WHY WERE COMMONWEALTH REVERSIONARY RIGHTS ABOLISHED (AND WHAT CAN WE LEARN WHERE THEY REMAIN)?

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In this Paper we examine the development and removal of the 1911 Imperial copyright reversion right. We find this right was spuriously removed in the UK, Australia and New Zealand. We then find that criticisms of the right in Canada (it still exists there) can help teach us what a new, effective reversion right might look like.

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I INTRODUCTION

British Commonwealth copyright laws have had a long history of reverting rights to authors, though most such laws were repealed without replacement a half century ago or more. Recently however there has been an upsurge of interest about the potential for reversionary mechanisms to ameliorate some of the biggest problems confronting modern copyright – its twin failures to keep works available, and get authors fairly paid.[1] If we are to think about designing a modern

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[1] See Canadian Parliament, Canadian Heritage Committee Meeting #118, 18 September 2018 per Daniel Gervais at 11:25am, Bryan Adams at 11:35am and 11:45am <https://openparliament.ca/committees/canadian-heritage/42-

reversionary framework fit for these purposes however, it's helpful to first look at the last go around. We explain when and how reversion came to be introduced via the Imperial Copyright Act of 1911, and then evaluate the justifications given by the UK, Australia and New Zealand for removing the right. We then shift attention to Canada, where the century-old scheme still operates, and ask what experience there can teach us about what a modern replacement should look like.

II How did the Commonwealth reversion scheme develop?

Nations descended from the common law tradition typically take a laissez-faire approach to copyright contracts, imposing few limits on what authors may transfer or licence.[2] General law doctrines such as unconscionability and undue influence can result in contracts being set aside in cases of impaired consent,[3] and states typically require assignments to be in writing and signed,[4] but aside from that, parties are free to make any deal they please.

However, even in Britain, copyright legislation did not always permit publishers to take the full rights in a work. The first British copyright statute, the 1710 *Statute of Anne*, initially allowed book authors to assign copyright for 14 years, then returned rights to their progenitors for a further term.[5] This provision was clearly designed to benefit authors,[6] with the return of

1/118/bryan-adams-7/?page=2> accessed 12 October 2018; Rebecca Giblin, "A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid" (2018) 41(3) *Columbia Journal of Law & The Arts* 369; Paul J Heald, "Copyright Reversion to Authors (and the Rosetta Effect): An Empirical Study of Reappearing Books" (8 December 2017, last revised 21 April 2018) <http://dx.doi.org/10.2139/ssrn.3084920> accessed 12 October 2018.

[2] Paul Goldstein and P Bernt Hugenholtz, *International Copyright: Principles, Law, and Practice* (Oxford University Press USA, 2013) 262; Rita Matulionyte, *Law Applicable to Copyright: A Comparison of the ALI and CLIP Proposals* (Edward Elgar Publishing 2011) 76 fn 14; Giusepina D'Agostino, *Copyright, Contracts, Creators: New Media, New Rules* (Edward Elgar Publishing 2010) 113 – 114; Giuseppina D'Agostino, "Contract *lex rex:* Towards copyright contract's *lex specialis*" in Graeme B Dinwoodie (ed) *Intellectual Property and General Legal Principles: Is IP a Lex Specialis?* (Edward Elgar Publishing 2015) 8.

[3] See eg *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308, referred to in W P Knight, "Restraint of Trade In Exclusive Service Contracts" (1977) *Sydney Law Review* 239 and Ann Harrison, *Music: The Business* (Random House, 2014, 6th ed) 66 – 67, where the Court set aside an agreement that prevented the songwriter from working as a songwriter for any other publisher for five years. Rushton notes that this was because "inequality of bargaining power had led to an unconscionable agreement." Michael Rushton, "The Law and Economics of Artists' Inalienable Rights" (2001) 25 *Journal of Cultural Economics* 243, 247. See also William Cornish, "The Author as Risk-Sharer" (2002) 26 *Columbia Journal of Law & the Arts* 1, 5, fn 7; W R Cornish, "Authors in Law" (1995) 58(1) *The Modern Law Review* 1, 14.

[4] *Copyright, Designs and Patents Act 1988*, s 90(3); *Copyright Act 1994* (NZ), s 114; *Copyright Act 1968* (Cth), s 196(3).

[5] *Copyright Act 1710* 9 Ann c. 21, s 11, referred to in Lionel Bently and Jane Ginsburg, ""The Sole Right…Shall Return to the Authors": Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright" (2010) 25 *Berkeley Technology Law Journal* 1475, 1479.

[6] Lionel Bently and Jane Ginsburg, ""The Sole Right…Shall Return to the Authors": Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright" (2010) 25 *Berkeley Technology Law Journal* 1475, 1485; Oren Bracha, "The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant" (2010) 25 *Berkeley Technology Law Journal* 1427, 1438; Ronan Deazley, "What's new about the Statute of Anne? Or Six observations in search of an act" in Lionel Bently, Uma

rights putting them in a position "to grant rights anew from a stronger bargaining position should her work have earned a substantial audience",[7] particularly where the initial payment was insufficient in comparison to the book's subsequent popularity.[8] However, these rights did not always have the intended effect, with publishing contracts routinely purporting to take rights for the original term and renewal both.[9]

In 1814, the Statute of Anne's reversionary right disappeared,[10] when Parliament instituted a single term of 28 years (plus the remainder of the author's life if they were still living once that expired).[11] In 1842, the term was increased to 42 years or seven years after the author's death, whichever was later.[12]

Reversionary rights reappeared with the passage of the *Imperial Copyright Act 1911* ("**Imperial Act**"), which, consistent with the recommendation of the Berne Convention's 1908 text, granted a term of the author's life plus 50 years.[13] Crucially, the Imperial Act also introduced a provision that mandated copyrights would automatically revert to authors' heirs 25 years after death, as extracted in part below:

> *…where the author of a work is the first owner of the copyright therein, no assignment of the copyright, and no grant of any interest therein, made by him (otherwise than by will) after the passing of the Act, shall be operative to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of twenty-*

Suthersanen and Paul Torremans (eds), *Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace* (Edward Elgar Publishing Inc 2010) 46.

[7] Lionel Bently and Jane Ginsburg, ""The Sole Right…Shall Return to the Authors": Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright" (2010) 25 *Berkeley Technology Law Journal* 1475, 1479; Jane Ginsburg, "Copyright" in Rochelle Dreyfuss and Justine Pila (eds) *The Oxford Handbook of Intellectual Property Law* (OUP 2017) 497.

[8] Isabella Alexander, *Copyright Law and the Public Interest in the Nineteenth Century* (Hart Publishing 2010) 25.

[9] Lionel Bently and Jane Ginsburg, ""The Sole Right…Shall Return to the Authors": Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright" (2010) 25 *Berkeley Technology Law Journal* 1475, 1492.

[10] Between 1710 and 1814, the following Acts concerning copyright were passed in Great Britain, none of which affected the Statute of Anne's reversionary right: *Engravers' Copyright Act 1735, Engravers' Copyright Act 1766, Engravers' Copyright Act 1777, Calico Printers' Act 1787, Models and Busts Act 1798,* and the *Copyright Act 1801*: see Primary Sources on Copyright (1450 – 1900) eds L Bently & M Kretschmer <http://www.copyrighthistory.org/cam/tools/request/browser.php?view=country_record&parameter=United%20Kingdom&country=&core=all> accessed 23 October 2018.

[11] *Literary Copyright Act 1814* (UK), s 4, referred to in Lionel Bently and Jane Ginsburg, ""The Sole Right…Shall Return to the Authors": Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright" (2010) 25 *Berkeley Technology Law Journal* 1475, 1541 – 1542. See also John P Feather, "1710 and all that: The Statute of Anne revisited" (2011) 22(1) *Logos* 47, 50, where the new copyright term in the 1814 Act is described as "the first clear and direct linkage between the term of copyright and the author's lifetime, ensuring that the latter represented the minimum term."

