

A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid

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INTRODUCTION

Copyright’s fundamental structure is based on outdated assumptions, including that marginal costs of copying and distribution are high, and registration systems necessarily onerous and expensive.¹ International treaties embedded these assumptions into domestic laws worldwide, and for good reasons: when the Berne Convention prohibited formalities in 1908, it was a necessary response to compulsory registration systems that unfairly burdened authors.² And, when those high marginal costs meant only the most popular works could be made enduringly available anyway, there was little downside in granting long terms that could outlast their owners’ interest: those less popular works were going to be lost regardless.³

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1. For a fuller analysis of the “physical world” assumptions on which copyright is based, see generally REBECCA GIBLIN, *CODE WARS* (2011); Rebecca Giblin, *Physical World Assumptions and Software World Realities (and Why There Are More P2P Software Providers than Ever Before)*, 35 COLUM. J.L. & ARTS 57 (2011).

2. 1 SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND* 18-19, 96 (2d ed. 2006).

3. See Mark Twain’s testimony to the US Congress, reprinted at <https://perma.cc/S6FR-SE23>; Rebecca Giblin, *Reimagining Copyright’s Duration*, in *WHAT IF WE COULD REIMAGINE COPYRIGHT?* 177, 178 (Rebecca Giblin & Kimberlee Weatherall eds., 2017).

These assumptions no longer hold good (at least for those with digital access). Registrations can occur cheaply and almost instantaneously online. The information age brought with it the widespread ability to copy and distribute many kinds of work—globally, virtually instantaneously, for close to zero marginal cost—making the deadweight loss caused by too-long copyrights precipitously larger.⁴

Copyright law would no doubt look very different if we were to design it from scratch today, unconstrained by existing ways of doing things, vested interests, and the international treaty framework.⁵ Kimberlee Weatherall and I recently led a project to explore what such a reimagined copyright could look like. The core lessons that emerged? That any copyright system we were to create today would be much better targeted towards protecting authors' interests; would not leave availability and access so much to chance; and would impose reasonable reciprocal obligations along with rights.⁶

That thought experiment was a useful exercise for understanding what current approaches cause us to lose, but as we explained in our conclusions, any wholesale reimagining would be impossible to implement in practice.⁷ Leaving aside the powerful lobbying power of the biggest beneficiaries of existing approaches, crucial reform pathways are permanently blocked by the Berne Convention for the Protection of Literary and Artistic Works, supported (and made enforceable in the World Trade Organisation) by the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"). While Berne was intended to be revised regularly to keep up with changing circumstances, it has now been almost half a century since Berne has seen any substantive change.⁸ Regulators and scholars have sometimes assumed Berne can be modified, albeit with difficulty,⁹ but that's simply not feasible given 170+ veto-wielding member nations with their wide range of often competing interests. As Sam Ricketson writes in this volume, "you're dreaming!" if you imagine likely any revisions to Berne.¹⁰ Walking away isn't an option either, since that would mean loss of reciprocal global protection

4. Fixed costs of production are sometimes also reduced in this new paradigm—e.g., in the case of digital photographs. For other forms of work, however, such as books, they remain high, since technological improvements do little to reduce the intensive cost of the main input—the actual writing.

5. See generally WHAT IF WE COULD REIMAGINE COPYRIGHT?, *supra* note 3.

6. Rebecca Giblin & Kimberlee Weatherall, *A Collection of Impossible Ideas*, in WHAT IF WE COULD REIMAGINE COPYRIGHT?, *supra* note 3, at 315, 316-19.

7. *Id.* at 319-24.

8. Berne was most recently amended in 1979, and its most recent substantive revision was the Paris Act in 1971.

9. See, e.g., DANIEL GERVAIS, (RE)STRUCTURING COPYRIGHT: A COMPREHENSIVE PATH TO INTERNATIONAL COPYRIGHT REFORM (Edward Elgar ed., 2017); PRODUCTIVITY COMMISSION, "INTELLECTUAL PROPERTY ARRANGEMENTS: PRODUCTIVITY COMMISSION DRAFT REPORT" 117 (April 2016), <https://perma.cc/CJ28-36JX>. The Productivity Commission removed references to this possibility in its final report after receiving submissions as to the unlikelihood of this eventuality. See PRODUCTIVITY COMMISSION, "INTELLECTUAL PROPERTY ARRANGEMENTS: PRODUCTIVITY COMMISSION INQUIRY REPORT" 131 (Sept. 2016), <https://perma.cc/4DB9-SP97>.

10. Sam Ricketson, *The International Framework for the Protection of Authors: Bendable Boundaries and Immovable Obstacles*, 41 COLUM. J.L. & ARTS 341, 353 (2018) (citing iconic Australian film "The Castle").

and ejection from the WTO.¹¹ Even new parallel international arrangements are impossible (barred by Article 20 to the extent of inconsistency), and TRIPS is proving virtually unamendable too.¹² There are other international agreements that limit discretion over copyright, including the Internet treaties and various “free trade” agreements, but they are much easier to amend or withdraw from. By contrast, Berne and TRIPS effectively define copyright’s hard limits. If we want copyright to better achieve its aims, we must work within their boundaries.

While Berne and TRIPS *do* preclude many options for reform, there are nonetheless opportunities to navigate their gaps and flexibilities in order to secure a different bargain—one better capable of responding to the challenges of this age. The key, as I develop below, lies in disentangling copyright’s incentives and rewards motivations and updating its core assumptions. The treaties do indeed present certain “immovable obstacles,”¹³ but that doesn’t necessarily require us to take precisely the same approaches that we have in the past. This paper seeks to provoke new thinking about the possibilities for doing things differently, to better achieve our aims, within the existing treaty structure.

The analysis proceeds in five parts. Part I highlights the failures of current approaches by evaluating them against copyright’s fundamental aims. Part II develops the failed assumptions on which those approaches are constructed, and proposes updated alternatives with which they might be replaced. Informed by those failures and lessons, Part III then sketches an alternative bargain which seeks to better secure to authors rewards from their copyrights whilst simultaneously reclaiming much of the culture lost under current approaches. Part IV briefly addresses possibilities for undermining (and expanding) that proposed alternative, before Part V concludes.

The paper’s aim is not to evangelise for the adoption of this model—significant empirical work is necessary before any responsible advocacy can occur. Rather, it is to provoke new thought about the possibilities for achieving meaningful reform, in ways that reflect current social and technological realities, without requiring impossible textual change.

I. EVALUATING CURRENT APPROACHES

There is no single coherent normative rationale for copyright: as Sherman and Bently explain, “the emergence of modern intellectual property law was neither

11. See Agreement on Trade-Related Aspects of Intellectual Property Rights, arts. 41-61, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299; 33 I.L.M. 1197 (1994) [hereinafter Marrakesh Agreement] (providing that the instruments in Annex 1, of which TRIPS is one, are integral parts and binding on all members). Note also that withdrawal from Berne will not re-enliven the Universal Copyright Convention, because of that treaty’s special clauses applying to former Berne states. See Universal Copyright Convention, as revised at Paris on July 24, 1971, with Appendix Declaration relating to Article XVII and Resolution concerning Article XI 1971, Appendix Declaration relating to Article XVII, July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 178 (1971), <https://perma.cc/NUD6-UC8V>.

12. Giblin & Weatherall, *supra* note 6, at 322-23.

13. Ricketson, *supra* note 10.

natural nor inevitable, nor was it an example of the law coming to occupy its proper philosophical position.”¹⁴ That leaves room for numerous rationales and explanations: that it is intended to recognize the fruits of authors’ intellectual labor,¹⁵ provide incentives to create and disseminate works for the greater public benefit,¹⁶ enhance democratic civil society,¹⁷ protect against unfair competition,¹⁸ or guarantee investors’ rights to exploit in any markets they choose.¹⁹

Having said that, however, two rationales stand ahead of the rest in justifying copyright policies over time. Mapping to historical “instrumentalist” and “naturalist” theories of copyright, they boil down to being about *incentives* and *rewards*. Instrumentalist theories justify copyright as a way of achieving social and economic aims, putting the public interest at the forefront. Naturalist approaches assume that authors’ contributions of intellectual labor or personality give rise to rights to rewards in their own right (and arguably above and beyond the amount necessary to incentivise the work).²⁰ No jurisdiction today can plausibly claim to be purely consequentialist or deontological in its approach to copyright: considerations traceable to both rationales coexist within both international treaties and domestic laws.²¹

Incentives are intended not to encourage production of and investment in cultural works as aims in and of themselves, but to achieve the broader social benefits that flow from widespread access to knowledge and culture. Thus, incentive aims are more properly conceptualised as access aims.²² That is one reason why copyright does not seek to secure the whole value of the copyright to owners. Some parts of all works are always reserved for the benefit of the public, including the ideas within them, de minimis or non-substantial takings, and tolerated or excepted uses.

14. BRAD SHERMAN & LIONEL BENTLY, *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE, 1760–1911* 141 (1999).

15. See, e.g., Rebecca Giblin & Kimberlee Weatherall, *If We Redesigned Copyright from Scratch, What Might it Look Like?*, in *WHAT IF WE COULD REIMAGINE COPYRIGHT?*, *supra* note 3, at 1, 16–17.

16. See e.g., U.S. CONST. art. I § 8, cl. 8.

17. See generally Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *YALE L.J.* 283 (1996).

18. MARK J. DAVISON ET AL., *AUSTRALIAN INTELLECTUAL PROPERTY LAW 4-5* (2d ed. 2012).

19. PETER DRAHOS & JOHN BRAITHWAITE, *INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY?* 176 (2002).

20. Giblin & Weatherall, *supra* note 15, at 16–17.

21. *Id.* at 17. For a discussion of how these aims have animated global copyright policymaking, see, e.g., MARTIN SENFTLEBEN, *COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST* (2004), especially 6–10. Ginsburg’s historical analysis demonstrates how even the United States, which professes such a strong utilitarian tradition, has been influenced by “authors’” claims of personal right. See Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 *TUL. L. REV.* 991, 995 (1990). See also Alain Strowel, *Droit d’auteur et copyright, Divergences et Convergences* (Bruylant, 1993); GILLIAN DAVIES, *COPYRIGHT AND THE PUBLIC INTEREST* 348–51 (2d ed., 2002); J. H. Reichman, *Duration of Copyright and the Limits of Cultural Policy*, 14 *CARDOZO ARTS & ENT. L.J.* 625, 643–44 (1996); Sam Ricketson, *The Copyright Term*, 23 *INT’L REV. INDUS. PROP. & COPYRIGHT L.* 753, 755 (1992); Alfred C. Yen, *Restoring the National Law: Copyright as Labor and Possession*, 51 *OHIO ST. L.J.* 517 (1990).

