made on September 18, 1747 between Abraham Le Moine (d. 1757), writer of *A Treatise on Miracles*, and John Nourse. The agreement recounted that Nourse had printed 750 copies at his own expense, and undertook that once those expenses had been paid “the Profits arising from the sale of the remaining Copies are to be equally divided between the two said Parties.”¹⁸² Another, dated October 30, 1800, between Rev. John Farrer (1735-1808) and J. and G. Rivington, relating to a volume of *Sermons on the Parables* gave the Rivingtons “one half of the copy right” and required the Rivingtons to print 750 copies and pay Farrer half the profits on the sale of those copies (and subsequent impressions).¹⁸³

2. *How Was the Reversion Understood?*

Given the wide variation in contractual provisions that we have identified, a key question arises as to how these clauses would have been understood as affecting the reversion right: Was the reversionary term seen as overriding contractual attempts to assign the copyright or not? Or was the second term assignable? If so, in what circumstances? It is only with an understanding both of contractual practice and law (or perception of law) that we can assess whether section 11 secured any benefits for authors during the eighteenth century. However, prior to the decision of the Court of Chancery in *Millar & Dodsley v. Taylor* in 1765 there are no clear answers to these questions. Even after that date, and after further court decisions in the 1780s confirming the assignability of the reversion, the legal requirements that needed to be satisfied remained largely a matter of conjecture. Throughout the eighteenth century, there was little discussion of the question of the assignability of the reversion in the few textbooks and commentaries. Our sources comprise a few brief letters, notes, and the contracts themselves. Moreover, even though the Statute of Anne was applicable throughout

178. 1 UPCOTT, *supra* note 5, at [177]. According to the ESTC, *supra* note 96, a 1774 edition was issued not by Nourse but by F. Newbery. See also Memorandum between Adam Ferguson and Strahan, Cadell & Creech, (Feb. 28, 1782) (on file with CE French Papers, Massachusetts Historical Society), *reprinted in* 2 FERGUSON, *supra* note 89, at 576 (according to which Ferguson was obliged to purchase copies that were unsold after eighteen months and, on so doing, the publishers would “reassign the Copy Right”).

179. *Id.*

180. 2 UPCOTT, *supra* note 5, at [23], [120], [150]. See also SHER, *supra* note 3, at 236; R.B. Sher, *New Light on the Publication and Reception of The Wealth of Nations*, 1 ADAM SMITH REV. 3, 3-29 (2004); Letter from SHER, *supra* note 3, at 236; Adam Smith to William Strahan (Nov. 13, 1776), *in* ADAM SMITH, CORRESPONDENCE OF ADAM SMITH 221 (Nov. 13, 1776) (Letter No. 179); Letter from William Strahan to Adam Smith (Nov. 26, 1776), *in* SMITH, *supra*, at 222 (Letter No. 180).

181. 2 UPCOTT, *supra* note 5, at [31] (discussing a sale by Alexander Blackwell to John Nourse, dated September 28, 1737, of one third share in a book created by his wife, Elizabeth). See also *id.* at [35], [38].

182. *Id.* at [150]. The ESTC, *supra* note 97, refers to one edition published by Nourse in 1747.

183. 2 UPCOTT, *supra* note 5, at [120].

Britain, for much of the eighteenth century different answers were given to these questions in Scotland as opposed to England.¹⁸⁴

a) 1710- 1765: A Plurality of Interpretations

In the period before 1765, there were at least three interpretations of the law: first, that the reversion was personal and non-assignable; second, that it was assignable, but this required some indication of an explicit intention to do so and, possibly, the use of a deed; third, that the reversion was subsumed within, and assignable along with, the “perpetual common law right.”

The view that the reversion was not assignable at all seems to have widest recognition in Scotland.¹⁸⁵ A letter from Ronald Crawford to George Ross, dated November 28, 1754, discussing whether Robert Foulis, a Scottish publisher, had infringed rights in Pope’s works, argued that in relation to work in which a second term of fourteen years had begun to run before Pope’s death, no action could be brought.¹⁸⁶ Crawford explained that “yet I have a doubt If on his Death, such Privilege is assignable for what part of the 2d term may be then to run. It seems to be only personal, to the Author himself, but not to his Executors or Assigns.”¹⁸⁷ Crawford’s legal opinion thus suggests that the second term itself was personal and not assignable. The basis for such a claim was the close, textual reading of the Statute of Anne. The section granting the initial term described the right that was conferred on authors or their assignees as “the sole liberty of printing and reprinting such book,”¹⁸⁸ whereas the clause granting the reversionary term to authors was related to “the sole right of printing or disposing of copies.”¹⁸⁹ Crawford, it seems, was arguing that the different descriptions of the beneficiaries (“authors or their assignees” v. “authors”) and objects (“books” and “copies”) implied different interests, in particular, that the reversion gave only a personal right, not a proprietary one. Therefore, it appeared, the right was non-assignable *even after* the right fell into possession, based on a technical reading of the statute. This view certainly had some circulation in Scotland, but ultimately fell to be rejected by the Court of Session in *Cadell v. Anderson* (1787).

A second view was that the reversionary term was assignable, but only by way of express terms in a deed (that is, a promise under seal). This seems to have been the view of Alexander Pope, decipherable from a note scribbled on the back of a letter:

184. See DEAZLEY, *supra* note 20, at 182 (discussing the Act of Union 1707, and the question of common law rights), 189 (“The legal plurality of a politically united British state allowed for legitimisation of two fundamentally opposed concepts of copyright, one in the north and one in the south.”)

185. A similar doubt appears to have existed in the mind of the author of Pope’s contracts with Lintot. This transfer rights for “as long as the said Alexander Pope hath any right power and authority by the said Act of Parliament or otherwise to grant or sell the same” and add a promise, were the immediate transfer not effective, Pope promised, on Lintot’s request, to “and without further Consideration or Reward whatsoever...make any new or further grant of the said Book and the Poems and ... for and during another Term of fourteen years and for and during all and every other Term or Terms *as far as the said Alexander Pope hath any Right power and authority by the said Act of Parliament or other wise to grant or sell the same.*” (emphasis added). See *supra* note 118.

186. Letter from Ronald Crawford to George Ross (Nov. 28, 1754), BL Eg.Mss. 1959, fols. 23-24, reproduced in WARBURTON & KNAPTON, *supra* note 166, at 102.

187. *Id.*

188. Statute of Anne, 1710, 8 Ann., c. 19, § 1 (G.B.).

189. Statute of Anne, 1710, 8 Ann., c. 19, § 11 (G.B.).

I never alienated, intentionally, any Copy for ever, without expressly giving a Deed in forms, to witness & that the Copy right was to subsist after the Expiration of the 14 years in Queen Ann's Act, which then was understood generally to be the [c]ase, unless covenanted to the Contrary.¹⁹⁰

Although not wholly unambiguous, Pope seems to imply that it was generally understood that a “deed” or “covenant” was required to establish that the purported transferee was vested with the whole copyright, the contingent interest otherwise reverting to the author. (While the Statute of Anne said nothing about a deed, Pope’s views might have reflected provisions in some royal privileges requiring that consent be by deed, or the fact that famous contracts from before the Statute, most notably that between Milton and Simmons, were by deed.) Consequently, Pope was of the view that a number of his works that had been printed by Jacob Tonson Junior, and had been published in 1712 and 1714, had reverted to him in 1726 and 1728: “the property is therefore reverted to Me from that time, unless I covenanted to the contrary; which will appear by the writing I gave. & by which I am ready to be determined.”¹⁹¹ Although he acknowledged that he could not recollect the details of the transaction, Pope was convinced that he had not alienated the reversion to Tonson, “because the Mony I receivd was a very trifling Sum, no way proportioned to a Perpetuity.”¹⁹²

If Pope’s understanding of the interaction of section 11 of the Statute of Anne and contractual practice was widely held, then Ransom’s claim that the reversionary right was useless because of the continued practice of assignment in perpetuity looks particularly dubious. If a deed were really required to assign the reversionary term, very few of the surviving documents – maybe one in ten – would have actually been effective to do so. However, Pope’s view may have been idiosyncratic or unusually well-informed. Or, his view may have prevailed in the period from 1710 to 1740, only to be replaced by a more flexible view. The contractual practice revealed by *The Upcott Collection* might well reflect a change in understanding after 1740.

The third view, that the reversion was assignable, was held by Pope’s literary executor, William Warburton. Warburton was one of the first to resuscitate the claim to perpetual copyright (which some of the booksellers had themselves claimed before 1710).¹⁹³ As is well known,¹⁹⁴ Warburton published in 1747 *A Letter from an Author to a Member of Parliament*

190. BL Eg. Mss. 1951, *supra* note 165, fols. 17, 18, 19; ALEXANDER POPE, *THE CORRESPONDENCE OF ALEXANDER POPE 222-24* (George Sherburn ed., 1956). McLaverty says the note reveals “a fiercely protective attitude to literary property and a close knowledge of the legislation.” FOXON, *supra* note 36, at 238.

191. POPE, *supra* note 190, at 223.

192. *Id.* at 224. Given what went before (in particular, Pope’s observation that books published prior to 1710 were now “no man’s property but common” suggesting that Pope thought that the statutory terms governed), this reference to “perpetuity” was probably not an indication that he believed (as some booksellers did) that there was a “perpetual” common law right, but rather, merely, that he could, and had in some circumstances, transferred the potentially twenty-eight year term in full.

193. Jacob Tonson the Elder, the leading publisher in the reign of Queen Anne, held such views before the enactment of the statute, but may well have concluded that the Statute replaced the common law. See Tomas Gomes-Arestogui, *Tonson v. Baker*, in this volume.

194. Warburton’s authorship has sometimes been questioned. See, e.g., INFORMATION FOR ALEXANDER DONALDSON, *supra* note 39, at 66, but it is clear from his letter to Knapton, 26 August 1747, BL Eg.Mss. 1954, *supra* note 88, fol. 1, in WARBURTON & KNAPTON, *supra* note 166, at 13.

Concerning Literary Property, developing from first principles an argument in support of “the right of property in AUTHORS to their works.”¹⁹⁵ The same argument was simultaneously being made (albeit inconclusively) in an action in Scotland against some Scottish reprinters,¹⁹⁶ and was echoed fifteen years later by the author of *A Vindication of the Rights of Authors* (1762) in parallel with another inconclusive action in England.¹⁹⁷ In practice Warburton acted as many booksellers did, as if the statutory terms meant nothing. This practice extended to acts that were not self-serving; thus, Warburton gave shares in the 1751 edition of Pope’s works to Tonson and Lintot, even though the statutory 28-year terms in works in which they had any interest (all published before 1723) would have lapsed. In a letter to Mercy Dodderidge, in 1759, he explained, “If the work was written within fourteen years, the property is secured by Act of Parliament; when that time elapsed, it is then claimed by common law.”¹⁹⁸

The reversionary term seems to have made no impression on Warburton’s consciousness. For those educated to believe in common law copyright, the terms of the contract, rather than section 11 of the Statute, may have been believed to govern the mutual rights of authors and publishers. According to Boswell, writing in 1763, “it has always been understood by the trade, that he who buys the copy-right of a book from another, obtains a perpetual property; and upon that belief, numberless bargains are made to transfer that property after the expiration of the statutory term.”¹⁹⁹

b) *Millar & Dodsley v. Taylor* (1765): The First Ruling on Assignability

The first legal ruling on the reversion right fell in the mid 1760s in suit, *Millar & Dodsley v. Taylor*, before the Court of Chancery.²⁰⁰ The case involved Edward Young’s poem *The Complaint or Night-Thoughts on Life, Death and Immortality*. A work of nine parts, *The Complaint* had been published in stages during the 1740s, and two publishers Andrew Millar and James Dodsley sought in 1763 first to prevent Alexander Donaldson, the Edinburgh and London publisher from reprinting, and Robert Taylor, who operated in the south west of England,²⁰¹ from selling the book.²⁰² Although Donaldson entered a general demurrer, Taylor did not

195. WILLIAM WARBURTON, A LETTER FROM AN AUTHOR TO A MEMBER OF PARLIAMENT, CONCERNING LITERARY PROPERTY (1747).

196. *Midwinter v. Hamilton* (1743-48) and *Millar v. Kincaid* (1749-51) BL 18th century reel, 4065/03, 04. The litigation is explained in DEAZLEY, *supra* note 20, at Ch. 5(1).

197. VINDICATION, *supra* note 3. The parallel litigation was *Tonson v. Collins*, which is described in DEAZLEY, *supra* note 20, at ch. 5(2).

198. Letter from Warburton to Mercy Dodderidge (Mar. 8, 1759) (on file with Historical Society of Pennsylvania, Dreer Collection). Letter from Robert Foulis to William Murray (Dec. 20, 1754), BL Eg.Mss. 1959, *supra* note 186, f. 20, in WARBURTON & KNAPTON, *supra* note 166, at 105.

199. 1 BOSWELL, *supra* note 3, at 437 (entry for July 20, 1763). According to Boswell, Johnson stated that “the term of fourteen years is too short; it should be sixty years.” *Id.*

200 The case was never reported, and the following account is based on the original court documents held at the National Archive at Kew.

201. C111/166 (May 5, 1766) (explaining he sold copies in Bristol, Exeter, Taunton, Salisbury and Bridgewater).

202. The Bill of complaint by Millar against Donaldson, dated May 2, 1763, is C12/515/13. We are grateful to Tomas-Gomez Arestogui for supplying us with a copy of this. Affidavits were lodged in relation to the action against Donaldson by Millar, Dodsley & William Nicoll, the latter of St. Pauls Churchyard, and dated May 2, 1763. Nicoll attested to having purchased a copy of *The Complaint*, printed by Donaldson & Reid in Edinburgh in 1761, from Donaldson for 2 shillings and 6 pence. See C31/148, 270. An interim injunction was awarded on May 3, 1763. C33/420 at 244. The Answer, dated May 9, 1763 is located at C12/405/18.

deny selling the work, 150 copies of which he explained he had been given by Donaldson in exchange for some other books. However, Taylor did say that Donaldson had “informed . . . [him] . . . that the said doctor Young had never sold or assigned the copy right of the said Poems but was pleased with every person who published the same for the public and general benefit of mankind”²⁰³ In addition to asserting his ignorance as to Millar and Dodsley’s title, Taylor’s response went on to assert that neither Dodsley nor Millar had any longer an interest in the poem, the first fourteen years having lapsed. In essence, Taylor did not deny the illegitimacy of his acts, but rather that of the claimants to object to his wrongdoing: if anyone was to bring such an action, Taylor argued, it was Edward Young himself. The defendant:

humbly insists and is advised that the Authors of Books of genius and Compositions of the Brain or the assignees have not vested in them by law a perpetual indefinite right or property to the Copies of such Books but that the sole liberty given to Authors or their Assigns of Printing or reprinting such Books is limited and restrained to the Term of ffourteen Years with this exception that in case the Author of such Book be living after the Expiration of such Term of ffourteen years the sole Right of printing and disposing of Copies of such Books reverts and returns to them for another Term of ffourteen years and this Defendant humbly insists with great submission to the Judgment of honourable Court that the Sale and Assignment of the Books set forth in the Bill (if any such there was) was not good and valid in law for any greater or longer term than ffourteen Years And also humbly insists that the Term of ffourteen years which commenced from the first publication of the said Books being some time since expired and the said Doctor Young being the Author thereof being still alive (as this Defendant believes) the sole property of printing and disposing of the Copies did return to and is now vested in the said Dr Edward Young and him only clean and discharged from the original Sale and unaffected by any mesne assignment of the right of printing such Books. . . . And this Defedant humbly isists upon and hopes he shall have the benefit of the Act of the Eighth of Queen Anne ch. 8 . . . in like manner as if he had pleaded the same to the Complainant’s Bill of Complaint. . . .²⁰⁴

The Master of the Rolls, Thomas Sewell, reviewed the evidence and granted an injunction. Examining the contracts, the Court found that the first five parts had been published in 1743 by Robert Dodsley, who had purchased for £168 “the sole right to him and his heirs

Significantly, perhaps, Donaldson’s demurrer was argued successfully, and the injunction was dissolved by a provisional order on March 18, 1766, made absolute on April 24, 1766. C33/426 at 158, 245. An order was made permitting amendment of the plaintiffs complaint on June 7, 1766, but it is not clear that the matter was pursued any further. C33/426 at 383.

The Bill against Robert Taylor, dated May 31, 1763 is C 12/517/43 m.1. Affidavits were supplied by Millar, dated May 25, 1763, and James Easton, dated May 26, 1763. Millar attested to his and Dodsley’s joint title, while Easton, of Salisbury in Wiltshire, gave evidence that he had purchased a copy of *The Complaint*, printed by Donaldson & Reid in Edinburgh in 1761, from Taylor for 2 shillings and 7 pence on May 20, 1763. *See* C31/148 at 254, 275. After an ex parte hearing at which the plaintiff was represented by the Attorney General, an interim injunction was awarded on June 3, 1763. C33/420 at 307. Taylor’s answer was much slower in coming, dated Feb 1, 1764. C12/517/43 m.2. The Answer was taken by Jacob Kirbey and John Lean on Feb. 1, 1764, at the Fountain Tavern in Bristol. Further orders, for Taylor to produce witnesses or show cause why publication should not pass, were made on May 11, 1765 and June 7, 1765. C33/424 at 226, 299.

For the most exhaustive published account, see DEAZLEY, *supra* note 20, at 172-73.

203. C12/517/43 m.2.

204. C12/517/43 m.2.

forever of the Copy.”²⁰⁵ Dodsley had also purchased “the sole right of Printing” the sixth part in January 1744, and Young giving a written receipt for £52.²⁰⁶ The rights in the remaining three parts were purchased in 1749 by Andrew Millar, for £63, in a deed which conveyed “all that the said Edward Young’s sole right and property in and to” the second volume of the work “forever.”²⁰⁷ When Robert Dodsley gave up business as a publisher in 1759, rights in Young’s work had been transferred to James Dodsley, and thus he and Millar controlled the rights to the work jointly. Following “debate of the matter,” the Master of the Rolls affirmed the grant of an injunction:

to stay the defendant from printing, publishing and vending the Books in question . . . for the remainder of the two terms of fourteen years and fourteen years during which the said Doctor Young as Author of the said Work and the Plaintiffs as standing in his place had a right to the sole printing publishing and vending of the said Books.²⁰⁸

Moreover, the Master of the Rolls referred the calculation of an account of profits to the Master.²⁰⁹

The decision thus indicates that the Court regarded the reversionary term as transferrable, and, indeed, that an agreement to transfer the reversionary term could be entered into prior to the vesting of that term.²¹⁰ Thus Ronan Crawford’s view, that the reversion created a purely personal right, was rejected. Although the reasoning remains unknown, the holding highlights the limitations of the statutory approach. By conceptualizing the author-protective measure in proprietary terms, in 1710 Parliament placed the right within the more general logic of property. One aspect of that logic was, and remains, that property rights are typically assignable.

Moreover, it is an irresistible conclusion from the facts of the case that the Court considered that it was unnecessary to refer explicitly to the reversionary interest or to attempt to over-ride the effect of section 11 through some sort of exclusion clause (such as that pioneered by John Watts). Beyond that, however, it is difficult to draw any precise conclusions as to what the court regarded as *necessary* to assign the reversionary term. Although Dodsley was relying on rather rudimentary documentation, the holding does not imply that this was, of itself, sufficient to transfer the reversionary term. This is because the Court would have been able to base its conclusion that an injunction should be granted on the rights in the final three parts of *The Complaint*, which Millar had secured by way of a deed. All we can be certain of is that a deed in that form was sufficient to transfer the reversion, at least where the dispute was between the alleged transferee and a third party (rather than

205. C33/426.

206. The receipt is contained in the Houghton Library, Harvard University, and is reproduced in EDWARD YOUNG, *THE CORRESPONDENCE OF EDWARD YOUNG* 597 (Henry Pettit ed., 1971).

207. *Ibid.*, 598.

208. *Millar & Dodsley v. Taylor*, C33/426 (Ch. 1765).

209. In his response to interrogatories, Taylor persisted in his claim that he had only sold 150 copies, and that he had gained these in exchange for certain other books (Milton’s *Paradise Lost* and *Paradise Regained*, Bunyan’s *Pilgrims Progress*) which he gave Donaldson. Taylor argued that he made, at most 6 pence on each sale, so that the profits for which he should account were a measly £315 shillings. C111/166 (May 5, 1766).

210. One question mark must have hung over the decision: how could Taylor, the seller, be liable if Donaldson, the publisher, was not? *See supra* note 202.

between the alleged transferee and the intended beneficiary of the statutory reversion: the author).

c) 1765-1774: Common Law Copyright and the Redundancy of the Reversion Right

The 1765 *Millar & Dodsley v. Taylor* decision, significant as it looks in retrospect, seems to have attracted little attention at the time, for booksellers and authors were consumed by a much more significant question: that of common law copyright. Following the 1762 action in *Tonson v. Collins*, which had been dismissed on the basis that the defendant's fees were in fact being paid by the claimant, the issue of an author's rights at common law had been fully argued but lay tantalisingly unresolved.²¹¹ The eyes of the booksellers and authors were thus, from 1763, firmly fixed on the other *Millar v. Taylor*, the case involving James Thomson's *The Seasons*. When the Court of King's Bench held in 1769 that an author, and his assigns, had a perpetual copyright at common law, the limitations that Parliament had imposed on copyright through the Statute of Anne, including the reversionary right, were implicitly redundant.²¹² A common law right existed that, like any other, was assignable in full. Indeed, the common law right in that case may have arisen in Thomson's *The Seasons* as a result of his original efforts, but the action was brought by Andrew Millar, who had himself acquired the rights in three of the four poems from Thomson's original publisher, John Millan. The original agreement between Thomson and Millan was embodied in a written receipt, dated July 18, 1728, purporting to confer on Millan "the intire Right and Property . . . for ever."²¹³ The recognition of the common law right, then, not only undermined the "reversion,"²¹⁴ but may have also resolved the uncertainty that clearly existed over the precise form and content of an assignment. Absent special regulation, common law property in "copies" was assignable like any other property.²¹⁵

d) 1774-1785: Attention Returns to the Statute of Anne

211. *Tonson v. Collins*, (1762) 96 Eng. Rep. 108. Perhaps the arguments in *Tonson* also informed Millar and Dodsley's decision to pursue Taylor and Donaldson over Young's work. Joseph Yates, counsel for Collins, had argued that there could be no perpetual right in the author on the basis that it was inconsistent with section 11: "The Limitation of Time is still farther proof of the same: It commences at a future day; It endures for fourteen years; if the author be living, the right returns to him for fourteen years more. Why only fourteen? Why not to his Representatives, as well as himself." *Id.*

212. *Millar v. Taylor*, (1769) 98 Eng. Rep. 201.

213. The original receipt is in the Houghton Library, Harvard University, but is reproduced in THOMSON, *supra* note 121, at 63. Millan's assignment of the rights to Millar also survives and is reproduced *id.* at 120.

214. Indeed, for this reason, several members of the Scottish Court of Session declined to follow the King's Bench ruling: Lord Kennet said that the reversionary provision "would have been absurd, if authors were understood to have that sole right *ab ante*?" while the Lord President said the reversion was "proof that no previous right was understood to exist." THE DECISION OF THE COURT OF SESSION UPON THE QUESTION OF LITERARY PROPERTY IN THE CAUSE OF JOHN HINTON, LONDON, BOOKSELLER AGAINST ALEXANDER DONALDSON AND JOHN WOOD, BOOKSELLER OF EDINBURGH AND JAMES MEUROSE, BOOKSELLER, KILMARNOCK 2, 36 (James Boswell pub., 1774).

215. That said, Andrew Millar's claim in the 1769 case would not have been affected had the courts required a deed. This is because he had acquired the "sole and exclusive property and right of printing" in the fourth poem, *Spring*, was assigned directly to Andrew Millar by way of a deed, attested by two witnesses, on Jan 16, 1729/30. The original is in the Houghton Library, Harvard University, but is reproduced in THOMSON, *supra* note 121, at 69.

Although there is much dispute over the meaning of the House of Lords' decision in *Donaldson v. Beckett*,²¹⁶ one thing that was clear was that, after February 22, 1774, the continued existence of copyright in published works was a matter for the Statute of Anne rather than the common law. The decision thus clarified the existence of a legal public domain of books in which copyright had lapsed and in relation to which legitimate competition could exist.²¹⁷ At the same time, the decision re-focused attention (of English publishers and authors) on the bifurcated, contingent, term, and, in turn, the issue of assignability. Reporting on the decision, the *Annual Register* observed:

The English booksellers have now no other security in future for any literary purchases they make but the statute of the 8th of Queen Anne, which secures to author's assigns an exclusive property for 14 years, to revert again to the author and vest in him for 14 years more.²¹⁸

After 1774,²¹⁹ publishers' concern with, and authors' consciousness of, the reversion increased.²²⁰ David Hume, for example, offered to assign to his publisher, William Strahan, copyright in the revisions of his works, in order to extend the term:

As to my writings, I think it will be possible for me to prolong your lease of them, even according to the Statute. I have never made a new edition without Alterations, and even Additions, sometimes of a considerable length. If it were thought worth while, I could transfer you anew the Property of these; and if Nobody can reprint these passages during fourteen Years after the first publication, it would effectively secure you so long from any pirated edition.²²¹

216. (1774) 98 Eng. Rep. 257; COBBETT'S, *supra* note 85, at 993 ff.

217. But the London booksellers continued to protect themselves by "honorary copyright": 3 BOSWELL, *supra* note 3, at 370; Harlen, *supra* note 4, at 198.