[12] *Literary Copyright Act 1842* (UK), s 3.

[13] *Copyright Act 1911* (UK), s 3; see Catherine Seville, "British colonial and Imperial copyright" in Isabella Alexander, H Tomás Gómez-Arostegui (eds), *Research handbook on the history of copyright law* (Edward Elgar Publishing 2016) 283.

> *five years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period shall, on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal personal representatives as part of his estate, and any agreement entered into by him as to the disposition of such reversionary interest shall be null and void…*[14]

The origins of this provision are mysterious. The Committee commissioned to review Britain's copyright law in light of the 1908 Conference on the Berne Convention made no such recommendation in its report,[15] and the legislative debates shed little light on how it came to be introduced.[16] Nevertheless, subsequent judicial and academic commentators agree that the intention behind the provision was "to protect authors and their heirs from the consequences of the imprudent disposition of the fruits of their special talent and…originality."[17] The

[14] *Copyright Act 1911* (UK), s 5(2).
[15] Report of the Committee on the Law of Copyright (1909), 1.
[16] See eg House of Lords, *Debates*, 14 November 1911 vol 10 cc 113 – 66, 157 – 158 per Lord Courtney of Penwith:

> There is no convention at all leading up to [this provision]…I do not know how the proposal originated, and I do not know that it is found in the system of laws of any other country…it is an entirely novel proposition…for which there is no parallel elsewhere…That is, indeed, putting authors in leading strings, and treating them as persons who cannot take care of their own interests and who must be protected in this very unusual fashion.

See also House of Commons Debates, 17 August 1911 vol 29, cc 2133 – 2138; House of Lords Debates, 31 October 1911, vol 10, cc39, 50 – 51 per Lord Courtney of Penwith; Hugh Laddie et al, *The Modern Law of Copyright and Designs* (Butterworths, 2000, 3rd ed) [23.34] fn 1; See also Bernard Rudden, "The Resurrection of Reversionary Copyright: Redwood Rides Again" (1981) 1(2) *Oxford Journal of Legal Studies* 296, 298. At 300 Rudden speculates that a reference to the Spanish reversion system by one of the witnesses who gave evidence to the Committee could provide "a clue to the provenance of this technique", but does not take this further.
[17] See Gillian Davies, Nicholas Caddick, Gwilym Harbotle (eds), *Copinger and Skone James on Copyright*, (Sweet & Maxwell, Thomson Reuters,17th ed, 2016) 5-118. See also Paul Torremans, Carmen Otero García Castrillón, "Reversionary Copyright: A Ghost of the Past or a current Trap to Assignments of Copyright?" (2012) 2 *Intellectual Property Quarterly* 77, 78; E J Macgillivray, *The Copyright Act, 1911 Annotated* (Steven and Sons, Limited, London, 1912) 67; David Vaver, *Essentials of Canadian Law: Copyright Law* (Irwin Law Inc 2000) 110; Hugh Laddie et al, *The Modern Law of Copyright and Designs* (Butterworths, 3rd ed, 2000) 882; George Stuart Robertson, *The law of copyright* (Oxford 1912) 97, Gale Cengage Learning, accessed 9 July 2018; Charles Clark (ed), *Publishing Agreements: A Book of Precedents* (Unwin Hyman, 3rd ed, 1998) 191; *Chappell & Co Ltd and others v Redwood Music Ltd* [1980] 2 All ER 817, 825; *Redwood Music Ltd v Francis, Day & Hunter Ltd and Others* [1978] RPC 429, 450 per Goff J; *Crown Record Co Ltd v Eng Kin Film Co Ltd* [1992] HKCA 241 [17]; *Anne of Green Gables Licensing Authority Inc v Avonlea Traditions Inc* [2000] OJ No 740 [83]. See also Bernard Rudden, "The Resurrection of Reversionary Copyright: Redwood Rides Again" (1981) 1(2) *Oxford Journal of Legal Studies* 296, 298; Helen Norman, *Intellectual Property Law Directions* (OUP 2011), 444 – 445.

Imperial Act applied to the British Empire as a whole,[18] and was adopted into the copyright laws of "self-governing [British] dominions"[19] like Australia, [20] Canada[21] and New Zealand.[22]

III WHY WAS REVERSION REMOVED?

The Imperial Act's reversionary rights have now been abolished in almost every state.[23] Here we examine and evaluate the reasons for its removal in the UK, Australia and New Zealand.

A *The removal process*

These nations were prompted to reconsider their copyright statutes by Berne's Brussels Revision in 1948. [24] The UK's Gregory Committee recommended that the reversionary provision be removed for inconsistency with Berne (as discussed in detail below). Parliament gave effect to that recommendation in enacting the *Copyright Act 1956* (UK).[25] This Act contained a transitional provision applying the reversion scheme to assignments between the commencement dates of the 1911 and 1956 Acts. [26] Australia followed the UK's lead,

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[18] Uma Suthersanen, "The first global copyright act" in Uma Suthersanen and Ysolde Gendreau (eds), *A Shifting Empire: 100 Years of the Copyright Act 1911* (Edward Elgar Publishing 2013) 18. See *Copyright Act 1911* (UK), s 25(1). These are "believed to include the following: Anguilla, Antigua, Ascension Islands, Australia, Bahamas, Bangladesh, Barbados, Barbuda, Belize, Bermuda, Botswana, British Antarctic Territory, British Virgin Islands, Brunei, Canada, Cayman Islands, Central and Southern Line Islands, Channel Islands, Cyprus, Dominica, Falkland Islands, Federated Malay States, Gambia, Ghana, Gibraltar, Grenada, Guyana, Haiti, Hong Kong, India, Republic of Ireland, Isle of Man, Israel, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Malta, Mauritius, Montserrat, New Zealand, Nigeria, North Borneo, Pakistan, Pitcairn Islands, Rendonda, Republic of South Africa, Sarawak, Seychelles, Sierra Leone, Singapore, Solomon Islands, Somalia, South Georgia, South Sandwich Islands, Sri Lanka, St Helena, St Kitts-Nevis, St Lucia, St Vincent, Swaziland, Tanzania, Tonga, Trinidad and Tobago, Tristan de Cunha, Turks and Caicos Islands, Tuvalu, Uganda, United Kingdom, Zambia, Zimbabwe." Alter Kendrick Baron, *British Reversionary Right* <https://akbllp.com/introduction-and-copyright-overview/british-reversionary-right/> accessed 22 October 2018.

[19] Uma Suthersanen, "The first global copyright act" in Uma Suthersanen and Ysolde Gendreau (eds), *A Shifting Empire: 100 Years of the Copyright Act 1911* (Edward Elgar Publishing 2013) 18 – 19.

[20] *Copyright Act 1912* (Cth), implementing the *Copyright Act 1911* (UK). See also Sam Ricketson, "The Imperial Copyright Act 1911 in Australia", in Uma Suthersanen and Ysolde Gendreau (eds), *100 Years of the Copyright Act 1911* (Edward Elgar Publishing 2013), 52, 68 – 69; Benedict C Atkinson, *The true history of copyright: the Australian experience 1905 – 2005* (Sydney University Press 2007) 94 – 95.

[21] *Copyright Act 1921* (Canada), s 11(2).

[22] *Copyright Act 1913* (NZ), s 8(2).