22. Giblin, *supra* note 3, at 198.

Rewards are granted to creators in recognition of their contributions of personality and intellectual labor.²³ As Ricketson explains: “[t]here is a strong moral argument . . . that as authors confer benefits on society through their creative activity—the provision of learning, instruction and entertainment—this contribution should be duly rewarded.”²⁴

That is why, even if we could induce desired cultural production for relatively small incentives (or even none at all), that does not mean that’s where the grant of rights should end. Authors additionally *deserve* some of the additional social surplus of their creations. Those moral claims are what make author-favoring rhetoric so powerful and effective.²⁵

While copyright doubtless has other rationales, those around incentives and rewards have had the most enduring power in justifying copyright policy over time.²⁶ Thus, copyright law is predominantly sold as a means of:

1. Incentivizing initial cultural production (so that society benefits from access to knowledge and culture);
2. Incentivizing ongoing investment in existing works (to ensure their preservation and continued availability – those access aims again); and
3. Rewarding authors for their creative contributions.

As I have analyzed elsewhere however, current approaches do a poor job of achieving these aims.²⁷ It is worth recapping the reasons for that in some detail, since understanding the failures of the current system is necessary to understanding how we might achieve better results.

A. WHAT IS NECESSARY TO INCENTIVIZE INITIAL CULTURAL PRODUCTION (SO THAT SOCIETY CAN BENEFIT FROM ACCESS TO KNOWLEDGE AND CULTURE)?

Incentivizing works’ initial production is a purely economic aim. How much protection is necessary to elicit those investments? A number of inputs affect this, but two are particularly significant: the discounting necessary to reflect the time value of money, and rates of cultural depreciation.

The “time value of money” recognizes that the further away in time a benefit will be received, the less it is currently worth.²⁸ Thus, the promise of \$100 next week is worth much more to us today than the promise of \$100 in a decade’s time.

23. Canvassing the possible reasons for this intuition, see Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 284-91 (1970).

24. Ricketson, *supra* note 21, at 757.

25. For a detailed tracing of the ways in which the concept of authorship has been used to promote particular positions in legal discourse, including in ways directly contrary to authors’ interests, see Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of Authorship*, 1991 DUKE L.J. 455; Rebecca Giblin, *Should it be copyright’s role to fill houses with books?*, in INTELLECTUAL PROPERTY AND THE REGULATION OF THE INTERNET 18-19 (Susy Frankel & Daniel Gervais eds., 2017).

26. Giblin, *supra* note 25, at 18.

27. Giblin, *supra* note 3, at 179-96.

28. Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners, at 4, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618) [hereinafter Economists’ Brief].

You do not have to be an economist to grasp this concept. Just imagine that you are interviewing housemates, and they offer the same amount in rent—but one would pay monthly in advance, and the other five years after they move out. The difference in value is readily apparent.

A group of prominent economists demonstrated how the time value of money affects investment incentives in their Brief to the U.S. Supreme Court in *Eldred v. Ashcroft*. Assuming a real interest rate (net of inflation) of seven percent, they showed that a dollar today is worth \$0.93 if received in a year, just \$0.0045 if received in eighty years and a mere \$0.0012 if it's going to take a century to end up in one's pocket.²⁹ Thus, years of protection far in the future have little or no *additional* incentive value even if works continue generating a consistent stream of royalties over the entire period of copyright (which, as we see in a moment, is rarely the case).

Cultural depreciation also plays an important role in determining the incentives necessary to achieve the desired production. Like new cars and televisions, cultural works tend to lose commercial value over time. Depreciation rates differ across categories of work, but historical data show that most works have a short commercial lifespan. The Gowers Report showed that most of sound recordings' commercial value is extracted within ten years of release, while for fiction books, sales become negligible within just a single year.³⁰ That helps explain why, when the U.S. had renewal-based terms, few owners bothered to actually exercise their rights: just thirteen percent of the copyrights registered between 1923 and 1942 were actually renewed.³¹ Using registration and renewal data as the basis of their analysis, Landes and Posner have found that the full commercial lifespan of works published in 1962 averaged just 18.5 years.³² Of course, other factors also contributed to these low renewal rates, including complex administrative hurdles. But the point stands that the remaining value of works, as the time for renewal approached, was almost always too low to make it worthwhile to leap them.

Once we discount the value of future earnings to their present value, and account for cultural depreciation,³³ it becomes clear that the period of exclusivity necessary to incentivize initial creation of even the most expensive works is far shorter than current copyright terms. Even with generous assumptions as to discount rate and depreciation, the potential to earn money from a work after the first twenty-five years would do little or nothing *further* to persuade a rational investor to invest in a work at the time that decision is made.³⁴ Indeed, Pollock's model, assuming a

29. *Id.* at 4-7.

30. ANDREW GOWERS, HM TREASURY, GOWERS REVIEW OF INTELLECTUAL PROPERTY 52 (2006), available at <https://perma.cc/78YV-RN3T>.

31. William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 502 (2003).

32. *Id.*

33. Software, for example, has a much higher depreciation rate than feature films, given the speed with which it tends to become technologically obsolete.

34. Landes & Posner, *supra* note 31, at 476 (“[T]he incremental incentive to create new works as a function of a longer term is likely to be very small (given discounting and depreciation) beyond a term of twenty-five years or so”).

discount rate of six percent and cultural depreciation of five percent (and factoring in also the mathematical supply function for creative works, and the welfare associated with new works) estimates optimal copyright terms to be just fifteen years.³⁵

The speculative nature of cultural investment does not change this outcome. It is true that investors will often invest in a number of works in the expectation that some will make losses and others will make sufficient profit to make the overall investment worthwhile.³⁶ But this does not make terms exceeding twenty-five years necessary to incentivize those investments, since the vast majority of most works' commercial value is still typically extracted soon after release.

What all this tells us is that, beyond the first couple of decades, the prospect of future earnings has virtually no impact on investment decisions by intermediaries *at the time those decisions are made*. Even if publishers might *like* to hold the lottery ticket that turns out to hit the jackpot, they do not *need* it to incentivize their investments.³⁷ That explains why, although authors in the U.S. have an inalienable right to terminate copyright transfers after thirty-five years, there is no shortage of books being published. It also explains why the empirical evidence does not show any increase in cultural production caused by extensions of term to life plus seventy.³⁸

Separately, it is sometimes argued that above-incentive rights are still justifiable on incentives rationales because they result in additional investment in *other* cultural works. The award of above-incentive terms (i.e. those longer than necessary to spur works' creation) can discourage future creativity by making it more expensive for subsequent authors to build on those that came before.³⁹ However, it is sometimes argued that this is more than offset by publishers

35. Rufus Pollock, *Forever Minus a Day? Calculating Optimal Copyright Term*, 6(1) REV. ECON. RES. ON COPYRIGHT ISSUES 35, 56, <https://perma.cc/7GS7-BMGS>. Elsewhere, Kretschmer has argued for a still shorter initial term of ten years, followed by reversion to the author. See Martin Kretschmer, *Copyright Term Reversion and the "Use-it-or-lose-it" Principle*, 1 INT'L J. MUSIC BUS. RES. 44, 44-53 (2012).

36. See, e.g., Brian Day, *In Defense of Copyright: Record Labels, Creativity, and the Future of Music*, 21 SETON HALL J. SPORTS & ENT. L. 61, 62 (2011); Steven Bolanos, Note, *Knock, Knock, Knockin' on [Congress's] Door: A Plea to Congress to Amend Section 203 of the Copyright Act of 1976*, 41 WASH. ST. U. L. REV. 391, 398 (2014).

37. That's why the author-focused U.K. publisher Canelo can make money by requiring only five-year licenses and guaranteeing authors receive royalties of at least fifty percent of revenues (in contrast to the "traditional" publication model, which typically takes a license for the entire term of copyright in exchange for a ten percent royalty on e-books). See *Our Offer*, CANELO, <https://perma.cc/8E37-ZM5G>.

38. See Giblin, *supra* note 3, at 184. One study did link the twenty-year term extensions in a number of OECD countries to increases in the number of movies produced. However, ultimately the study was never peer-reviewed or published. See I.P.L. Png & Qiu-hong Wang, *Copyright Duration and the Supply of Creative Work* (September 2006) (unpublished manuscript), <http://perma.cc/2Y92-FR6U>. A subsequent (also non-peer-reviewed) paper by the same authors incorporated that research with other work they had conducted and "found no statistically robust evidence that copyright term extension was associated with higher movie production." See I.P.L. Png and Qiu-hong Wang, *Copyright Law and the Supply of Creative Work: Evidence from the Movies* (April 2009) (unpublished manuscript), <https://perma.cc/UHX6-R3NK>.

39. Economists' Brief, *supra* note 28, at 9.

reinvesting their windfall profits in works that they would not otherwise have taken a chance on. To the extent that occurs, it could support the case for longer terms. Of course, those investments that would have gone ahead even without those windfall profits will not count. As those same economists argue in their *Eldred* brief, this means that the likely impact of windfall profits in new production is small:

In general, a profit-maximizing producer should fund the set of projects that have an expected return equal to or greater than their cost of capital. If a producer lacks the cash on hand to fund a profitable project, the producer can secure additional funding from financial institutions or investors. If the producer has resources remaining, after funding all the projects whose expected returns are higher than the cost of capital, this remainder should be invested elsewhere, not in sub-par projects that happen to be available to the firm.⁴⁰

The economists' argument is that rational producers will only fund projects which they expect to be profitable, and then only where the expected return exceeds the cost of capital—regardless of whether that money comes from cash at hand or other sources. Of course, this argument disregards works which rational producers might fund even if they expect it to make a loss, for example to build prestige or other forms of goodwill. But still, the point is a good one: a great deal of the investment in new works would occur even in the absence of above-incentive rewards.⁴¹ The main exception is where a producer has no access to capital markets. Consider the individual artist or small publisher who is unable to obtain a loan or other source of funding. In such cases the profits generated from older projects may well be the only source of funding for new ones, and may indeed lead to investment in creations which could not otherwise have been funded.⁴²

Overall, this analysis suggests that the grant of additional incentives translates poorly into new productions. It is only in edge cases (where the producer has no alternative source of capital) where this is likely to causally link to new investment. This tells us that, if we intend copyright to promote investment in works that would not otherwise have been created, we need to be more targeted in the allocation of rights. It also tells us that existing approaches award far more than is necessary to incentivize even the biggest investments. If copyright is to be justified beyond an initial term of about twenty-five years, it needs to be on other rationales.

B. TO WHAT EXTENT DO EXISTING APPROACHES INCENTIVIZE ONGOING INVESTMENT IN EXISTING WORKS (TO ENSURE THEIR PRESERVATION AND CONTINUED AVAILABILITY)?