218. *Annual Register*, XVII.i.95, *quoted in* 2 JOHNSON, *supra* note 155, at 443.

219. Letters between David Hume and publisher William Strahan indicate that the latter did not think the decision in *Donaldson* would or should affect the prices paid to authors for copyright. Writing on April 2, 1774, Hume suggested that the decision would not alter publishers' practices because they could, as previously, operate "a tacite Convention among" themselves. Strahan replied on April 9 that he would "not take into account the present uncertain state of literary property in general" because the "simple question" of remuneration turned on how many copies a book would sell at a particular price "in a few years." HUME, *supra* note 155, at 80, 283-84. Contrast the views of James Beattie in a letter to Edward Dilly, March 29, 1774, who described the decision as one "attended with bad consequences not to Booksellers only, but to authors also, and to Literature in general" and also in a letter to Thomas Blacklock, dated May 23, 1774 (discussing apparent rejection of Blacklock's book by the bookseller Davis), *in* 2 BEATTIE, *supra* note 157, at 261 (Letter no. 514), 269 (Letter no. 550).

220. In 1786, the historian, William Robertson discussed the decision of his publisher to issue a new edition of his *History of Scotland* explicitly in terms of the bifurcated copyright: "Messrs Strahan & Cadell intend to close the second fourteen years of their Copyright property by printing two elegant editions of the Book, one in quarto and the other in octavo." Letter from Robertson to Hardwicke (Jan. 30, 1786), BL Add. Mss. 35350, fol. 73, *cited in* Smitten, *supra* note 158, at 48. Likewise, Gibbon referred to the possibility of providing a revision of his *Decline and Fall* so that the latter would "renew your copy-right at the expiration of the last fourteen years." Letter from E. Gibbon to T. Cadell (Feb. 11, 1789), *in* 3 GIBBON LETTERS, *supra* note 161, at [721].

221. Hume to Strahan, March 1774, 2 HUME, *supra* note 158, (Letter No. 496), 286. *See also* Adam Smith to Thomas Cadell, March 14, 1786, SMITH, *supra* note 180 (Letter no. 257) ("the eight and twenty years property are now expired [in *The Theory of Moral Sentiments*]. But I hope to be able to secure you the property for at least fourteen years more."). Smith was planning a substantially revised edition.

While attention was refocused on the Statute of Anne, including section 11, the earlier Chancery decision of *Millar & Dodsley v. Taylor* seems to have been forgotten by authors, booksellers and (at least some) lawyers alike.²²²

Author Samuel Johnson, for example, clearly had no appreciation of the decision. Considering the possibility of legislative reform of the limited period of protection granted by the Statute of Anne, the famous lexicographer and wit, Dr. Samuel Johnson wrote to his publisher Strahan on March 7, 1774 with the following suggestions:

1. That an Authour should retain during his life the sole right of printing and selling his work . . .

2. That the authour be allowed, as by the present act, to alienate his right only for fourteen years. A shorter time would not procure a sufficient price, and a longer would cut off all hope of future profit, and consequently all solicitude for correction or addition.

3. That when after fourteen years the copy shall revert to the authour, he be allowed to alienate it again for only seven years at a time. After fourteen years the value of the work will be known, and it will be no longer bought at hazard. Seven years possession will therefore have an assignable price. It is proper that the authour be always incited to polish and improve his work, by that prospect of accruing interest which those shorter periods of alteration will afford.

4. That after the authour's death his work should continue an exclusive property capable of bequest and inheritance, and of conveyance by gift or sale for thirty years.²²³

While Dr. Johnson's proposal is interesting, not least because Johnson would have not only reinstated but reinforced the author-protective provisions from section 11, what is more significant about this letter, from our perspective, is Johnson's interpretation of the effect of the section, namely, that it only *permitted alienation* of copyright for fourteen years. According to Johnson, even with a deed and an express intention to override the statutory protection, alienation of the reversionary term was impossible until it had fallen into possession.

Moreover, the practices of at least some publishers seem to have altered after 1774 in a way that suggest that they no longer recalled, or trusted, the 1765 decision. Several of the publishing contracts entered by William Strahan (the addressee of Dr Johnson's letter) in the early 1780s are made by deed, suggesting that Strahan had started to think, as some publishers had in the 1720s and 30s, that such formality was required. Moreover, in a number of these contracts the authors promise, after the fourteen year period has lapsed, to do whatever is necessary to perfect the publisher's title. This implies that the booksellers doubted that even such deeds had necessarily achieved that goal.²²⁴

The legal profession, too, had new doubts about the assignability of the reversionary term. Barrister and law reporter, Charles Ambler, King's Counsel, for example, advised the music publishers, Longman & Broderip, in 1783, that transfers that they believed they had

222. *But see infra*, text accompanying notes 237-238 (counsel for Carnan's reference to "*Millar v. Taylor*").

223. 2 JOHNSON, *supra* note 155, at 442-46 (citing from an original then in the possession of R.B. Adam of Buffalo) (emphasis added).

224. BL Add. Mss. 48901A, *supra* note 88, fol. 20 (Blair), fol. 22 (Buchan), fol. 39 (Mackenzie).

received in the 1760s might not have been fully effective with respect to the contingent reversion.²²⁵ As later recounted in litigation, the Ambler opinion stated that the words of the Statute of Anne were “general” so that it appeared that, if living, the author was entitled to the second term of protection “even against his own Act.”²²⁶ He said he could not “call to mind any Judicial determination upon [the issue].”²²⁷ As a reporter of Chancery decisions from the late 1730s onwards (1737-83), albeit one without an outstanding reputation,²²⁸ he would have been in a good position to know.²²⁹ Clearly, *Millar & Dodsley v. Taylor*, being unreported and having attracted little attention, had quickly disappeared from memory.

- e) 1785-87 Judicial Interpretation of Section 11 in *Rennett v. Thompson*, *Rennett v. Longman and Broderip*, *Carnan v. Bowles* and *Cadell v. Anderson*

The issue of whether, and if so, when and how the reversionary term could be transferred fell finally for decision in four cases in the mid-1780s, two before the four Barons in Exchequer,²³⁰ one in Chancery,²³¹ and one in the Scottish Court of Session.²³² None concerned works of high literature. The first two cases, *Rennett v. Thompson* and *Rennett v. Longman and Broderip*, in Exchequer, concerned music,²³³ a subject matter that courts had only in 1777 explicitly recognized as falling within the scope of the Statute of Anne’s protection of “books.”²³⁴ The third, *Carnan v. Bowles*, was about very different subject matter, namely maps,²³⁵ while the fourth case, *Cadell v. Anderson*, concerned Blackstone’s *Commentaries*.²³⁶

225. Mace, *supra* note 73, at 9, contains Rennett’s answer to Longman & Broderip’s complaint against him, E112/1702, no 3728.

226. Mace, *supra* note 73, at 9.

227. *Id.*

228. John Wallace complained that in “many instances the language of the Judges was so erroneously reported that false ideas were given of the points decided.” JOHN WILLIAM WALLACE, THE REPORTERS ARRANGED AND CHARACTERIZED 513 (1882). Van Vechten Veeder was more damning still. V.V. Veeder, *The English Reports, 1202-1865*, 15 HARV L. REV. 1, 114-15 (1901) (“their statement of facts is often defective, their reports of the arguments of counsel are far from lucid, and sometimes they give an incorrect report of the decree”).

229. Eldon LC said that he had “a very considerable knowledge of the decisions of his own time.” *Clarke v. Parker*, (1812) 34 Eng. Rep. 419, 423.

230. *Rennett v. Thompson* (unreported, 1785) and *Rennett v. Longman and Broderip* (unreported, 1785). The processes seem to have been similar, though Exchequer was often speedier. For background, see W.H. BRYSON, THE EQUITY SIDE OF THE EXCHEQUER: ITS JURISDICTION, ADMINISTRATION, PROCEDURES, AND RECORDS (1975); Henry Horwitz, *Chancery Equity Records and Proceedings, 1600-1800*, 55 CAMBRIDGE L.J. 146 (1996); Henry Horwitz, *Chancery’s “Younger Sister”: The Court of Exchequer and Its Equity Jurisdiction, 1649-1841*, 72 HIST. RES. 161 ff (1999); Judith Milhous & Robert Hume, *Eighteenth Century Equity Lawsuits in the Court of Exchequer as a Source for Historical Research*, 70 HIST. RES. 231 (1997).

231. *Carnan v. Bowles*, (1785) 29 Eng. Rep. 45 (Ch.).

232. *Cadell v. Anderson*, No. 340 (July 17, 1787), in DECISIONS OF THE COURT OF SESSION: FROM NOVEMBER 1781 TO AUGUST 1787, at 522 (A. Law, W. Steuart & R. Craigie eds., 1788) [hereinafter COURT OF SESSION].

233. The cases are thoroughly described in Mace, *supra* note 73, at 13-22.

234. *Bach v. Longman*, (1777) 98 Eng. Rep. 1274 (K.B.). See Michael Carroll, *The Struggle for Music Copyright*, 57 FLA. L. REV. 907, 935-45 (2005).

235. Thompson and Carnan are linked by a curious geographical coincidence: Carrington Bowles and Charles Thompson occupied adjacent premises in St. Paul’s Churchyard: RAVEN, *supra* note 75, at 184 (“Of Donaldson’s Churchyard neighbours, Charles Thompson’s music printing shop stood to the north of the great West door of the [St. Paul’s] Cathedral, almost adjoining Thomas and Carrington Bowles, printsellers and

In the two *Rennett* decisions, the claimant, Charles Rennett, a barrister-turned-music seller,²³⁷ had purchased reversionary terms in certain works from their composers,²³⁸ the celebrated Charles Dibdin and John Garth, before pursuing action for infringement against two music publishers, Thompson and the partnership of James Longman and Francis Broderip who claimed to be acting under the authority of the original transfer. Both claims were unsuccessful. According to a newspaper report, in the first case, *Rennett v. Thompson*, the Barons expressed their “disapprobation of the Plaintiff’s conduct in departing from his profession for that of a Dealer in Musick” before dismissing the Bill unanimously on the basis that the “suit was frivolous and vexatious.”²³⁹ In the second case, *Rennett v. Longman*, the Barons, after reviewing Rennett’s case, and “without hearing one word of the evidence on the part of Messrs Longman and Broderip,” ruled against Rennett.²⁴⁰ The two cases are damning judgments against Rennett, but it is difficult to draw much from them. Although *Rennett v. Thompson* was referred to in argument in *Carnan*, neither it nor the subsequent Rennett action against his former employer, Longman and Broderip, was fully reported, and the reasoning will have remained a mystery to contemporaries.²⁴¹ Not surprisingly, therefore, *Carnan v. Bowles* has long been regarded as the key authority.

Carnan v. Bowles (1786) concerned rights in the book *A New and Accurate Description of All the Direct and Principal Cross-roads in Great Britain*, compiled by Daniel Paterson, the assistant to the Quarter Master General of His Majesty’s Forces. On January 7, 1771, Paterson entered into a publishing agreement with Thomas Carnan, a bookseller at St. Paul’s Churchyard in London. In return for £50 and 300 copies of the book, according to Carnan’s Bill, Paterson:

[D]id Bargain and Sell unto your Orator his Executors Administrators and Assigns the said Book . . . and all his the said Daniel Paterson’s right of copy title interests and Property of in and to the same together with the sole right of printing publishing and vending the same to the only proper use benefit and advantage of your Orator, his Executors, Administrators and Assigns.²⁴²

wholesalers, and for a long time the greatest print and cartoon shop in the country. Thomas Bowles traded no 69, next to the Chapter House, from about 1712 to 1767. His nephew, Carington, son of his brother John, who had been in the trade since about 1720, continued the business until his own death in 1793.”). One might wonder whether Bowles was tempted to transact with Paterson because he knew of Rennett’s assertion of the reversion rights against his neighbour, Charles Thompson.

236. *Cadell v. Anderson*, (July 17, 1787), Case No. 340, in COURT OF SESSION, *supra* note 232, at 522.

237. The complaint described Rennett as “of the Inner Temple” (one of the Four Inns of Court). Rennett operated his music selling from 80 Haymarket.

238. The Garth piece was “Six Sonatas for the Harpsichord, Pianoforte and Organ (assigned on October 20, 1784). The Dibdin works were operas called “The Padlock,” “The Recruiting Serjeant,” and “The Jubilee”, and were assigned on July 28, 1784. Mace, *supra* note 72, at 10, 12.

239. The decree is at E126/33/Trin 1785/26, *cited in* Mace, *supra* note 73, at 21 n.50; ST JAMES CHRONICLE, June 28-30, 1784, at 4d.

240. The decree is at E126/33/Mich 1785/6 and a report of the hearing appeared in TIMES, Dec. 13, 1785, *both cited in* Mace, *supra* note 73, at 21 n.51.

241. One particular difficulty with interpreting the holding in the Longman & Broderip case derives from the fact that Rennett had learned about the vulnerability of Longman’s title while he was employed by the music-sellers as a legal advisor. He would hardly have appeared as having “clean hands.”

242. The Bill and Answer can be found in the National Archives at Kew, London, at C12/133/25m. The Orders are contained in C33/465 at 449 and C33/467 at 23, 393, 429.

Carnan entered the title on the Stationers' register and published and sold many thousands of copies at two shillings each. In due course Paterson corrected and added to the work for a further four editions (in 1772, 1776, 1778, and 1781), each time being paid by Carnan between £10 and £16. Carnan registered each new edition at Stationers Hall. The fifth registration read as follows: "3d September 1781. Received of Mr Carnan Ten Pounds ten shillings for improving and correcting the fifth edition of the Description of the Roads. Dan Paterson."²⁴³

As the first period of fourteen years was coming to an end, Paterson entered discussions with a map and printseller, Carrington Bowles, also of St. Paul's Churchyard, as to the possibility of publishing a map book accompanied by copper-plate illustrations. They seem to have understood that the first term of copyright in the Carnan publication would expire on January 1, 1785. As Bowles was willing to offer Paterson £263 13 shilling and 2 pence, plus fifty copies, it is not surprising that Paterson agreed, and in due course Bowles published *Paterson's British Itinerary, being a New and accurate Delineation and Description of the Direct and Principal Crossroads of Great Britain in Two Volumes*, with some 360 copper plates. The work sold for 2 guineas a copy, twenty-one times the price of the Carnan volume.²⁴⁴

In 1785, Carnan brought an action. Carnan's Bill alleged that the agreements entitled him to

the sole right and property of the said book or pamphlet with additions or improvement so made thereto for a second term of fourteen years commencing and to be computed from the expiration of the first term or from the said 3d day of September 1781 the date of the said last mentioned receipt of the said Daniel Paterson or from the time of his publishing such fifth edition as aforesaid and entering the same in the said Register Book of the stationers Company.²⁴⁵

Such "receipts," Carnan charged, "were and are transfers and sales respectively and the last thereof was and is a transfer of all of such copyright for the term of fourteen years from the dates thereof respectively or at all events of the additions and improvements," improvements which were "numerous and of great value."²⁴⁶ Consequently, Carnan claimed both to be the assignee of the second term in the work embodied in the first edition, and of any rights over improvements made in each subsequent edition, so that any arrangement between Paterson and Bowles was ineffective to vest any rights in Bowles. The Bill went on to assert that the book published by Bowles infringed this right, and to deny Bowles and Patersons' claim that they had published a "different and distinct work and composition."²⁴⁷ Carnan claimed that it was "the same book" and that any variations were "colourable," and sought an answer, an injunction and an account of all the profits made by Bowles.²⁴⁸

The Answers of both Paterson and Bowles denied the charges, claiming that the term of copyright conferred by the statute was fourteen years "and no longer" and had come to an end the previous January, and, in any case, that the book was not the same book, varying

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

from Carnan's in a "very great number of essential particulars."²⁴⁹ In particular, Paterson submitted:

[T]hat he had not power to renew the said complainant's right of printing and publishing the said work so sold to him by this Defendant or his assignor or to enforce his term therein beyond the aforesaid term of 14 years this Defendant being disabled as this Defendant humbly apprehends by the said Act of the Eighth Year of the Reign of Queen Anne from selling or assigning the said Copy right for a longer term or number of years than Four teen Years only.²⁵⁰

In July 1785, the Solicitor General, Archibald MacDonald, supported by Madocks and Needham, put the case for Carnan, that the contract by Paterson, purporting to convey "all his . . . right," must convey the contingent interest in the second term of fourteen years, as well as the absolute interest in the first fourteen.²⁵¹ The power to assign must be co-extensive with the right given by the Act.²⁵² In effect, this was a direct appeal to the proprietary logic implicated in the form of the statutory provision: the author was given two rights, two properties, and because each was a property, each was assignable.

Carnan's counsel also appealed to authority. They cited in support the decision in *Millar v. Taylor*, as well as that of the Court of Exchequer in *Renett v. Thompson*. The report says that the Solicitor-General argued that "[i]t was understood in the case of *Millar v. Taylor*, 4 Burrow, 2303, that Millar took the whole right for twenty-eight years, if the author should be alive at the end of the first fourteen,"²⁵³ but the reporter, William Brown, seems to have confused the Kings Bench decision with the 1765 Chancery case, mistakenly inserting the reference to the former.²⁵⁴ Counsel further urged that the case was governed by *Renett*, where an assignee of the reversionary term was held not to be entitled to injunctive relief as against the initial purchaser on the grounds that "the whole right" had been passed by "the first grant."²⁵⁵

Counsel for Bowles, Mansfield and Stanley argued for Paterson that he "meant to convey only what he had absolutely, the right of sole printing for fourteen years."²⁵⁶ Moreover, they observed that "the expression in the [A]ct meant to secure something to authors, even against their own acts."²⁵⁷ After fourteen years, it says, "the right shall *return to the authors* (not their assigns), if living; so that it is a personal bounty to the authors only. In selling the right, the author sells all that is in him, not the contingent right that may return to

249. *Id.*

250. *Id.*

251. *Carnan v. Bowles*, (1786) 29 Eng. Rep. 45 (Ch.).

252. *Id.* at 46. Carnan featured some of the leading barristers of the time, with one contemporary account noting that "[t]here was a vast quantity of talents exercised on this object." THE WORLD, & FASHIONABLE ADVERTISER, July 20, 1787.

253. *Carnan v. Bowles*, (1786) 29 Eng. Rep. 45 (Ch.), 46.

254. Indeed counsel for the defendant was also wrong-footed, observing, "In *Millar v Taylor*, if Thompson had lived, the question would have been between them, not upon the common law right. No argument can be drawn from that case as to this question." *Carnan v. Bowles*, (1786) 29 Eng. Rep. 45 (Ch.), 46. Counsel clearly were thinking of the case concerning James Thompson's *The Seasons*, rather than Edward Young's, *The Complaint*.

255. *Id.*

256. *Carnan v. Bowles*, (1786) 29 Eng. Rep. 45 (Ch.), 46.

257. *Id.*

him.”²⁵⁸ The Solicitor-General’s reply sought to account for the language in the statute: the “*return* is only between the public and the author, not between him and his assignee. There are no negative words in the act to prevent his assigning that, as well as his other rights. In many cases, if he could not assign it, the disability would be productive of great inconvenience.”²⁵⁹

The Master of the Rolls,²⁶⁰ sitting for the Lord Chancellor, seems to have treated the latter arguments as persuasive, because he viewed the whole question not as one of whether the author could convey the contingent interest, but whether, on the facts, he had done so. Holding that Paterson had transferred the reversionary term, Lord Kenyon looked at both the wording of the 1771 grant and its context. The reference to transfer of all interest, he explained, was capable of transferring the contingent interest (leaving unclear whether the other terms – “right of copy, title, . . . and property” – would have had a similar effect). This was especially so because, in the context of the agreement, which fell between the decision of the Court of King’s Bench in *Millar v. Taylor* (1769) and that in *Donaldson v. Becket* (1774), the parties would have assumed a common law right in perpetuity:

[T]he contingent interest must pass by the word interest in the grant. He conveys all his interest in the copyright: the assignment must have been made upon the idea of perpetuity; and it is probable not a syllable was said or thought of, respecting the contingent right. They merely followed the old precedents of such conveyances. It must I think be considered as conveying his whole right. If he had meant to convey his first term only, he should have said so.²⁶¹

The decision as to the similarities between the works was to prove more problematic. When the Master of the Rolls, Lloyd Kenyon, heard the case, on July 23, 1785, he referred the question of the similarities between the works to Master Wilmot, who reported on May 29, 1786, that while the works were not the same book, differing significantly, nevertheless there were similarities in the roads described.²⁶² On June 20, 1786, the Master of the Rolls awarded an injunction, taking the view that adding pictures did not mean that Bowles could escape liability: “the mere act of embellishing could not divest the right of the owner in the text.”²⁶³ But, on appeal, in November 1786, Lord Thurlow, Lord Chancellor, found that the report of the Master was not sufficiently clear, and should be referred back to him to determine whether the Bowles work was “a new and original work and in any and what particulars.”²⁶⁴ The Master reported on May 19, 1787, in a manner favorable to the defendant, therefore, it seems that no final injunction was granted.²⁶⁵

258. *Id.* (emphasis in original).

259. *Id.* at 46-47 (emphasis in original).

260. William Brown’s report attributes the Lord Chancellor, but the Order Book, C33/465 at 449 suggests that the order was made by the Master of the Rolls.

261. *Carnan v. Bowles*, (1786) 29 Eng. Rep. 45 (Ch.), 47.

262. *Carnan v. Bowles*, (1786) 29 Eng. Rep. 1168.

263. *Carnan v. Bowles*, (1786) 29 Eng. Rep. 45 (Ch.), 47-48; C33/465 at 449.

264. *Carnan v. Bowles*, (1786) 29 Eng. Rep. 45 (Ch.), 48 n.1; *Carnan v. Bowles*, (1786) 29 Eng. Rep. 1168; C33/467 at 23 (November 24, 1786).

265. C33/467 at 393 (Lord Chancellor ordering that effect be given to the report of the Master unless the plaintiff showed good cause why it should not); *id.* at 429 (June 4, 1787) (requiring plaintiff’s objections be argued within 4 days or to be dismissed). As there are no further references, we can assume that the plaintiffs did not pursue the matter further.

(f) 1787-1814: Deciphering *Carnan v. Bowles*

Lord Kenyon’s analysis of the question of the reversionary right might thus, in strict precedential terms, have been considered “obiter.” It did not matter, for the purposes of the suit, whether Carnan owned the copyright: even if he did, there was no reversion. But this is too narrow and meticulous an understanding of what, to contemporaries, would have been regarded as the leading decision – given that the two *Rennett* cases lacked published reasons and remained largely unreported. *Carnan* established three points clearly: that the reversionary term could be assigned; that this assignment could occur in advance, that is before it vested; and that no deed (in the sense of a document signed *and sealed*) was required to do so. On the first two points, the view that had prevailed in some circles in Scotland was firmly rejected south of the border – and in *Cadell v. Anderson*, the Court of Session came to the same conclusion for Scotland.²⁶⁶ On the third point, the Court clarified something that had been unclear to contemporaries, from Pope onwards (and had not been resolved in *Millar & Dodsley v Taylor* (1765)). As the *Rennett* cases and *Cadell* also seem to have not involved “deeds,” they, too, affirmed this point.²⁶⁷ Indeed, in one of the *Rennett* cases, the successful defendants, Longman & Broderip, had maintained that it had been the habitual practices of publishers of music and books merely to give receipts in return for copyright.²⁶⁸ But, those three clarifications apart, the judgment in *Carnan* (and the unexplained holdings in the other cases) left unclear precisely what it was that was effective to convey the reversionary term. Three possible interpretations suggest themselves.

On one reading of *Carnan*, Lord Kenyon may be thought to have said that the reversion was only retained in a case where the author expressly reserved his or her rights: after all, the judge explained, “[i]f he had meant to convey his first term only, he should have said so.”²⁶⁹ Such a conclusion would have removed the statutory protection, placing the onus on the author to establish his or her rights expressly in the contract. It seems unlikely that, so soon after *Donaldson v. Becket* had emphasised the importance of statutory law that a judge would feel justified in ignoring it.

An alternative understanding of *Carnan* is that the contingent reversion was transferred because the document used “the word *interest* in the grant.”²⁷⁰ If so, the implication might be that the alternative terms of “right,” “property,” or “copyright” (terms that might have implied a vested interest rather than an expectant one) would not themselves have sufficed. On this reading, an effective transfer required that a transferee ensure that there were special words in the contract. Such an understanding would have placed undue emphasis on what might appear to be the chance inclusion of one noun amongst many alternatives. As our review of *The Upcott Collection* makes clear, many transactions use the terms right, property,

266. *Cadell v. Anderson* (July 17, 1787), Case No. 340, in COURT OF SESSION, *supra* note 232, at 522.

267. *Rennett’s* bill of complaint did, however, state that his assignment of the reversionary term, which occurred once the contingent term had vested in the composer John Garth was “by Indenture.” See Mace, *supra* n. 72, at 10, 12.

268. Mace, *supra* note 73, at 15-22.

269. *Carnan v. Bowles*, (1786) 29 Eng. Rep. 45 (Ch.), 47.