[23] The only states we have located that still retain the Imperial Act's reversionary rights for current assignments are Canada, Myanmar, Swaziland (Eswatini) and the Turks and Caicos Islands: see *Copyright Act,* RSC 1985, c C-42, s 14(1); *Copyright Act of 1911* (Myanmar), s 5(2), *Copyright Act 1912* (Eswatini), s 7(2); Owen Foley and Stephen Savage, "Doing business in the Turks and Caicos Islands", Practical Law, *Cross-Border Handbooks* (2007) 657 <https://www.worldservicesgroup.com/guides/Doing%20Business%20in%20Turks%20and%20Caicos%20Islands.pdf> accessed 23 October 2018.

[24] Richard Arnold, "The need for a new Copyright Act: a case study in law reform" (2015) 5(2) *Queen Mary Journal of Intellectual Property* 110, 116.

[25] Gillian Davies and Nicholas Caddick (eds), *Copinger and Skone James on copyright* (2016 Westlaw UK 17th ed), 5-127; Richard Arnold, "The need for a new Copyright Act: a case study in law reform" (2015) 5(2) *Queen Mary Journal of Intellectual Property* 110, 117. The Act contained a transitional provision applying the reversion scheme to assignments between the commencement dates of the 1911 and 1956 Acts: *Copyright Act 1956* (UK), Seventh Schedule, cl 28(1), 28(3). This was maintained in the *Copyright, Designs and Patents Act 1988* (UK): Schedule 1, para 27.

[26] See *Copyright Act 1956* (UK), 7th Schedule, cl 28(1), 28(3).

appointing the Spicer Committee to review the operation of its copyright legislation. In 1959 the Spicer Committee recommended Australia's reversionary provision be removed on the basis of both the Gregory Committee's reasoning regarding inconsistency with *Berne* and criticisms that it was ineffective in its primary aim of assisting authors' families.[27] The resulting *Copyright Act 1968* (Cth) had no reversionary provision.[28]

The New Zealand Government also commissioned a Copyright Committee to review its copyright legislation.[29] The New Zealand Committee did *not* find that the reversionary provision was inconsistent with Berne, or valueless to heirs.[30] Nonetheless, the New Zealand Parliament passed the *Copyright Act 1962* (NZ) without the reversionary provision.[31] We can find no record explaining why Parliament rejected the Copyright Committee's recommendation. The explanatory memorandum for the Bill stated it was "largely based on the [UK] Act and the 1959 Report",[32] although there were some disagreements with its recommendations.[33] Subsequent commentary on the reversionary provision is sparse[34] and Hansard entries on the Bill do not mention it.[35] So far as we can tell, legislative drafters removed the reversionary provision against the strong recommendation of the Copyright Committee without explanation.

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[27] *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider what Alterations are Desirable in The Copyright Law of the Commonwealth* (1959) <https://static-copyright-com-au.s3.amazonaws.com/uploads/2015/05/R00079-theSpicerReport.pdf.> ("**Spicer Report**") [395] – [396].

[28] *Copyright Act 1968* (Cth), s 196, although reversion still applies to assignments between the commencement of the Imperial Act and the 1968 Act: *Copyright Act 1968* (Cth), s 239(4). See also Corney & Lind Lawyers, *Commercialising Your Intellectual Property – Copyright Assignment and Copyright Licences* <https://www.corneyandlind.com.au/resource-centre/intellectual-property/commercialising-intellectual-property-copyright-assignment-copyright-licences/> accessed 3 July 2018:

> If you do intend to make a partial assignment, however, it is extremely important that the assignment is expressed **without unlimited terms or absolutely**. If this happens there will be right to have the copyright reverted to you. If the partial assignment is expressed in unlimited or absolute terms, however, *whether or not you intended for the copyright to revert to you after a particular period of time may not matter, and there may be no right of reversion*. (emphasis added)

[29] Report of the Copyright Committee (1959).

[30] Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Study 31, *Renewal of Copyright*, 86th Congress, 2nd session (United States Government Printing Office, Washington, 1961) 219.

[31] *Copyright Act 1962* (NZ), s 56. Reversion was retained for assignments made between 1 April 1914 and 1 April 1963: *Copyright Act 1962* (NZ), First Schedule, s 36(3).

[32] Copyright Bill 1962 63 – 1, Explanatory Note.

[33] New Zealand Parliamentary Debates v 331, 24 August 1962, 1653.

[34] See eg Lucy Elizabeth Kenner, "Can Legislative Reform Secure Rewards for Authors? Exploring Options for the New Zealand Copyright Act" (2017) 48 *Victoria University of Wellington Law Review* 571, 577.

[35] See mentions of the copyright term in New Zealand Parliamentary Debates v 332, 24 October 1962, 2324; also see amendments to be read in, none of which involve the reversionary provision, in New Zealand Parliamentary Debates v 333, 27 November 1962, 2970.

B *Evaluating the Removals*

In this section we evaluate the two main arguments advanced to justify the removal of the reversionary provision: that it was inconsistent with Berne, and that, in any event, it was not of benefit to authors.

1 *Inconsistency with Berne*

The argument that the reversionary provision in section 5 of the Imperial Act was inconsistent with Berne actually stems from complaints about sections 3 and 4. Section 3 enabled any party to republish a work from 25 years after the author's death upon the payment of a 10% royalty. Section 4 provided for the grant of compulsory licences to reproduce a work after an author's death if the copyright owner had withheld it from the public.[36] These sections had, validly, been criticised for limiting copyright in a manner inconsistent with the Convention's requirements.[37] However, having decided that the offending parts must be removed, the UK's Gregory Committee abruptly went on to find that the reversionary provision in section 5 must also be removed: because it "would seem to have been inserted so as to give the royalty under s 3 to the personal representatives of the author."[38] That is, the Gregory Committee linked section 5 to section 3, seemingly simply because they both referenced the same time period, ie 25 years after the author's death. Australia's Spicer Committee did not specify in any more detail *how* section 5 was inconsistent with Berne, simply commenting that its compatibility was "somewhat doubtful"[39] and apparently accepting the Spicer Committee's analysis that s 5(2) should be removed because it appeared to be a corollary to ss 3 and 4.

This reasoning has received some support in a 2004 English High Court case:

> The bar on the assignment of the reversionary interest *has to be read in conjunction with (and is explained by) the provisions of s 3 of the 1911 Ac*t, which set the duration of the copyright as the author's life plus 50 years, but created a statutory right of reproduction in the last 25 years of the term, exercisable upon the giving of the prescribed notice and the payment of a specified royalty to the owner of the copyright. *The proviso to s 5(2) has the effect of making the right to receive those statutory royalties inalienable by the author in his lifetime and of vesting those rights in the author's personal representatives*. Prior assignment by the author of the whole of the

[36] *Copyright Act 1911* (UK), ss 3, 4.
[37] Gregory Report, page 7, para 15.
[38] Gregory Committee Report, page 9, para 23. See also Paul Abel, "The Brussels Copyright Convention and its Influence on Domestic Copyright Legislation (in Particular in the United Kingdom and in Austria)" (1954) 3(2) *International & Comparative Law Quarterly* 880, 888.
[39] Spicer Report [395].