Another justification for above-incentive terms is that they might be necessary to incentivize copyright owners to *continue* to invest in existing works, thus

40. *Id.*

41. *Id.*

42. *Id.*

ensuring their ongoing availability. This was one of the explicit reasons given for extending U.S. copyright terms in the 1976 Act:

Although limitations on the term of copyright are obviously necessary, too short a term harms the author without giving any substantial benefit to the public. The public frequently pays the same for works in the public domain as it does for copyrighted works, and the only result is a commercial windfall to certain users at the author's expense. *In some cases, the lack of copyright protection actually restrains dissemination of the work since publishers and other users cannot risk investing in the work unless assured of exclusive rights.*⁴³

This reasoning suggests that, although the public has already paid to incentivize works to be created, it must then keep paying to persuade the right holder to continue to make them available.

The best empirical evidence in support comes from a study into the effects of U.S. copyright law before 1920, which did not recognize copyright in foreign books. The study found evidence that publishers were hesitant to risk the heavy financial investments associated with typesetting and printing absent some guarantee of exclusivity.⁴⁴

More recently however, it has been repeatedly found that works restricted by copyright are actually subject to *less* investment and *narrower* dissemination than their counterparts in the public domain. For example, research conducted in 2005 on behalf of the National Recording Preservation Board at the Library of Congress examined the exploitation of sound recordings created in the first seventy-five years of that medium's availability. Under U.S. law, sound recordings pre-dating 1972 can be protected by a patchwork of state and common law until 2067, with the consequence "that there are almost no pre-1972 US sound recordings in the public domain across the United States."⁴⁵ One of the key rationales for granting that lengthy term was to give owners an incentive to invest in making those older recordings available to the public.⁴⁶ Elsewhere, however, those recordings have fallen into the public domain. This gives rise to a natural experiment: if it is true that works will be under-exploited in the absence of copyright, those older recordings should have been made more available by their owners, who are not

43. H.R. REP. NO. 94-1476, at 134 (1976) (emphasis added). *See also Copyright Term Extension Act of 1995: Hearing on S. 483 Before the Comm. on the Judiciary*, 104th Cong. 6-8 (1995) (statement of Marybeth Peters, Register of Copyrights and Associate Librarian for Copyright Services, U.S. Copyright Office, Library of Congress).

44. *See* Paul J. Heald, *Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Bestsellers*, 92 MINN. L. REV. 1031, 1035 (2008), citing B. Zorina Khan, 'Does Copyright Piracy Pay? The Effects of US International Copyright Laws on the Market for Books, 1790-1920', at 21, 23-24 (Nat'l Bureau of Econ. Research, Working Paper No. 10271, 2004), <https://perma.cc/8Y5U-HD59>.

45. Eva E. Subotnik & June M. Beseck, *Constitutional Obstacles? Reconsidering Copyright Protection for Pre-1972 Sound Recordings*, 37 COLUM. J.L. & ARTS 327, 330-31 (2014).

46. "One consideration by Congress in extending copyright protection to owners for such a long period was to give those owners an incentive to reissue, and thereby preserve, older recordings." TIM BROOKS, LIBRARY OF CONG., SURVEY OF REISSUES OF U.S. RECORDINGS v (2005), <https://perma.cc/4ZX2-SSW8>.

only likely to have the best access to master copies, but greater incentives to produce them thanks to their ongoing monopoly rights. However, the study found that, on average, just fourteen percent of sound recordings published between 1890 and 1964 had been re-released by right holders on compact disc. Non-right holders re-released twenty-two percent of those recordings without the benefit of any monopoly rights—over fifty percent more than those that did.⁴⁷

Heald's study into the impact of copyright protection on the price and availability of books over time reached similar findings. Once again, U.S. law provided ideal conditions for the experiment: books published between 1913 and 1932 had fallen progressively into the public domain from 1988 until 1997, but a twenty-year retroactive extension then ensured books published from 1923 to 1932 would continue to be restricted by copyright until at least 2018. If the under-investment theory were correct, the data should show that the works in the public domain were being neglected by comparison to the works that were still subject to copyright. But once again the opposite proved true. Between 1988 and 2001, the public domain books were in print at the same rate as copyrighted books, and after 2001 they became available at a rate which was "significantly higher."⁴⁸ By 2006, ninety-eight percent of the public domain sample was in print, compared to just seventy-four percent of the copyrighted works.⁴⁹ Public domain books also averaged significantly more editions—6.3 compared to 3.2—and were available to the public at significantly lower cost.⁵⁰ Only a small part of this discrepancy is explainable by the lower costs of digital distribution: there were still 5.2 editions of public domain titles available when ebook editions were excluded.⁵¹ Heald hypothesized that under-exploitation of works in the absence of copyright protection was likely only to be a problem where the costs of reproduction and distribution are high.⁵² There is less risk of "ruinous competition" in the case of works that are easily and cheaply reproducible. In the digital world, this includes not only books, but also movies, music, photographs, software, music and more.

In a subsequent study, Heald discovered that copyright seems to actually have a negative impact on the availability of books over time. Using a random sample of 2,266 new editions of books available for sale on Amazon, and controlling for factors such as duplicates and multiple editions of the same title, the availability of copyrighted works was found to drop sharply shortly after release, before increasing dramatically upon entry to the public domain.⁵³ Indeed, Heald made the remarkable discovery that more books were available from the 1880s than from the 1980s.⁵⁴ Adjusted for the number of total books actually published in each decade,

47. *Id.* at 7–8. Note that some reissuers may have claimed copyright in the "remastered" recordings; other producers claim copyright in the accompanying artwork.

48. Heald, *supra* note 44, at 1040.

49. *Id.*

50. *Id.* at 1043, 1048–50.

51. *Id.* at 1043.

52. *Id.* at 1050.

53. Paul J Heald, *How Copyright Keeps Works Disappeared*, 11 J. EMPIRICAL LEGAL STUD. 829, 840 (2014).

54. *Id.* at 843.

the trend became starker still.⁵⁵ The lack of availability of print copies is not being filled by the ebook market either: though ninety-four percent of public domain “bestsellers” were available in electronic formats, the same was true of just twenty-seven percent of copyrighted books.⁵⁶

The orphan works problem further illustrates what a poor job the blanket grant of long terms does of encouraging works’ continued availability. Countless millions are sterilized (in that their DNA cannot become part of future creation) or lost altogether because their owners cannot be traced.⁵⁷ Very often, this is caused by works having commercial life spans shorter than their terms of protection.⁵⁸ The range of orphaned works in cultural collections is enormous, “spanning published books, commercial photographs, journals, newspapers, television shows, films, sound recordings, plays and music compositions, as well as email messages, home videos, private letters, community pamphlets, postcards, government publications and other non-commercial ephemera.”⁵⁹ Some ninety percent of the photographs held by U.K. museums are orphans, as are about thirteen percent of in-copyright books;⁶⁰ some E.U. archives claim orphaning rates around forty percent.⁶¹ Hargreaves decried this state of affairs as “cultural negligence”: “[a]s long as [it] . . . continues, archives in old formats (for instance celluloid film and audio tape) continue to decay, and further delay to digitisation means some will be lost for good.”⁶² The phenomenon is by no means limited to old works. A recent project to preserve New Zealand’s early video game heritage, for example, was unable to track down the owners of key pieces of software coded as recently as the 1980s.⁶³ There are people who wish to invest in preserving and disseminating these works; preventing them from so doing, in circumstances where their authors and owners have themselves lost track of the work, imposes all cost and no benefit on society. By the time such works finally enter the public domain, perhaps more than a century from initial creation, many will be irretrievable from physically deteriorated and obsolete containers.

The results of the availability studies referenced above might often also be explainable by orphaning. After all, if a would-be exploiter cannot be sure that

55. *Id.*

56. *Id.* at 852.

57. IAN HARGREAVES, DEP’T FOR BUS., INNOVATION & SKILLS, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH, at 38 (2011), <https://perma.cc/N95Y-2PQY>.

58. See, e.g., Ellen Franziska Schultze, *Orphan Works and Other Orphan Material Under National, Regional and International Law: Analysis, Proposals and Solutions*, EUR. INTEL. PROP. REV. 313, 313 (2012). Orphaning is also partly caused by the lack of formalities in copyright: see discussion in Dev S. Gangjee, *Copyright Formalities: A Return to Registration?*, in WHAT IF WE COULD REIMAGINE COPYRIGHT?, *supra* note 3, at 213, 227–29.

59. AUSTL. DIG. ALL. & AUSTL. LIBRARIES COPYRIGHT COMM.’, COPYRIGHT & THE DIGITAL ECONOMY 52 (2012), <https://perma.cc/ZA2G-3GSP>.

60. See ANNA VUOPALA, EUR. COMM’N, ‘ASSESSMENT OF THE ORPHAN WORKS ISSUE AND COSTS FOR RIGHTS CLEARANCE’ 5 (2010), <https://perma.cc/UN8R-UM5V>.

61. HARGREAVES, *supra* note 57, at 38.

62. *Id.*

63. Susan Corbett, *The Law—Is It an Ass?*, PLAY IT AGAIN (Apr. 1, 2014), <https://perma.cc/2BPB-VD7R>.

they control the rights, or ascertain the identify of those who do, that severely curtails possibilities for distribution. Presumably however, where works have sufficient commercial value, rights holders take steps to prevent their falling into such lacunae. That so many owners lose track of their holdings goes to suggest how often works' value falls below that threshold.

Many other works are not technically orphans but are lost to society nonetheless because of what might be described as "parental neglect." Owners may so little value their copyrighted works that they do not bother making them available despite having monopoly rights to do so. This presents a collective action problem: individually, most works are worth too little for owners to bother with, but their cumulative lost value to society is huge.

This evidence about orphaning and neglect demonstrates that, when society makes blanket awards of above-incentive rights (partly) in exchange for works' continuing availability, it often achieves the opposite result.

C. TO WHAT EXTENT DO CURRENT APPROACHES REWARD AUTHORS FOR THEIR CREATIVE CONTRIBUTIONS?

The above analysis shows that, if copyright was simply about incentivising initial creation and investments in ongoing availability, terms would only be justified for about twenty-five years. But it is not just about incentives at all. Vitally, copyright is also about *recognising* and *rewarding* creators. This motivation is reflected in Berne's adoption of terms based on the author's lifetime, which Ricketson described as "represent[ing] the success of an idea, rooted in natural law concepts, that authors have a natural right to property in the fruits of their creative endeavours."⁶⁴ In the U.S., which boasts a strongly utilitarian copyright tradition, it is also reflected in the termination right, which Fromer describes as "a powerful signal to authors that copyright law cares about the personhood, labor, and possessory interests they have in their work."⁶⁵ The power and importance of rewards rationales can be seen in how persistently authors' interests have been used to justify broader and longer terms of protection. For example, the rhetoric accompanying the 1998 U.S. term extension focused on the desirability of "[a]uthors [being] able to pass along to their children and grandchildren the financial benefits of their works."⁶⁶ Such arguments are effective because they appeal to our inclinations to *reward* authors for their creative contributions.