270. *Id.*

and copyright but not “interest.” However, given that Lord Kenyon went on to conclude that the transaction was to “be considered as conveying his whole right,”²⁷¹ it seems unlikely that he intended the transfer of the reversion to depend on such a technicality. Although the subsequent *Cadell* case gives no guidance, as the precise terms of the initial assignment from Blackstone to Cadell, Strahan and Creech are unspecified,²⁷² the *Rennett* cases support the view that it was not merely a question of the use of the precise term “interest”: *Rennett*, who purported to be the assignee of the reversion in some of the musical works of Charles Dibdin there failed to establish that the initial transfer had not itself conveyed the reversion to the transferee even though the document had merely specified that the money Dibdin received was “for my property” in the music, with no further elaboration.²⁷³

A third reading of Lord Kenyon’s judgment would view the interpretation as reflecting the specific assumptions of the parties at a particular time in legal history. The Judge explained that “the assignment must have been made upon the idea of perpetuity.”²⁷⁴ This assumption seems plausible given that the date of the contract between Paterson and Carnan on January 7, 1771 preceded the House of Lords decision in *Donaldson v. Becket* on February 22, 1774. If so, it is unclear whether the reasoning would only have applied to contracts made after April 20, 1769, the date of the judgment of the court of King’s Bench in *Millar v. Taylor*, or ones made in England (given that different assumption might have applied in Scotland)? *Rennett*’s failed action against Longman and Broderip was, however, inconsistent with this technical interpretation. Although, as regards Garth’s works, Longman’s defence was based on a contract from June 1769, the Dibdin contracts were said to have occurred in January 1769, and thus preceded the King’s Bench decision in *Millar v Taylor*.²⁷⁵ Of course, it might be that the parties’ expectations even before *Millar v. Taylor* was that there was a perpetual common law right. If this was the real basis of the Carnan decision, then presumably these types of contracts would have had a very different effect where they were entered after February 22, 1774.

In fact, it seems that after *Carnan v. Bowles*, the interpretation of section 11 that was most widely adhered to was that in order to transfer the second fourteen year period to the original publisher, the contract must have expressed an intention specifically to convey the reversionary term. This was how Lord Chancellor, Lord Scott, who had appeared as counsel successfully in both the *Rennett* cases and in *Carnan v Bowles*, interpreted the law in *Rundell v.*

271. *Id.*

272. *Cadell v. Anderson*, No. 340 (July 17, 1787), in COURT OF SESSION, *supra* note 232, at 522.

273. *Rennett*’s Bill of complaint, asserted that on June 23, 1769, the composer John Garth did “sell assign and set over the said Opera or Musical Work unto Peter Welcker of Gerrard Street Soho in the City of Middlesex Music Seller together with all his said John Garth’s Right and Interest therein.” E112/1705 No 3808..

274. *Carnan v. Bowles*, (1786) 29 Eng. Rep. 45 (Ch.), 47.

275. The *Rennett v. Thompson* case was based on rights in the works of John Garth a composer of keyboard sonatas, which too, had originally been published in the late 1760s, with the sold to publisher Peter Welcker before finding their way into the hands of Thompson. *Rennett*’s complaint asserted that Garth’s sale of rights to Peter Welcker occurred on June 23, 1769, and thus that the rights reverted in June 1783. The Dibdin operas on which the complaint was also based, that is, *The Padlock*, *The Recruiting Serjeant*, and *The Jubilee*, were said to have been created and published “in or about” January 1769. E112/1705 No 3808. Mace, *supra* n. 72 at 10, dates their composition as 1768 (*The Padlock*), 1769 (*The Jubilee*) and 1770 (*The Recruiting Serjeant*).

Murray (1821).²⁷⁶ He explained: “I conceive that an author will not be taken to have assigned his contingent right in case of his surviving the fourteen years, unless the assignment is so expressed as to purport to pass it.”²⁷⁷ An 1808 Bill that would have abolished the reversionary term prospectively also contained a transitional clause that reflected this understanding of the position under section 11,²⁷⁸ giving the author the sole liberty of printing and reprinting such Book and “the power of assigning and disposing of such additional right and liberty, any general words in any former Agreement or Assignment to the contrary notwithstanding.”²⁷⁹ This provision appears to be an affirmation of the interpretation, consistent with (if not specified in) *Carman*, that “general words” were not effective to assign the reversionary term.

The case law of the 1780s, then, preferred the idea of an author’s proprietary autonomy to the sort of paternalistic view that seems to have motivated the legislature in 1710, the Booksellers Bill in 1737, or Johnson’s remarks in 1774.²⁸⁰ Such an approach may well have been informed by the famously lucrative payments many authors had received in the 1770s from publishers such as Cadell and Strahan. These indicated that some authors could negotiate well for themselves, and that, in many cases it was publishers who took the risk. When Johnson famously stated that Andrew Millar had “raised the price of literature,”²⁸¹ he was referring approvingly to these increased payments to authors rather than objecting, as might have been traditional, to the exorbitant prices that the booksellers charged. Elsewhere, discussing payment he had himself received from the collective of booksellers who funded the production of his famous dictionary, Johnson observed that the “booksellers are generous liberal-minded men.”²⁸²

3. *Evidence of Use of the Reversion*

If perceptions of the law were such that many of the contractual arrangements originally made by authors with their publishers would not have successfully transferred the reversion, what evidence is there of these authors using the reversionary term to extract further remuneration? The answer is that, as far as we can tell there is very little.²⁸³ None of the contracts in *The Upcott Collection* appear to be assignments of the second fourteen-year term, itself, perhaps, rather telling evidence of their comparative rarity. But individual biographical

276. (1821) 37 Eng. Rep. 868, 870.

277. *Id.*

278. A Bill for the Further Encouragement of Learning in the United Kingdom of Great Britain and Ireland, by Securing to the Libraries of the Universities, and Other Public Libraries, Copies of All Newly Printed Books, and Books Reprinted with Additions; and by Further Securing the Copies and Copyright of Printed Books to the Authors of Such Books, or Their Assigns, for a Time to Be Limited, 1808, H.C. Bill [314] (G.B.) [hereinafter 1808 Bill]. The Bill was considered in Committee on June 22, 1808. (1808) H.C.JOUR. 461.

279. 1808 Bill, H.C. Bill [314], at 3.

280. Cornish, *supra* note 28, at 22 (“In an age when freedom of contract was gaining an increasing hold, the judges were not willing to read an ambiguous section of the Statute as imposing a mandatory construction in the hope of protecting authors against the booksellers”)

281. 1 BOSWELL, *supra* note 3, at 288.

282. *Id.* at 304-05.

283. We have relied on THE UPCOTT COLLECTION, *supra* note 5, and biographical accounts. One important primary source we have yet to investigate is the Strahan ledgers in the British Library. As we will see, this includes at least one reference to a payment being made for the reversionary term. Further work might reveal other entries of this sort.

records do tell us of at least four occasions where an author seems to have taken advantage of the reversion.

The first case, perhaps not surprisingly, concerned Alexander Pope. In 1740, Pope was anticipating the lapse of a fourteen year assignment of rights in *The Dunciad*, which he had assigned, indirectly, to Lawton Gilliver in 1728.²⁸⁴ As far as Pope was concerned, the assignment related only to the first fourteen-year period under the statute,²⁸⁵ and thus the rights in the work would revert to him in 1742.²⁸⁶ However, Pope then heard that Gilliver (whose relationship with Pope had deteriorated) had assigned his right to another publisher, Henry Lintot (son of Bernard Lintot, who had published some of Pope's early works).²⁸⁷ Pope feared that if Lintot now republished *The Dunciad*, this would undermine Pope's plans for a new edition "with diverse alterations, additions and improvements thereto."²⁸⁸ Lintot wrote to Pope in January 1740/41, primarily about *The Iliad* and *The Odyssey*, but Pope's notes on the letter – transcribed by George Sherburn from the originals in the Egerton Manuscripts – are revealing.²⁸⁹

see Gilliver's assignment Lords.

Silend: The dunciad, qu. Of Lintot, Gillivers Property is expir'd or expires next year
or this not to purchase it...²⁹⁰

Pope's reference to "Lords" is almost certainly to the very peculiar circumstances by which Gilliver came by the rights: Pope had initially assigned the copyright to three Lords, to shield his identity from the public, and then had them assign the rights to Gilliver.²⁹¹ The rest of the note is self-explanatory: as far as Pope was concerned, Gilliver's rights were about to lapse and thus should not be assigned. Unfortunately, the transaction was completed and Lintot went ahead with his reprinting of the poem, as Pope had feared. Pope thereupon brought a claim in Chancery, relying simultaneously on the limited terms of the contract and the proviso contained in section 11 of the Statute of Anne. In the claim, Pope alleged that the property in the copy had reverted to him "not only in consequence of the said

284. The details are recounted in the pleadings in the case of *Pope v. Lintot*, which survive in the National Archive. C11/549/39 (Feb. 16, 1743). The complaint from Pope is dated February 16, 1742/3 and the answer from Lintot April 19, 1743. Some aspects of the litigation are discussed in Howard P. Vincent, *Some Dunciad Litigation*, 18 *PHILOLOGICAL Q.* 285 (1939).

285. The bill of complaint explains that the agreement was for the "purchase of copy or sole right of printing and publishing the said Book or Poem for a Term of Fourteen Years pursuant to the Regulations and Provisions made in and by an Act of Parliament in the Eight Year of her late Majesty Queen Ann. . . ."

286. The pleadings in fact leave a number of gaps where the relevant dates were to appear. James McLaverty notes that "Pope [was] very uncertain about when he had disposed of the copyright." James McLaverty, *Lawton Gilliver: Pope's Bookseller*, 32 *STUD. BIBLIOGRAPHY* 101, 104 (1979).

287. Henry Lintot's answer suggests that he bought a one third share indirectly, via a printer named Clarke and another publisher, John Osborne, on Jan 18, 1739/40, and then two thirds directly from Gilliver on December 15, 1740. For Pope's contracts with Bernard Lintot, see *supra* note 118.

288. National Archive C11/549/39 (Feb. 16, 1743).

289. BL Eg. Mss. 1951, *supra* note 165, fols. 17, 18, 19; 4 POPE, *supra* note 190, at 222-24.

290. BL Eg. Ch. 738.

291. As Pope's bill of complaint explained "a Treaty of Agreement was thereupon set on foot by and between your Orator or others on your Orators behalf...with your Orator's privity and consent." See National Archive, C11/549/39 (Feb. 16, 1743). On the background, see James Sutherland, *The Dunciad of 1729*, 31 *MODERN LANGUAGE REV.* 347 (1936).

assignment or bill of Sale and the express agreement therein contained but also of the express proviso in the said Act of Parliament.”²⁹² The pleading suggests that Lintot had offered three reasons for refusing to comply: first, that it was not clear that Pope was the author or owner; secondly, that the assignment was of the perpetual “author’s right”; and thirdly, that Lintot was unaware of the limitation. In his answer, Lintot acknowledged Pope’s authorship of *The Dunciad*, and relied only on his assignment of whatever interest Gilliver possessed, alleging he was ignorant of the existence and or extent of any limitation on that right. The answer thus did not squarely address the question of the statutory reversion.

For reasons that remain unclear, the case did not proceed to a hearing. There is no record on the *English Short Title Catalogue* of a Lintot edition of *The Dunciad*, so it is likely that he conceded the validity of Pope’s claim, in return for which Pope dropped the suit.

The other three examples come from later in the eighteenth century. Anecdotal evidence suggests that a number of high profile authors, including Sir William Blackstone, Adam Smith, and Dr. Samuel Johnson (1709-1784), dealt explicitly with the reversion: Johnson retained the reversion rights, while Blackstone and Smith explicitly assigned the right once it had fallen into possession.

The William Blackstone example relates to his *Commentaries on the Laws of England*.²⁹³ This classic text is in four volumes, and each volume was published at different times, the first on November 18, 1765 at eighteen shillings and with a print run of 1,500. Blackstone retained the copyright and had the book printed by Oxford University Press.²⁹⁴ The *Commentaries* was an immediate success.²⁹⁵ In 1772, the copyright was assigned to Daniel Prince, William Strahan, and Thomas Cadell for £2000.²⁹⁶ When the first fourteen-year period of copyright in the first volume came to an end, Blackstone, who was still alive, assigned the reversionary term to Cadell.²⁹⁷ The Strahan ledgers,²⁹⁸ which feature the initial payment of £2000, do not suggest that any additional payment was made. Blackstone had been a well-known advocate for perpetual copyright,²⁹⁹ and it may be that, at the time he first contracted with Cadell and Strahan (when the 1769 King’s Bench decision in *Millar v. Taylor* that recognized a perpetual common law copyright was the governing authority), he had believed he was transferring the rights to the publishers in perpetuity. If so, he may well have thought it proper in 1769 to

292. *Id.*

293. Cadell v. Anderson, No. 340 (July 17, 1787), in COURT OF SESSION, *supra* note 232, at 522.

294. Harry G. CARTER, A HISTORY OF OXFORD UNIVERSITY PRESS 406-08 (1975); WILFRID R. PREST, WILLIAM BLACKSTONE: LAW AND LETTERS IN THE EIGHTEENTH CENTURY 217 (2008); JAMES PRIOR, THE LIFE OF EDMOND MALONE, EDITOR OF SHAKESPEARE 431 (London, Smith, Elder & Co. 1860) (anecdote suggesting Blackstone made £14,000 and his bookseller made £10,000).

295. Prest, *ibid.*, 219-220 (“enormous success”).

296. IAN G. DOOLITTLE, WILLIAM BLACKSTONE: A BIOGRAPHY 100 (2001); C.S. ELLER, THE WILLIAM BLACKSTONE COLLECTION IN THE YALE LAW LIBRARY 2-3 (1993); PREST, *supra* note 299, at 217-19, app. 2 (transcribing details of annual income from the book); R.D. Harlen, *Sale and Profits of Some Early Editions of Sir William Blackstone’s Commentaries*, 58 PAPERS BIBLIOGRAPHICAL SOC’Y AM. 156, 156-159 (1964); R.D Harlen, *supra* note 4, at 188. There is no surviving Blackstone archive.

297. *Id.*

298. BL Add. Mss. 48807, *supra* note 88, relates to Blackstone’s *Commentaries*.

299. Blackstone was counsel for Tonson in *Tonson v. Collins*, (1762) 96 Eng. Rep. 180, and for Millar in *Millar v. Taylor* (1769) 98 Eng. Rep. 201, and later one of the eleven judges in *Donaldson v. Becket* (1774) 98 Eng. Rep. 257.

transfer the second term, so as to give effect, as far as possible, to the agreement he had intended to make in 1772.

The Johnson dealings concerned *The Lives of the Poets*.³⁰⁰ William Cook, the author of *The Life of Samuel Johnson with occasional remarks on his writings*, says that:

[T]he booksellers on going to press with the third edition of the *Lives* offered Johnson £200 for his reversion of the copyhold; but the Doctor, meeting the offer with the same generosity, after pausing some time replied, “Why, let me see – fourteen years hence, why I shall be but eighty-six – no – I’ll even keep the reversion as a nest egg for old age.”³⁰¹

As matters turned out, Johnson’s decision to retain his rights was of no consequence. He died the next year, well within the first fourteen-year term, so the contingent term never came into being.

The third example concerns Adam Smith and *The Wealth of Nations*, which was first published in 1776 by Strahan and Cadell on a profit-share basis.³⁰² Twelve years later, and after four successful editions, the publishers purchased the copyright from Smith for £300.³⁰³ In the spring of 1790, the first term was approaching its end, and the publishers were keen to secure the reversion. Smith, who was sick and dying, was — it seems — also eager to sell the property so that he could make suitable provision for his nephew, David Douglas.³⁰⁴ Consequently, in April 1790, Smith conveyed the reversionary term for a further £300. Details of the transaction are recorded in Strahan’s ledgers,³⁰⁵ and were recalled by Thomas Cadell in a letter two years later.³⁰⁶ The transaction was just in the nick of time: Smith passed away three months later on July 17, 1790.³⁰⁷

The limited evidence of use of the reversion may seem surprising, but is less so when placed in the context of late-eighteenth century author-publisher relations. Most books would perish after a short time, and, where they did not do so, the author frequently passed away before the contingent term was in operation.³⁰⁸ Moreover, many of the books that were valuable after fourteen years retained that value as a result of repeated updating and

300. SAMUEL JOHNSON, *THE LIVES OF THE MOST EMINENT ENGLISH POETS: WITH CRITICAL OBSERVATIONS ON THEIR WORKS* (R. Lonsdale ed., 2006).

301. (Kearsley, 1785) 65, *quoted in* 1 JOHNSON, *supra* note 155, at 433.

302. SHER, *supra* note 3, at 236; Sher, *supra* note 180; Letter from Adam Smith to William Strahan (Nov. 13, 1776), *in* SMITH, *supra* note 180, at 221 (Letter no. 179); Letter from William Strahan to Adam Smith (Nov. 26, 1776), SMITH, *supra* note 180, at 222 (Letter no. 180).

303. SHER, *supra* note 3, at 236; Sher, *supra* note 180.

304. Sher, *supra* note 180, at 8.

305. BL Add. Mss. 48814A, *supra* note 88, fol. 7, *reproduced in* Sher, *supra* note 180, at 7 fig. 2.

306. Letter from Thomas Cadell, the elder, to Henry Mackenzie (Dec. 21, 1792) (letter No. 95), *in* HENRY MACKENZIE, *LITERATURE AND LITERATI 177* (H.W. Drescher ed., 1989).

307. Donald Winch, *Smith, Adam (bap. 1723, d. 1790)*, OXFORD DICTIONARY NAT’L BIOGRAPHY, Sept. 2004, online ed. Oct. 2007, *available at* <http://www.oxforddnb.com/view/article/25767> (last accessed June 21, 2010).

308. Of those that had a continuing market, a substantial proportion related to works published within 14 years of the authors death: *The Wealth of Nations* turned 14 just months before Smith died, but Goldsmith wrote *The Vicar of Wakefield* seven years before his death, while Johnson died only three years after publication of his magnum opus, *The Lives of the Poets*. See 1 UPCOTT, *supra* note 5, at [129] (indicating that George Lillo’s *The London Merchant*, was first published in 1731, only eight years before Lillo’s death).

amendment. Such alterations not only induced new sales, but also created new copyrights. Writing in 1774 to his co-publisher William Creech, William Strahan justified the publisher's generous gift of copies of books to their author: "His constant Corrections will merit such a Present, and tend much as well to the Preservation of Property as to the sale of it."³⁰⁹ In the context of a work that had been amended on a number of occasions during the first fourteen-year term, reversion would only have enabled the sale of rights in the text as originally conceived. A new publisher would not be entitled to use the revisions. This meant that the reversion would be of limited value, really only relevant where the new assignee had some vision of a transformed work (as in *Carman v. Bowles*) or where there were no revisions (as, for example, with pieces of music).

The practice of revising editions reminds us, too, that the author-publisher relationship was often one characterised by continuity — a continuity which a decision to exercise the reversion might well have disrupted. This continuity had, in some cases, a social element and, in many cases, a commercial one.³¹⁰ Many authors published their works through the same publisher again and again. In such cases, old deals that turned out, in retrospect, to look as if they had disproportionately rewarded a publisher, could be compensated by generous new deals. One such example concerned Strahan and Creech's dealing with William Buchan, who having had a huge commercial success with *Domestic Medicine*, proposed to compose a different work: *Preventive Medicine*. The publishers were keen to retain Buchan, and keep him happy, for if he moved to a different publisher he might write a book that would supplant demand for *Domestic Medicine*. Although they never envisaged that Buchan would complete *Preventive Medicine*, nor were the publishers particularly keen to do so, they entered a generous contract with the author.³¹¹ Another dimension to the continuity of relations between publisher was the seemingly relatively common practice whereby if a book turned out to be particularly successful, the publisher would offer the writer extra payment beyond that to which he or she was entitled under their contract.³¹² Given these sorts of relationships, it is hardly surprising that the authors that explicitly exercised their reversion rights, such as Adam Smith or William Blackstone, did so by conveying the contingent term to the original publisher.

Finally, it is perhaps worth observing that, while the contingent reversion was designed to protect authors, many authors of the time expressed a preference for outright assignments

309. Letter from Strahan to Creech (Sept. 9, 1774), *quoted in* Richard B. Sher, *William Buchan's Domestic Medicine: Laying Book History Open*, in *THE HUMAN FACE OF THE BOOK TRADE: PRINT CULTURE AND ITS CREATORS* 45, 54 (Peter Isaac & Barry McKay eds., 1999).

310. KENT, *supra* note 156, at 61 ff (describing the relationship between publisher, John Newbery, and writer Oliver Goldsmith, including Newbery's payment of the writer's rent and debts). In *The Vicar of Wakefield*, Goldsmith describes Newbery as "the friend of all mankind." OLIVER GOLDSMITH, *THE VICAR OF WAKEFIELD: A TALE SUPPOSED TO BE WRITTEN BY HIMSELF* 113 (Houghton, Mifflin & Co., 1895).

311. BL Add. Mss. 48901, *supra* note 88, fol. 22, *cited in* Sher, *supra* note 309, at 64 n.21

312. For example, Andrew Millar paid Henry Fielding an additional £100 for *Tom Jones*, over and above the £600 copy money. *See* Horace Walpole to George Montagu (May 18, 1749), in WALPOLE, *supra* note 130, at 384. Millar also paid the same sum to Mrs. Sheridan, when the demand for her play, *The Dupe*, turned out to be "uncommonly great." Letter from Andrew Millar to Mrs. Sheridan (undated), in SAMUEL WHYTE & E.A. WHYTE, *MISCELLANEA NOVA* 118 (Dublin, 1801). Richard Sher gives many examples of authors who had continuing relationships with specific publishers, and circumstances where publishers would "compensate" authors for bad bargains with additional gratuitous payments or increased payments on later works. SHER, *supra* note 3, at 244-45 (detailing extra payments from Strahan & Cadell to John Moore).

over other forms of exploitation. Advising Sylvester Douglas in 1775, James Beattie wrote: “I would not advise you to make a conditional bargain, stipulating for a price proportioned to the sale of the Book . . . I think it would be better if you could finish the matter at once, and sell your manuscript finally for a sum of money.”³¹³ Historian Richard Sher proclaims that this view “was widespread among eighteenth-century authors.”³¹⁴ Certainly, a number explained that they sold copyright in order to avoid the difficulty of managing publication. For example, David Hume wrote to William Strahan that “in order to avoid the Trouble and Perplexity” of publishing himself, he wished “at once to part with all the Property” in the *History of England*.³¹⁵ Similarly, the novelist Frances Burney (1752-1850), who had initially been careful not to sell her copyright in *Camilla* (1796), did so soon after publication in order to save herself the job of managing its exploitation.³¹⁶

C. THE DEMISE OF THE REVERSION RIGHT IN 1814

Section 11 of the Statute of Anne was repealed and replaced by the Literary Copyright Act of 1814.³¹⁷ The Act extended the term of copyright from two terms of fourteen years to one term of twenty-eight years, and if the author were still alive when the twenty-eight-year term elapsed, to the life of the author. The relevant part of section four specified, with regard to works composed or published after the passage of the Act (July 29, 1814), “The author and his assignee or assigns, shall have the sole liberty of printing and reprinting such Book or Books for the full term of twenty eight years. . . and also, if the author shall be living at the end of the period, for the residue of his natural life.”³¹⁸

The idea of replacing the bifurcated term with a single one had been conceived at least six years previously, rather oddly, perhaps, in the context of concerns over the enforcement of the obligation imposed by the Statute of Anne upon publishers to deposit copies of their works with various libraries, including those of the Universities of Oxford and Cambridge.³¹⁹ In the case of *Beckford v. Hood*,³²⁰ it was held that an action lay on the basis of the Statute for damages, as opposed to the penalties prescribed by the Act, and that this remedy was available whether or not the work was registered with the Company of Stationers.³²¹ As a

313. Letter from James Beattie to Sylvester Douglas (Aug. 14, 1775), in 2 BEATTIE, *supra* note 157, at 308-09, cited in SHER, *supra* note 3, at 214.

314. SHER, *supra* note 3, at 214.

315. Letter from Hume to Strahan (Feb. 15, 1757), in HUME, *supra* note 155, at 14.

316. 3 THE JOURNALS AND LETTERS OF FANNY BURNEY (MADAME D'ARBLAY) 227 (J. Helmlow et al. eds., 1972).

317. An Act to Amend Several Acts for the Encouragement of Learning, 54 Geo 3, c. 156, § 4 (G.B. and British Empire). The details of the passage of the Act are obscure. Lionel Bently, *R v. The Author: From the Death Penalty to Community Service*, 32 COLUM. J.L. ARTS. 1, 66-71 (2008); Ronan Deazley, *Commentary on the Copyright Act of 1814*, available at PSOC, *supra* note 3, [http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabeCom/"uk_1814"](http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabeCom/) (calling this a “blind-spot in accounts of British copyright law”).

318. An Act to Amend Several Acts for the Encouragement of Learning, 54 Geo 3, c. 156, § 4 (Eng.).

319. The Statute of Anne designated nine (The Royal Library, University of Oxford, University of Cambridge, Sion College, the University Library and the Faculty of Advocates in Edinburgh, the University Libraries at Glasgow, St Andrews and Aberdeen) and a further two (Trinity College Library and the Kings Inn Library) had been added in 1801 when the application of the Act was extended to Ireland. 41 Geo. 3, c. 2.

320. *Beckford v. Hood*, (1798) 101 Eng. Rep. 1164 (K.B.).