> copyright would therefore take effect, subject to this proviso, and *it was for this reason that the second part of the proviso describes the right to receive the royalties during the last 25-year period as reversionary*. In a case in which there had been a prior assignment of the copyright to a third party, the proviso operated to re-vest the rights in the author's estate without the need for any re-assignment. (emphases added)[40]

However, this is somewhat of an outlier as the Committee's reasoning has been the subject of considerable criticism elsewhere. *Copinger and Skone James on Copyright* notes that while the Gregory Committee recommended reversion be removed because it had been "inserted…to give the compulsory royalty to the personal representatives of the author", "it is unclear from the Parliamentary debates at the time that this was in fact the case."[41] Others have characterised as a mere assumption the idea that there was any connection between the two provisions,[42] and the English Court of Appeal has gone so far as to suggest it was 'based on a misapprehension'.[43] The New Zealand Copyright Committee also disagreed that removing s 5(2) was a "necessary corollary" to removing ss 3 and 4 of the Imperial Act,[44] finding that s 5(2) "stood on its own feet."[45]

Even if the Gregory Committee was correct and it was Parliament's intention for ss 3 and s 5(2) to be connected, the reversionary scheme could have functioned perfectly by itself if s 3 was removed. According to Viscount Haldane's comments in the House of Lords regarding the original Imperial Act, the intention of the reversionary provision was for authors' heirs to benefit through either a compulsory royalty **or** being able to do with the copyright as they saw fit.[46] Therefore, even if the compulsory royalty provision in section 3 was removed, the latter

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[40] *Novello & Co Ltd v Keith Prowse Music Publishing Co Ltd* [2004] EWHC 766 (Ch) [10]. See also [22] where the Court confirms its reasoning is consistent with that of the Gregory Committee.
[41] Gillian Davies, Nicholas Caddick, Gwilym Harbottle (eds), *Copinger and Skone James on copyright* (Sweet & Maxwell, Thomson Reuters, 17th ed, 2016), 5-120, fn 98.
[42] See Ken Cavalier, "Potential Problems with Commonwealth Copyright for Posthumous Poets and other Dead Authors" (2005) 52(3) *Journal of the Copyight Society of the USA* 225, 232, fn 26:

> …it is interesting that little or no consideration was given to the proviso allowing copyrights to revert to the author's estate during their last 25 years; the Committee appeared to assume that if the 25-year compulsory license were dropped…the 25-year reversion necessarily went with it.

This is an extract from the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Study 31, *Renewal of Copyright*, 86th Congress, 2nd session (United States Government Printing Office, Washington, 1961) 217. At 217 the Subcommittee questions the removal of sections 3 and 4 as well, as these would not affect the term of copyright. See also Bernard Rudden, "The Resurrection of Reversionary Copyright: Redwood Rides Again" (1981) 1(2) *Oxford Journal of Legal Studies* 296, 299.
[43] *Novello and Co Ltd v Keith Prowse Music Publishing Co Ltd* [2004] EWCA Civ 1776 [41].
[44] Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Study 31, *Renewal of Copyright*, 86th Congress, 2nd session (United States Government Printing Office, Washington, 1961) 219.
[45] Report of the Copyright Committee (1959), 35 [80].
[46] House of Lords, *Debates*, 14 November 1911 vol 10 cc 113 – 66, 159 per Viscount Haldane:

would still provide some benefit to an author's heirs as they would be able to renegotiate with publishers 25 years after the author's death, ie at a time when the value of the work(s) in question could be more accurately assessed. There is no suggestion that the reversionary provision, functioning independently, would be contrary to Berne – the treaty requires copyright in works to last for at least life + 50 years but remains silent about *ownership* of those rights.[47] Accordingly, the reasoning that the reversionary provision should be removed as contrary to Berne does not stand up to scrutiny.

2 *Failure to achieve its aims*

Having characterised the reversionary provision's consistency with Berne as "somewhat doubtful", Australia's Spicer Committee then asked whether Australia should give up the benefits of the Brussels Act in order to retain it. Its answer was "no" since, in its view, the reversionary provision "ha[d not] been of great benefit to authors' families". Citing *Copinger & Skone James on Copyright*, the Australian committee described the benefits of the provision as "somewhat illusory", especially since it could be sold cheaply by heirs upon the author's death.[48]

In this context however, the *Copinger* reasoning is itself problematic. The treatise argued that "…[the publisher's payment would not be very large because] he would in any event be entitled to publish the work upon payment of a royalty and also that, if he did purchase, he could for the same reason not acquire an exclusive right"…[49] In other words, the *Copinger* criticism about lack of value arising from the reversionary right was inextricably entwined with the existence of the compulsory licence provision in section 3.

> It is the author's descendants we are trying to help. Whilst we do not allow them to shut out the public for the last twenty-five years of the fifty *we secure to them that they shall have at least 10 per cent royalties* and the meaning of this proviso [s 5(2)]…is simply that the author is not to be allowed to contract himself out of what we think a fair standard of rights, but that for the last twenty-five years, in the shape either of the copyright itself or of royalties from those who republish the book, the benefit is to be secured to his family. He may assign to his publisher for life and twenty-five years, and after that his right in the copyright returns to his descendants, and they can part with it again, or it can be dealt with in any other way as the subject of royalties… (emphasis added)

[47] See eg Rebecca Giblin, "A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid" (2018) 41(3) *Columbia Journal of Law & The Arts* 369, 396; Martin Kretschmer, "Copyright Term Reversion and the "Use-It-Or-Lose-It" Principle" (2012) 1(1) *International Journal of Music Business Research* 44, 47; Martin Kretschmer, *Independent Review of Intellectual Property Growth,* Response to consultation 3: 2011 <http://www.ipforesightforum.ac.uk/documents/Kretschmer_IP%20review%20Mar%202011.pdf> 4, accessed 7 July 2018; Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Study 31, *Renewal of Copyright*, 86th Congress, 2nd session (United States Government Printing Office, Washington, 1961) 217.

[48] Spicer Report at [395].

[49] Gillian Davies, Nicholas Caddick, Gwilym Harbottle (eds), *Copinger and Skone James on Copyright* (Sweet & Maxwell, Thomson Reuters, 17th ed, 2016) [5-126].

Importantly however, a 10% royalty may have actually been more than the author's estate was entitled to as part of the initial bargain as part of the work. In such cases the author's estate could reject a publisher's attempts to renegotiate a copyright assignment to force them to adopt the 10% royalty option, which in such cases would be an increase.

Moreover, members of the Spicer Committee apparently failed to turn their minds to the fact that the *Copinger* criticism was limited to the law that was: it did not reflect the increased value a publisher would potentially have been willing to pay for the reversionary interest if the compulsory licensing provision was removed, as would be necessary to adopt the Brussels Act. If the reversionary provision had been retained *without* the compulsory licensing provision, once copyright had reverted to an author's estate 25 years after death, the publisher would have no option but to negotiate a licence or assignment with the estate in order to continue their exploitation – thus largely neutralising the *Copinger* criticisms.

Further, the Spicer Committee failed to mention any evidence about actual use of the reversionary interest by the heirs of authors. The New Zealand Committee found the same lack of evidence, but took a diametrically different view, finding "that the proviso can do no harm and may possibly do good."[50] It described any removal of the reversionary interest as "a retrograde step"[51] and one which would actually benefit the publishers or other assignees rather than authors' families.[52]

It is undoubtedly true that so long after publication, most works have lost all commercial value.[53] However, that is not *inevitably* the case. Two famous examples bear out the New Zealand view that the reversionary rights could indeed be valuable to heirs. The first involves a song written in South Africa, which had retained the reversionary provision under the Imperial Act until 1965.[54] A Mr Solomon Linda wrote a musical composition entitled "Mbube" in 1939 and sold the tune for ten shillings.[55] It became extraordinarily successful, being used

[50] Report of the Copyright Committee (1959), 35 [80].
[51] Report of the Copyright Committee (1959), 24.
[52] Report of the Copyright Committee (1959), 24 – 25.
[53] Jacob Flynn, Francois Petitjean and Rebecca Giblin, *Books lost: relationships between copyright status and availability of ebooks to public libraries* (forthcoming 2019).
[54] Tana Pistorius, "The Imperial Act's role in shaping South African law" in Uma Suthersanen and Ysolde Gendreau (eds), *A Shifting Empire: 100 Years of the Copyright Act 1911* (Edward Elgar Publishing 2013) 216.
[55] Malan lists what Mr Linda actually received "from making up the most famous melody that ever emerged from Africa":

> …ten shillings, a big reputation, adulation and lionization; several cool suits, a wind-up gramophone, a check from Pete Seeger and a trickle of royalties that had spared his daughters from absolute penury.