These morality-based rewards motivations are what overwhelmingly supports the award of rights above that which is necessary to achieve our incentives aims. In practice, however, relatively few of copyright's rewards end up in creators' pockets. Indeed, such a huge proportion of the benefits of increased protection is captured by others in the cultural production chain that authors are sometimes

64. Ricketson, *supra* note 21, at 783.

65. Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1806 (2012).

66. H.R. REP. NO. 105-452 (1998).

viewed as “stalking horse[s]” to mask other economic interests.⁶⁷ In the case of the U.S. term extension, for example, the beneficiary of the unbargained-for windfall from the U.S. term extension was the rights holder at the time it was granted; very little was secured to the original author or their heirs.⁶⁸

Teasing out the reasons for creators’ poor economic outcomes requires revisiting that key tenet of economic incentive theory—that works will be created only if the fixed costs of production can be recovered (hence the need to grant exclusive rights in the first place). However, that rule does not always hold good in the context of creative labor—a reality which contributes to authors’ poor financial outcomes.

Creativity is driven by a rich range of motivations, but one of the most powerful can be an individual’s intrinsic desire to solve a problem, or tell a story. Tushnet has described how “the desire to create can be excessive, beyond rationality, and free from the need for economic incentive.”⁶⁹ When authors explain why they write, they “invoke notions of compulsion, overflowing desire, and other excesses” far more commonly than the urge to make money.⁷⁰ In many cases, those reasons “are not the products of conscious choice or rational weighing of utilities.”⁷¹ This is not to say that a desire to make a living is not also a powerful motivator,⁷² but it does help explain why a great deal of creation occurs independently of economic motivations (or, at least, would occur even if those fixed costs of production could not be recovered).

Non-economic motivations may have translated poorly to outputs when high costs of production and dissemination meant the production of cultural works required significant financial investments. Today, however, many cultural artifacts can be made and disseminated for unprecedentedly little outlay, and largescale, high-quality cultural production is occurring independently of copyright’s

67. Jaszi, *supra* note 25, at 500. See also Eddie Schwartz, *Coda: Fair Trade Music: Letting the Light Shine In*, in *THE EVOLUTION AND EQUILIBRIUM OF COPYRIGHT IN THE DIGITAL AGE* 312, 315–16 (Susy Frankel & Daniel Gervais eds., 2014).

68. See Copyright Term Extension Act of 1998, Pub. L. No. 105–298, § 101, 112 Stat. 2827, 2828 (1998), <https://perma.cc/58MK-GQBK>. The only exception was that the Extension Act did amend the Copyright Act to give authors and their heirs a termination right at the end of the original seventy-five years from first publication, but only if they hadn’t exercised their prior termination right at the end of fifty-six years from first publication. See 17 U.S.C. § 304(c)–(d). See also William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 908 (1997).

69. Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM & MARY L. REV. 513, 515 (2009).

70. *Id.* at 523. See also the comments to this blog post on writer’s incomes in Australia, in which a number of authors explicitly refer to such intrinsic motivations: Annabel Smith, *How Writers Earn Money #1: Advances*, <https://perma.cc/62AK-J6TX>. Two of the comments in sequence read: “Shannon Meyerkort November 1, 2017 Thank you for your openness and honesty Annabel! I think all writers would agree though, they don’t do it for the money, but because they are compelled to tell a story.”; “Annabel Smith November 1, 2017 Absolutely. I always say this to aspiring writers: if you’re in this for fame and fortune, quit now! If you’re in it for love, it’s worth it.”

71. Tushnet, *supra* note 69, at 524.

72. See, e.g., T.J. Stiles, *Among the Digital Luddites*, 38 COLUM. J.L. & ARTS 293 (2015).

incentives.⁷³ Millions of individuals contribute product reviews, Wikipedia edits, and Internet movie database entries without any expectation of financial reward. Others supply an extraordinary amount of original music and video to online platforms (Soundcloud alone hosts over 170 million tracks⁷⁴), produce free and open source software,⁷⁵ dedicate their photographs to the public domain,⁷⁶ and record audio versions of public domain novels to share online.⁷⁷ As Boyle muses, that there seems to be some “innate human love of creation that continually drives us to create new things even when homo economicus would be at home in bed, mumbling about public goods problems.”⁷⁸

Creators’ keenness to practice their crafts can lead them to accept lower prices for their works than they would if motivated exclusively by their economic interests.⁷⁹ The Screen Actors’ Guild attempts to prevent its members from driving their own wages down to unsustainable levels by prohibiting them from taking work that does not comply with union minimums. As Johnson puts it, “the only way actors can overcome the temptation to work for below scale is to enter into a group pledge to punish one another for doing so.”⁸⁰ Nonetheless, creators regularly exhibit willingness to supply creative labor for lower wages than other forms of labor.⁸¹ And, as Towse explains, “[f]irms in the creative industries are able to ‘free-ride’ on the willingness of artists to create and the structure of artists’ labor markets, characterized by short term working practices and oversupply, mak[ing] it hard for artists to appropriate rewards.”⁸² The desirability of creative work also tends to put creators in poor bargaining positions in their dealings with investors and intermediaries, which can lead them to transfer a great deal of the rewards of

73. See, e.g., Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 492 (2015). Regarding the phenomenon of commons-based production, see Yochai Benkler, *Coase’s Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369 (2002); see also Michael J. Madison et al., ‘Constructing Commons in the Cultural Environment,’ 95 CORNELL L. REV. 657 (2010).

74. See *Introducing the New SoundCloud Home Experience*, THE SOUND CLOUD BLOG (Dec. 14, 2017), <https://perma.cc/8BRR-HBGU>.

75. The Github open source software repository alone hosts literally millions of projects. See GITHUB, <https://perma.cc/8NF5-F2N7> (last visited Feb. 3, 2018).

76. At time of writing, a Wikipedia page indexing free public domain image sources listed sites offering tens of millions of photos, drawings and other visual works. See *Wikipedia: Public Domain Image Resources*, WIKIPEDIA, <https://perma.cc/3TQX-X9PL> (last visited Feb. 3, 2018).

77. See *About LibriVox*, LIBRIVOX, <https://perma.cc/72LY-PHUD> (last visited Feb. 14, 2018) (describing the LibriVox public domain audiobook project, now in its second decade).

78. James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66-SPG LAW & CONTEMP. PROBS. 33, 45–46 (2003).

79. Tushnet, *supra* note 69, at 545.

80. Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623, 668–669 (2012).

81. See RUTH TOWSE, *CREATIVITY, INCENTIVE AND REWARD* 53–58 (2001); CHARLES DAVID THROSBY & B. J. THOMPSON, *BUT WHAT DO YOU DO FOR A LIVING? A NEW ECONOMIC STUDY OF AUSTRALIAN ARTISTS* (1994) (reporting on an extensive study of Australian artists demonstrating that artists often worked in non-arts jobs, but only to the extent necessary to support their artistic occupation).

82. Ruth Towse, ‘Copyright and Cultural Policy for the Creative Industries’, in *ECONOMICS, LAW AND INTELLECTUAL PROPERTY* 419, 427 (Ove Granstrand ed., 2003).

their creative labors to others.⁸³ Rather than limit themselves to securing the minimum they need to justify their investment, investors very often take everything they can get. For example, in the book industry, publishers typically require authors to assign exclusive rights for the entire term of copyright—even as they sub-license rights to publishers in other territories for much shorter terms.⁸⁴ Since at least 1919, the standard language in contracts between U.S. music publishers and songwriters has commonly delivered the benefit of any and all future term extensions to investors, funneling them away from creators.⁸⁵ Even influential and famous composers have sometimes been forced by their publishers into sharing authorship credit and royalties.⁸⁶ The data show that the “vast majority” of musicians make little from their copyrights and performers rights, with the lion’s share going instead to intermediaries and a small minority of stars in more powerful bargaining positions.⁸⁷ Similar dynamics apply in Hollywood, where standard form contracts routinely require artists to sign over their rights not just within the realm of planet earth, but throughout the universe at large.⁸⁸ These dynamics of cultural labor markets mean that what publishers take from authors can be largely divorced from both the cost of their investment and the work’s ultimate commercial value (typically largely unknown at the time of transfer).

These realities are not new. Indeed, they have been known at least as far back as 1737. At that time, recognizing that the true worth of books is often unknown until well after publication, and that authors may, out of necessity, sell their entire rights to investors, British legislation proposed limiting transfers to a maximum of ten years, followed by reversion to authors.⁸⁹ That proposal was never enacted, but almost 250 years later the House Report for the (ultimately enacted) U.S. termination right focused similarly on the “impossibility of determining a work’s value until it has been exploited,” as did the Supreme Court’s interpretation of those provisions soon after they came into operation.⁹⁰

83. *Id.* at 429; Rebecca Tushnet, *supra* note 69, at 545.

84. See *A Publishing Contract Should Not Be Forever*, AUTHORS GUILD (July 28, 2015), <https://perma.cc/67DE-JQBN>.

85. William F. Patry, *The Copyright Term Extension Act of 1995: Or How Publishers Managed to Steal the Bread from Authors*, 14 CARDOZO ARTS & ENT. L.J. 661, 675–76 (1996).

86. *Id.* at 665.

87. TOWSE, *supra* note 81, at 126.

88. See, e.g., Dionne Searcey & James R. Hagerty, ‘Lawyerese Goes Galactic as Contracts Try to Master the Universe,’ WALL ST. J. (Oct. 29, 2009, 12:01 AM), <https://perma.cc/CT3N-LFEF>; *Work for Hire Agreement #1*, DONE DEAL PROFESSIONAL (Jan. 31, 2007), <https://perma.cc/TP83-3P5E> (follow “Examples” hyperlink, then follow linked title of document).

89. See *An Act for the Encouragement of Learning*, 10 GEO. 2, 9 (1737), in PRIMARY SOURCES ON COPYRIGHT (1450-1900) (Lionel Bently & Martin Kretschmer eds.), <https://perma.cc/8JR3-3CZH>. The Statute of Anne itself, in operation from 1710, provided reversionary rights to authors if they were still living at the end of the initial fourteen-year term. See Statute of Anne, 8 Ann. c. 21, § 11 (“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 Term of fourteen years.”).