321. *Id.* at 1168 (Lawrence, J.).

corollary, it appeared that compliance of the deposit requirement likewise was not a condition that had to be met in order to receive protection. When, as a result, booksellers registered and deposited fewer and fewer works, the Cambridge Law Professor Edward Christian began a campaign for “vindication of the rights of universities.”³²² In turn, the booksellers sought to highlight the injustice of the deposit requirements. In the face of this resistance, Christian proposed a compromise: in return for the publishers’ compliance with the obligation to provide copies of work for deposit libraries, the publishers would be given a consolidated single term of twenty-eight years.³²³ This compromise was agreed to sometime in 1807,³²⁴ but an attempt at legislative reform failed.³²⁵

The matter lay dormant and unresolved for a few years until another court decision, *University of Cambridge v. Bryer*, which affirmed the obligation to deposit copies even where a bookseller did not propose to take advantage of the remedies in the Statute of Anne.³²⁶ The booksellers were angered and petitioned Parliament to remedy the situation. In one of a series of petitions, the booksellers also alluded to the issue of the dual term:³²⁷ “[T]he petitioners humbly submit that this distinction is, in many cases, productive of great hardships to the families of authors, and is not founded upon just principles.”³²⁸ Not long after the filing of the petition, an anonymously-authored pamphlet was published that elaborated the argument for a consolidated term of twenty-eight years and the removal of or reduction of the obligation of the deposit.³²⁹ On the first page, the pamphlet explained the injustice that arises under section 11 where an author died before the end of the first term:

[F]amily loses all the profits of his labours at the very time when, from the event of his death, they are in the greatest need of them. It seems the dictate of reason and justice that authors should have at least the full twenty eight years, without any reference to the life of the author.³³⁰

322. EDWARD CHRISTIAN, VINDICATION OF THE RIGHT OF THE UNIVERSITIES OF GREAT BRITAIN TO A COPY OF EVERY PUBLICATION (Cambridge Univ. Press 1807).

323. See REPORT FROM THE SELECT COMMITTEE ON THE COPYRIGHT ACTS OF 8 Ann., c. 19 & 15 Geo. 3, c. 53; Paper 402 (1818) 83-85 (Edward Christian, stating that it was agreed that “if the Universities could induce the House by the influence of their members and their representatives, to get an increase in copyright; the booksellers undertook never to disturb us again, but that we should have a copy of every book which they published”).

324. ; *id.* at 92 (John Charles Villiers, detailing the meeting which he had hosted); (1812-13) (341) SELECT COMMITTEE ON ACTS FOR ENCOURAGEMENT OF LEARNING BY VESTING COPIES OF PRINTED BOOKS IN AUTHORS OR PURCHASERS OF COPIES: MINUTES OF EVIDENCE 17 (July 20, 1813) [hereinafter 1813 SELECT COMMITTEE MINUTES] (Mr. J. Mawman saying he consented to the Villiers Bill but he would be “exceedingly sorry if anything [he] did then, should be considered as denoting [his] opinion at present”). Cf. Thomas Norton Longman’s statement that he was present at the meeting at MP John Charles Villiers’s house in 1807, but that he did not consider the extension of copyright an adequate quid pro quo for the continuation of the deposit obligations even though there were “some persons of that opinion.” *Id.* at 11-12.

325. Leave was given to introduce a bill of June 16, 1808, and Villiers, Sir William Scott, the Earl of Euston, the Attorney General, Solicitor General and Lord Advocate of Scotland were charged with its preparation. (1808) H.C. JOUR. 441.

326. *Univ. of Cambridge v. Bryer*, (1812) 104 Eng. Rep. 1109 (K.B.).

327. 24 PARL. DEB., H.C. (1st ser.) (1812) 308, 310 (U.K.).

328. *Id.*

329. S. TURNER, REASONS FOR A MODIFICATION OF THE ACT OF ANNE RESPECTING THE DELIVERY OF BOOKS AND COPYRIGHT (London, Nichols, Son & Bentley 1813).

330. *Id.* at 1.

The single fourteen-year term, the pamphlet argued, is “clearly too small.”³³¹ This was for two reasons: first, there were very many valuable works which “scarcely get known to the publick during the first fourteen years;”³³² secondly, because the cost of publishing books had considerably increased in the century since the Statute of Anne was enacted, a longer period was needed to recoup the additional expense.³³³

Although the pamphlet assumed to represent the interests of authors,³³⁴ given that many contracts, as we have seen, purported to convey the second term if the author survived, the claim that “the family loses all the profits” was tendentious to say the least. Even those authors (such as Blackstone or Gibbon) who retained the copyright initially, merely permitting the printing of early editions (or entering into profit share arrangements), usually later assigned away their property during the first term of protection. Moreover, had the goal been to protect the families of deceased authors, then a provision such as that which would later be adopted in the United States in 1831 and Lower Canada in 1832,³³⁵ allowing the estate to take advantage of the reversion, would have been better suited than the consolidation of the two terms into a single unit. A more principled justification was offered by Sir Samuel Romilly, debating the petition, who pointed to an anomalous effect of the dual term:

It operated in a way most injurious to the best interests of literature; for as young authors were more likely to reach the second term than old, it gave the immature and jejune compositions of the former double the reward reserved for the productions of ripened genius.³³⁶

Parliament appointed a Select Committee to look into the matter under the chairmanship of Davies Giddy (also known as Davies Gilbert).³³⁷ The Committee heard evidence only from five booksellers, three printers, Reverend Dibdin and Sharon Turner.³³⁸ Some reference was made to the fact that engravers already received a fixed term of protection for twenty-eight years,³³⁹ thereby pointing to the apparent anomaly in the treatment of books. But it seems, further, that the Committee accepted the contention that the contingent term added unnecessary uncertainty to copyright law without benefiting the author.

In fact, the Committee appears only to have considered as an afterthought the author-protective aims that had informed the inception of section 11 of the Statute of Anne. On June 16, 1813, the Committee called Sharon Turner, who had already given evidence on

331. *Id.*

332. *Id.* at 31.

333. *Id.* at 35 (stating that “they require a much larger space of time before the author can get reimbursed in his expenses from that sale.”).

334. *Id.* at 59.

335. *See infra* notes 381-3 (describing US Act of 1831). *See also* Act for the Protection of Copy Rights, 1832, 2 Will. 4, c. 53 (Can.). Protection lasted for an initial 28 year term (from recording of the work’s title with the Superior Court), but with the possibility of renewal for 14 years if the author was alive at the end of that period, and resident in the Province, “or being dead, shall have left a widow or child or children, either or all then living.” *Id.* The provision was extended to the whole of Canada when Upper and Lower Canada were united: An Act for the Protection of Copy Rights in this Province, 4&5 Vict c. 61 (Can.).

336. 25 PARL. DEB., H.C. (1st ser.) (1813) 12, 16 (U.K.).

337. 1813 SELECT COMMITTEE MINUTES, *supra* note 323.

338. *Id.*

339. *Id.* at 18 (question put to John Cochrane).

behalf of the booksellers (as well as playing an active role questioning the witnesses), for re-examination. At that point, Giddy asked Turner to consider the position of authors, and in particular, whether “any advantages would result to authors from a division of the term of copy right into two portions, and from an enactment that no sale of the second portion should take place, till after the expiration of the first?”³⁴⁰

The question itself was interesting, in that it must have been appreciated after *Carnan* that the reversionary term could be assigned before it fell into possession. It seems that another member of the Committee, Charles Watkin Williams Wynn, MP for Montgomeryshire, had raised the possibility of strengthening the author’s position vis-à-vis the publisher.³⁴¹ Wynn was the life-long friend of the Poet Laureate, Robert Southey. Corresponding with Wynn in April and May 1813, Southey declared:

My opinion is that literary property ought to be inheritable, like every other property, and that a law which should allow the use of trees upon your estates for eight-and-twenty years, and after that term make them over to the Carpenter’s Company, would not be more unjust than that which taken from me and my heirs the property of my literary labour, and gives it to the Company of Booksellers. I am afraid you do not agree with me on this, and certain that even if you do, nothing more can be done towards restitution of the author’s rights than simply to make their complaint when you speak upon the subject....*It is doing something to get the twenty-eight years absolute...I should rather the right of sale was limited: it would give the author some share of those prices in the lottery which now fall, almost wholly, to the bookseller. The second term would have enriched Cowper.* And if you gave us a lease for life I may probably be benefited by it.³⁴²

Intriguingly, in another letter from Southey to Wynn,³⁴³ the poet refers to a mysterious proposed amendment by Wynn: “Your proposed clause will be a real benefit to authors: the copyright of ‘Joan of Arc’ and of my poems would have reverted to me if the bookseller’s custom did not declare otherwise.”³⁴⁴ Although the precise details of Wynn’s proposal are unknown, the questions posed by Giddy to Turner, as well as the timing (less than two months later), suggest Wynn had passed on Southey’s complaints.

In response to Giddy’s question, Turner explicitly denied that there was any “bookseller’s custom” that disadvantaged authors. Moreover, Turner told the Committee that he thought “no benefit would result to authors,” from a reversionary term that was inalienable, adding that he thought it would be desirable merely “that all contracts for copy right should be in writing, and that the term for which the author disposes of it should be

340. *Id.* at 33.

341. For general background on Wynn’s Parliamentary career and relationship with Southey, see Gwyneth Evans, *Charles Watkin Williams Wynn 1775-1850* (1935) (unpublished M.A. dissertation, University of Wales) (on file with University College Library, Bangor).

342. Letter from Southey to Wynn (May 23, 1813), in *2 SELECTIONS FROM THE LETTERS OF ROBERT SOUTHEY* 323 (John Wood Warter ed., London, Longman, Brown, Green & Longmans 1856) (emphasis added). The reference to ‘Cowper’ is to the poet William Cowper who died in 1800.

343. Letter from Southey to Wynn (Apr 24, 1813), *id.* at 320.

344. *Id.* at 321. Southey’s *Joan of Arc* was published in 1796.

there expressed.”³⁴⁵ Turner,³⁴⁶ it might be noted, has been identified as the author of the 1813 pamphlet, mentioned above, which had itself put the case for a single consolidated twenty-eight year term.³⁴⁷

Ultimately, Turner’s response proved persuasive. The *Report of the Select Committee on Copy Right of Printed Books*³⁴⁸ recommended the consolidation of the two fourteen-year terms in to one of twenty-eight years. Addressing the issue in its final paragraph, the Report stated:

Your Committee have taken into their consideration, the subject of Copy Right; which extends at present to fourteen years certain, and then to a second period of equal duration, provided the author happens to survive the first. They are inclined to think, that no adequate reason can be given for this contingent reversion, and that a fixed term should be assigned beyond the existing period of fourteen years.³⁴⁹

The transformation of the reversionary fourteen-year term into a single twenty-eight-year copyright which was effected by the 1814 Act had, thus, been in the pipeline for some time. The reform reflected a perception that the existing system created uncertainty, operated capriciously, did not secure any benefits to authors and potentially deprived booksellers of a suitable period in which to recoup their investments. The apparent absence of protest from authors suggests that there was little affection for the contingent, reversionary term.

The failure to replace the reversion with an author-protective provision may well have reflected the growing dominance of the ideology of freedom of contract.³⁵⁰ Indeed, it is instructive to compare the manner in which the legislature, in the very same year, 1814, treated the issue of the extension of the term of copyright in sculpture, which had been first recognized in 1798. The Models Act of that year introduced protection for sculptors lasting for fourteen years.³⁵¹ The Act proved inadequate for various reasons, and when reform was proposed, so too was an increase of the term so that sculptors could be placed on a par with engravers (who received a fixed twenty-eight-year term) and writers (who hitherto had received the dual fourteen-year terms). For some reason, the legislators chose the writers’ model for sculptors, but balked at the idea of reversion. In place, a new principle was adopted: a sculptor would receive an additional fourteen-year term if he or she was alive when the first term lapsed unless the rights in the work had already been disposed of.³⁵² Although the legislative record reveals no details about the reasoning behind the approach, this curious provision seems to reflect a desire to confer greater protection on sculptors who

345. (1818) (177) COMMITTEE ON ACTS OF 8 ANNE, AND 15 & 41 GEO. III, FOR THE ENCOURAGEMENT OF LEARNING, BY VESTING THE COPIES OF PRINTED BOOKS IN THE AUTHORS OR PURCHASERS OF SUCH COPIES: MINUTES OF EVIDENCE 33 (April 13, 1818).

346. (1768-1847). Turner was a solicitor who represented booksellers in the case against the University of Cambridge, gave evidence to the 1813 Select Committee, and assisted Southey in his legal battle surrounding the publication of *Wat Tyler* in 1817.

347. *Reasons* was attributed to Sharon Turner by Egerton Brydges, a literary figure closely involved in these debates. EGERTON BRYDGES, REASONS FOR A FARTHER AMENDMENT OF THE ACT 54 GEO. III. C. 156, BEING AN ACT TO AMEND THE COPYRIGHT ACT OF QUEEN ANNE (London 1817).

348. 1813 SELECT COMMITTEE MINUTES, *supra* note 323.

349. *Id.*

350. The classic exposition is P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979).

351. Models and Busts Act, 1798, 3 Geo. 3, c. 71 (G.B.).

352. Sculpture Copyright Act 1814, 54 Geo. 3, c. 56, § 6 (G.B.).

survive, but not to give a windfall to assignees. Both goals are achieved through a targeted, contingent extension, in a manner which avoids interfering with freedom of contract.

As it happens, the Literary Copyright Act, 1814 did not merely consolidate the two fourteen-year terms into a single period of twenty-eight years, but also provided that, if the author were alive at the end of the twenty-eight-year term, copyright was to continue for the remainder of the author's life.³⁵³ In contrast with the decision to consolidate the reversion into a fixed twenty-eight-year term, this extension to the life of the author appears to have arisen spontaneously and without any serious debate.³⁵⁴ According to Deazley, the amendment was moved during the third reading of the Bill in the Commons, and just before it went up to the Lords.³⁵⁵ The record suggests that the amendment was tabled by the MP, Samuel Egerton Brydges (who had campaigned primarily for a reduction in the deposit obligations).³⁵⁶ Whatever Brydges' reasons for proposing this extension in a Bill that he generally opposed, it is worth noting that the clause was written in a way that, although introducing a "contingency," avoided any impression that the effect would be to reintroduce a reversionary term. The clause stated clearly that the contingent term benefited the author, "his assignee or assigns," and avoided any language (such as that of "returning") that might be interpreted as suggesting reversion. For those authors who assigned the rights "for ever," and took in return a fixed fee, the clause would have operated for the financial benefit of publishers. For most authors, the amendment was of largely symbolic, rather than pecuniary, significance: the Statute recognized that there was some notional relation between their individual survival and the existence of property in the text (even if that property would rarely belong to the author). The amendment reflected the legal embodiment of what Oren Bracha has called "the ideology of authorship,"³⁵⁷ at the same moment that the law abandoned its attempt to intervene in the functioning of the book market to protect the interests of real, flesh-and-blood, writers.

Nevertheless, before the idea had come to be abandoned in Britain, it was imported, in almost identical terms, by the newly independent states of South Carolina and Maryland, and, with slight variations in Connecticut, New Jersey, Pennsylvania, Georgia and New York.³⁵⁸ From there, it made its way into U.S. federal copyright law, transforming itself into the idea of a "renewal term," and via the United States into Canadian law. In Part II, we

353. An Act to Amend Several Acts for the Encouragement of Learning, 54 Geo. 3, c. 156, § 4 (G.B. and British Empire.).

354. Whether or not they influenced the British legislation, copyright terms based on the life of the author were in force elsewhere in Europe. *See, e.g.*, French Literary and Artistic Property Act, art. 1, 2 (1793) (Fr.), available at PSOC, *supra* note 3, http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/showmax/%22f_1793_im_001_0001.jpg%22. *See also* BADEN CIVIL CODE art. 577 d f (Luis A. Sundkvist trans., Karlsruhe 1809), available at PSOC, *supra* note 3, http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/showTranslation/%22d_1809_im_001_0003.jpg%22.

355. Deazley, *supra* note 317.

356. 2 EGERTON BRYDGES, THE AUTOBIOGRAPHY, TIMES, OPINIONS, AND CONTEMPORARIES OF SIR EGERTON BRYDGES 321 (London, Cochrane & McCrone 1834) ("Nor was I less earnest and active in the trouble I took about the Copyright Act, - however unsuccessfully."). Brydges's disappointment related, almost certainly, to the failure to reduce the deposit obligations significantly in either 1814 or 1818.

357. Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186 (2008).

358. Cross-reference to Bracha paper in BTLJ about legal transplants.

explore how well it succeeded in the United States and its ultimate transformation into a “termination right.”

II. UNITED STATES

A. THE CONSTITUTIONAL COPYRIGHT CLAUSE AND THE FIRST COPYRIGHT ACT

The 1787 U.S. Constitution empowers Congress to “secur[e]” “for limited Times to Authors . . . the exclusive Right to their . . . Writings.”³⁵⁹ The plural duration echoes the Statute of Anne’s provision for a second term, contingent on the author’s survival.³⁶⁰ Even before the Constitution, Congress’ 1783 resolution encouraging the states to enact copyright laws and many of the ensuing state copyright statutes imported the contingent two-term structure from the Statute of Anne.³⁶¹ The United States followed England as the only nation at the time to design exclusive rights around the author, first by instructing Congress that exclusive rights were to go to the creators of “Writings,” and second, by implicitly directing that any additional terms of years also vest in authors. The specification of “limited Times” thus, we suggest, makes authors’ continued ownership interest in their copyrights part of the constitutional scheme.³⁶²

The first copyright statute, enacted in 1790, accordingly implemented a two-term duration, the second fourteen-year period contingent on the author’s survival. But while the Statute of Anne provided that the rights would “return to the Authors,” the first U.S. copyright act stated: “if, at the expiration of the said term, the author or authors, or any of them, be living, and a citizen or citizens of these United States, or resident therein, the same exclusive right shall be continued to him or them, his or their executors, administrators *or assigns*, for the further term of fourteen years”³⁶³ The reference to “assigns” might suggest that the author could assign her rights not only for the first term, but also for the second (subject to her surviving through the first term).³⁶⁴ On the other hand, “assigns” appears alongside “executors” and “administrators” and the interests of the latter two arise subsequent to the author’s death, yet the renewal term was then contingent on the author’s survival. Thus, it more likely follows that, just as executors and administrators could have succeeded to the author’s second term rights only in the event that the second term came into being, so the “assigns” in question would have been grantees only of rights transferred

359. U.S. CONST. art I, § 8, cl. 8.

360. 1710, 8 Ann., c. 19, § 11 (Eng.).

361. Conn. (1783); N.J. (1783); Md. (1783); S.C. (1784); Pa. (1784); Ga. (1786); N.Y. (1786).

362. The plural designation of “Times” might also reflect Art. I, § 8, cl. 8’s combined grant of power to Congress to provide both for copyright and for patents, since the two regimes from the start carried different terms of protection. *See generally* Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 100-03 (2d Cir. 1951) (reviewing differences in first copyright and patent acts), but the prior federal and State copyright provisions suggest an additional reason.

363. An Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of Such Copies, During the Times Therein Mentioned (May 31, 1790), 1 Stat. 124, ch. XV, § 1 [hereinafter 1790 Copyright Act] (emphasis added).

364. Even without statutory provision for “assigns,” the English courts held the author’s contingent interest in the second term to be assignable. *See* Carnan v. Bowles, (1786) 29 Eng. Rep. 45 (Ch.), discussed *supra* Part I.B.2.e). It is possible that this decision influenced the drafting, four years later, of the U.S. provision.

after the renewal term vested.³⁶⁵ Nonetheless, the contrast between the Statute of Anne’s specification that the right would “return to the Author” and the U.S. text’s provision that the “exclusive right shall be *continued* to him . . .”³⁶⁶ perhaps weakens the claim that the first U.S. copyright statute included a reversion right (or that the Constitution required one); however, if Congress did not intend the rights to return to the author, it is not apparent why it would have made the author’s survival a condition of the vesting of a second term.

B. SUBSEQUENT STATUTES AND CASE LAW PRECEDING THE 1909 ACT

In any event, courts construing the renewal term interpreted it to incorporate a reversionary right. Although early U.S. case law on reversion rights is sparse, it recognizes the second term of copyright as a “new interest” that was “made to benefit authors.”³⁶⁷ But neither the Constitution nor the 1790 Act clearly precluded the author’s advance assignment of his renewal term interest, even though such anticipatory alienability arguably defeated the purpose of the reversionary right: if the author’s prior assignment of the second term bound the surviving author, then he would not have obtained the benefit of the renewal term.³⁶⁸ Some members of Congress appear both to have understood the statute to provide for a reversion, and to have appreciated the anomaly of its assignability, for several bills proposed in the early 1800s would have retained the reference to “assigns,” but would also have provided “[t]hat any contract for the sale of the copyright for the second term of fourteen years, or any part of the same made or entered into before the expiration of the first, shall be utterly void.”³⁶⁹ By clarifying that relevant “assigns” would have been new grantees for the second term of copyright, the bills would have ensured that the reversion right retained its remedial function of enabling authors to participate in the subsequent success of their works.

In its 1831 amendments to the duration of copyright, however, Congress did not explicitly address the validity of authors’ advance alienation of the renewal term. The 1831 amendments extended the first term from fourteen to twenty-eight years and removed the condition that the author survive into the (still fourteen-year) renewal term, thus making compliance with relevant formalities the only remaining prerequisite to the vesting of the second term. Section 16 of the 1831 Act, covering subsisting copyrights, appears to vest the fourteen years added to the first term of copyright in the author rather than the author’s grantee. The debates over this provision in the House of Representatives reinforce this conclusion.³⁷⁰ Representative Hoffman objected to the provision not only because he

365. This construction of the text does not, however, clearly preclude first term assignments of the renewal term, or at least of a future contingent interest. See discussion *infra* Part II.B.

366. 1790 Copyright Act, 1 Stat. 124, § 1.

367. *Pierpont v. Fowle*, 19 F. Cas. 652, 659-60, (C.C.D. Mass. 1846).

368. If the author received a separate consideration for conveying the future interest, the assignment would have conferred some benefit, although the parties’ probable inability to anticipate the work’s future value would have deprived the author of the *raison d’être* for vesting the renewal term in him. Moreover, at least as of the advent of the nineteenth-century book publishing form contract, authors’ agreements systematically granted both the first and the renewal terms, without providing additional consideration for the latter. See discussion of publishing contracts *infra*.

369. H.R. 38, 11th Cong. (as reported to Comm. of the Whole, Jan. 19, 1811); H.R. 75, 10th Cong. (as reported to Comm. of the Whole, March 7, 1808); A Bill for the Encouragement of Learning, and for the Promotion of Useful Arts, 7th Cong. (as reported to Committee of the Whole, Jan. 19, 1803).

370. The one decision that adverts to this extension appears to assume that the author would take the additional term of years appended to the first period of copyright. See *Pierpont v. Fowle*, 19 F. Cas. 652, 659

opposed a longer term of copyright generally, but also because section 16 “would be a breach of contract with those booksellers who had purchased copyrights of author heretofore, and whose rights would be infringed upon, should the privileges of the authors of works be extended as proposed by the bill.”³⁷¹ Representative Huntington’s rejoinder, rhetorically inquired: “why . . . should the author who had sold his copyright a week ago, be placed in a worse situation than the author who should sell his work the day after the passing of the act?”³⁷² The Supreme Court has cited this objection as evidence of a long-standing practice of extending the terms of existing copyrights when Congress institutes a longer term for new works.³⁷³ The passage in context seems equally (if not more so) to address the claims of authors to benefit directly from the extended term. Huntington may have assumed that the author who sold a fourteen-year copyright would have received less remuneration than an author who sold a twenty-eight-year copyright, and therefore would have objected that the publisher should not get the windfall of twenty-eight years of exclusive rights for the price of fourteen. Similarly, William Ellsworth, introducing the bill for the House Judiciary Committee asserted: “The question is, whether the author or the bookseller shall reap the reward.”³⁷⁴ Whether the author in fact took the fourteen years added to the first term free and clear of the grant of the initial fourteen years would have turned on the scope of the granting language.³⁷⁵

In addition, the 1831 amendments clarified who could claim the renewal term: “the same exclusive right shall be continued to such author . . . or, if dead, then to such widow and child, or children, for the further term of fourteen years”³⁷⁶ The provision was apparently designed to protect a family in need, upon the death of the author.³⁷⁷ A later court

(C.C.D. Mass. 1846) (“[T]he extension allowed under the act of 1831, of a copyright taken out under that act, looks entirely to the author and his family, and not to assignees.”).

371. 7 CONG. DEB. app. 423 (Jan. 6, 1831).

372. *Id.* at 424.

373. *Eldred v. Ashcroft*, 537 U.S. 186, 204 (2003).

374. 7 CONG. DEB. app. cxx (Dec. 17, 1830).

375. In the early part of the 19th century, it appears that limited-term exclusive grants were more common than transfers for the full term of copyright plus any extensions or renewals. *See, e.g.*, Contract between James K. Paulding and Harper & Bros. (1836) (on file with Atkins Archive at Columbia University Rare Book & Manuscript Library [hereinafter Atkins (Columbia)]) [NOTE TO BTLJ: THERE SEEMS TO BE SOME CONFUSION ABOUT ARCHIVES. “ATKINS” AND HARPER & BROS ARCHIVES ARE DIFFERENT COLLECTIONS IN THE COLUMBIA RARE BOOK ROOM. Atkins archives are cited only in note 386.] (for *The Life of Washington*) (granting Harper exclusive publication rights for ten years); Contract between Joel Parker and Harper & Bros. (1843) (on file with Atkins (Columbia), *supra*) (for *Invitations to True Happiness and Motives for Becoming a Christian*) (same). Later contracts tended to refer to the “term” or “terms” of copyright in grant language. *See, e.g.*, Contract between Samuel J. Prime and Harper & Bros. (1854) (on file with Atkins (Columbia), *supra*) (for *Travels in Europe and the East*) (granting exclusive right to publish during the “term” of copyright); Contract between E.D.G. Prince and Harper & Bros. (1871) (on file with Atkins (Columbia), *supra*) (for *Around the World*) (granting exclusive right to publish during the “terms” of copyright).