Rian Malan, "In the Jungle: Inside the Long, Hidden Genealogy of 'The Lion Sleeps Tonight'", *Rolling Stone* (online), 14 May 2000 <https://www.rollingstone.com/music/music-features/in-the-jungle-inside-the-long-hidden-genealogy-of-the-lion-sleeps-tonight-108274/> accessed 11 July 2018; Tana Pistorius, "The Imperial

as the basis of the song "The Lion Sleeps Tonight" in the hit animated movie *The Lion King*.[56] However, Mr Linda "died penniless"[57] and his heirs were "poorly educated and did not know how to obtain royalty payments,"[58] living in poverty despite the song's success.[59] Reports indicated that the heirs received very low royalties from the use of the song in Disney's *The Lion King*.[60] Aided by the publicity of a 2000 expose in *Rolling Stone* magazine[61] and the 2002 documentary *A Lion's Trail*,[62] Mr Linda's heirs eventually obtained legal representation and sued Disney "for using the song without permission in…The Lion King",[63] on the basis that the reversionary provision meant that the copyright had passed to Mr Linda's estate 25 years after he died.[64] Prior to the matter being litigated, the parties reached a settlement for an undisclosed amount involving backdated royalties, worldwide royalty payments in the future and Mr Linda being acknowledged "as a co-composer of 'The Lion Sleeps Tonight'".[65] Aware of this provision's continuing potential to secure remuneration for heirs, the South African Copyright Review Commission recommended in 2011 that attempts be made to seek royalties

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Act's role in shaping South African law" in Uma Suthersanen and Ysolde Gendreau (eds), *A Shifting Empire: 100 Years of the Copyright Act 1911* (Edward Elgar Publishing 2013) 216 – 217.

[56] Tana Pistorius, "The Imperial Act's role in shaping South African law" in Uma Suthersanen and Ysolde Gendreau (eds), *A Shifting Empire: 100 Years of the Copyright Act 1911* (Edward Elgar Publishing 2013) 217.

[57] Tana Pistorius, "The Imperial Act's role in shaping South African law" in Uma Suthersanen and Ysolde Gendreau (eds), *A Shifting Empire: 100 Years of the Copyright Act 1911* (Edward Elgar Publishing 2013) 217.

[58] Giusepina D'Agostino, *Copyright, Contracts, Creators: New Media, New Rules* (Edward Elgar Publishing 2010) 77:

> It soon became clear that Linda's daughters had no understanding of music publishing and related arcana. All they knew was that "people did something with our father's song outside", and that monies were occasionally deposited in their joint bank account by mysterious entities they could not name.

[59] Rian Malan, "In the Jungle: Inside the Long, Hidden Genealogy of 'The Lion Sleeps Tonight', *Rolling Stone* (online), 14 May 2000 <https://www.rollingstone.com/music/music-features/in-the-jungle-inside-the-long-hidden-genealogy-of-the-lion-sleeps-tonight-108274/> accessed 11 July 2018. Sanders indicates that one of Mr Linda's daughters passed away from AIDS as she was not able to afford medication. Deborahmichelle Sanders, ""The Lion Sleeps Tonight" Royalties", *The Write Stuff*, 2 June 2014 <https://sites.google.com/site/sandersdeborahmichelle/-the-lion-sleeps-tonight-royalties> accessed 11 July 2018.

[60] Approximately $15,000.00 from 1992 – 2002: Fred Khumalo, "Wimoweh royalties start to roll", 2 July 2004 <http://blogs.sun.ac.za/iplaw/files/2013/01/Artikels-Lion-Sleeps-Tonight.pdf> 1, accessed 11 October 2018; $17,000.00 from 1991 – 2001: Bill DeMain, "The Lion Sleeps Tonight" (2017) 95 *Performing Songwriter* <http://performingsongwriter.com/lion-sleeps-tonight/> accessed 11 October 2018.

[61] Rian Malan, "In the Jungle: Inside the Long, Hidden Genealogy of 'The Lion Sleeps Tonight', *Rolling Stone* (online), 14 May 2000 <https://www.rollingstone.com/music/music-features/in-the-jungle-inside-the-long-hidden-genealogy-of-the-lion-sleeps-tonight-108274/> accessed 18 October 2018.

[62] Bill DeMain, "The Lion Sleeps Tonight" (2017) 95 *Performing Songwriter* <http://performingsongwriter.com/lion-sleeps-tonight/> accessed 11 October 2018.

[63] Rory Carroll, "Lion takes on Mouse in copyright row", *The Guardian* (online), 3 July 2004 <https://www.theguardian.com/world/2004/jul/03/film.arts> accessed 11 July 2018.

[64] Tana Pistorius, "The Imperial Act's role in shaping South African law" in Uma Suthersanen and Ysolde Gendreau (eds), *A Shifting Empire: 100 Years of the Copyright Act 1911* (Edward Elgar Publishing 2013) 217.

[65] Giusepina D'Agostino, *Copyright, Contracts, Creators: New Media, New Rules* (Edward Elgar Publishing 2010) 77; Music Law Updates, *Solomon Linda's estate heirs awarded for 'The Lion Sleeps Tonight'*, March 2006 <http://www.musiclawupdates.com/?p=3031> accessed 11 July 2018; Eva Hemmungs Wirtén, *Terms of Use: Negotiating the Jungle of the Intellectual Commons* (University of Toronto Press 2008) 123 – 124; Tana Pistorius, "The Imperial Act's role in shaping South African law" in Uma Suthersanen and Ysolde Gendreau (eds), *A Shifting Empire: 100 Years of the Copyright Act 1911* (Edward Elgar Publishing 2013) 217.

on behalf of the heirs of other South African composers who may fall under the reversionary provision.[66]

A second example of the value of reversionary rights as provided by the Imperial Act comes from the Redwood Music litigation in the UK in the 1970s and early 1980s. Known as "one of the most momentous court wrangles in popular music history",[67] these cases began when an American, Miriam Stern, formed a company to help estates enforce their rights under the prior British law.[68] Ms Stern represented around 177 estates, involving between 30,000 – 40,000 songs.[69] After failed negotiations with publishers,[70] Redwood Music Limited ("**Redwood**") commenced test litigation on the ownership of a series of songs in 1974.[71] Initially, the Court found that reversion did not apply because the test songs were subject to the "collective work" exception in s 5(2).[72] However, the Court of Appeal overturned this finding,[73] an approach followed by the House of Lords[74] although there was a "remarkable" "diversity of judicial reasoning" on the collective works point.[75] *Billboard* magazine reported that as a result of this decision, estates would "gain backdated monies and future royalties…[and a] greater percentages of both mechanical and performance income…"[76] After the House of Lords decision, Redwood reached a confidential settlement with eight publishers to "avoid further judicial battles".[77] These examples show that the provision could and did have a tangible impact for the heirs of authors.