90. See H.R. REP. NO. 94-1476, at 124 (1976); *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 172–73 (1985) (“More particularly, the termination right was expressly intended to relieve authors of the consequences of ill-advised and unremunerative grants that had been made before the author had a fair

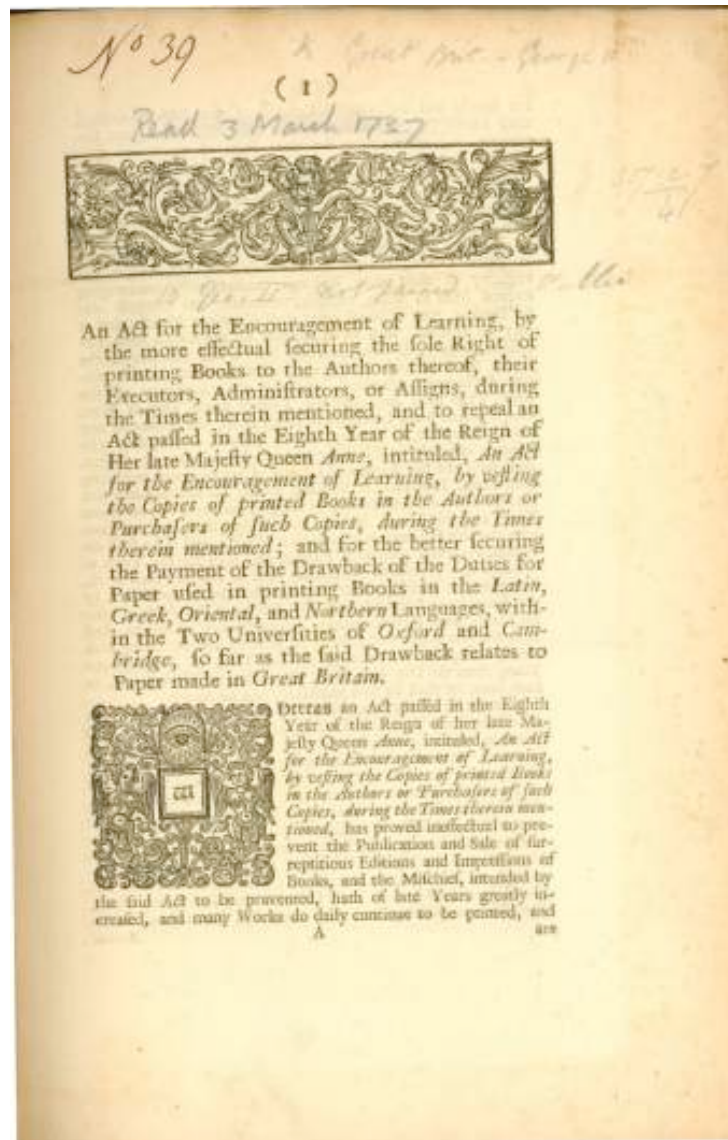


Figure 1: the opening page of the 1737 draft legislation. Image credit: L. Bently & M. Kretschmer eds., *An Act for the Encouragement of Learning (Draft)*, London (1737), PRIMARY SOURCES ON COPYRIGHT (1450-1900), <https://perma.cc/DM3D-N733>.

opportunity to appreciate the true value of his work product.”). For description and analysis of the various permutations of termination right in U.S. law, see generally R. Anthony Reese, *Termination Formalities and Notice*, 96 B.U. L. REV. 895 (2016).

There are of course certain “floors” to what publishers can or will offer even in the absence of statutory limits on what authors can transfer. These may exist as part of copyright law (such as mandated minimum remuneration rights for authors), general law (for example, prohibitions on “unconscionable” contracts), as a matter of competition (where the offered amount is so low that a rational competitor would outbid it) or morality (where publishers are “shamed” for paying below a certain level). Warner Brothers apparently responded to this latter motivation after the media began bringing attention to the plight of the creators of “Superman,” decades after they sold the comic strip and character outright for \$130. While their creation was still generating hundreds of millions of dollars for others, the men were entering their old age virtually destitute. Describing itself as under a “moral obligation,” Warner Brothers agreed—almost forty years after the initial grant—to provide Superman’s first creators with health insurance, a modest annual annuity, and attribution.⁹¹ However, these floors set a low bar, and rarely prevent authors from being required to hand over the lion’s share of their economic interest as a condition of investment or distribution in the first place.

Ricketson has argued that, since so many copyrights tend to be transferred to intermediaries, copyright duration “become[s] of secondary importance” to authors.⁹² Where investors hold the rights, he suggests that the relevant question becomes: “What length of protection is necessary to ensure the continuance of investment?”⁹³ In an environment where rights are routinely extracted, authors’ interests might be better protected by “appropriate safeguards for the licensing and assignment of their rights” than by longer terms.⁹⁴ Certainly we can see that longer terms, without steps to secure them to authors, do little to direct rewards to their proper pockets.⁹⁵

II. COPYRIGHT’S OUTDATED ASSUMPTIONS

When evaluated against its fundamental aims, copyright comes into focus as a bad deal. I have argued that current approaches award far more than what is necessary to incentivize even the biggest investments—and they do so in a way that is actively counter-productive to the underlying access aims those incentives are intended to promote. At the same time, they see much of the benefit of copyright’s

91. See *Siegel v. Warner Bros. Ent. Inc.*, 542 F. Supp. 2d 1098, 1107, 1112-13 (C.D. Cal. 2008).

92. Ricketson, *supra* note 21, at 784.

93. *Id.*

94. *Id.*

95. See, e.g., Silke von Lewinski, *EC Proposal for a Council Directive Harmonizing the Term of Protection of Copyright and Certain Related Rights*, 23 INT’L REV. OF INDUS. PROP. & COPYRIGHT L. 785, 788–89 (1992) (“Usually, assignment or transfer of copyright goes to an exploiting enterprise for the entire duration of protection. Therefore, an extension of the term of protection lies primarily in the interest of such exploiting enterprises in regaining their investments. . . . Because a law of copyright contracts providing sufficient protection for authors does not exist yet, an extension of the term of protection will to a considerable extent benefit those exploiting copyright works.”) (internal citations omitted).

rewards component, justifiable only for authors themselves, being diverted to investors instead.

As foreshadowed in this paper's Introduction, I argue that this situation has come about, in large part, because many of copyright's underlying assumptions no longer hold good. Below, I identify and explain the most significant of these failed premises. Updated versions are then proposed to better reflect current socio-technological realities, and form the basis for the alternative bargain that follows.

A. FAILED PREMISES

1. There Is No Downside To the Grant of Terms That Will Almost Certainly Outlast Their Owner's Interest, Because Most Works Will Be Quickly Lost Regardless

Explicit evidence of this assumption can be found in Samuel Clemens' 1906 testimony to the U.S. Congress.⁹⁶ Advocating for longer terms, he pointed out there is "only one book in 1000 that can outlive the [existing] forty-two-year limit." When copyrights expired, those few valuable books continued to be published, and the valueless continued not to be: the only difference lay in whether publishers were obliged to continue sharing their profits with authors or their heirs. Thus, Clemens argued, lawmakers might as well grant long terms to every single work. That would enable authors to share in the benefits of those few that proved of lasting value—the rest would be lost to obscurity regardless.

At that time, he was correct: high marginal costs of copying and distribution indeed meant that only the most popular and valuable works could be made enduringly available. This might help explain why the development of international norms governing duration has been, as Ricketson puts it, "notable for an almost complete absence of debate of the policy and theoretical issues involved."⁹⁷ The assumption that there was no downside then in giving long terms to all works still held good in 1948, when the Brussels Act of the Berne Convention first mandated minimum terms (for most works) of author's life plus fifty years. And indeed, most participants in the copyright ecosystem undoubtedly still understood it to work that way in 1994, when those minimums were baked into (and made meaningfully enforceable by) TRIPS. Almost immediately after, however, the popularisation of the Internet and digital technologies drove the marginal cost of copying and global distribution, for many kinds of works, to virtually nothing. That means most works now don't *have* to be lost—and that there are real costs imposed by the automatic grant of long terms regardless of whether their owners want them, need them or even know they exist. The problem is worse for some works than others, with a 2010 report for the European

96. *A Bill to Amend and Consolidate the Acts Respecting Copyright: Hearing on S. 6330 and H.R. 19853 Before the H. and S. Comms. on Patents, 59th Cong. (1906)* (statement of Samuel L. Clemens [Mark Twain]), in *INTELLECTUAL PROPERTY: LAW & THE INFORMATION SOCIETY* 286-89 (James Boyle & Jennifer Jenkins eds., 3d ed. 2016).

97. Ricketson, *supra* note 21, at 777.

Commission reporting that ninety percent of the photographs held in UK museums were orphaned.⁹⁸ Even books, typically emblazoned with the names of both author and publisher, were “conservatively” estimated to be orphaned at a rate of thirteen percent.⁹⁹ Where works’ owners can be found at all, cultural institutions can spend up to fifty times the cost of digitisation tracking down works’ owners.¹⁰⁰ Neglected copyrights are causing works to languish, unexploited, even when investors want to publish them and authors and readers want them read.

2. If Copyright Is Granted, Access Will Follow

Copyright’s instrumentalist aims are not intended to incentivize creation as an aim in and of itself, but so that societies can benefit from widespread access to knowledge and culture. However, copyright owners have no positive obligations to make works available in order to obtain any part of that protection. Instead, the approach entrenched in Berne and TRIPS—for rights to be paid in full, upfront—seems premised on the idea that, if a work is awarded copyright, access will follow.

As we see from the scale of the orphan works and availability problems already discussed, we can no longer rely on this to happen.¹⁰¹ In large part, the reasons identified immediately above apply to explain the failure of this assumption too: reduced costs of copying and distribution mean it is feasible to make far more works enduringly available than was the case in the past, but that does not mean that copyright owners themselves will be interested in being the ones to do so. Reductions in the costs of initial production for many kinds of work might also disrupt this assumption: after all, if a work costs less to make, it follows that the commercial imperative to exploit lessens also.¹⁰²

Additionally, however, the failure of this assumption can be attributed to the explosion in the range of business models available to creators and cultural investors. Consider this change as it relates to book distribution. In 1971, when Berne was last revised, an author feasibly had just one way of making her work available to the public: print publication via a publisher. High marginal costs of copying, storage and distribution meant that works could remain in print only for as long as they continued to sell in sufficient numbers (or the author or investor were willing to subsidize their production). Today there are myriad alternatives to that model, including any combination of print-on-demand, digital sale, digital subscription and library licensing. Self-publishing, via services such as

98. VUOPALA, *supra* note 60, at 29 (citing GOWERS, *supra* note 30).

99. *Id.* at 19. This data was sourced from the Society of College, National and University Libraries and was current as of Jan. 2010. The methodology for calculating this figure is set out in the report.

100. *Id.* at 24. This data was sourced from the University of Innsbruck Library, Austria, as of December 2009.