376. An Act to Amend the Several Acts Respecting Copy Rights (Feb. 3, 1831), 4 Stat. 436, ch. XVI, § 2.

377. *See* 7 CONG. DEB. app. at cxix (emphasizing that “by the very event of the death of the author, his family stand in more need of the only means of subsistence ordinarily left to them”), *cited in* Barbara Ringer, *Study No. 31, Renewal of Copyright*, in 1 STUDIES ON COPYRIGHT 503, 507 & n.13 (Arthur Fisher ed., 1963); Stenographic Report of the Proceedings of the Librarian’s Conference on Copyright (Mar. 1906), in LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, pt. C at 35 (E. Fulton Brylawski & Abe Goldman eds., 1976), *available from* HeinOnline [hereinafter Stenographic Report 1906] (affirming 1831 Act’s concern for author’s family because the “proprietor is carefully excluded from the renewal term”). Noah Webster heavily

perceived the amendment's designation of statutory heirs to convert the second term from a mere continuance of the author's rights — rights which the author could transfer to a publisher or other party — to a true new title:

[The 1831 Act] broke up the continuity of title, and gave the right of renewal to the widow or child or children . . . Here, then, was an entirely new policy, completely dis severing the title, breaking up the continuance in a proper sense of the word, whatever terms might be used, and vesting an absolutely new title eo nomine in the persons designated.³⁷⁸

While decisions construing the renewal rights of authors still alive at the vesting of the second term generally assumed that the author could convey her future interest in the renewal term, at least some courts, advert ing to the intent underlying the renewal term, declined to rule that the initial assignment necessarily conveyed the renewal right as well as the first term. Thus, the author's assignment of the copyright would not suffice to convey the author's contingent interest in the renewal term. But an explicit assignment would:

It was the genius which conceived and the toil which compiled the book that is to be rewarded by even the first copyright, and no one ever dreamed that an assignee could alone take out the second or extended term, unless he has paid for it, clearly contracted for it . . .³⁷⁹

Lower courts also acknowledged the moral claims of the author against the assignee:

There are at least sentimental reasons for believing that Congress may have intended that the author, who according to tradition receives but little for his work, and afterwards sees large profits made out of it by publishers, should later in life be brought into his kingdom.³⁸⁰

In the course of the nineteenth century, however, publishing practices evolved to defeat authors' accession to their kingdom: the publishing form contracts that appear to have become standard by the 1870s systematically provided for the alienation of the first and the renewal terms, without any separate consideration for the latter. For example, during this period, a typical Harper & Brothers form contract included the following language:

In consideration of the premises, the Author hereby grants and assigns to Harper & Brothers an unpublished work, the subject or title of which is [name of work] and also all rights of translation, abridgement, dramatization, selection, and other rights of, in, or to said work, for the United States of America. Harper & Brothers shall also have the exclusive right in their own name to take out copyright in the United States of America for said work, and to obtain all renewals of copyright, and to hold

lobbied for these family-protective provisions. See Oren Bracha, *Commentary on the Copyright Act 1831*, at 7, in PSOC, *supra* note 3, http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabeCom/%22us_1831%22.

378. *White-Smith Music Publ'g Co. v. Goff*, 187 F. 247, 250 (1st Cir. 1911).

379. *Pierpont v. Fowle*, 19 F. Cas. 652, 659-60 (C.C.D. Mass. 1846). See also *Cowen v. Banks*, 24 How. Pr. 72 (C.C.D.N.Y. 1862) (intention of parties to assign author's contingent interest in renewal term); GEORGE TICKNOR CURTIS, A TREATISE ON THE LAW OF COPYRIGHT 234 (1847).

380. *White-Smith Music*, 187 F. at 251.

said copyright and renewals, and to publish said work during the term or terms thereof.”³⁸¹

Leading authors might withhold the renewal term, or even provide for termination of the grant by the author earlier than the expiration of the first term,³⁸² but most grants included the renewal term.³⁸³

C. 1909 ACT

1. Legislative history

In the 1909 Act, Congress gathered the disparate provisions sprinkling the Revised Statutes and in effect created the first federal copyright code. The term of protection and authors’ reversion rights figured prominently among the reforms Congress addressed.

381. Contract between Julia Magruder and Harper & Bros. (1899) (on file with Atkins (Columbia), *supra* note 376) (for *A Manifest Destiny*). Earlier handwritten contracts did not explicitly convey rights to the renewal term, but would grant the right to publish “during the *terms* of copyright.” See, e.g., Contract between Mary A. Dodge and Harper & Bros. (1871) (on file with Atkins (Columbia), *supra* note 376) (for *School-House Stories*) (emphasis added). Other publishers’ form contracts contained similar language. See, e.g., Contract between Frances Hodgson Burnett and Charles Scribner & Sons (December 3, 1895) (on file with Atkins (Columbia), *supra* note 376) (for *A Lady of Quality*) (“exclusive right to publish said work during the terms of copyright and renewals thereof”); Contract between same parties (June 14, 1897) (on file with Atkins (Columbia), *supra* note 376) (for *Duke of Osmonde*) (same granting language); Contract between Frances Hodgson Burnett and Holiday Publishing Co. (Sept. 7, 1900) (on file with Atkins (Columbia), *supra* note 376) (for *The Land of the Blue Flower*) (“during the full terms of copyright of the same and all renewals thereof”).

382. See, e.g., Contract between Samuel Clemens and Harper & Bros. (1902) (on file with Atkins (Columbia), *supra* note 376) (for *A Double-Barrelled Detective Story*) (Clemens retained right to terminate contract beginning five years after publication); Contract between Clara Kathleen Rogers and Harper & Brothers (1892) (on file with Atkins (Columbia), *supra* note 376) (for *The Philosophy of Singing*) (exclusive publication rights to Harper only for five years); Contract between N. Otis and Harper & Bros. (1862) (on file with Atkins (Columbia), *supra* note 376) (for *Illustrated History of the Panama Rail*).

383. Even when the statutory heirs renewed the copyright and thus enjoyed a “new estate” superseding prior contracts, grantees appear at least at times to have continued to exploit the work as if no reversion had vested. See, e.g., Letter from Harper & Bros. to John C. Howard (May 26, 1919) (on file with Atkins (Columbia), *supra* note 376) (explaining that although author died in 1911 during first term of works created between 1885 and 1900, when representative of widow wrote to inquire about copyright renewal and royalties during the renewal term, Harper responded that the copyrights “will be renewed by us in the regular way, in the name of the nearest kin”).

The form contracts, and early 1870s handwritten contracts, did contain out of print clauses returning the copyright to authors if the books proved unsuccessful. See, e.g., Contract between Sarah Randolph and Harper & Bros. (1871) (on file with Atkins (Columbia), *supra* note 376) (for *The Domestic Life of Thomas Jefferson*) (giving Harper & Bros. the right to cancel for lack of demand beginning five years after publication). Because out of print books were rarely renewed, the statutory reversion right, albeit available to the author, would not have mattered.

Although out of print clauses were a form of reversion, contractual rather than statutory in nature, publishers, rather than authors, appear to have had the most to gain from allowing the author to recapture her copyright. Once the rights reverted, the publisher saved the expenses of keeping and mailing detailed royalty records. See MICHAEL WINSHIP, AMERICAN LITERARY PUBLISHING IN THE MID-NINETEENTH CENTURY: THE BUSINESS OF TICKNOR AND FIELDS 35 (1995); mailing other communications to authors, *id.* at 184 (citing postage as the largest of miscellaneous overhead expenses), business tax on inventory items, *id.*, and costs of warehousing and concomitant efforts for “tighter inventory control.” ALEXIS WEEDON, VICTORIAN PUBLISHING: THE ECONOMICS OF BOOK PRODUCTION FOR A MASS MARKET, 1836-1916, at 63, 103 (2003). Out of print clauses also allowed publishers to destroy plates and extra stock if author declined to purchase them. The publisher also enjoyed right to sell copies free of any royalties if author did not purchase the stock.

Proposals included a bill offered in 1906 by Sen. Kittredge and Rep. Currier,³⁸⁴ which, for most works, would have extended the term of protection to the life of the author, plus fifty years.³⁸⁵ A section concerning “extension of term of existing copyright,” would have extended subsisting copyrights (then protected for a first term of twenty-eight years, renewable for another fourteen) “to endure for the full terms of copyright provided by this Act, for the sole use of the author of said work, if he be living.”³⁸⁶ The proposal further limited the rights of authors’ assignees to:

such term as the said assignee would have been entitled to hold and possess the same under the copyright laws in force on the day of the date of said assignment, and no longer. [The] remainder of said term of copyright shall revert to and vest in the author of the work, if he be living.³⁸⁷

Thus, the extension of the term of works then in their first or second periods would clearly, and consistently with the Constitutional direction, have gone “to Authors.”

Authors’ assignees – publishers – while purporting to endorse the vesting of the extended term in living authors, objected to the next iteration of the proposal, which would also have granted the “remainder of said term” to authors’ “heirs, executors, and administrators.”³⁸⁸ The Publishers Copyright League therefore proposed to substitute a second renewal term, following the then-current fourteen-year term, allowing subsisting copyrights to:

be further renewed and extended by the author, inventor or designer if he be still living, or by his widow or children if he be dead, for a further period equal to that provided under the present act, i.e. for fifty years after the author’s death, provided that the said copyright has not been assigned previous to the passage and approval of this act.³⁸⁹

The publishers claimed that the amendment, by limiting post-mortem beneficiaries to the author’s surviving spouse and children (as had the 1831 Act), would allay the publishers’ fears of having to come to agreements with a plethora of heirs, who, lacking the personal relationship with the publisher that would make the author or her family more likely to “show themselves reasonable in the matter of the protection of this invested property” (by the publisher in creating plates for the printing of the books), would instead “insist upon securing a bonus before he would permit the publisher to continue under the extended term the publication of those books.”³⁹⁰

384. S. 6330, 59th Cong. § 18 (1906). This bill was the product of the Librarian of Congress’s Conference on Copyright, at which participants worked from a memorandum draft prepared by Thorvald Solberg, Register of Copyrights. Stenographic Report of the Proceedings of the Librarian’s Conference on Copyright (Nov. 1905), in LEGISLATIVE HISTORY, *supra* note 377, at pt. D xv-lxxv [hereinafter Stenographic Report 1905]. The bill is thus generally referred to as the Solberg Bill.

385. S. 6330 § 18(c). Other terms were provided for labels on manufacturing items (twenty eight years from publication) and composite works (fifty years from publication).

386. Stenographic Report 1905, *supra* note 384, at 219-20 (proposed § 53(a)).

387. *Id.* at 220 (proposed §§ 53(b), (c)).

388. Stenographic Report 1905, *supra* note 384, at 297 (proposed § 67, 298 (statement of George Haven Putnam: “The publishers endorse this”).

389. *Id.* at 299.

390. *Id.* at 298-99 (characterizing the bonus-demanding heir as an “obstructing child”).

The amendment in fact would have given the publishers something they had not clearly obtained in prior legislation, however: explicit statutory recognition that the author's assignment of her copyright would also convey any renewals or extensions of the copyright term. While the representative of the American Authors Copyright League did not initially perceive the wolf in the sheep's clothing of an amendment offered in the publishers' professed "willing[ness] that they [authors] should have the full benefit of this extension of those copyrights,"³⁹¹ the reference to assignments did not escape the notice of another participant in the discussions. Arthur Steuart, Chairman of the American Bar Association, aptly characterized the term extension as "for the benefit of the publisher."³⁹² The ensuing discussion regarding rights of publishers versus authors is somewhat confusing. The participants asserted different renewal consequences to publishing agreements in which authors retained their copyrights but granted publishing rights in return for royalties, and outright assignments, with the latter lending themselves to an impasse if the copyright reverted to an author or heir who declined to re-grant the copyright, leaving the publisher with plates it could not use. In the latter instance, publishers would even have preferred to let the work go into the public domain, so that they could continue to exploit their investment in the plates (even if rival publishers could also then go to the expense of setting their own plates).³⁹³ The compromise amendment retained much of the renewal language of the 1831 Act, but would have required that any assignee or licensee have joined the renewal application.³⁹⁴ An extended term contingent on the author's (or heir's) and publisher's "mak[ing] some new arrangement between themselves" eased the publishers' apprehension of being held up by authors.³⁹⁵

Before long, however, critics pointed out the compromise's susceptibility to the opposite abuse, indeed that the "law [would] simply result in a legalized system of blackmail – nothing more or less"³⁹⁶:

Let us assume that this bill passes, that a copyright expires next year, and that I am the author of a certain book. I go to my publisher and say: "Here under the law I am entitled to a renewal of the copyright for my book for a term of fifty years in all, or during my life, or whatever the term may be." The publisher replies: "Very well: you want me to join in the securing of that extension, do you?" "Yes." "Well, I have

391. *Id.* at 299-300 (R.R. Bowker for the authors pronounced the publishers' proposal "perfectly acceptable").

392. *Id.* at 300.

393. *Id.* at 300-03.

394. The Solberg Bill read, in relevant part:

[T]he copyright subsisting in any work at the time when this act goes into effect may . . . Be further renewed and extended by the author . . . or if he be dead, leaving a widow, by his widow . . . Or if now widow survive him, by his children . . . provided further, that should such subsisting copyright have been assigned, or a license granted therein for publication upon payment of royalty, the copyright shall be renewed and extended only in case the assignee of licensee shall join in the application for such renewal and extension.

S. 6330, 59th Cong. § 18.

395. Stenographic Report 1906, *supra* note 377, at 302 ("if they be reasonable people, they ought to be able to work out some fair settlement").

396. *To Amend and Consolidate the Acts Respecting Copyright: Hearings on S. 6330 and H.R. 19853 Before the H. and S. Comm. on Patents*, 59th Cong. (Dec. 1906) [hereinafter *Hearings* (Dec. 1906)] (statement of George W. Ogilvie, publisher from Chicago).

been paying you 20 per cent royalty: I will pay you 2 per cent hereafter, and if you do not take that I will pay you nothing.”³⁹⁷

The following year, the Monroe-Smith Amendment to the Kittredge-Barchfeld Bill responded, incompletely, to the criticisms the prior bill had attracted. It provided for authors’ reversion, but only if there was no royalty agreement or if the publisher refused to continue to pay the same percentage as set out in the existing royalty agreement.³⁹⁸ The rationale for excluding royalty agreements from the application of the author’s reversion right is consistent with the purpose of the right, to allow authors to share in the future success of their works. While authors who assigned rights for a lump sum would not participate in future revenues, authors receiving a royalty would; moreover, the bill endeavored to ensure that those authors’ royalties would remain constant. On the other hand, while rights could revert to authors who had received lump sums, the reversion was conditioned on filing a renewal application jointly with the original assignee or its successor. Thus, this version of the bill explicitly continued the rights of assignees whose contracts provided for payment of royalties, while leaving in place the means for assignees who had paid a lump sum for the copyrights to “blackmail” authors who sought to renew the copyright for the extended term.

Subsequent hearings on the precursors to the 1909 Act indicate that the drafters understood the importance to authors of renewal term reversion of rights. The Patents Committee Chair, Rep. Currier, repeatedly stressed the example of Mark Twain, who had sold the first term of copyright in *Innocents Abroad* “for a very small sum,” but whose “contract did not cover the renewal period, and in the fourteen years of the renewal period he was able to get out of it all of the profits.”³⁹⁹ The drafters abandoned the requirement that assignees join the authors on any renewal application in favor of leaving the transfer of

397. *To Amend and Consolidate the Acts Respecting Copyright: Hearings on S. 6330 and H.R. 19853 Before the H. and S. Comm. on Patents*, 59th Cong. (June 1906) [hereinafter *Hearings* (June 1906)] (statement of George W. Ogilvie, publisher from Chicago).

398. The Monroe-Smith Amendment read, in relevant part:

[I]f such subsisting copyright shall have been assigned or a license granted therein for publication, and if such assignment or license shall contain provision for payment of royalty Said original assignee or licensee or his successor shall nevertheless be entitled to continue to publish the work on payment of the royalty stipulated in the original agreement; but if such original assignment or license contain no provision for the payment of royalty, the copyright shall be renewed and extended only in case the original assignee or licensee or his successor shall join in the application for such renewal and extension.

S. 2900, 60th Cong. (1907); H.R. 11794, 60th Cong. (1908).

Another bill, the Smoot-Currier Bill, read, in relevant part:

[T]he copyright subsisting in any work at the time when this act goes into effect may Be further renewed and extended by the author . . . or if he be dead, leaving a widow, by his widow Or if now widow survive him, by his children . . . provided further, that should such subsisting copyright have been assigned, or a license granted therein for publication upon payment of royalty, the copyright shall be renewed and extended only in case the assignee of licensee shall join in the application for such renewal and extension.

Smoot-Currier Bill, S. 2499, 60th Cong. (1907); H.R. 243, 60th Cong. (1907).

399. *To Amend and Consolidate the Acts Respecting Copyright: Hearings on S. 6330 and H.R. 19853 Before the H. and S. Comm. on Patents*, 59th Cong. 20(1908) [hereinafter *Hearings* (1908)]; see also *id.* at 62.

renewal or extended term rights to the parties' contractual arrangements.⁴⁰⁰ It is not clear from the hearings whether those arrangements included contracts that assigned the extended term in advance of its vesting. At least one participant stressed that the Constitution states that Congressional grants of copyright are to go "to Authors,"⁴⁰¹ and another expressed "doubt about whether it [validating advance assignments] legally could be done"; moreover he urged that the bill "say that it cannot be done, so that the author is certain to have that extension as a provision for his age or a provision for his widow and his children."⁴⁰²

The vesting of the extended term, or of an additional renewal term in authors, presented additional problems in the case of multiple-authored works, particularly encyclopedias and other composite works. Publishers testified to the difficulty of locating and obtaining new assignments from the authors of such contributions, and stressed their need to retain copyright in the contributions throughout any extensions or renewals of the copyright term.⁴⁰³

As enacted, the 1909 Act largely retained the approach of the 1831 Act, and, rather than adopting a unitary term of years based on the life of the author, added another fourteen years to the renewal term, for a total of two twenty-eight-year terms or, assuming renewal was effected, fifty-six years from first publication.⁴⁰⁴ With respect to works already in their renewal term, Congress extended their renewal terms so that the works would enjoy a total of fifty-six years of protection.⁴⁰⁵ Notwithstanding the earlier debates over the beneficiary of term extension (or perhaps because of them), the text did not specify whether the additional years should vest initially in the author or automatically in the rightholder, nor did the statute address the advance assignability of the fourteen-year extension of the second term of copyright for existing works or of the twenty-eight-year renewal term for new works. One passage of the House Report appears to support the inalienability of the renewal term:

Your committee, after full consideration, decided that it was distinctly to the advantage of the author to preserve the renewal period. It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, your committee felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right.⁴⁰⁶

But the reference to "the existing law" undermines the argument for inalienability: under the 1831 Act, the practice, and considerable authority both from caselaw and treatises,

400. See *Hearings* (Dec. 1906), *supra* note 396, at 48 (statement of George Ogilvie) (admitting that "the amendment I suggested in June is impractical"); *Hearings* (1908), *supra* note 399, at 72 (statement of George Ogilvie) (noting that, in his decision to turn against the joint-application proposal, "there was a little bit of conscience mixed up in the matter"); *id.* at 128 (statement of William Jenner) (discussing contracts for extended term).

401. *Hearings* (June 1906), *supra* note 397, at 48 (statement of George Ogilvie).

402. *Hearings* (1908), *supra* note 399, at 128 (statement of William Jenner).

403. *Hearings* (1908), *supra* note 399, at 18-19 (statement of George Haven Putnam, Secretary of American Publishers Copyright League); *id.* at 109 (statement of W.A. Livingstone, Print Publishers' Association).

404. An Act to Amend and Consolidate the Acts Respecting Copyright (Mar. 4, 1909), 35 Stat. 1075, ch. CCCXX, § 24 [hereinafter Act of March 4, 1909].

405. *Id.* § 23.

406. H.R. REP. NO. 60-2222, at 14 (1909).

recognized that the author might bind himself to assign the renewal term, at least if his contract clearly so provided.⁴⁰⁷

Sections 24 and 23 of the Act (addressing new and subsisting works, respectively) both contained the following language:

[T]he author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widowers or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work⁴⁰⁸

Thus, like the 1831 Act, the 1909 Act provided widows and children with renewal rights even after the death of the author. The 1909 Act, however, added rights for executors and next of kin after the death of the widow and children.

Responding to the concerns expressed by publishers of encyclopedias and other composite works, the 1909 Act also listed certain categories of works whose creators would not be vested with the renewal right. Rather, the “proprietors” would take the renewal. For works published as of the Act's effective date, proprietors received renewal rights for posthumous works, periodicals, encyclopedias, and composite works, corporate bodies having copyrighted works, and employers in cases of works-for-hire.⁴⁰⁹ For subsisting works, renewal rights were given only to proprietors of composite works.⁴¹⁰ This distinction has been attributed either to solicitude for the future interests of the families of authors whose works were published under the prior regime, or simply to careless drafting.⁴¹¹ Even if the 1909 Act preserved some authors' renewal rights in subsisting works, it appears that, relative to prior enactments, the 1909 Act narrowed the scope of works in which authors could claim renewal term reversions of rights, particularly with respect to contributions to collective works.

2. *The 1909 Act renewal term in court: to authors or to their assigns?*

While the 1909 Act did not expressly resolve the assignability of the renewal term, the Supreme Court, in a controversy involving the song “When Irish Eyes Are Smiling,” ultimately ruled that the author's first-term assignment of the second term bound him to

407. See authorities cited *supra* note 275; EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES: EMBRACING COPYRIGHT IN WORKS OF LITERATURE AND ART, AND PLAYRIGHT IN DRAMATIC AND MUSICAL COMPOSITION 326-32 (n.p. 1879).

408. Act of March 4, 1909, 35 Stat. 1075, ch. CCCXX, §§ 23, 24.

409. Section 23, on new works, reads:

That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body . . . or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright”

Act of March 4, 1909, 35 Stat. 1075, ch. CCCXX, § 23. See also Catherine L. Fisk, *Authors at Work: The Origins of the Work-for-Hire Doctrine*, 15 YALE J.L. & HUMAN. 1, 62-67 (2003).

410. Section 24, on subsisting works, reads: “[I]f the work be a composite work upon which copyright was originally secured by the proprietor thereof, then such proprietor shall be entitled to the privilege of renewal and extension granted under this section.” Act of March 4, 1909, 35 Stat. 1075, ch. CCCXX, § 24.

411. See Ringer, *supra* note 377, at 123.

convey the renewal term to the original publisher. Justice Frankfurter, finding no explicit statutory limitation on the author's advance assignment of the renewal term, showed no solicitude for the plight of the author, finding no reason, "sentimental"⁴¹² or practical, for constraining the author's freedom to contract away his renewal rights:

We are asked to recognize that authors are congenitally irresponsible, that frequently they are so sorely pressed for funds that they are willing to sell their work for a mere pittance, and therefore assignments made by them should not be upheld We cannot draw a principle of law from the familiar stories of garret-poverty of some men of literary genius We do not have such assured knowledge about authorship . . . or the psychology of gifted writers and composers, as to justify us as judges in importing into Congressional legislation a denial to authors of the freedom to dispose of their property possessed by others. While authors may have habits making for intermittent want, they may have no less a spirit of independence which would resent treatment of them as wards under guardianship of the law.⁴¹³

Because most book publishing contracts routinely — since at least the 1870s — systematically and explicitly conveyed both the first and the renewal terms,⁴¹⁴ generally with no separate consideration for the latter, the Court's ruling validated industry practice but also ensured that authors by and large would not be "brought into [their] kingdom,"⁴¹⁵ nor even into a minor freehold.

By contrast, the Supreme Court also ruled that the author's statutory heirs took the renewal term free of the decedent's grant (improvident or otherwise). Unsentimental as ever, the Court did not advert to congressional policy to protect widows and orphans (though this concern almost certainly animated the 1831 law), but rather dryly characterized the author's prior grant as a mere "expectancy," thus making the original grantee's acquisition of the renewal term contingent on the author's survival.⁴¹⁶ Not surprisingly, it became industry practice in some sectors to condition payment for the author's grant of copyright on the author's obtaining assignments to the publisher of her statutory heirs' contingent interests in the renewal term.⁴¹⁷

If the contract of transfer did not, however, explicitly cover the renewal term, many courts declined to deem it included within the scope of the grant. As the Second Circuit

412. *White-Smith Music Publ'g Co. v. Goff*, 187 F. 247, 251 (1st Cir. 1911).

413. *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 656 (1943). The Supreme Court majority thus made short work of Judge Frank's extensive critique in dissent below of "laissez faire" approaches to contract. *See M. Witmark & Sons v. Fred Fisher Music Co.*, 125 F.2d 949, 954-69 (1942) (Frank, J., dissenting).

414. *See Harper & Bros, Scribner, and Holiday Publishing contracts cited supra note 375.*

415. *White-Smith Music*, 187 F. at 251.

416. *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373, 375 (1960).