The Australian committee's recommendation to abolish the reversionary right stemmed directly from its erroneous conclusion that it was inconsistent with Berne, which was then

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[66] Copyright Review Commission Report 2011 at para 3.1.7, referred to in Tana Pistorius, "The Imperial Copyright Act 1911's role in shaping South African copyright law" in Uma Suthersanen and Ysolde Gendreau (eds) *A Shifting Empire: 100 Years of the Copyright Act 1911* (Edward Elgar Publishing 2013) 217.
[67] Peter Jones, "Reversionary Rights Rule Shocks Publishers", Billboard Magazine, 9 August 1980, 4, 64.
[68] *Redwood Music Ltd v Francis, Day & Hunter Ltd and Others* [1978] RPC 429, 435.
[69] *Redwood Music Ltd v Francis, Day & Hunter Ltd and Others* [1978] RPC 429, 436; see Bernard Rudden, "The Resurrection of Reversionary Copyright: Redwood Rides Again" (1981) 1(2) *Oxford Journal of Legal Studies* 296, 297.
[70] *Redwood Music Ltd v Francis, Day & Hunter Ltd and Others* [1978] RPC 429, 436 – 438.
[71] *Redwood Music Ltd v Francis, Day & Hunter Ltd and Others* [1978] RPC 429, 438.
[72] *Redwood Music Ltd v Francis, Day & Hunter Ltd and Others* [1978] RPC 429, 452.
[73] *Redwood Music Ltd v B Feldman & Co Ltd* [1979] RPC 385, 403.
[74] William J Braithwaite, "From Revolution to Constitution: Copyright, Compulsory Licences and the Parodied Song" (1984) 18(1) *University of British Columbia Law Review* 35, 40.
[75] Hugh Laddie, Peter Prescott, Mary Vitoria, *The Modern Law of Copyright and Designs* (Butterworths, 1995, 2nd ed) [13.37].
[76] Peter Jones, "General News: Reversionary Rights Rule Shocks Publisher", 92(32) *Billboard*, 9 August 1980, 4, 65
[77] "General News: Settle Reversionary Case", *Billboard*, 27 December 1980, 4. See also Peter Jones, "General News: Reversionary Rights Rule Shocks Publisher", 92(32) *Billboard*, 9 August 1980, 4, 65. See also William M Krasilovsky and Robert S Meloni, "Copyright Law as a Protection against Improvidence: Renewals, Reversions, and Terminations (1983) 5(4) *Communications and the Law* 3, 11; Russell Sanjek, *American Popular Music and Its Business: The First Four Hundred Years, Volume III: From 1900 – 1984* (OUP 1988) 593.

supported by the ancillary finding that the benefits to heirs from reversion were too few to justify giving up the treaty's overall benefits. Had it reached the correct conclusion on the Berne issue, it seems likely that it must have adopted the view of the New Zealand committee – that, even if there was no evidence at the time that the provision was achieving its aim of supporting authors' families, it "c[ould] do no harm and may possibly do good."[78] After all, as Vaver argues, there was no "evidence that the imbalance of bargaining power between authors and copyright acquirers had mysteriously vanished"[79] – so the need to address it remained.

IV WHAT CAN WE LEARN FROM THE CANADIAN EXPERIENCE?

The analysis above shows that the reasons given to justify the removal of the Imperial Act's reversionary provision don't hold up to scrutiny. Most significantly, there are no Berne barriers to reintroducing a reversion law. But that is not to say that we ought to re-introduce one in the same terms as that which was so blithely deleted from the statute books in the UK, Australia and New Zealand. The world has changed almost beyond recognition since 1911, and care would need to be taken to design a law that's fit for purpose. Towards those ends it is helpful to look to Canada, where the century-old Imperial reversion provision still remains in force,[80] to see what lessons can be learnt from its experience.

Canada's *Copyright Act 1921* adopted the *Copyright Act 1911* (UK) "without major substantive changes".[81] Like its Commonwealth brethren, the Canadian government also commissioned a copyright report which was released in 1957 ("**Ilsley Report**").[82] However, the Ilsley Report did not refer to the reversionary provision at all.[83] It only advocated that Canada should adopt the free contracting approach to copyright assignments taken in the *Copyright Act 1956* (UK).[84] Despite these recommendations, Canada's copyright legislation did not undergo major changes

[78] Report of the Copyright Committee (1959), 35 [80].
[79] David Vaver, "Authors' Moral Rights and the Copyright Law Review Committee's Report: W(h)ither Such Rights Now?" (1988) 14 *Monash University Law Review* 284, 289, fn 16.
[80] *Copyright Act,* RSC 1985, c C-42, s 14(1).
[81] Daniel Gervais, "The Emergence and Development of Intellectual Property Law in Canada" in Rochelle Dreyfuss and Justine Pila, *The Oxford Handbook of Intellectual Property Law* (OUP 2017) 2.3; see also Sara Bannerman, "Copyright: Characteristics of Canadian Reform" in Michael Geist (ed) *From "Radical Extremism" to "Balanced Copyright"* (Irwin Law Inc 2010) 24. The reversion provision was in s 11(2) of the 1921 Act.
[82] Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs, *Report on Copyright* (Edmund Cloutier CMG OA DSP, Queen's Printer and Controller of Stationery, Ottawa 1957) ("**Ilsley Report**").
[83] See eg Ilsley Report at 14, where the Report discusses the compulsory license 25 years after an author's death but not the reversionary provision.
[84] Ilsley Report, 115.

until some thirty years later.[85] The reversionary provision survived unscathed despite multiple earlier calls for its repeal.[86]

Canada's reversionary provision is not popular. It has been criticised for failing to sufficiently benefit heirs,[87] and inconsistency with Berne,[88] which we have addressed above.[89] The other main criticisms include that it is "confusingly drafted",[90] unjustifiably interferes with freedom or contract by maintaining the stereotype of the "congenitally irresponsible" author who cannot effectively enter into contracts on their own,[91] could cause publishers to pay authors less in anticipation of rights reverting,[92] could disincentivise publishers from exploiting works that

[85] *Copyright Amendment Bill (Bill C-60)* (Canada); see David Vaver, "Copyright Law: Recent Canadian Developments" (1988) 16 *Australian Business Law Review* 412, 415 – 416; Jay Makarenko, *Copyright Law in Canada: An Introduction to the Canadian Copyright Act,* Mapleleafweb, 13 March 2009 <https://www.mapleleafweb.com/features/copyright-law-canada-introduction-canadian-copyright-act.html#history>, accessed 2 July 2018. Canada did amend the 1921 Act by ratifying the Rome revisions of Berne, and these came into effect in a 1931 Act: *Copyright Amendment Act* (21-22 Geo. V c. 8). See also Linda Hansen, "The Half-Circled "c": Canadian Copyright Legislation" (1992) 19(2) *Government Publications Review* 137, 142 – 143.

[86] See eg Laurent Carrière, *Limitation Where Author is First Owner of Copyright: Reversionary Interest in the Copyright* Robic LLP <https://www.robic.ca/en/publications/limitation-where-author-is-first-owner-of-copyright-reversionary-interest-in-the-copyright-some-comments-on-section-14-of-the-canadian-copyright-act/> accessed 2 July 2018, 10 referring to Andrew A Keyes et al, *Copyright in Canada: Proposals for a Revision of the Law* (1977 CCAC Ottawa), 76, *From Gutenberg to Telidon – A White Paper on Copyright* (1984 CCAC Ottawa), Barry Torno, "Term of Copyright Protection in Canada: Present and Proposed (1980) 46 *Canadian Patent Report* (2d) 257. Two other government copyright reports were released between the Ilsley Report and the 1988 amendments, being the *Report on Intellectual and Industrial Property* (1971) and the *Charter of Rights for Creators – Report of the Subcommittee on the Revision of Copyright* (1985). Neither of these reports mention the reversionary provision. See also Douglas A Smith, "Recent Proposals for Copyright Revision: An Evaluation" (1988) 14(2) *Canadian Public Policy/Analyse de Politiques* 175, 175; Linda Hansen, "The Half-Circled "c": Canadian Copyright Legislation" (1992) 19(2) *Government Publications Review* 137, 144 – 148.