101. See *supra* notes 44, 48-56 and accompanying text.

102. See, e.g., GIBLIN, CODE WARS, *supra* note 1, at 142-45.

Smashwords, Amazon or Apple iBooks, is also increasingly viable: by 2015, about one third of the bestselling ebooks on Amazon were self-published.¹⁰³

The availability of this new multitude of options is significant. The mere fact one party holds the rights for a work does not mean that they will have the interest or capacity to fully exploit them in all the formats and markets where they have (or develop) value. As developed in Thompson's empirical analysis of the U.S. and U.K. trade book industries, investors may have rational reasons for forsaking such opportunities. In work built from years of insider interviews, Thompson describes how the main trade publishing houses achieved growth amidst flat sales by reducing staff and cutting costs. Rather than investing in more titles, the aim was to consolidate, and then maximize profit by selling more copies of a smaller number. Those tactics saw sales forces reduced and increasingly overstretched, to the point where insiders reported being able to provide support to only about twenty-five percent of new titles published.¹⁰⁴ Not surprisingly, those practices resulted in heavy field polarization, whereby bestselling titles came to sell more copies than ever but those in the range of ten thousand to fifty thousand paperbacks declined significantly.¹⁰⁵ In such consolidated markets, investors may rationally avoid exploiting the full range of possible uses, to reduce costs and avoid splitting the revenues they might obtain from mega sellers. While such strategies may further investors' immediate interests, they do not ideally promote society's interest in access.

This century's explosion of new business models provides another lesson too. Under Berne/TRIPS, copyright in works must last at least the author's lifetime plus fifty years. Such time horizons can usher in enormous changes. Just because an investor was best placed to exploit a particular work at one point in time, that's not to say she still will be decades later. If copyright is to be an effective tool for promoting access, it needs better mechanisms for freeing up rights to new uses as circumstances change.

3. Copyright Will Get Authors Paid

This assumption differs from the others in that it's perhaps arguable it has never really held good: as we saw from the 1737 draft legislation referenced above, recognition of authors being unfairly extracted of their copyrights has existed for almost as long as copyright itself. Be that as it may, the idea that it gets authors paid is a core article of faith in support of copyright. Today however that faith is being tested as never before—particularly for professional writers, who in recent years have suffered truly precipitous declines in income.¹⁰⁶

103. See Alexandra Alter, *Meredith Wild, a Self-Publisher Making an Imprint*, N.Y. TIMES (Jan. 30, 2016), <https://nyti.ms/2ktrlcp>.

104. JOHN THOMPSON, *MERCHANTS OF CULTURE: THE PUBLISHING BUSINESS IN THE TWENTY-FIRST CENTURY 189-90* (2d ed., 2012).

105. *Id.* at 389-91.

106. See THE AUTHORS GUILD, *THE WAGES OF WRITING 4-5* (2015), <https://perma.cc/BPE6-9B69> (U.S.); THE AUTHORS' LICENSING AND COLLECTING SOCIETY, *WHAT ARE WORDS WORTH NOW? FURTHER FINDINGS 4-5* (2017), <https://perma.cc/8V46-ZC79> (U.K.); JAN ZWAR ET AL., *AUSTRALIAN*

There are numerous explanations for this, including the field consolidation and polarization so masterfully chronicled by Thompson.¹⁰⁷ One other of particular (and under-recognized) import concerns the increasing divergence of authors' and publishers' interests. Once again, the trade book industry usefully illustrates. Publishers typically take exclusive rights for the entire term of copyright. Before digital, this was not so problematic: after all, there were no realistic options for keeping a book available once sales fell below a certain feasibility threshold, regardless of who controlled the rights, and that meant the author's interest and the publisher's interest had some significant degree of alignment. Now that decreases in the marginal cost of distributed copying have generated so many more options, however, it may not be in the author's interest for one publisher to hold exclusive rights ongoing. As a result, contract duration has become an increasingly urgent priority for authors' organizations worldwide.¹⁰⁸

To get a sense of how authors' and publishers' interests can diverge over time, it is useful to look to the terms which publishers offer public libraries older books for digital lending. Figure 2 lists winners of the Pulitzer Prize for fiction for ten years starting in 1982 (i.e., twenty-five years ago at time of writing), the current price of a paperback edition, and the price and licence terms on which it is purchasable by U.S. and Australian public libraries. Figure 3 shows the same data for the four winners from 2013-2016 (there was no prize awarded in 2012) to provide contrast with the treatment of newer titles.

AUTHORS: INDUSTRY BRIEF NO. 3: AUTHORS' INCOME 2 (2015), <https://perma.cc/HTT5-ZAE7> (Australia).

107. See *supra* notes 104-105 and accompanying text.

108. See, e.g., Society of Authors, *An Open Letter to Members of the Publishers Association & the Independent Publishers Guild* (Jan. 5, 2016), <https://perma.cc/G98Q-8KLH> (emphasizing contract duration under "T" term of "CREATOR" principles). This letter was part of a broad international push to seek reform in contractual terms. See Alison Flood, *Philip Pullman: Professional Writers Set to Become "an Endangered Species"*, *GUARDIAN* (Jan. 7, 2016), <https://perma.cc/JS78-2844>. See also *AUTHORS GUILD*, *supra* note 84.

Pulitzer Prize winners 1982-1991	Publisher	Available for e-lending in US?	Available for e-lending in Australia?	Paperback price (Amazon)	US licence type	US licence price	Australia licence type	Australia licence price
Updike, Rabbit Is Rich	Penguin Random House	✓	✓	\$12	OC/OU	\$48	MA: 36 checkouts/2 years	\$17
Walker, The Color Purple	Open Road	✓	✗	\$12	OC/OU	\$30	-	-
Kennedy, Ironweed	Penguin Random House	✓	✓	\$12	OC/OU	\$51	MA: 12 months	\$13
Lurie, Foreign Affairs	Open Road	✓	✓	\$11	OC/OU	\$32	MA: 36 checkouts/2 years	\$15
McMurtry, Lonesome Dove	Simon & Schuster	✓	✓	\$12	MA: 12 months	\$20	MA: 52 checkouts/2 years	\$9
Taylor, A Summons to Memphis	Penguin Random House	✗	✗	\$10	-	-	-	-
Morrison, Beloved	Penguin Random House	✓	✓	\$9	OC/OU	\$48	MA: 36 checkouts/2 years	\$17
Tyler, Breathing Lessons	Penguin Random House	✓	✓	\$11	OC/OU	\$48	MA: 36 checkouts/2 years	\$15
Hijuelos, The Mambo Kings [...]	Farrar, Straus and Girous	✗	✗	\$12	-	-	-	-
Updike, Rabbit at Rest	Penguin Random House	✓	✓	\$11	OC/OU	\$48	MA: 36 checkouts/2 years	\$22

Figure 2

Pulitzer Prize winners 2013-2016	Publisher	Available for elending in US?	Available for elending in Australia?	Paperback price (Amazon)	US licence type	US licence price	Australia licence type	Australia licence price
Johnson, The Orphan Master's Son	Penguin Random House	✓	✓	\$8	OC/OU	\$51	MA: 36 checkouts/2 years	\$15
Tarrt, The Goldfinch	Little, Brown & Co	✓	✗	\$13	OC/OU	\$90	-	-
Doerr, All the Light We Cannot See	Simon & Schuster	✓	✓	\$12	MA: 12 months	\$19	MA: 26 checkouts	\$12
Nguyen, The Sympathizer	Grove Atlantic	✓	✗	\$11	OC/OU	\$16	-	-

Figure 3

Prices in USD, rounded to nearest dollar. Prices offered to libraries valid as of July 27 2017. Paperback prices take the average of the last 50 price changes as of 13 December 2017, sourced via camelcamelcamel.com. Publishers are listed as the parent group where they are an imprint of a larger organisation.

This is a tiny sample, but nonetheless provides some useful insights. Notably, twenty percent of the older Pulitzer-winning books are not available to U.S. libraries and thirty percent are not available to Australian ones on any terms at all. For those that are available, the data show that the terms offered to U.S. and Australian libraries vary significantly. U.S. libraries tend to be offered “OC/OU” (“one copy, one user”) licences, which permit them to hold the books on a perpetual basis, for lending to one user at a time, in exchange for a higher upfront payment. Australian libraries typically pay less up front in exchange for more limited “metered access” licences, which limit the number of checkouts and/or time the title can be held within the collection. Thus, a U.S. library can license Updike’s classic *Rabbit at Rest* for \$48, and lend it out to one user at a time indefinitely, while an Australian library can purchase it for \$22 (i.e. twice the paperback price) and it will be deleted from its collection in two years or after thirty-six checkouts, whichever comes first. Interestingly, there seems to be little attempt at discriminating between titles on price: of the five available titles published by Penguin Random House, four are offered to U.S. libraries for \$48, and one for \$51. The single Penguin Random House title in the “recent” prize list is also set at \$51. The lack of price differentiation between newer and older titles might surprise, given that we know (given high rates of depreciation on the trade book industry) that older books are not a good substitute for new ones.

Obviously, such pricing and licencing strategies influence which books libraries add to their collections. High upfront prices and “exploding” licences (which see books deleted from collections even if never borrowed) can both act as deterrents to purchase, particularly for older books that are likely to have relatively low demand. However, the strategies make sense when you realise that publishers are generally interested in maximizing their overall share of library collection budgets, rather than in maximising the income of any individual author. They are also not necessarily interested in any individual book continuing to be read, which may well be part of an author’s interest. It is probably quite rational for publishers to price their back catalogue highly, knowing that fewer books will be sold, but overall profits will be larger. However, those strategies can mean less income for individual authors than they might otherwise have had. That’s problematic, when we recollect that for titles that are twenty-five years old and more, the continued existence of copyright is justifiable overwhelmingly as being about rewards for authors.

We see divergence in authors’ and publishers’ interests earlier too. Recall Thompson’s study into the U.K. and U.S. trade book industries, in which he found that the industry “consolidation” that enabled it to achieve growth in an era of flat sales left it unable to provide sales support to more than about one-quarter of titles on release. The interest of those publishers is in selling as many copies as possible with the smallest overheads, and that has driven development of an increasingly polarized field featuring a few mega-sellers and far fewer midrange books than was the case in the past.¹⁰⁹ In such a market, it makes sense that investors might

109. See *supra* notes 104-105 and accompanying text.

rationally decline to pursue other potential revenue streams, particularly those that might not individually generate much income (or which might potentially eat into the sales of those mega books). But again, those potential revenues are likely to be much more significant to individual authors, particularly in this era of declining incomes.