417. Interview with Irwin Robinson, former President, EMI Music Publ'g (Jan. 14, 2010); Interview with Jay Morgenstern, Exec. Vice President/Gen. Manager, Warner Chappell Music Inc. (Nov. 25, 2009). The practice of obtaining assignments from contingent heirs did not always ensure the grantee's acquisition of the renewal term, for example, if on the author's death his wife was pregnant and the renewal term had not yet vested. Email to Jane Ginsburg from Jay Morgenstern (June 8, 2010) ("[T]he studio demanded all of the signatures and we were able to comply. [Then] the author died while his wife was expecting. Everybody at the studio went into cardiac arrest thinking that the new heir could renege on the license at reversionary time.")). *See also Report of the Register of Copyrights on the General Revision of U.S. Copyright Law*, in *STUDIES ON COPYRIGHT*, *supra* note 377, at 1199, 1253 [hereinafter *Report of the Register*] ("A considerable amount of trafficking in the possible future renewal rights of authors and their prospective heirs has grown up.")

noted, in a case involving a grant of “full ownership . . . in all countries of the world” of the copyright in a musical composition, “[t]he presumption against conveyance of renewal rights serves the congressional purpose of protecting authors’ entitlement to receive new rights in the 28th year of the original term.”⁴¹⁸ Thus, an assignment of rights in the copyright term would not suffice to convey the renewal term rights.⁴¹⁹ Similarly, because the renewal term was considered a “separate interest,” courts protective of authors’ reversion rights might interpret a grant of “all right, title and interest in and to the copyright” to apply only to the first term.⁴²⁰ On the other hand, contract language, even if lacking the specification “all renewals and extensions thereof,” but which denoted intent to transfer the renewal term, such as “exclusive right to . . . use . . . forever,” could rebut the presumption.⁴²¹

D. REVERSION RIGHTS UNDER THE 1976 COPYRIGHT ACT

Against this background, when Congress finally revised the copyright law, its provision in the 1976 Act of an inalienable termination right stood out as a signal victory for authors. But, as examination of the text and experience to date will show, the 1976 Act imposes many practical impediments to successful exercise of the termination right. First, we will summarize the genesis of the termination right with respect both to works published before 1978 and to grants of rights (whether in works published before 1978 or created after that date) made as of 1978. Then, in Part E, we will examine how the termination right has been working in practice.

1. *Termination of contracts concluded under the 1976 Copyright Act*

In the 1976 Act, Congress abandoned the two-term copyright scheme, and for new works adopted the by-then international standard of the life of the author plus fifty years. (In 1998, Congress extended the term of copyright to life of the author, plus seventy years.) Although the renewal term which had triggered the reversion right would no longer exist, Congress determined to retain a reversion right, and pegged it to the date of conclusion of a grant of rights under copyright, with the right coming into effect from thirty-five to forty years from that date (subject to no fewer than two and no more than ten years’ advance notification).⁴²²

Some kind of reversion right figured in every copyright bill leading up to the 1976 final version. In the initial *Report of the Register of Copyrights on the General Revision of U.S. Copyright Law*,⁴²³ the Federal Register called for automatic reversion twenty years following the

418. *Corcovado Music Corp. v. Hollis Music, Inc.*, 981 F.2d 679, 684 (2d Cir. 1993).

419. *See, e.g.*, *Edward B. Marks Music Corp. v. Charles K. Harris Music Publ’g Co.*, 255 F.2d 518, 521 (2d Cir. 1958) (“The cases are clear that a copyright renewal creates a separate interest distinct from the original copyright and that a general transfer by an author of the original copyright without mention of renewal rights conveys no interest in the renewal rights without proof of a contrary intention.”). *Cf.* authorities cited *supra* note 379 (requiring specificity in assignment of renewal term interests under prior Acts).

420. *See, e.g.*, *Rossiter v. Vogel*, 134 F.2d 908, 911 (2d Cir. 1943) (holding “all right, title and interest” transfer at outset of first copyright term insufficient to convey renewal term: “the circumstances justifying the transfer of the right of renewal must be stronger than those justifying the transfer of the copyright, since the right of renewal is separate from the original copyright”).

421. *Siegel v. Nat’l Periodical Publ’ns, Inc.*, 508 F.2d 909, 913-14 (2d Cir. 1974).

422. *See* 17 U.S.C. § 203 (2006).

423. *Report of the Register, supra* note 417, at 1292-94 (calling for “protection of authors against unremunerative transfers”). Section 16 would go on to become § 203 of the 1976 Act. *See* An Act for the

conclusion of a grant, unless the grant provided for continuing royalty payments to the author: “[t]he statute should provide that any assignment by an author or his representative or heirs shall not be effective for more than twenty years from the date of its execution, unless it provides for the continuing payment of royalties based on the uses made of the work of the revenue derived from it.”⁴²⁴ The Register’s report both harked back to one of the proposals preceding the 1909 Act, which would have exempted royalty agreements from termination upon the vesting of the renewal term,⁴²⁵ and partly echoed copyright legislation in other countries, notably France, which required authors’ contracts to provide for a royalty for every mode of exploitation.⁴²⁶ But author groups persuaded the Register that the royalties safeguard was “illusory, since the royalties could be nominal and the proposal could easily be evaded.”⁴²⁷

The Register’s Preliminary Draft Bill two years later thus offered two very different alternative approaches. “Alternative A” provided for automatic reversion twenty-five years after transfer “notwithstanding any agreement to the contrary.”⁴²⁸ Offsetting the gain to authors of an automatic and inalienable reversion right, the proposal excluded works-for-hire and provided an exception allowing the continued exploitation of derivative works created prior to termination.⁴²⁹ “Alternative B” focused on “unremunerative transfers,” allowing the author to terminate twenty years after the transfer. If “the profits received by the transferee or his successors in title are strikingly disproportionate to the compensation, consideration, or share received by the author or his successors, action may be brought in any court mentioned in section 1338 of Title 28 to reform or terminate said transfer.”⁴³⁰

While Alternative B in theory captured the *raison d’être* for the termination right – to redress the imbalance when the author has sold her copyright for a pittance and the publisher reaps all the reward if the work proves successful — the “strikingly disproportionate” standard would have invited expensive and inconclusive litigation.⁴³¹ The proposal accordingly garnered little support.⁴³² With respect to Alternative A, even with its concessions on works-for-hire and derivative works (the former at least in part an

General Revision of the Copyright Law, Title 17 of the United States Code, and for Other Purposes, 90 Stat. 2541, 2569 (1976) [hereinafter 1976 Act] (. Section 22, which became § 304, is addressed below.

424. *Id.*

425. *See* discussion *supra* Part II.C.1.

426. *See* Copyright law of 1957, arts. 31, 35 (now Code de la propriété intellectuelle, arts. L. 131-3, 131-4) [hereinafter Copyright law (France)]. The Register’s Report took care to add, however, “We would encourage the compensation of authors on a royalty basis but we would not forbid lump-sum transfers.” *Report of the Register, supra* note 417, at 1293. On the other hand, the French law also acknowledged certain instances of permissible lump sum transfers as well. *See* Copyright law (France), art. 35 (now CPI art. L. 131-4).

427. REGISTER OF COPYRIGHTS, COPYRIGHT LAW REVISION PT. 3, PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSION AND COMMENTS ON THE DRAFT, 88TH CONG., 2D SESS., at 278 (Comm. Print 1964) [hereinafter COPYRIGHT LAW REVISION PT. 3] (statement of Barbara Ringer).

428. *Id.* at 16.

429. *Id.* at 15-16.

430. *Id.* at 16.

431. *Id.* [See *infra* note 497 --Why this crossreference? doesn’t seem relevant]).

432. *See, e.g., id.* at 250 (American Book Publishers Council: “The second alternative would, in addition, be extremely impractical in terms of its open invitation to endless and costly litigation in which the publishers might well find themselves at the mercy of the courts, which would have no objective standard to guide them.”).

accommodation of the transactions costs problem arising with multiple-authored works; the latter a recognition of the reliance interests in the investments made to create derivative works such as motion pictures), the proposal proved too radical for publisher interests who decried “another example of slapping the publishers down, but in this instance the slap would be so violent as to drain the very lifeblood of the industry.”⁴³³

The following year the Revision Bills introduced in Congress⁴³⁴ retreated from two of the Preliminary Draft’s most author-favorable provisions: they made termination optional rather than automatic, and they delayed vesting of the termination right from twenty to thirty-five years following execution of the contract. On the other hand, the 1964 Bill retained the inalienable character of the termination right, and clarified the scope of its application: “The termination may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any other future transfer.”⁴³⁵ Both authors and publishers found the changes objectionable. The Authors League of America considered thirty-five years too long to wait for termination rights,⁴³⁶ and feared that the exemption for works-for-hire would encourage publishers to press authors to sign work-for-hire agreements.⁴³⁷ The American Book Publishers Council proved no happier: “There is no adequate reason why the well-entrenched doctrine of non-governmental interference with freedom of contract should not be applied to this situation.”⁴³⁸ The Council dismissed arguments grounded in authors’ inferior bargaining positions; they emphasized authors’ representation by literary agents, and noted: “As a matter of fact, if an author’s first book sells well, usually other publishers bid for him and his original publisher must bargain competitively or lose the author.”⁴³⁹

Despite the publishers’ bid to eliminate reversion rights, subsequent bills continued to include both the right and the “notwithstanding any agreement to the contrary” proviso.⁴⁴⁰ The termination right was made applicable to “the exclusive or nonexclusive grant of a transfer or license,”⁴⁴¹ and the timeframe for effecting the termination was limited to five years beginning thirty-five years after transfer.⁴⁴² Thus, the exercise of the termination right became progressively less author-favorable: from a right that vested automatically twenty, then thirty-five, years from the conclusion of the contract, it next would have vested only if

433. *Id.* at 318 (Music Publishers’ Protective Association).

434. S. 3008, H.R. 11947, 88th Cong., (1964); H.R. 12354, 88th Cong., (1964).

435. REGISTER OF COPYRIGHTS, COPYRIGHT LAW REVISION PT. 5, 1964 REVISION BILL WITH DISCUSSION AND COMMENTS, 89TH CONG., 1ST SESS., at 10 (Comm. Print 1964) [hereinafter COPYRIGHT LAW REVISION PT. 5]. *See also* COPYRIGHT LAW REVISION PT. 3, *supra* note 427, at 402-03 (suggestions of Prof. Melville Nimmer).

436. COPYRIGHT LAW REVISION PT. 5, *supra* note 436, at 239.

437. *Id.* at 156 (statement of Irwin Karp on behalf of Authors League). The concern may have been overstated, in light of the 1976 Act’s restriction of works-for-hire to employee works or only certain specially ordered works, and subject to a signed writing. *Id.* at 145 (testimony of Barbara Ringer concerning author-favorable change in definition of works-for-hire). On the other hand, the concern may have been prescient. *See* *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 292 (2d Cir. 2002) (retroactively deeming work a “work for hire” constitutes impermissible agreement contrary to termination right).

438. COPYRIGHT LAW REVISION PT. 5, *supra* note 436, at 225.

439. *Id.*

440. H.R. 4347, 89th Cong., § 16(a)(4) (as introduced Feb. 4, 1965).

441. *Id.* § 203(a).

442. *Id.* § 203(a)(2) (with slight variation for grants for right of first publication).

the author exercised his right (continued rights of exploitation thus by default remaining with the assignees), and finally, through the addition of the five-year deadline, fell subject to a use-it-or-lose-it regime. These compromises, together with the exclusion of works-for-hire and previously created derivative works from the scope of the termination, made the termination right palatable to publishers and motion picture producers.⁴⁴³

At least one issue remained in dispute – namely, whether unanimity was required among joint authors and/or their heirs to exercise the termination right. Motion picture producers pushed for unanimity,⁴⁴⁴ while authors’ groups contended that such a requirement would likely render the exercise of the right in co-authored works unworkable.⁴⁴⁵ The Authors League thus urged that a majority of those sharing the copyright be sufficient.⁴⁴⁶ The following year’s bill awarded the round to the authors, allowing exercise of termination by a “majority of the authors”⁴⁴⁷ and working through the portion of the termination interest the widow(er) and each of the children would hold.⁴⁴⁸ By 1966, then, Congress had settled most of the details of the 1976 Act termination provisions respecting contracts entered into as of its effective date.

2. *Reversion rights in works whose 1909 Act copyrights were still subsisting*

For works published before 1978, Congress extended the term of copyright by adding nineteen years to the twenty-eight year renewal term for a total of seventy-five years protection from publication.⁴⁴⁹ Congress then confronted the question of the beneficiary of the additional nineteen years, an issue raised as early as the Register’s 1961 Report. Without explicitly advertent to the Constitution’s authorization to Congress to secure exclusive rights “to Authors,” the Register acknowledged that “there would be little justification for lengthening the term unless the author or his heirs were to receive some benefit from it.”⁴⁵⁰ The Register initially recommended an automatic reversion at the end of the twenty-eighth year of the renewal term, but only for works for which the author was not receiving royalties.⁴⁵¹ In the course of the revision bills, however, the same compromises that trimmed the statutory termination right for post-1977 contracts also whittled down the reversion right attached to the “extended renewal term.”⁴⁵² Thus, “proprietors” who under the 1909 Act were entitled to effect the renewals remained in title throughout the extended renewal period

443. *Hearings on Copyright Law Revision Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 89th Cong. 98 (1965) (Memorandum Statement by the Copyright Comm. of the Motion Picture Association of America, Inc. on H.R. 4347) (“Although we are still strongly opposed in principle to the very concept of statutory recapture in any form, the compromise worked out, after much travail, in H.R. 4347, is a minimal basis on which we can learn to live with such a provision, and accept the same in the interests of furthering an adequate revision statute.”).

444. *Id.* at 996-98.

445. *Id.* at 94 (Prepared Statement of Rex Stout on Behalf of the Authors League of America) (“one of several children of a deceased author” could prevent his mother and siblings, or even the still-living co-authors of a work from exercising termination rights).

446. *Id.*

447. H.R. 4347, 89th Cong., § 203(a)(1) (as reported by Judiciary Comm., Oct. 12, 1966).

448. § 203(a)(2).

449. 17 U.S.C. § 304(a) (2006).

450. *Report of the Register*, *supra* note 417, at 1258.

451. *Id.*

452. 17 U.S.C. § 304(c).

as well, and the scope of the reversion right excluded already-created derivative works.⁴⁵³ By contrast, under the 1909 Act, the renewal term (if not contracted away) entitled authors to retrieve their copyrights free and clear of all prior grants; thus, the copyright owners of any derivative works created under the authority of the first-term grant would be obliged to negotiate with the owner of the renewal term rights in the underlying work.⁴⁵⁴ And, as with termination of post-1977 contracts, the extended renewal term reversion right did not attach automatically; the author (or her heirs) was obliged to effect the termination, within a specified time period, otherwise the previously transferred rights would remain with the grantee for the remaining duration of copyright.⁴⁵⁵

When Congress in 1998 added another twenty years to the terms of extant copyrights, it gave the authors (or heirs) of works published before 1978 another opportunity to terminate grants during the last twenty years, but only so long as they had not previously terminated grants at the outset of the prior nineteen-year extension.⁴⁵⁶ As a result, as between the two term extensions, authors may only once recapture rights they assigned or licensed.⁴⁵⁷ The grantee who negotiated rights for the first extended renewal term of nineteen years thus would reap thirty-nine years of exclusive rights for the price of nineteen. In such instances, one may query whether Congress has “secur[ed]” the term extension “to Authors.” If compliance with the constitutional clause was already attenuated under the use-it-or-lose-it recapture provisions accompanying the nineteen-year renewal term extension, the exclusion of many authors from the twenty-year renewal term extension seems even less compatible with the constitutional charge.⁴⁵⁸

3. *No reversion rights in unpublished works*

The 1909 Act reversion right and its extensions in the 1976 Act all are tied to the renewal term following the first twenty-eight-year term. The 1976 Act and 1998 Copyright Term Extension Act amendments’ reversions are both a recapture of rights during the extended renewal term. But the renewal term follows an initial twenty-eight-year period that, unless the work was registered as an unpublished work, began upon publication. If the author

453. See §§ 203(b)(1), 304(c)(6)(A) (2006).

454. See, e.g., *Stewart v. Abend*, 495 U.S. 207 (1990) (renewed copyright in short story on which film *Rear Window* was based). In 1992, Congress amended § 304(a) of the Copyright Act to provide for automatic renewal of copyright registrations. If the author or her heirs effect the registration, all renewal term rights, including in derivative works, will vest; if the renewal is automatic, the first-term grantee of derivative work rights is permitted to continue to exploit the already-created derivative work during the renewal term and its extensions. See 17 U.S.C. § 304(a)(4)(A).

455. § 304(c).

456. See § 304(c), (d).

457. § 304(d).

458. See, e.g., *Hearing on S. 483 Before the S. Comm. on the Judiciary*, 104th Cong. 112 (1995) (Register of Copyright Marybeth Peters’ response to challenge on “to Authors” issue); *id.* at 117 (Comm’r of Patents and Trademarks Bruce Lehman’s response to challenge on “to Authors” issue); *id.* at 165 (statement of Prof. William Patry) (“[M]usic publishers have let it be known they would oppose any bill that gives the [extended] copyright to authors. This assertion, if true, demonstrates how far S. 483 as drafted departs from the constitutional goal of protecting authors.”); S. REP. NO. 104-315, at 33-34 (1996) (minority views of Sen. Hank Brown) (arguing that CTEA “does not secure the copyright to authors. Instead it secures the extended monopoly grant to the current owners of the copyright.”).

granted derivative work rights in an unpublished work — for example, a grant of motion picture rights in an unpublished play or story — the underlying work would remain unpublished, and no renewal term would ever attach.⁴⁵⁹ Thus, while the 1909 Act renewal term reversion did not include the derivative works carve-out the motion picture producers demanded for the 1976 Act, to the extent the producers based their films on prior unpublished works that were not works made for hire, they would have limited their exposure to hold-up from the authors of underlying works. By contrast, because the 1976 Act provisions on termination of grants thirty-five years following their conclusion do not distinguish between published and unpublished underlying works, the perceived need for a derivative works carve-out becomes apparent.

E. IMPLEMENTATION OF THE 1976 ACT REVERSION RIGHTS

1. *Summary of termination provisions*

Different events trigger the 1976 Act's termination provisions. For works first published when the 1909 Act was still in force, the advent of the author's reversion rights is calculated from the date of first publication.⁴⁶⁰ For grants made as of the 1976 Act's effective date, the date of the execution of the grant (not the date of publication of the work) determines the vesting of the reversion right.⁴⁶¹

The 1976 Act includes transitional provisions covering the reversion of renewal term rights in works published before 1978, and therefore under the aegis of the 1909 Act. These works fall into two categories, those published before 1964 (whose first twenty-eight-year term expired before 1992), and those published between 1964 and 1977 (whose first twenty-eight-year term expires between 1992 and 2015); the latter group benefits from the automatic renewal amendments made in 1992.⁴⁶² For works published before 1964, the renewal term reversion of rights vested automatically (upon proper application and registration). The term generally vested in the author,⁴⁶³ but if she survived into the renewal term she was bound by a prior grant of renewal term rights; if the author died before the renewal term vested, the author's surviving spouse or children took the rights notwithstanding any grant of renewal term rights by the author, including with respect to derivative works. No deadline was

459. See, e.g., *Copyright Office Assignments of Copyright*, 186 PHOTOSTAT COPIES 141 (grant from Vin Moore to Universal Picture Corp, 30 Aug. 1927, of all rights, “forever” in unpublished story “Ocean Bruisers”); *id.* at 47 (grant from Agnes Christine Johnston to Columbia Pictures Corp., September 20, 1927, of motion picture rights in unpublished original dramatic composition “The Kiss”). See also *Paige v. Banks*, 80 U.S. 608, 616 (1871) (finding no reversion right because publisher received unpublished manuscript).

It is possible that 1978 unpublished works became vested with § 203 termination rights on January 1, 1978, when § 303 brought these works under federal copyright, because the “execution” of a grant of *federal* copyright rights would have occurred only with the effective date of the 1976 Act. See Letter from Jane C. Ginsburg, Professor, Columbia Univ., to Maria Pallante, Assoc. Register, Policy & Int'l Affairs, U.S. Copyright Office (Apr. 27, 2010), available at www.copyright.gov/docs/termination/comments/2010/ginsburg-jane.pdf. But the § 203(b)(1) exception for derivative works would in any event shield the motion picture producers from any non employee for hire's termination

460. 17 U.S.C. § 304(c)(3).

461. *Id.*

462. See § 304(b)(2).

463. The 1909 Act included four categories of works whose “proprietors” took the renewal. See 17 U.S.C. § 23 (repealed Oct. 19, 1976).

imposed on the author's or statutory heirs' exercise of the reverted rights.⁴⁶⁴ For works published between 1964 and 1977, inclusive, if the author did not grant the renewal term, or if the author died before the renewal term vested, then renewal term rights revert if the renewal is effected during the twenty-eighth year of copyright. (If the author, or survivor, does not renew, then the term of copyright will be automatically renewed, *but* the transferee may continue to use already-created derivative works.⁴⁶⁵)

With respect to the nineteen additional years the 1976 Act appended to the end of the renewal term for works published under the 1909 Act, the author or her heirs may effect the reversion of these extended renewal term rights within a five-year period beginning at the end of fifty-six years from publication (with a minimum of two years, and a maximum of ten years, advance notice); however, the transferee may continue to use already created derivative works. Similarly, for the twenty years Congress in 1998 added to the extended renewal term of 1909 Act works, the author or her heirs may effect the reversion during a five-year period beginning at the end of seventy-five years from publication (with a minimum of two years, and a maximum of ten years, advance notice), but only if the author or her heirs did not terminate at the end of fifty-six years; the transferee may continue to use already-created derivative works.

For grants of exclusive or non-exclusive rights made after 1977 (regardless of the work's date of publication), the author or her heirs may effect termination within a five-year period beginning thirty-five years from execution of the grant (or, if the grant transferred publication rights, thirty-five years from publication or forty years from execution, whichever is earlier), with a minimum of two years, and a maximum of ten years, advance notice.⁴⁶⁶ As with all other 1976 Act terminations, the transferee may continue to use already-created derivative works.⁴⁶⁷

2. *Caselaw*

Grants concluded after 1977 are governed by section 203 of the 1976 Act; they will be terminable beginning in 2013 (with the earliest notice period having begun in 2003). As a result, courts have yet to interpret those provisions. But controversies under section 304(c), governing the termination of the extended renewal term, began to arise with the effective date of the 1976 Act, and are likely to continue for as long as the right to reclaim the section 304(c) or (d) extended renewal term remains enforceable, that is, until 2055.⁴⁶⁸ The cases calling for interpretation of section 304(c) have fallen into three general categories: adequacy of notice given to grantees; scope of the derivative works right exception to termination; and evasion of the inalienability principle embodied in the "notwithstanding any agreement to the contrary" proviso.

a) Adequacy of notice to grantees

464. Thus, for example, in *Rohauer v. Killiam Shows, Inc.*, 551 F.2d 484 (2d Cir. 1977), the author's widow effected the renewal in 1952, but did not assign the rights to Rohauer until 1965.

465. 17 U.S.C. § 304(b)(4)(A).

466. 17 U.S.C. § 203(a)(3) (2006).

467. § 203(b)(1).

468. The last works under the aegis of the 1909 Act were published in 1977; the second extended renewal term will vest seventy five years later, 2052. The author (or heir) has five years in which to effect termination (2057), but must give at least two years advance notice, hence 2055.

The notice provisions of section 304(c) are not author-friendly. As the court in *Siegel v. Warner Bros.*, concerning the recapture of rights in *Superman*, lamented, section 304(c)'s "intricate provisions oftentimes create unexpected pitfalls that thwart or blunt the effort of the terminating party to reclaim the full measure of the copyright in a work of authorship."⁴⁶⁹ The caselaw confirms this sobering assessment. In *Burroughs v. MGM*,⁴⁷⁰ Edgar Rice Burroughs' heirs sought to recapture film rights in the *Tarzan* books. While the derivative works exception insulated the grantees of rights in previously-created motion pictures, the Burroughs heirs aimed to exercise control over future films incorporating the *Tarzan* characters. The Second Circuit held that the termination notice's "undoubtedly inadvertent"⁴⁷¹ failure to include five of fourteen "Tarzan" titles rendered the termination ineffective even though the five omitted titles did not include the first appearances of the various *Tarzan* characters. In theory, any rights conveyed in the five remaining titles should have been limited to the new matter contributed by those titles, the basic character attributes and adventures having been set out in the earlier works covered by the notice of termination.⁴⁷² As a result, the terminated grantee seeking to make a new film should not have been entitled to rely on its remaining rights in the later works because any new film would inevitably incorporate character traits and plot elements contained in the earlier works in which the grantee no longer had rights.

The Second Circuit, however, citing no authority, proclaimed "when an author grants the rights to a work that contains material protected by the author's copyright in an earlier work, the grant implicitly authorizes the use of all material contained in the licensed work, including material that may be covered by the author's other copyrights."⁴⁷³ The decision is especially devastating for authors of works in which the same characters appear in multiple sequels. The court's reasoning has the effect of nullifying the limitation on the derivative works exception to already-created derivative works. Section 304(c)(6)(A) specifies that the "privilege [to continue to exploit previously prepared derivative works] does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant." If derivative works rights granted in later works in the series may continue to be exploited based on an "implicit" grant of rights in earlier works, then the character rights will not be retrieved until fifty-six years following the publication of the last pre-1978 sequel, or thirty-five years following a post-1978 grant of rights in the last sequel.

In *Siegel v. Warner Bros.* the termination notice served by the heirs of Jerome Siegel, one of the two creators of *Superman*, specified an effective date that failed, by a few days, to encompass the first published appearance of the *Superman* character in promotional announcements for the forthcoming first comic book featuring the character. Though the

469. *Siegel v. Warner Bros. Ent., Inc.*, 542 F. Supp. 2d 1098, 1117 (C.D. Cal. 2008).