[87] Strachan Heighinton and Andrea Rush, "Reversionary Interests under the Canadian Copyright Act" (1989) 9 *Estates & Trusts Journal* 176, 178; see also A A Keyes and C Brunet, *Copyright in Canada: Proposals for a Revision of the Law* (Consumer and Corporate Affairs Canada 1977) 69; Harold G Fox, *The Canadian Law of Copyright and Industrial Designs* (The Carswell Company Limited, Toronto, 2nd ed, 1967) 293.

[88] A A Keyes and C Brunet, *Copyright in Canada: Proposals for a Revision of the Law* (Consumer and Corporate Affairs Canada 1977) 69.

[89] See Part III above.

[90] Bob Tarantino, "Long Time Coming: Copyright Reversionary Interests in Canada" (2013) *Développements récents en droit de la propriété intellectuelle* <https://ssrn.com/abstract=2368464> 12.

[91] Barry Torno, "Term of Copyright Protection in Canada: Present and Proposed (1980) 46 *Canadian Patent Report* (2d) 257, 288, referred to in See Laurent Carrière, *Limitation Where Author is First Owner of Copyright: Reversionary Interest in the Copyright* Robic LLP <https://www.robic.ca/en/publications/limitation-where-author-is-first-owner-of-copyright-reversionary-interest-in-the-copyright-some-comments-on-section-14-of-the-canadian-copyright-act/> accessed 2 July 2018, 11. See also A A Keyes and C Brunet, *Copyright in Canada: Proposals for a Revision of the Law* (Consumer and Corporate Affairs Canada 1977) 69; Canadian Council of Archives, *Brief to the Standing Committee on Industry Science and Technology in its Statutory Review of the* Copyright Act*,* 28 August 2018 <http://www.archivescanada.ca/uploads/files/Documents/Copyright/CCA-CopyrightBriefEN_August28-2018.pdf> 2, accessed 8 October 2018; *From Gutenberg to Telidon – A White Paper on Copyright* (1984 CCAC Ottawa) 57.

[92] Bob Tarantino, "Long Time Coming: Copyright Reversionary Interests in Canada" (2013) *Développements récents en droit de la propriété intellectuelle* <https://ssrn.com/abstract=2368464> 17.

are close to reverting,[93] is not subject to a means test,[94] takes too long to kick in,[95] creates uncertainty for publishers as to when they will lose their rights,[96] and can be defeated by using a testamentary disposition.[97]

Only two of these criticisms attack the very concept of reversion. The first is the argument it unduly interferes with freedom of contract. In light of what we know about the dynamics of creative labour markets, that objection is disingenuously made. Restrictions on the freedom to contract are imposed where necessary to achieve broader aims.[98] Cultural economists such as Professor Ruth Towse have shown that artists are very often at a bargaining disadvantage and are obliged to enter into contracts that see them be obliged to give away the lion's share of the rights, in exchange for very little, before any of the parties know what the work is worth.[99] Given that copyright is not purely justified by incentives (which could go to anyone) but also moral claims to additional "reward" (justifiable only for authors themselves),[100] it is appropriate to intervene to help ensure those rewards reach the intended beneficiaries.[101]

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[93] Bob Tarantino, "Long Time Coming: Copyright Reversionary Interests in Canada" (2013) *Développements récents en droit de la propriété intellectuelle* <https://ssrn.com/abstract=2368464> 17 – 18; see also A A Keyes and C Brunet, *Copyright in Canada: Proposals for a Revision of the Law* (Consumer and Corporate Affairs Canada 1977) 69.

[94] Bob Tarantino, "Long Time Coming: Copyright Reversionary Interests in Canada" (2013) *Développements récents en droit de la propriété intellectuelle* <https://ssrn.com/abstract=2368464> 18.

[95] Bob Tarantino, "Long Time Coming: Copyright Reversionary Interests in Canada" (2013) *Développements récents en droit de la propriété intellectuelle* <https://ssrn.com/abstract=2368464> 18.

[96] Bob Tarantino, "Long Time Coming: Copyright Reversionary Interests in Canada" (2013) *Développements récents en droit de la propriété intellectuelle* <https://ssrn.com/abstract=2368464> 17.

[97] A A Keyes and C Brunet, *Copyright in Canada: Proposals for a Revision of the Law* (Consumer and Corporate Affairs Canada 1977) 69.

[98] For example, for consumer protection: Justice Steven Rares, "Striking The Modern Balance Between Freedom of Contract and Consumer Rights", 14th International Association of Consumer Law Conference, Sydney, 2 July 2013 <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-rares/rares-j-20130702> accessed 26 October 2018.

[99] See eg Ruth Towse, "Copyright, Risk and the Artist: An Economic Approach to Policy for Artists" (1999) 6(1) *International Journal of Cultural Policy* 91, 99; see also Rebecca Giblin, "A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid" (2018) 41(3) *Columbia Journal of Law & the Arts* 369, 376, referring to William F Patry, "The Copyright Term Extension Act of 1995: Or How Publishers Managed to Steal the Bread from Authors" (1996) 14 *Cardozo Arts & Entertainment Law Journal* 661, 675 – 676; Emily Burrows, "Termination of Sound Recording Copyrights & The Potential Unconscionability of Work for Hire Clauses" (2010) 30(1) *The Review of Litigation* 101, 102 – 103; Matthew Marinett, "The Alienation of Economic Rights and the Case for Stickier Copyright" (2017) 30(1) *Intellectual Property Journal* 125, 133.

[100] Rebecca Giblin, "A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid" (2018) 41(3) *Columbia Journal of Law & the Arts* 369, 381; Martin Senftleben, "Copyright, creators and society's need for autonomous art – the blessing and curse of monetary incentives" in Rebecca Giblin and Kimberlee Weatherall (eds), *What if we could reimagine copyright?* (ANU Press 2017) 59; Rebecca Giblin, "Reimagining copyright's duration" in Rebecca Giblin and Kimberlee Weatherall (eds), *What if we could reimagine copyright?* (ANU Press 2017) 177 – 178, 192; Rebecca Giblin and Kimberlee Weatherall, "A collection of impossible ideas" in Rebecca Giblin and Kimberlee Weatherall (eds), *What if we could reimagine copyright?* (ANU Press 2017) 316.

[101] See Tony Greenman, *The Balance between Copyright and the Freedom of Contract – an Israeli* Perspective, WIPO <http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ipr_ge_11/wipo_ipr_ge_11_topic7.pdf> 4, accessed 10 July 2018. See also Agnès Lucas-Schloetter, "The remuneration of authors and performers in copyright contract law" in Paul Torremans (ed) *Research Handbook on Copyright Law* (Elgar Law 2017, 2nd ed) 271, whose reasoning applies generally despite referring to European countries.