Research from the British Authors' Licensing and Collecting Society recently found that seventy percent of authors who reclaimed their rights from publishers ended up earning more money from their works after reversion.¹¹⁰ This sample exhibits self-selection bias, but nonetheless it shows that leaving works in the hands of an initial publisher for decades won't necessarily result in the best outcomes for authors. If we really want authors to get paid, consideration needs to be given to ways of freeing up rights for future exploitations that might not be maximally valued by the initial investor.

4. Registration Requirements Are Costly and Onerous To Authors

Registration requirements certainly were expensive and often unfair in 1908, when the Berlin Act first prohibited formalities on the exercise and enjoyment of rights—and even in 1994 when TRIPS was agreed (and when less than half a percent of the world's population yet had access to the Internet).¹¹¹ Today of course registration online has become so rapid and cheap to be an unremarked feature of daily life (at least in developed nations). At last count, I had personally registered for around five hundred different websites and apps. Currently, registrations exist for over three hundred and thirty *million* top level domain names.¹¹² Digital-era copyright registration would be a very different beast to that which prevailed when the first Model Ts were rolling off Ford's production line, with potential not only to increase revenues by connecting copyright owners to potential licensees, but also, as discussed below, to help better secure to authors their share.

5. Departing from Berne's Minima Is Definitionally Worse for Authors

Berne is only intended to regulate members' treatment of other members' nationals. Thus, states are expressly permitted to depart from Berne minima with regard to works "first published" within their borders.¹¹³ This principle of independence of protection is one of the three "basic principles" on which Berne is based.¹¹⁴

110. See THE AUTHORS' LICENSING AND COLLECTING SOCIETY, *supra* note 106, at 9.

111. See Julia Murphy & Max Roser, *Internet, OUR WORLD IN DATA* § I.1 (2018), <https://perma.cc/7GMQ-7AXG>.

112. See VERISIGN, THE DOMAIN NAME INDUSTRY BRIEF 2 (2017), <https://perma.cc/FA6J-D545>.

113. See Berne Convention for the Protection of Literary and Artistic Works, art. 5, Sept. 9, 1886, *as revised* July 24, 1971, and *as amended* Sept. 28, 1979, S. Treaty Doc. No. 99-27 (1986), <https://perma.cc/A8MA-9CGV>.

114. See WORLD INTELLECTUAL PROPERTY ORGANIZATION, *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, <https://perma.cc/TJ6K-UE3Q>.

Despite that, it is assumed that Berne's standards are definitionally more advantageous to authors, and thus that nations would rarely (if ever) choose to depart from them. For example, Ginsburg writes: "Although neither [Berne nor TRIPS] prescribes the level of protection a member State must afford authors whose works were first published in that State, most countries, *wary of treating their own authors worse than foreign authors*, end up incorporating the international norms in to domestic legislation."¹¹⁵

It remains the case that nations are, for good reason, wary of giving their own authors less preferential treatment. However, the discussion above has shown how radically the costs and benefits of copyright have changed with the advent of digital (particularly with regard to formalities), and how poorly existing approaches secure rewards to authors. Policy responses need also to change. If we have reached a point where judicious use of registration could better secure to authors their share, as I will argue more fully below, then it is also time to challenge the orthodoxy that domestic Berne departure is definitionally bad for authors.

B. WHAT ASSUMPTIONS SHOULD WE BE WORKING FROM INSTEAD?

The copyright equation has fundamentally altered over the last century, while its fundamental structure has largely remained unchanged. This helps explain why copyright now does such a poor job of achieving its aims.

We have seen that copyright's main treaties are effectively unamendable—but that does not mean we have to keep regulating everything exactly the same way as we have in the past. A better approach would be to update our assumptions about copyright's costs and benefits, identify what we want to achieve, and then seek out a pathway through the treaty framework that will get us closest to being able to achieve those aims. So what might updated assumptions look like?

1. Most works can be made enduringly available in some form or another, even if not necessarily via the same distribution model which first took them to market.
2. While maintaining investment incentives, rights need to be regularly "freed up" to facilitate use by those willing to make the desired investments in availability and access.
3. Formalities can be cheap and easy, at least in developed countries. They shouldn't be ruled out just because they might require domestic departure from Berne minima, particularly if that would help secure a bigger share to authors.
4. The interests of authors and investors are different. Rights should be allocated so as to properly satisfy society's incentives and rewards motivations.

In the following section I use these updated assumptions as a guide to navigating the international treaty framework and sketching out an alternative copyright

115. Jane C. Ginsburg, *Contracts, Orphan Works, and Copyright Norms: What Role for Berne and TRIPS?*, in *WORKING WITHIN THE BOUNDARIES OF INTELLECTUAL PROPERTY* 471, 483 (Rochelle C. Dreyfuss et al. eds., 2010).

bargain achievable within its contours. It shows that, although the treaties do impose certain “immovable obstacles,” they nonetheless leave scope for meaningful reform that could reconceptualize parties’ rights and responsibilities, reflect current social and technical realities, and bring about a copyright bargain that better achieves its aims.¹¹⁶

III. AN ALTERNATIVE BARGAIN: NAVIGATING COPYRIGHT’S INTERNATIONAL TREATY FRAMEWORK TO BETTER ACHIEVE ITS AIMS

What could an alternative bargain, built on assumptions that better reflect the realities of the world we live in, while remaining within existing treaty texts, actually look like?

A. AUTOMATIC REVERSION TO AUTHORS

We have seen that, after about twenty-five years, copyright’s initial incentive rationales are satisfied, with the remainder of the term overwhelmingly justified as an additional reward for authors. We have seen also that current approaches see that rewards component being too-often captured by investors. Given all we know about cultural labor markets, one way of better securing authors their share would be to limit what they can give away in the first place. What if authors could only assign or exclusively license rights for a maximum of twenty-five years, after which the rights would automatically revert back to them in full?

There are no treaty obstacles to such an approach, as Berne and TRIPS are silent as to ownership of rights. Indeed, Canadian law already automatically reverts works to heirs twenty-five years after the author’s death,¹¹⁷ and U.S. law permits authors or their heirs to reclaim rights in most works thirty-five years after grant.¹¹⁸

The legal literature around reversionary rights has sometimes hypothesized, though so far without empirical substantiation, that reversionary arrangements must result in authors receiving lower upfront payments.¹¹⁹ That would be a problematic result given that creative incomes already tend to be very low,¹²⁰ and that, relative to investors, authors tend to be more risk averse, having shorter time horizons for recouping their investments.¹²¹ However, economists Karas and Kirstein have

116. Elsewhere, I have led a similar reimagination exercise unconstrained by these treaties. *See generally* Giblin & Weatherall, *supra* note 6.

117. Copyright Act, R.S.C. 1985, c C-42, § 14(1) (Can.).

118. *See* 17 U.S.C. § 203. These rules apply to grants made on or after Jan. 1, 1978. Slightly different termination rules apply to works pre-dating the 1978 Act. *See* 17 U.S.C. § 304.

119. *See e.g.*, Guy A. Rub, *Stronger than Kryptonite? Inalienable Profit-Sharing Schemes in Copyright Law*, 27 HARV. J.L. & TECH. 49, 97-98 (2013); Kate Darling, *Occupy Copyright: A Law & Economic Analysis of U.S. Author Termination Rights*, 63 BUFF. L. REV. 147, 165-66 (2015); Amy Gilbert, Note, *The Time Has Come: A Proposed Revision to 17 U.S.C. § 203*, 66 CASE W. RES. L. REV. 807, 810 (2016).

120. *See e.g.*, TOWSE, *supra* note 81; Throsby & Thompson, *supra* note 81. *See also supra* note 106 (detailing declines in author salaries).

121. Darling, *supra* note 119, at 164.

recently questioned assumptions that termination drives down initial prices. After modelling the U.S. termination law, they found that, rather than making contracts riskier for authors, termination contracts can actually *reduce* the risk:

if . . . the present value of royalty earnings avoided through a termination decision is smaller than the present value of termination revenue streams, we have the contrary effect, and the amount of risk in termination contracts decreases. In other words, the termination right would not necessarily force authors into lotteries, at least no more so than in the conventional copyright systems.¹²²

It makes sense that a reversionary term around twenty-five years would have little (if any) downward effect on prices.¹²³ After all, the present value of those later years of copyright protection is zero or virtually zero at the time of contracting, so the existence of a reversionary right should also make zero or virtually zero difference to the amount paid upfront. Where reversionary rights currently operate (e.g., after thirty-five years in the US, or twenty-five years after the author's death in Canada), I have been unable to locate any data suggesting that those authors receive less than counterparts in equivalent jurisdictions. Significantly also, in considering whether there is likely to be any impact, it's important to remember that cultural labor markets do not operate in the ordinary fashion. As we have seen, practitioners exhibit willingness to provide creative labor for far lower rates than other forms of labor,¹²⁴ making art, as Doctorow puts it, "an *irrational* market."¹²⁵ In cases where prices paid to authors are already divorced from the value of their labor, and bearing in mind that longer than that the value beyond twenty-five years would be virtually zero at the time of contracting, that length of reversionary term ought not have downward impact on prices. If however opportunistic investors *were* to threaten to use that as excuse to further reduce payments to authors, then that could be countered by regulation securing unwaivable minimums to authors, drawing inspiration from one or more of the continental European countries that already have them in place.¹²⁶

122. Michael Karas & Roland Kirstein, *Efficient Contracting Under the U.S. Copyright Termination Law*, INT'L REV. L. & ECON. (forthcoming 2017) (manuscript at 7) (authors' corrected proof available at <https://perma.cc/67B3-2GAK>).

123. Cf. Kretschmer, *supra* note 35, at 46 (proposal for ten-year reversionary terms). Given the same discount and cultural depreciation rates as used here, that could indeed be expected to sometimes have a downward impact on initial prices paid (though it may also ultimately result in higher earnings in many cases). Such proposals for short reversionary terms are worthy of much fuller experimentation and modelling to better understand likely overall impacts. I note that the Canelo digital publishing company requires that authors grant exclusive licenses of only five years, in exchange for royalties of at least fifty percent, demonstrating that some forms of publishing require investments that can be recouped on very short time horizons. See CANELO, *supra* note 37.

124. See *supra* note 106 and accompanying text.

125. 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 (Dec. 8, 2017, 10:54 AM), <https://perma.cc/8LCG-7D4Y>.

126. These systems are broadly outlined and evaluated in SÉVERINE DUSOLLIER ET AL., EUR. PARLIAMENT DIR. GEN. FOR INTERNAL POLICIES, CONTRACTUAL ARRANGEMENTS APPLICABLE TO CREATORS: LAW AND PRACTICE OF SELECTED MEMBER STATES (2014).