470. *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610 (2d Cir. 1982).

471. *Id.* at 622.

472. *Cf.* 17 U.S.C. § 103(b) (2006) (copyright in a derivative work "extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.").

473. *Burroughs*, 683 F.2d at 622.

timing of the notice did encompass the comic book, Warner Bros. claimed that the subsistence of its rights in the earlier advertisements preserved its rights in the essential visual and story elements of the character. The court agreed that as much of the character as was depicted in the announcements remained unaffected by the termination. However,

The Court begins by observing what is *not* depicted in the announcements. Obviously, nothing concerning the Superman storyline (that is, the literary elements contained in *Action Comics*, Vol. 1) is on display in the ads; thus, Superman's name, his alter ego, his compatriots, his origins, his mission to serve as a champion of the oppressed, or his heroic abilities in general, do not remain within defendants [*sic*] sole possession to exploit. Instead the only copyrightable elements left arise from the pictorial illustration in the announcements, which is fairly limited.

The person in question has great strength (he is after all holding aloft a car). The person is wearing some type of costume, but significantly the colors, if any, for the same are not represented, as the advertisement appears only in black and white. The argument that the "S" crest is recognizable in the promotional advertisement is not persuasive. What is depicted on the chest of the costume is so small and blurred as to not be readily recognizable, at best all that can be seen is some vague marking or symbol its precise contours hard to decipher. The Court thus concludes that defendants may continue to exploit the image of a person with extraordinary strength who wears a black and white leotard and cape. What remains of the Siegel and Shuster's Superman copyright that is still subject to termination (and, of course, what defendants truly seek) is the entire storyline from *Action Comics*, Vol. 1, Superman's distinctive blue leotard (complete with its inverted triangular crest across the chest with a red "S" on a yellow background), a red cape and boots, and his superhuman ability to leap tall buildings, repel bullets, and run faster than a locomotive, none of which is apparent from the announcement.⁴⁷⁴

The *Siegel* court correctly construed the relationship between the copyright in a work containing a character's first appearance and the copyright in each subsequent work containing additional iterations of the character. *Superman* may be unusual in that the first published works (the promotional announcements) did not convey all the essential elements of the character's appearance and story. The heirs' recapture, while incomplete, was nonetheless sufficiently substantial to oblige Warner Bros. to account to the heirs for profits generated by at least some of the exploitations of the Superman copyright.⁴⁷⁵

b) Scope of the derivative works exception to termination

The 1976 Act termination right returns fewer rights to the author than did the renewal term reversion because "a derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination," while the "new estate" of the renewal term freed the author (if she had not previously assigned her renewal term rights) or her statutory heirs from all prior grants.⁴⁷⁶ Without the

474. *Siegel*, 542 F. Supp. 2d at 1126.

475. The court does not appear to have considered whether Warner Bros.' rights in later iterations of *Superman* derived from subsequent, unexpired (or unexpired, if later iterations were work for hire) grants which "implicitly" incorporated grants of rights in the earliest versions of the character.

476. *Stewart v. Abend*, 495 U.S. 207, 226, 230 (1990) (holding that renewal terminates right to exploit derivative works).

continued use exception, derivative works grantees, principally motion picture producers, would have opposed, and likely defeated, an inalienable termination right. While the exception secured the investment made in the creation of derivative works, the Supreme Court interpreted the statute to benefit not only derivative works producers but also (and at the cost of authors) the intermediaries, generally publishers, who license them. In *Mills Music v. Snyder*, the heirs of the composer of the aptly-named song “Who’s Sorry Now?” served a notice of termination on the music publisher.⁴⁷⁷ The music publisher had, pursuant to the now-terminated grant, licensed several record producers to make sound recordings of the song. Under the exception, it was clear that the record producers could continue to sell the recordings they had already made. At issue were the royalty payments: would the record producers now pay 100% of the royalties to the composer’s heirs, or would they continue to pay 50% to the publisher, even though the publisher no longer held any rights in the song? The Supreme Court, in a 5-4 decision, construed “the terms of the grant” to cover both the composer’s grant of rights to the music publisher, and the publisher’s grants of derivative works rights to the record producers. As a result, the publisher would continue to receive its prior share of the royalties. While the derivative works licenses in *Mills Music* split the royalties evenly, so that the author continued to be remunerated, the Court’s reasoning would seem to apply even when the licensing intermediary keeps most or all of the royalties.⁴⁷⁸ The decision has been widely criticized as inconsistent with legislative intent;⁴⁷⁹ subsequent decisions of lower courts appear to endeavor to limit the potential damage.

In *Woods v. Bourne*, the Second Circuit considered the post-termination distribution of royalties in arrangements of the song “When the Red Red Robin Comes Bob Bob Bobbin’ Along” as sold in sheet music and as publicly performed in sound recordings.⁴⁸⁰ The Court rejected the terminated publisher’s reliance on *Mills Music* for two reasons. First, with respect to royalties earned from the radio broadcasts and other public performances of the recorded songs, the court held that the exception “protects only authorized uses made by derivative work copyright owners, or their licensees.”⁴⁸¹ Because, at the time of the decision, there was no public performance right in a sound recording, the public performances whose royalties were at issue could not be authorized uses with respect to the sound recordings, rather they implicated rights in the underlying musical composition.

But what was the underlying musical composition? The composer’s heirs contended it was the piano-vocal version, from which subsequent arrangements were adapted. The

477. *Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985).

478. *See id.* at 177 (“no support . . . for the proposition that Congress expected the author to be able to collect an increased royalty for the use of a derivative work”).

479. *See, e.g.*, PAUL GOLDSTEIN, COPYRIGHT § 5:132-34.; Howard B. Abrams, *Who’s Sorry Now? Termination Rights and the Derivative Works Exception*, 62 U. DETROIT L. REV. 181, 224-32, 238-39 (1985); Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 901-02 (1987) (“With this interpretation, the [*Mills Music*] Court did to the right of termination essentially the same thing as it had done to the 1909 Act’s renewal provision 42 years earlier. With termination, as with renewal, the author’s recapture expectancy is essentially alienable. In industries such as music publishing where authors and composers typically assign to the publisher the right to license any further uses, the statutory right to terminate will have little value. As with the renewal term, the author will have assigned most of what is valuable in her work to people from whom she will be unable to recapture it.”).

480. *Woods v. Bourne Co.*, 60 F.3d 978 (2d Cir. 1995).

481. *Id.* at 989.

publisher argued that the initial iteration of the song in the “lead sheet” constituted the “work” that was the subject of the “grant.” The lead sheet was “a very simple, hand-written rendering of the lyrics and melody of the composition without harmonies or other embellishments. [The publisher argued that it] modified the lead sheet by adding harmonies and other elements to create a commercially exploitable piano-vocal arrangement that qualifies as a derivative work.”⁴⁸² In that event, if all the commercially exploited versions of the song were derivative works, then none would be terminable, and under *Mills Music*, the publisher would keep its share of the royalties from the continued sale of the sheet music. Thus, as its second basis for distinguishing *Mills Music*, the court affirmed the district court’s ruling that the “work” was the piano-vocal version, and, moreover, that most of the arrangements derived from the piano-vocal version lacked sufficient originality to constitute derivative works. If the works for which the royalties were owed were not derivative works, then the derivative works exception would be irrelevant. Applying the Second Circuit’s “distinguishable variation” standard of requisite creativity for derivative works,⁴⁸³ the court distinguished originality from the mere skill or “special training” that characterized the “cocktail pianist variations of the piece that are standard fare in the music trade by any competent musician.”⁴⁸⁴

In its endeavor to prevent the derivative works exception from swallowing the songwriter’s termination right, the court may have applied an unduly high standard of creativity, a suspicion supported by the court’s favorable citation to *Gracen v. Bradford Exchange*.⁴⁸⁵ *Gracen’s* suggestion that a higher standard of originality is required for derivative works than for underlying works has since been discredited in its own circuit.⁴⁸⁶ On the other hand, the *Woods* court’s reference to “standard fare in the music trade”⁴⁸⁷ may be consistent with prior Second Circuit decisions that reject the originality of variations that are necessary to implement the adaptation of a work from one medium to another. For example, in *Batlin v. Snyder*, the Court disregarded the changes the copyright claimant introduced in producing a plastic version of a public domain cast iron “Uncle Sam” bank on the ground that the variations were trivial or necessitated by the medium transformation. In *Woods*, the Second Circuit may have felt confident in affirming the trial court’s assessment that most of the arrangements were trivial because the trial judge was not only a respected jurist but also an opera composer⁴⁸⁸ (although the court of course did not allude to this additional competence). The disqualification of the alleged derivative works meant not only that the terminated intermediary publisher would not receive royalties for the continued exploitation of the arrangements, but that the terminating author (or his subsequent grantee) would determine whether and when the arrangements might henceforth be exploited.⁴⁸⁹

482. *Id.*

483. *See* L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490 (2d Cir. 1976) (internal quotations omitted).

484. *Woods*, 60 F.3d at 991 (internal quotations omitted).

485. *Gracen v. Bradford Exchange*, 698 F.2d 300 (7th Cir. 1983).

486. *See* Schrock v. Learning Curve Int’l, Inc., 586 F.3d 513 (7th Cir. 2009).

487. *Woods*, 60 F.3d at 991.

488. *See* Christine Perkins, *Courtrooms and Dramas: Richard Owen ’50 Has a Noteworthy Career in Both*, HARV. L. BULL., Summer 2006, available at http://www.law.harvard.edu/news/bulletin/2006/summer/cn_01.php.

489. The works the court deemed were not “derivative works” were various sheet music arrangements. The sound recordings, even if based on unoriginal arrangements, would nonetheless be derivative works by virtue of the originality of the recorded performances and of the contributions of the recording engineer.

In *Fred Ahlert Music Corp. v. Warner-Chappell Music*, the Second Circuit adapted *Mills Music*'s interpretation of "under the terms of the grant" in the author's favor.⁴⁹⁰ Addressing whether the licensor of pre-termination derivative works could authorize different exploitations of the derivative work post termination, the court ruled that the grantor of a mechanical license to make a sound recording of the song "Bye-Bye Blackbird" was not later entitled to license that derivative work for the soundtrack and soundtrack album of the film "Sleepless in Seattle" once the songwriter reclaimed his rights for the extended renewal term. The Second Circuit emphasized that in *Mills Music*, the Supreme Court interpreted "the grant" as "*the entire set of documents that created and defined each licensee's right to prepare and distribute [the] derivative work[]*."⁴⁹¹ Thus, the court determined that "the grant" at issue combined the songwriter's original grant to the music publisher with the publisher's subsequent grant to the record producer:

Although the original grant would presumably authorize this new use [in connection with the motion picture], plainly Warner's license to A&M does not This grant does not authorize any additional releases of the . . . derivative [recording], much less its inclusion on a movie soundtrack. Just as Warner continues [by virtue of *Mills Music*] to benefit from the terms of the second grant, pursuant to which it receives royalties from sales of the [derivative recording] . . . , it is bound by those terms of the second grant which limit its exploitation of the Song to sales of that phonorecord.⁴⁹²

Because the music publisher had not, pre-termination, authorized additional uses of the licensed derivative work, it was now too late to engage in new exploitations, and the rights to license and receive royalties from those exploitations reverted to the author (or his statutory heirs). Whether *Fred Ahlert* effectively cabins *Mills Music* may turn on whether during the minimum two-year period between service of the notice of termination and the effective date of the termination,⁴⁹³ the grantee engages in a flurry of downstream licensing to cover the exploitations the grantee did not previously authorize. If "[t]he effect of *Mills Music* . . . is to preserve during the post-termination period the panoply of contractual obligations that governed pre-termination uses of derivative works by derivative work owners or their licensees,"⁴⁹⁴ then perhaps intermediary grantees may elude the effect of *Fred Ahlert* by expanding the "panoply" before the effective date of the termination.⁴⁹⁵

A related issue concerns the interpretation of the phrase "a derivative work *prepared* under authority of the grant before its termination"⁴⁹⁶ (emphasis supplied): must the derivative work have been fully created before termination, or will the derivative work escape termination so long as its creation has been undertaken before the effective date of termination? If "prepared" encompassed derivative works begun but not yet completed,

490. *Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc.*, 155 F.3d 17 (2d Cir. 1998).

491. *Id.* at 23 (emphasis and brackets in 2d Cir.'s opinion).

492. *Id.* at 24.

493. See 17 U.S.C. § 304(c)(4)(A) (2006).

494. *Woods v. Bourne Co.*, 60 F.3d 978, 987 (2d Cir. 1995).

495. Section 304(c)(6)(B) provides that the "future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served," but it seems doubtful that the vesting cuts off the grantee's present rights during the notice period.

496. 17 U.S.C. § 304(c)(6)(A).

then one might anticipate that grantees would rush to initiate the creation of the maximum number of derivative works during the minimum two-year period between the notification and the effective date of termination. While the notice period may well have been intended to allow grantees the opportunity to wind down their exploitation in anticipation of termination,⁴⁹⁷ the termination right would be considerably compromised if the notice period also enabled grantees to gear up to engage in further development of derivative works. No decisions yet appear to confront this issue.⁴⁹⁸

c) Inalienability: “any agreement to the contrary”⁴⁹⁹

The termination right remains available to the author or her heirs “notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.”⁵⁰⁰ The Second Circuit has held that a subsequent agreement to recharacterize as a “work for hire” an author’s creation of “Captain America” for a series of comic books was an impermissible “agreement to the contrary” because grants of rights in works made for hire are not terminable.⁵⁰¹ The determination long after the work’s creation that it was “for hire” thus constituted an impermissible agreement that the creator would have no termination rights.⁵⁰² But it appears that not every agreement whose effect is to deprive the author or the statutory heir of the opportunity to terminate a grant is an “agreement to the contrary” within the meaning of section 304(c)(5). The Second and Ninth Circuits have issued conflicting decisions when the parties to an initial pre-1978 grant (or their successors) agreed post-1978 to rescind the grant and enter into a new agreement. Because the initial agreement would have been terminable under section 304(c), but the new agreement would not (nor would it be under section 203), the question arose whether the new agreement was “contrary” to section 304(c).

Milne ex rel. Coyne v. Stephen Slesinger, Inc., concerned transfers of renewal rights in A.A. Milne’s Winnie the Pooh works.⁵⁰³ Milne wrote and published several Winnie the Pooh stories between 1924 and 1929. In 1930, he granted Stephen Slesinger an exclusive license of

497. See, e.g., SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE US COPYRIGHT LAW: 1965 REVISION BILL 75 (May 1965) (“The thought behind the 2-to-10-year limitation on the time for serving a notice was to establish a definite period for filing the notice toward the end of the 35- or 40-year term, thus avoiding earlier, indiscriminate terminations, and to provide a fair period of advance notice to the grantee that his rights are to be terminated.”).

498. Cf. NIMMER, COPYRIGHT § 11.02[C][1] n.65 (suggesting that as much of derivative work as had been created by date of termination may continue to be exploited, and if remainder of derivative work is not based upon the underlying work – e.g., a soundtrack for a film based on a terminated novel, then the whole derivative work may continue to be exploited. By the same token, one may infer from this suggestion that the termination would preclude further additions to the derivative work-in-progress if those additions derive from the underlying terminated work.).

499. Portions of the following section are adapted from JANE C. GINSBURG & R. ANTHONY REESE, COPYRIGHT: CASES AND MATERIALS 40-44 (Supp. 2009). For a detailed examination of the “any agreement to the contrary” decisions, see Peter S. Mennell & David Nimmer, *Pooh-Poohing Copyright Law’s ‘Inalienable’ Termination Rights* (UC Berkeley Pub. Law Research Paper No. 1525516, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1525516. [NOTE TO BTLJ: This article may now be published somewhere, please verify]

500. 17 U.S.C. §§ 203(a)(5), 304(c)(5) (2006).

501. *Marvel Characters, Inc. v. Simon*, 310 F.3d 280 (2d Cir. 2002).

502. *Id.*

503. *Milne ex rel. Coyne v. Stephen Slesinger, Inc.*, 430 F.3d 1036 (9th Cir. 2005).

merchandising and other rights to the Pooh character in the U.S., for the initial and renewal copyright terms, in exchange for royalties (Slesinger then transferred his rights to the corporation SSI). The stories' copyrights were later properly renewed. In 1961, SSI — in exchange for royalties — exclusively granted to Walt Disney Productions the rights that SSI had under the 1930 contract, and Disney acquired, inter alia, film rights from Milne's widow. In 1983, after Mrs. Milne's death, her only child — Christopher Robin Milne — contracted with SSI and Disney not to exercise his statutory termination rights; SSI and Disney in turn agreed to increase Christopher Robin's royalties from the Pooh properties. The 1983 agreement revoked the 1930 and 1961 agreements and re-granted the rights in the Pooh works to SSI, which then granted rights to Disney. In 2002, Clare Milne, Christopher Robin's sole surviving child, attempted to terminate her grandfather's 1930 grant to Slesinger under Section 304(d). She then sought a declaratory judgment that her termination notice was valid and effective (Disney did not object, as Clare simultaneously agreed to grant to Disney the rights that reverted to her; indeed, Disney agreed to fund Clare's litigation).

The Ninth Circuit concluded that the execution of the 1983 agreement revoked the 1930 grant, so that when Clare Milne served her termination notice, there was no longer any pre-1978 agreement to be terminated. The court did not view the 1983 agreement as one inconsistent with the statutory goal of protecting authors or their families against unremunerative transfers, apparently because the 1983 agreement achieved the same objective as termination: obtaining a better deal for the author's heir (in this case the son, rather than the granddaughter). Moreover, the threat of termination proved the incentive both for increasing Christopher Robin's royalties and for paying them earlier than the termination date. That the arrangement cut out the statutory heir of the section 304(d) termination right (the section 304(c) right having gone unexercised) seems not to have troubled the court, which appears to have found Clare's claim almost frivolous.⁵⁰⁴

The Ninth Circuit reached the opposite result, however, in *Classic Media, Inc. v. Mewborn*,⁵⁰⁵ which involved the story "Lassie Come Home," written and copyrighted by Eric Knight in 1938, as well as Knight's 1940 novel based on the short story. Knight granted the predecessor to Classic Media the right to make a television series based on the works. Knight died in 1943, and his widow and three daughters later renewed the copyrights. Classic's predecessor had an agreement regarding the renewal term television rights with Knight's widow, but not his daughters. In July 1976, Ms. Mewborn, one of the daughters, assigned her 25% share of the film, TV, and radio rights in the Lassie works to Classic's predecessor for \$11,000. In March 1978, Classic's predecessor contracted with the other two daughters to assign their film, TV and radio rights, as well as ancillary merchandising, dramatic, and recording rights, for \$3,000 to each daughter. In order to conform all of the daughters' grants of rights, Classic's predecessor paid Mewborn \$3,000 to sign a new agreement in March 1978 that was identical to her sisters' agreements, except that it referred to the 1976 agreement, specifying that Mewborn was granting the identified rights "to the extent such rights are owned by me" and that the rights granted "are in addition to" the rights granted in the 1976 agreement.⁵⁰⁶ In April 1996, Mewborn served a notice of termination on Classic's

504. *See id.* at 1048.

505. *Classic Media, Inc. v. Mewborn*, 532 F.3d 978 (9th Cir. 2008).

506. *Id.* at 981.

predecessor, seeking to terminate her 1976 grant of film, TV, and radio rights effective May 1, 1998. Classic asserted that the termination was invalid, and eventually both parties sought a declaration of ownership of the disputed rights.

The court ruled that Mewborn's 1976 assignment had transferred all of her film, TV, and radio rights in the *Lassie* works. As a result, the court decided that when she entered into the 1978 assignment, all Mewborn had to left transfer were the ancillary rights that had not been mentioned in the 1976 agreement, so that the 1978 language purporting to transfer film, TV, and radio rights was "a nullity." The court concluded that the 1978 agreement did not substitute or revoke the 1976 agreement, but instead left it intact and explicitly affirmed it. Thus, Mewborn's pre-1978 agreement remained in force and subject to termination by her 1996 notice. Because the *Classic Media* court found that the 1978 agreement did not prevent Mewborn from terminating the 1976 grant, it did not need to decide whether the later contract was an "agreement to the contrary." (It did indicate, however, that interpreting the 1978 agreement as conveying film, TV, and radio rights to Classic would make that assignment void as an "agreement to the contrary.")

One might distinguish the "Lassie" case from "Pooh" on the ground that the remuneration for the 1978 Mewborn agreement was, compared to Christopher Robin's, relatively paltry, and, more importantly, that where Christopher Robin knew that the agreement bargained away future termination rights for a substantial sum, it does not appear that Mewborn understood that Classic's predecessor had devised the agreement to divest her of a later termination opportunity. The Ninth Circuit appears to distinguish a successful revocation and novation from one that violates the "any agreement to the contrary" proscription based on its evaluation of the extent to which the author benefits from the new arrangement and is aware that the conclusion of a new agreement will deprive her of a future termination opportunity.

Finally, *Penguin Group (USA) Inc. v. Steinbeck*,⁵⁰⁷ concerned a 1938 grant by John Steinbeck to Viking Press of the exclusive right to publish in the United States and Canada some of his best known works, in which he held the copyright, in return for royalty payments. The agreement was to last as long as the publisher kept the works in print. Steinbeck renewed the works' copyrights as they came due. Steinbeck died in 1968; his will left his interest in his copyrights to his widow Elaine. (His two sons from a previous marriage, Thomas and John IV, received \$50,000 each.) Viking later assigned its rights and duties under the agreement to Penguin. The section 304(c) termination window for the earliest work covered by the 1938 agreement opened in 1985; the termination window for the latest work closed in 2000. In 1994 Elaine and Penguin signed a new contract covering all works included in the 1938 agreement (as well as several earlier and posthumous Steinbeck works). Penguin agreed to pay a larger guaranteed annual advance against royalties and to pay royalties on the retail price of the copies sold, rather than the wholesale price. The 1994 agreement expressly provided that it canceled and superseded the 1938 agreement. Elaine died in 2003, leaving her interest in Steinbeck's copyrights to her children and grandchildren from a previous marriage, and excluding Thomas and John IV and their heirs. In 2004, Steinbeck's son Thomas and granddaughter (the only surviving child of the now-deceased John IV) served

507. *Penguin Group (USA) Inc. v. Steinbeck*, 537 F.3d 193 (2d Cir. 2008).

notice on Penguin seeking to terminate Steinbeck's 1938 grants under section 304(d). Each party sought a declaration as to ownership of the rights in question.

As in *Milne*, the *Steinbeck* court found the subsequent agreement superseded the original agreements, leaving no subsisting agreement to be terminated under section 304(c). Moreover, although the conclusion of the new agreement defeated the statutory heirs' termination rights, it was not held an "agreement to the contrary." According to the Second Circuit, the parties' intention to terminate the 1938 contract was clear from the language of the 1994 agreement. The court noted that, under applicable New York law, "parties to an agreement can mutually agree to terminate it by expressly assenting to its rescission while simultaneously entering into a new agreement dealing with the same subject matter."⁵⁰⁸ The court therefore concluded that the 1938 contract had been extinguished, and thus the 1994 agreement left no pre-1978 grants in effect that could be subject to termination under section 304.

The Second Circuit similarly concluded that the 1994 agreement was not an "agreement to the contrary," notwithstanding which the termination could be effected. Steinbeck's son and granddaughter argued that the effect of that agreement, as interpreted by the court, was to eliminate their opportunity to exercise their section 304 termination interest. The court explained that not every agreement which effectively eliminates an author's or heir's statutory termination right was "an agreement to the contrary." It noted, for example, that, in instances in which multiple parties share the right to terminate a particular agreement, the holders of a majority of the interest might agree among themselves not to terminate, which would effectively eliminate the minority parties' right to terminate the grant, but that the agreement among the majority would not be an invalid "agreement to the contrary."

The Second Circuit explained that under its interpretation of an "agreement to the contrary," "authors or their statutory heirs holding termination rights are still left with an opportunity to threaten (or to make good on a threat) to exercise termination rights and extract more favorable terms from early grants of an author's copyright," but that the statute does not suggest that they "are entitled to more than one opportunity, between them, to use termination rights to enhance their bargaining power or to exercise them."⁵⁰⁹ And like the *Milne* court, the Second Circuit viewed Elaine's actions in 1994 as consistent with the statutory purpose because she obtained an increased return on Steinbeck's works.⁵¹⁰

The Second and Ninth Circuits thus may understand "agreement to the contrary" not to mean contrary to the *exercise* of the termination right, but contrary to the *policy underlying* the termination right.⁵¹¹ But the statute says: "termination of the grant *may be effected*

508. *Id.* at 200 (quoting *Jones v. Trice*, 608 N.Y.S.2d 688 (N.Y. App. Div. 1994)).

509. *Id.* at 204.

510. Allowing Elaine to cut out Steinbeck's children from his first marriage appears not to have been inconsistent with Steinbeck's own intent, but the Second Circuit had previously held that the author's intent does not trump the interests of the statutory heirs. *See Larry Spier, Inc. v. Bourne Co.*, 953 F.2d 774 (2d Cir. 1992) (indicating that composer provided in his will for his mistress, but she was not entitled to share of copyright interests following termination by statutory heirs).