The second criticism of the concept of reversion is that publishers will discount their initial payments to authors because they are going to lose the rights after a period of time. However, there is no evidence that this is occurring.[102] Indeed, it has been suggested that having a reversion right could actually "incentivise *better* initial terms than received currently."[103] We should keep in mind that the "present value" of works after a period of time like 25 years is either "zero or virtually zero at the time of contracting".[104] Accordingly, the initial payment should not be affected by a reversionary period of that length if the publisher loses virtually no value when the rights return to the author.[105] We should also be aware that payments to authors are often not commensurate with the actual value of the works,[106] because authors tend to operate in an "irrational market"[107] and are often willing to accept far lower payments for their creative work than for other forms of work.[108] In light of this, and given that the post-25 year value of works is already very low, reversion at that time should not adversely affect initial payments to authors.[109]

The other complaints concern the way Canada's particular provision is drafted. Perhaps the highest profile objection is that 25 years after the author's death is too long to wait for rights

[102] Rebecca Giblin, "A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid" (2018) 41(3) *Columbia Journal of Law & the Arts* 369, 396 – 397.
[103] Matthew Marinett, "The Alienation of Economic Rights and the Case for Stickier Copyright" (2017) 30(1) *Intellectual Property Journal; Scarborough* 125, 168, referring to Jessica Litman, "Real Copyright Reform" (2010) 96 *Iowa Law Review* 1, 48; see also Rebecca Giblin, "A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid" (2018) 41(3) *Columbia Journal of Law & the Arts* 369, 397.
[104] Rebecca Giblin, "A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid" (2018) 41(3) *Columbia Journal of Law & the Arts* 369, 397.
[105] Rebecca Giblin, "A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid" (2018) 41(3) *Columbia Journal of Law & the Arts* 369, 397.
[106] Rebecca Giblin, "A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid" (2018) 41(3) *Columbia Journal of Law & the Arts* 369, 397; see also Matthew Marinett, "The Alienation of Economic Rights and the Case for Stickier Copyright" (2017) 30(1) *Intellectual Property Journal; Scarborough* 125, 159, 161.
[107] Rebecca Giblin, "A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid" (2018) 41(3) *Columbia Journal of Law & the Arts* 369, 397, referring to Cory Doctorow, "The Point of Patreon Isn't How Many People Earn a Full-Time Living, It's How Much of the Money from Art Goes to Artists", *Boing Boing*, 8 December 2017 <https://perma.cc/8LCG-7D4Y> accessed 26 October 2018; see also Matthew Marinett, "The Alienation of Economic Rights and the Case for Stickier Copyright" (2017) 30(1) *Intellectual Property Journal; Scarborough* 125, 161.
[108] Rebecca Giblin, "A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid" (2018) 41(3) *Columbia Journal of Law & the Arts* 369, 397.
[109] Rebecca Giblin, "A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid" (2018) 41(3) *Columbia Journal of Law & the Arts* 369, 397.

to revert. This argument was recently made by Canadian singer songwriter Bryan Adams, in attention-grabbing[110] testimony before a Committee of the Canadian House of Commons.[111]

With law professor Daniel Gervais, Adams argued that rights ought instead to instead revert 25 years after *transfer*.[112] This would be similar to the termination scheme that exists in US copyright law, which provides for authors to recover their rights after 35 years.[113] Given that economic modelling consistently finds that 25 years of protection is sufficient to incentivise even the most lavish investments, reversion after 25 years would indeed be justifiable to secure a greater part of the rewards share to authors whilst maintaining incentives for investors.[114] The other significant criticism is that the provision acts as a disincentive to exploit: that publishers won't invest in making older works available if they know the rights will shortly revert to an heir. However, this could be addressed easily if a reversionary term of 25 year was introduced, by enabling the agreement to be terminated by mutual agreement and re-formed according to new information about the work's value – each time for a maximum of 25 years.[115]

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[110] See eg Alan Cross, "What are these music copyright hearings in Ottawa all about? Actually it's something musicians really need to happen", A Journal of Musical Things, 19 September 2018 <http://ajournalofmusicalthings.com/what-are-these-music-copyright-hearings-in-ottawa-all-about-actually-its-something-musicians-really-need-to-happen/> accessed 28 September 2018; Michael Geist, "Cuts Like a Knife: Bryan Adams Calls for Stronger Protections Against One-Sided Record Label Contracts", 20 September 2018 <http://www.michaelgeist.ca/2018/09/adamscopyright/> accessed 28 September 2018; Amanda Connolly, "Here's why Canadian rock star Bryan Adams wants politicians to change copyright laws", *Global News,* 18 September 2018 <https://globalnews.ca/news/4461755/bryan-adams-copyright-law-changes/> accessed 28 September 2018; MusicLinkUp, "Bryan Adams Calls For Copyright Reforms in Canada", 19 September 2018 <https://www.musiclinkup.com/pulse/10300/bryan-adams-calls-for-copyright-reforms-in-canada> accessed 28 September 2018; Rebecca Giblin, "Everything he does, he does it for us. Why Bryan Adams is on to something important about copyright", *The Conversation*, 25 September 2018 <https://theconversation.com/everything-he-does-he-does-it-for-us-why-bryan-adams-is-on-to-something-important-about-copyright-103674> accessed 9 October 2018.

[111] Zi-Ann Lum, "Bryan Adams Asks MPs on House Heritage Committee To Change 1 Word In Copyright Act", *Huffington Post* (online), 18 September 2018 <https://www.huffingtonpost.ca/2018/09/18/bryan-adams-copyright-act_a_23531589/> accessed 25 September 2018; Terry Pedwell, "Bryan Adams calls for changes to Canada's copyright laws to help artists", *The Globe and Mail* (online), 18 September 2018. <https://www.theglobeandmail.com/politics/article-bryan-adams-calls-for-changes-to-canadas-copyright-laws-to-help/> accessed 9 October 2018; See eg Karen Bliss, "Bryan Adams Calls for Copyright Reforms in Canada", *Billboard* (online) 19 September 2018 <https://www.billboard.com/articles/news/8475893/bryan-adams-calls-for-changes-copyright-laws-in-canada> accessed 25 September 2018; Kathleen Harris, "Bryan Adams to MPs: Give artists more control over their work", *CBC News* (online) 18 September 2018 <https://www.cbc.ca/news/politics/bryan-adams-copyright-act-heritage-committee-1.4828097> accessed 25 September 2018; Charlie Pinkerton, "Canada 'dragging behind America' on copyright law, Bryan Adams tells House Committee", *iPolitics* (online), 18 September 2018 <https://ipolitics.ca/2018/09/18/copyright-rules-unfair-to-artists-bryan-adams-tells-house-committee/> accessed 25 September 2018.

[112] See Canadian Parliament, Canadian Heritage Committee Meeting #118, 18 September 2018 per Bryan Adams at 11:25am <https://openparliament.ca/committees/canadian-heritage/42-1/118/bryan-adams-7/?page=1> accessed 16 October 2018.

[113] *Copyright Act of 1976*, 17 USC §§ 203, 304.

[114] Rebecca Giblin, "A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid" (2018) 41(3) *Columbia Journal of Law & the Arts* 369, 396; Saleh Al-Sharieh, "The Blessing of Talent and the Curse of Poverty: Rectifying Copyright Law's Implementation of Authors' Material Interests in International Human Rights Law" (2018) 8(2) *Notre Dame Journal of International & Comparative Law* 62, 79.

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

Likewise, a 25 year reversion would address the concern that publishers do not know when their rights will be taken away; they would have a concrete date 25 years after an assignment contract, and could plan how they want to deal with the copyright.

Therefore, rather than reasons to remove reversion completely, these criticisms serve as important lessons for policymakers to learn from in considering what a re-introduced, fit-for-purpose reversion scheme could look like in Canada and other Commonwealth countries.

V CONCLUSION

The Imperial reversion right was designed to help authors' descendants by giving them the benefits of copyright later in the copyright term. This right was unceremoniously removed on the basis that it was inconsistent with the Berne Convention and not effective enough to justify keeping. However, reversion *was* consistent with Berne. It neither affected the copyright term, nor was it so connected to other Berne-inconsistent provisions that it needed to be removed. Reversion has also proved potentially valuable, as shown by the *Lion King* and *Redwood* examples, where authors' heirs received substantial settlements after taking action to enforce their reversionary rights. Does the spurious removal of the Imperial right mean we should reinstate it? Not quite. In Canada, where the right persists, many have criticised it and called for it to be repealed. Most of these criticisms are about how the Imperial right is structured. Accordingly, instead of using them to dismiss reversion, we can learn lessons from them about what a new, effective reversion right would look like. While the Imperial right is all but dead, these parts of copyright history do not present viable obstacles to introducing reversion rights to address copyright's twin failures: keeping works available and getting authors fairly paid.