511. *Penguin Group (USA)*, 537 F.3d at 204. These decisions also suggest a formula for eluding § 203 terminations of rights granted after 1977. Under that provision, grants may be terminated thirty-five years following conclusion of the contract, subject to a minimum two-year and maximum ten-year notice period. If, before the termination right vests with the service of notice, the author and her grantee rescind the prior grant

notwithstanding any agreement to the contrary” (emphasis added); it does not add “unless the agreement confers the kind of benefits the author or her heirs would have received had they effected the termination.” The rescission-and-rollover technique, if valid, not only postpones exercise of the termination right by another thirty-five years, but may prevent effecting the termination altogether. This is because, as to post-1977 grants, only those made by the author are terminable; heirs who re-grant rights in lieu of termination thereby lose their statutory termination rights.⁵¹² While the thirty-five-year accrual date for the statutory termination right should not be interpreted to prevent the parties from *ending* their relationship before thirty-five years have elapsed,⁵¹³ a *new agreement between the same parties* (or their successors in title) that follows the rescission attracts suspicion. The statute casts some doubt on these arrangements, for both sections 203(b)(4) and 304(c)(6)(D) bar agreements to make a further grant of any right covered by a terminated grant unless made after the effective date of termination; while the statute allows the terminating author or heir to make an agreement with the original grantee, she may do so only after the termination notice has been served.⁵¹⁴ At the least the rescission-and-rollover should invite judicial scrutiny. Judicial review may well be delicate, for arguably the present value of a modest increase in royalties might be worth as much, if not more, to the author than the future value of retrieving all her rights (except as to already-created derivative works). But in that event we may sense a depressing *déjà vu*: a return to the world of *Fred Fisher v. Witmark*, in which Justice Frankfurter contended that authors need not be protected against themselves, and that they could rationally choose to assign the renewal term for a small consideration before its vesting, rather than gamble on a greater return at the end of twenty-eight years.⁵¹⁵

III. CONCLUSION

If authors’ reversion rights laws endeavor to offset the author’s weaker bargaining position by assuring her a future opportunity to make a better deal, history and practice suggest at best inconsistent achievement of that aim. Legislators might improve the reversion rights regime, but it is not clear that authors’ lots will accordingly ameliorate. As Julie Cohen observed in this Symposium, “[i]f we think that termination of transfers is the

and enter into a new agreement, the thirty five year clock starts over again. If the heirs rescind and regrant, that grant will not be terminable at all. *See* 17 U.S.C. § 203(a) (2006). So long as the new agreement offers the author somewhat better terms than the revoked contract, the rescission-and-rollover technique arguably remains consistent with the policy underlying the termination right. Moreover, it may not even be necessary that the new grant offer better terms. *See* H.R. REP. NO. 94-1476, at 127 (1976) (“Section 203 would not prevent the parties to a transfer or license from voluntarily agreeing at any time to terminate an existing grant and negotiating a new one, thereby causing another 35-year period to start running.”).

512. 17 U.S.C. § 203(a) (stating that “the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination” (emphasis supplied))

513. *Compare* *Rano v. Sipa Press, Inc.*, 987 F.2d 580 (9th Cir. 1993) (holding thirty-five year termination period preempted earlier terminations), *with* *Walthal v. Rusk*, 172 F.3d 481 (7th Cir. 1999) (rejecting *Rano*), *and* *Korman v. HBC Florida, Inc.*, 182 F.3d 1291 (11th Cir. 1999) (same). *See also* *Latin Am. Music Co. v. Am. Soc’y of Composers Authors & Publishers*, 593 F.3d 95 (1st Cir. 2010) (section 203 requirements do not apply to terminations under state contract law); *Foley v. Luster*, 249 F.3d 1281 (11th Cir. 2001) (referring to caselaw upholding right under state contract law to terminate agreement before 35 years).

514. 17 U.S.C. §§ 203(a)(4), 304(c)(4) (2006).

515. *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 656 (1943).

best way to put authors in a good bargaining position with respect to what is, in some transcendent sense, rightfully ‘theirs,’ we may concentrate our energies on reforming termination of transfers, rather than, for example, engaging in substantive regulation of labor contracts in the creative industries.”⁵¹⁶ “Transcendent” or not, authors’ interests in reaping the fruits of their intellectual labors warrant meaningful and effective protection; substantive regulation of contracts of transfer, rather than rights to terminate those transfers, may indeed offer the preferable path. Reversion rights derive from an era in which delineation of time-limited property rights afforded the most legislatively likely means of attaining the author-protective objective. With time running out in April 1710 in the House of Lords, it is understandable that there is no evidence that any Lord raised or debated intervening in author-publisher contracts; British lawmakers simply adopted a device they knew and understood. The rest is history’s inertia. Perhaps American and certainly British authors now would be better off with a more continental European approach, limiting the scope of transfers and assuring them royalty participation for each mode of exploitation of the work.⁵¹⁷ Today we are less reluctant to legislate for the weaker party, as the author’s right to terminate grants of U.S. rights “notwithstanding any agreement to the contrary” at least in theory attests. We might consider redirecting those limitations on alienability to the substance of the grant, rather than to its duration.

516. See Julie Cohen, *ARTICLE TITLE IN THIS ISSUE*.

517. See Bernt Hugenholtz, *ARTICLE TITLE IN THIS ISSUE*.

IV. EVOLUTION OF U.S. AUTHORS' REVERSION RIGHTS

Statute of Anne (Britain 1710)⁵¹⁸

Original term: 14 years.

Additional term: 14 years (if author living).

Reversion of rights for additional term: Author.

Formalities required: None.

Language: “[A]fter the Expiration of the said Term of Fourteen Years, the sole Right of Printing or Disposing of Copies shall Return to the Authors thereof, if they are then Living for another Term of Fourteen Years.”⁵¹⁹

1783 Resolution of Continental Congress⁵²⁰

Original term: At least 14 years.

Additional term: At least 14 years (if author living).

Reversion of rights for additional term: Author; then to: executors, administrators, assigns.

Formalities required: Restrictions as States deem proper.

Language: “[R]ecomended to the several States . . . to secure to said authors, if they shall survive the first term mentioned, and to their executors, administrators, and assigns, the copy right of such books for another term of time not less than fourteen years.”

Connecticut (1783); New Jersey (1783); Pennsylvania (1784); Georgia (1786); New York (1786)⁵²¹

Original term: 14 years.

Additional term: 14 years (if author living).

Reversion of rights for additional term: Author; then to heirs, assigns.

Formalities required: None.

Language: “[A]t the expiration of the said term of fourteen years . . . the sole right of printing and disposing of any such book . . . shall return to the author thereof, if then living, and his heirs and assigns, for the term of fourteen years more.”

Massachusetts (1783); Rhode Island (1783); New Hampshire (1783)⁵²²

518. Statute of Anne, 1710, 8 Ann., c. 19, § 11 (Eng.).

519. *Id.* § 11. Assignment of renewal right was also possible. *Carnan v. Bowles*, (1785) 29 Eng. Rep. 45 (Ch.).

520. . Continental Congress Resolution recommending the states to secure copyright to the authors and publishers of new books, PSOC http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22us_1783c%22

521. . Connecticut, An Act for the Encouragement of Literature and Genius, PSOC, http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22us_1783a%22; New Jersey, An Act for the promotion and encouragement of literature, 1783 N.J. Acts 325, PSOC http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22us_1783f%22; Pennsylvania, PSOC, http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22us_1783f%22; Georgia, An Act for encouragement of literature and genius, PSOC, http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22us_1784a%22; New York An Act to promote literature, PSOC, http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22us_1786a%22

Original term: 21 years (20 years in N.H.).

Additional term: Not applicable.

Reversion of rights for additional term: Not applicable.

Formalities required: None.

Language: “[A]ll books . . . shall be the sole property of the said author or authors . . . Their heirs and assigns, for the full and complete term of twenty-one [twenty] years, from the date of their first publication.”

Maryland (1783)⁵²³

Original term: 14 years.

Additional term: 14 years (if author living).

Reversion of rights for additional term: Author.

Formalities required: None.

Language: “[A]t the expiration of the aforesaid term of fourteen years, the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of fourteen years.”

South Carolina (1784)⁵²⁴

Original term: 14 years.

Additional term: 14 years (if author living).

Reversion of rights for additional term: Author.

Formalities required: None.

Language: “[A]fter the expiration of the said term of fourteen years, the sole right of printing, or disposing of copies, shall return to the authors thereof, if they are then living, for another term of fourteen years.”

Virginia (1785)⁵²⁵

Original term: 21 years.

Additional term: Not applicable.

Reversion of rights for additional term: Not applicable.

Formalities required: None.

522. . Massachusetts, An Act for the purpose of securing to authors the exclusive right and benefit of publishing their literary productions for twenty-one years, PSOC, http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22us_1783d%22; Rhode Island, An Act for the purpose of securing to authors the exclusive right and benefit of publishing literary productions for twenty-one years, PSOC http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22us_1783h%22; New Hampshire, An Act for the encouragement of literature and genius, and for securing to authors the exclusive right and benefit of publishing their literary productions for twenty-one years, PSOC, http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22us_1783g%22

523. . Maryland, An Act respecting literary property, PSOC, http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22us_1783e%22

524. . South Carolina, An Act for the encouragement of the arts and sciences, PSOC, http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22us_1784b%22

525. . Virginia, An Act securing to authors of literary works an exclusive property therein for a limited time. PSOC, http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22us_1785%22

Language: “[T]he author of any book . . . his heirs and assigns shall have the exclusive right of printing and re-printing such book or pamphlet . . . For the term of twenty-one years, to be computed from the first publication thereof.”

North Carolina (1785)⁵²⁶

Original term: 14 years.

Additional term: Not applicable.

Reversion of rights for additional term: Not applicable.

Formalities required: None.

Language: “[T]he author of any book . . . and his heirs and assigns, shall have the sole liberty of printing, publishing, and vending the same within this State for the term of fourteen years.”

1789 Copyright Bill⁵²⁷

Original term: 14 years.

Additional term: 14 years (if author living).

Reversion of rights for additional term: Author.

Formalities required: None.

Language: “[A]fter the expiration of the said term of fourteen years, the sole right of printing and of disposing of copies of such books, shall return to the author or authors of such books, if they are living, for another term of fourteen years.”

Act of 1790⁵²⁸

Original term: 14 years.

Renewal term: 14 years (if author living).

Reversion / Power of Renewal: Authors; then to executors, administrators, assigns.

Formalities required: Re-recording of title in clerk’s office of author’s local Federal district court within six months before expiration of first term, and, within two months following renewal, publication of record in one or more newspapers for four weeks.

Language: “[I]f, at the expiration of the said term, the author or authors, or any of them be living, and a citizen or citizens of these United States, or resident therein, the same exclusive right shall be continued to him or them, his or their executors, administrators, or assigns, for the further term of fourteen years”⁵²⁹

526. .North Carolina, An Act for securing literary property, PSOC, http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22us_1785a%22

527. Copyright (and Patent) Bill, H.R. 10, 2d Cong., 1st Sess. (1789)..

528. 1790 Copyright Act, 1 Stat. 124.

529. *Id.* § 1. *See also* Paige v. Banks, 18 F. Cas. 1001 (C.C.S.D.N.Y. 1870), *aff’d*, 80 U.S. 609 (1872) (publication rights, during both terms, deemed assigned); White-Smith Music Pub. Co. v. Goff, 187 Fed. 247, 249-50 (1st Cir. 1911) (interpreting second term as continuation of original rights).

Early 1800s Bills⁵³⁰

Original term: 14 years.

Renewal term: 14 years (if author living).

Reversion / Power of Renewal: Authors; then to heirs, assigns. And, any contract for sale of renewal term void.

Formalities required: Re-recording of title in clerk's office of author's local Federal district court within 6 months before expiration of first term, and, within two months following renewal, publication of record in one or more newspapers for four weeks.

Language: “[I]f, at the expiration of the said term of fourteen years, the author or authors, or any of them . . . be living . . . the same exclusive right shall be continued to him or them, his or their heirs and assigns, for the further term of fourteen years . . . And provided, That any contract for the sale of the copyright for the second term of fourteen years, or any part of the same made or entered into before the expiration of the first, shall be utterly void.”

Act of 1831⁵³¹

Original term: 28 years.

Renewal term: 14 years.

Reversion / Power of Renewal: Authors; if deceased, then widows and children.

Formalities required: Re-recording of title in clerk's office of author's local Federal district court within 6 months before expiration of first term, and, within two months following renewal, publication of record in one or more newspapers for four weeks.

Language: “[I]f, at the expiration of the aforesaid term of years, such author . . . be still living, and a citizen . . . of the United States . . . or being dead, shall have left a widow, or child, or children, either or all then living, the same exclusive right shall be continued to such author . . . or, if dead, then to such widow and child, or children, for the further term of fourteen years”⁵³²

1838 Bill⁵³³

Original term: 28 years.

Renewal term: 14 years.

Reversion / Power of Renewal: Author; if deceased then heirs.

Formalities required: Within 6 months before expiration of first term, and, within two months following renewal, publication of record in one or more newspapers for four weeks.

Language: “[I]n all cases where any copy-right may have been obtained and term shall have expired, or may hereafter expire, when the author, if living, would have been or would

530. H.R. 38, 11th Cong., 3d Sess. (as reported to Committee of the Whole Jan. 19, 1811); H.R. 75, 10th Cong., 1st Sess. (as reported to Committee of the Whole March 7, 1808); No number, 7th Cong., 2d Sess. (as reported to Committee of the Whole Jan. 19, 1803).

531. An Act to Amend the Several Acts Respecting Copy Rights (Feb. 3, 1831), 4 Stat. 436.

532. *Id.* § 2. See also *Pierpoint v. Fowle*, 19 F. Cas. 652, 660 (C.C.D. Mass. 1846) (“new interest”); *White-Smith Music Pub. Co. v. Goff*, 187 Fed. 247 (1st Cir. 1911) (confirmed status as reversion and new grant).

533. H.R. 885, 25th Cong. (1838).

be entitled to a renewal thereof, the same privilege of renewal shall be, and the same is hereby, extended to the heirs of such author.”

1844 Bill⁵³⁴

Original term: The longer of: life of author plus seven years; or 42 years from publication.

Renewal term: Not applicable.

Reversion / Power of Renewal: Not applicable.

Formalities required: Not applicable.

Language: “[C]opyright . . . Shall endure for the natural life of such author, and for the further term of seven years, commencing at the time of his death, and shall be the property of such author and his assigns: Provided, always, That if the said term of seven years shall expire before the end of forty-two years from the first publication of such book, the copyright shall, in that case, endure for such period of forty-two years”⁵³⁵

Solberg Proposal (in Kittredge-Currier Bill) 1906⁵³⁶

Original term: New works: three-tiered single Term based on nature of work. Subsisting works: existing law.

Renewal term: Subsisting works: For period making total copyright period that granted by proposed act.

Reversion / Power of Renewal: Author; if deceased then widow, children. But, if assigned or licensed, only with assignee or licensee on application for renewal.

Formalities required: Renewal of copyright registration within 1 year before expiration of first term.

Language: “[T]he copyright subsisting in any work at the time when this act goes into effect may . . . Be further renewed and extended by the author . . . or if he be dead, leaving a widow, by his widow . . . Or if now widow survive him, by his children . . . provided further, that should such subsisting copyright have been assigned, or a license granted therein for publication upon payment of royalty, the copyright shall be renewed and extended only in case the assignee or licensee shall join in the application for such renewal and extension.”

Smoot-Currier Bill 1907⁵³⁷

Original term: Life of author plus 30 years.

Renewal term: Not applicable.

Reversion / Power of Renewal: Not applicable.

Formalities required: Full term obtained only if claim recorded within 28 years from publication, and author’s death recorded by executors, administrators, or assigns.

Language: “[W]ithin the next year preceding the expiration of twenty-eight years from the first publication of such work the copyright proprietor shall record in the Copyright Office a notice that he desires the full term . . . And provided further, That where the term is to

534. H.R. 9, 28th Cong. (1844).

535. Modeled after English Statute, 5 & 6 Vict., c. 45 (1842).

536. S. 6330, 59th Cong. § 18 (1906). *See supra* note 384.

537. S. 2499, 60th Cong. (1907); H.R. 243, 60th Cong. (1907).

extend beyond the lifetime of the author it shall be the duty of his executors, administrators, or assigns to further record in the Copyright Office the date of his death.”

Monroe Smith Proposal 1907 (in Kittredge-Barchfield Bill)⁵³⁸

Original term. New works: 42 years from publication or life of author plus 30 years, whichever longer. Subsisting works: Existing law.

Renewal term. New works: not applicable. Subsisting works: For period making total copyright period that granted by proposed act.

Reversion / Power of Renewal. Author; if deceased then: widow, children; if deceased then: heirs, executors, administrators BUT...if no royalty agreement, or author refused to continue royalty agreement: assignee/licensee entitled to be on application.

Formalities required. New works: Full term only obtained if claim recorded within 28 years from publication, and author's death recorded by executors, administrators, or assigns. Subsisting works: Renewal of copyright registration within 1 year before expiration of first term.

Language. “[I]f such subsisting copyright shall have been assigned or a license granted therein for publication, and if such assignment or license shall contain provision for payment of royalty . . . Said original assignee or licensee or his successor shall nevertheless be entitled to continue to publish the work on payment of the royalty stipulated in the original agreement; but if such original assignment or license contain no provision for the payment of royalty, the copyright shall be renewed and extended only in case the original assignee or licensee or his successor shall join in the application for such renewal and extension.”

Act of 1909: For New Works⁵³⁹

Original term. 28 years.

Renewal term. 28 years.

Reversion / Power of Renewal. Authors; if deceased then widows and children; if deceased then: executors, or next of kin EXCEPT proprietors (for composite works, periodicals, encyclopedias, works copyrighted by corporate body, or works for hire).

Formalities required. Renewal of copyright registration within one year before expiration of first term.

Language. “[T]he author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widowers or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years[,]” except “[t]hat in the case of any posthumous work or of any periodical, cyclopaedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyright by a corporate body . . . or by an employer

538. S. 2900, 60th Cong. (1907); H.R. 11794, 60th Cong. (1908).

539. Act of March 4, 1909, 35 Stat. 1075, ch. CCCXX, § 24.

for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension.”⁵⁴⁰

Act of 1909: For Subsisting Works⁵⁴¹

Original term: Existing law.

Renewal term: For period making total copyright period that granted by Act (i.e. 56 years).

Reversion / Power of Renewal: Authors, if deceased then widows, children; if deceased then executors, or next of kin, except proprietors (for composite works).

Formalities required: Renewal of copyright registration within 1 year before expiration of first term.

Language: “[T]he author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widowers or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further period such that the entire term shall be equal to that secured by this Act, including the renewal period: Provided, however, That if the work be a composite work upon which copyright was originally secured by the proprietor thereof, then such proprietor shall be entitled to the privilege of renewal and extension granted under this section.”⁵⁴²

Act of 1976: For Contracts executed after 1977 (whether in new or subsisting works)⁵⁴³

Original term: Life of author plus fifty years.

Renewal term: Not applicable.

Reversion / Power of Renewal: Termination of grant available for 5 years beginning 35 years after execution; or beginning 40 years after execution if grant included right of publication, with minimum 2 years and maximum 10 years notices to grantee; grantees of derivative works rights retain throughout renewal term rights in already-created derivative works.⁵⁴⁴

Formalities required: Notice to grantees & recordation of notice in Copyright Office.

Language: “Termination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier. . . Termination of

540. *White-Smith Music Pub. Co. v. Goff*, 187 Fed. 247 (1st Cir. 1911) (confirmed status as reversion and new grant); *Fred Fisher Music Corp. v. Knowles*, 318 U.S. 643 (1943) (nevertheless confirmed ability to assign future interest in renewal copyright); *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960) (deceased author's assignment of expectancy in renewed term does not bind statutory heirs); *Stewart v. Abend*, 495 U.S. 207 (1990) (renewal terminates right to exploit derivative works).

541. Act of March 4, 1909, 35 Stat. 1075, ch. CCCXX, § 23.

542. See sources listed *supra* note 540.

543. 1976 Act, 90 Stat. 2541 (1976), § 203.

544. First terminations to take effect starting 2013 (for grants made starting in 1978).

the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.”⁵⁴⁵

Act of 1976: For Subsisting Works⁵⁴⁶

Original term: Copyrights in first term on Jan 1, 1978: 28 years from date of copyright.

Renewal term: Copyrights in first term on Jan 1, 1978: 47 years. Copyrights in renewal term on Jan 1, 1978: total of 75 years from date of copyright..

Reversion / Power of Renewal: Copyrights at end of first term: Termination of grants as per 1909 Act. Copyrights in second term: Termination of grant available for 5 years beginning 56 years from date of copyright or Jan 1, 1978, whichever is later, with minimum 2 years and maximum 10 years notices to grantee; grantees of derivative works rights retain throughout renewal term rights in already-created derivative works.

Formalities required: Renewal: Renewal of copyright registration within 1 year before expiration of first term. Termination: Notice to grantees & recordation of notice in Copyright Office.

Language: “Termination of the grant may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1978, whichever is later . . . Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.”⁵⁴⁷

1992 Automatic Renewal Amendment⁵⁴⁸

Original term: Not applicable.

Renewal term: Same as extended renewal term for 1976 Act

545. *Id.* § 203(a)(3), (5).

546. *Id.* § 304.

547. *Id.* § 304(c)(3), (5).

Notice of termination: *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610 (2d Cir. 1982) (licensee retained continued rights to exploit works not mentioned in notice of termination); *Siegel v. Warner Bros. Ent., Inc.*, 542 F.Supp.2d 1098 (C.D. Cal. 2008) (notice of termination did not reach first appearance of Superman character, but did cover later iterations establishing essential story line and some visual aspects).

Scope of derivative works exception: *Mills Music v. Snyder*, 469 U.S. 153 (1985) (royalties from continued exploitation of derivative work paid to terminated publisher rather than to terminating author (heirs)); *Woods v. Bourne*, 60 F.3d 978 (2d Cir. 1995) (characterization of derivative works qualifying for exception); *Fred Ahlert Music Corp. v. Warner-Chappell Music*, 155 F.3d 17 (2d Cir. 1998) (new uses of pre-termination derivative works don’t qualify for exception).

“Any agreement to the contrary”: *Marvel Characters v. Simon*, 310 F.3d 280 (2d Cir. 2002) (retroactively deeming work a “work for hire” constitutes impermissible agreement contrary to termination right); *Milne v. Stephen Slesinger, Inc.*, 430 F.3d 1036 (9th Cir. 2005) (revocation of grant and negotiation of new grant, in lieu of exercising termination right, not impermissible agreement contrary to termination right); *Classic Media, Inc. v. Mewborn*, 532 F.3d 978 (9th Cir. 2008) (interpreting agreement not to have revoked earlier grant, thereby preserving termination right over grant); *Penguin Group (USA) Inc. v. Steinbeck*, 537 F.3d 193 (2d Cir. 2008) (revocation of grant and negotiation of new grant, before termination right could have been exercised, not impermissible agreement contrary to termination right).

548. Copyright Renewal Act of 1992, Pub. L. No. 102-307, 106 Stat. 264.

Reversion / Power of Renewal: If renewal effected during last year of first term, rights revert to author (or, proprietor in case of posthumous, cyclopedic, composite, or corporate-owned works); if renewal “automatic,” grantees of derivative works rights retain throughout renewal term rights in already-created derivative works.

Formalities required: If renewal by author or statutory heirs, must be applied for within 1 year before expiration of first term; if no renewal application, renewal automatic.

Language: Sec. 304(a)(2)(A) “At the expiration of the original term of copyright in a work specified in paragraph (1)(C) of this subsection, the copyright shall endure for a renewed and extended further term of 67 years, which—

(i) if an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, and the claim is registered, shall vest, upon the beginning of such further term, in any person who is entitled under paragraph (1)(C) to the renewal and extension of the copyright at the time the application is made; or

(ii) if no such application is made or the claim pursuant to such application is not registered, shall vest, upon the beginning of such further term, in any person entitled under paragraph (1)(C), as of the last day of the original term of copyright, to the renewal and extension of the copyright.”

Sec. 304(a)(4)(A) “If an application to register a claim to the renewed and extended term copyright in a work is not made within 1 year before the expiration of the original term of copyright in a work, or if the claim pursuant to such application is not registered, then a derivative work prepared under authority of a grant of a transfer or license of the copyright that is made before the expiration of the original term of copyright may continue to be used under the terms of the grant during the renewed and extended term of copyright without infringing the copyright, except that such use does not extend to the preparation during such renewed and extended term of other derivative works based upon the copyrighted work covered by such grant.”

1998 Copyright Term Extension Act: For Subsisting Works⁵⁴⁹

Original term: No change: Copyrights in first term on Jan 1, 1978: 28 years from date of copyright.

Renewal term: Copyrights in first term on Jan 1, 1978: 67 years. Copyrights in renewal term on Jan 1, 1978: total of 95 years from publication.

Reversion / Power of Renewal: If author or statutory heir failed to terminate grants 56 years from original copyright date, author or statutory heir may terminate grant during a period of 5 years beginning 75 years from date of copyright, with minimum 2 years and maximum 10 years notices to grantee; grantees of derivative works rights retain throughout extended renewal term rights in already-created derivative works.

Formalities required: Renewal: *See* 1992 Automatic Renewal Amendment, *supra*. Termination: Notice to grantees & recordation of notice in Copyright Office.

Language: “In the case of any copyright other than a work made for hire, subsisting in its renewal term on the effective date of the Sonny Bono Copyright Term Extension Act for which the termination right provided in subsection (c) has expired by such date, where the author or owner of the termination right has not previously exercised such termination right . . . 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 copyright was originally secured.”⁵⁵⁰

549. An Act to Amend the Provisions of Title 17, United States Codes, with Respect to the Duration of Copyright, and for Other Purposes (Oct. 27, 1998), 112 Stat. 2829.

550. *Id.* § 304(d).