To prevent subversion, authors would also need to be protected against attempts to extract all future twenty-five year blocks “upfront,” i.e., agreements to transfer rights in advance would need to be void. Otherwise, we would end up with the same problem as with previous reversionary systems, which saw publishers too often taking all they could get.¹²⁷

It would also be necessary to avoid situations where investors were disincentivized from further investment by a too-short remaining period of protection. For example, imagine a book author who enters a contract with a publisher to publish the book, granting exclusive rights to reproduce the text for twenty-five years and reserving the film rights. In the twenty-fourth year of the publication contract, a film adaptation is released. This would be a great opportunity to re-market the book, but the publisher may be reluctant to make those investments knowing that their exclusivity period was about to lapse.¹²⁸ While the author would be restricted from granting more than twenty-five years exclusivity at any time, there is no reason why the author and publisher should not be able to mutually agree to terminate the previous grant and enter into a fresh one for a new period of up to another twenty-five years—this time each with much better knowledge of what the work is worth.

B. WHAT COULD WE GAIN?

With such measures in place however, such a system suggests intriguing possibilities—not only for improving authors’ remuneration, but for achieving copyright’s access aims as well.

Upon expiry of that initial grant, authors could re-exploit in any way they wished, including by assigning it back to the same intermediary for up to another twenty-five years. As we have seen, the vast majority of most works’ commercial value tends to be extracted very soon after publication.¹²⁹ In the case of books, that can be within just a single year.¹³⁰ Those realities might make it infeasible for the work to continue being distributed ongoing via print publication or distributed through book stores.¹³¹ However, as the Authors Guild has argued, reversion after relatively brief terms can provide welcome flexibility for both writers and investors, as well as open up possibilities for alternative exploitations:

When the contract expires, if a book is still doing well, the author and publisher might negotiate another time-limited deal—or the author might choose to move the book to

127. See generally Lionel E.F. Bently & Jane C. Ginsburg, “The Sole Right . . . Shall Return to the Authors”: *Anglo-American Authors’ Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright*, 25 BERKELEY TECH. L.J. 1475 (2010); Patry, *supra* note 68, at 916–18 (discussing U.K. and U.S. reversionary laws). Note also that the draft English legislation, dated 1737, also included such a protection. See *supra* note 89.

128. See Ruth Towse, *Copyright Reversion in The Creative Industries: Economics and Fair Remuneration*, 41 COLUM. J.L. & ARTS 467 (2018) (in this volume).

129. See *supra* notes 30–35 and accompanying text.

130. GOWERS, *supra* note 30, at 52.

131. See JOHN THOMPSON, *supra* note 104, at 283–91 (describing the shortening shelf life of books, and accelerating speed with which physical copies are remaindered by retailers).

a house that has put more effort into marketing the author's later works. If the book is no longer gaining support from the original publisher, the author might choose to self-publish it or take it to another publisher. In any case, a time-limited contract gives authors the leverage and flexibility that they need in today's publishing environment.¹³²

Wholesale reversion could also encourage emergence of new markets for older books that are unfeasible under current arrangements. Consider the possibilities around direct licensing by authors of their older works for lending in libraries. Currently, publishers (rather than authors) are overwhelmingly the ones who sell books into libraries for lending. That makes sense since publishers typically take distribution rights for entire terms, leaving very few "published" book authors with the rights to authorise this kind of use. We saw above that investors can exploit these rights in such a way as to maximise their overall share of library collections budgets, rather than maximise revenues for any given author. As discussed above, authors can sometimes regain their rights by triggering contractual reversion clauses where their books have gone "out of print."¹³³ However, even where a book does satisfy that (increasingly outdated) notion, this requires authors to understand their rights, take positive action to assert them, and *then* seek out a new distributor. These barriers help explain why there are not yet any widespread direct licensing models directly between authors and ebook lending aggregators and/or libraries.¹³⁴

Now imagine an environment where every book author would automatically regain her rights after a maximum of twenty-five years. Suddenly it would make sense for services to facilitate the direct licensing of books by authors to libraries. And, unlike typical commercial publication contracts, which allocates just ten to twenty-five percent of ebook revenues to authors, those directly licensing their reverted rights would be entitled to the whole (minus a cut to the platform provider for providing the service and processing payments).¹³⁵ Libraries could potentially even collaborate to provide such platforms themselves.

The revenues that would result from such new markets may often be small for any given work, which is why the original publishers might rationally adopt pricing strategies that forsake them (particularly in consolidated markets such as that described by Thompson).¹³⁶ However, even if they are not interesting to investors, they may well amount to a valuable source of income for individual authors. Let's again use that data around those Pulitzer Prize winning older novels as an example. An Australian library may be unable to justify paying double the paperback price for a licence that will see the book deleted from its collection two years later, even if never borrowed at all. However, it could well be able to license the book for

132. AUTHORS GUILD, *supra* note 84.

133. *Id.*

134. See Part III.D, *infra* for further discussion of the problems with out-of-print clauses as typically drafted today.

135. *Half of Net Proceeds Is the Fair Royalty Rate for E-books*, AUTHORS GUILD (July 9, 2015), <https://perma.cc/5U9H-H2UX>.

136. See Thompson, *supra* note 104.

equitable per loan remuneration paid directly to the author—ultimately generating new revenues for authors, and keeping more books read.

C. WHAT COULD WE LOSE? THE POTENTIAL TO ORPHAN

Since rights would be opened to the possibility of new exploitations after a specified period, the proposed reversionary system would also beneficially reduce the concentration of rights that results in oligopoly power and perpetuates authors' poor remuneration outcomes. However, we would need to be very careful to ensure that it would not actually worsen the problem of orphaned or neglected works. Automatic reversion could potentially result in people ending up with rights without even realising, or perhaps direct them to individuals who have no interest in further exploitation. Thus, if an automatic reversion system were to be effective in achieving its aims, it would need also to be supported by an ownership registry to facilitate rights clearance. Berne and TRIPS prohibit formalities imposed on the "enjoyment and exercise" of treaty rights.¹³⁷ However, formalities on ownership transfers are permitted.¹³⁸ That means nations could validly require registration of transfers and other grants of exclusive rights. An appropriately low-cost online registration system would not be onerous given that most jurisdictions already require transfers and exclusive licenses to be evidenced in writing. And, if attempted transfers were to be void unless they are registered by the assignee, that would strongly incentivise compliance.

But that would still not entirely solve the potential for orphaning. Such a registry could be up to twenty-five years out of date by the time rights reverted. Although authors could be encouraged to keep their details up to date, there's still a risk that they might not be locatable—or that they would have no further interest in exploiting their reverted works. And it would be of no assistance at all for that vast majority of rights in works which fall outside our Berne-permissible registry power since they have never been transferred.

D. MIGHT ONE PROBLEM SOLVE THE OTHER?

Those works—artefacts such as local maps, photographs of towns over time, ephemera like concert tickets and protest posters and even self-published books—are at the heart of copyright's collective action problem. They all attract copyright, but the overwhelming majority of them are not individually valuable enough to their owners to be worth exploiting. Collectively, however, the lost value to society from copyrights that outlast their owners' interest is enormous.

Let us step back for a moment. Throughout this paper I have been arguing that current approaches to copyright suffer from two core problems. First, despite

137. Berne Convention, *supra* note 113, art. 5(2); Marrakesh Agreement, *supra* note 11, at art. 9(1).

138. See Jane C. Ginsburg, "With Untired Spirits and Formal Constancy": Berne Compatibility of Formal Declaratory Measures to Enhance Copyright Title Searching, 28 BERKELEY TECH. L. J. 1583, 1611–22 (2013).

having put authors at the forefront of expansionary rhetoric for generations, copyright can't seem to find a way of actually getting them paid. Second, despite (or perhaps because of) ever broader and longer rights, current approaches to copyright are very often causing the loss of cultural value. In other words, there's not enough money, and too much money being left on the table. This juxtaposition is suggestive. Might the one problem help solve the other?

This framing evokes Victor Hugo's idea of a *domaine public payant*, most famously enunciated in his speech of 1878. At that time, the French *droit d'auteur* already granted rights that extended past the author's lifetime.¹³⁹ When rights expired, publishers continued not publishing the valueless books, and printing the still valuable ones—the only real difference was that they had no obligation to continue sharing the revenues with authors' heirs. Hugo argued that they should not be entitled to the whole of the pie, and that, instead, investors should have some continuing obligation to pay to print those works. Suggestively, his concern was not with authors' "heirs of the blood" (at least not beyond a single generation). Instead, he proposed that most revenues from exploitation of out-of-copyright texts should go to authors' "heirs of the spirit"—new generations of writers who needed support to write and get established.¹⁴⁰ They, in turn, would nourish future generations of writers.

The problem we confront today is much the same: What should we do with still-valuable works in which their authors no longer have an interest? One option might be to introduce, not a paid public domain, but an "author's domain." Works in the author's domain could be appropriately exploited by a cultural steward, with the resulting proceeds used to directly support authorship through the provision of prizes, grants and fellowships. Such a steward could have the dual mission of generating revenues while also promoting widespread availability and access. Such a system could help get creators paid *by* reclaiming lost cultural value—furthering both copyright's incentives and rewards aims while directly supporting production of new works to boot.

Any such system would seem doomed to fall foul of Berne, since distinguishing between still-interested and no-longer-interested authors would seem to inevitably require some form of registration, contravening the blanket prohibition on formalities on exercise and enjoyment of rights (to say nothing of the potential additional violations of limits on exceptions and compulsory licensing). But if such measures could further copyright's incentives and rewards aims, improving remuneration outcomes for authors and access for broader society, Berne's obstacles take on a different character. As discussed above, members have no obligation to apply Berne to works first published within their borders. It has long been assumed that departing from Berne is definitionally worse for authors, and thus that countries would rarely wish to do so: treating local authors worse than foreign ones has *terrible* political optics. However, this analysis shows that we

139. DAVIES, *supra* note 21, at 136–37.

140. See 5-6 VICTOR HUGO, *ACTES ET PAROLES DEPUIS L'EXIL 1876-1880*, at 99–104 (J. Hetzel & Cie – Maison Quantin eds., 1889).

have reached a point where this assumption too does not necessarily hold good. Introducing an “author’s domain” to reclaim some of the value from abandoned works (being those where the author has not taken minimal steps to indicate her continuing interest) and invest it into direct support of authorship requires elements of domestic Berne departure—but in ways that advance authors’ interests more strongly than current arrangements.

Appropriate governance structures would of course be vital to the success of any such system. Particular care would need to be taken to ensure that an “author’s domain” does not give (and is not perceived as giving) the state too much control over culture.¹⁴¹ Cultural differences and existing organizational infrastructure would play a big role in determining how appropriate governance would be achieved in different nations, but it would seem necessary to separate revenue collection from revenue allocation, and perhaps task specialist cultural bodies in various artistic fields with the job of determining recipients (upon appropriately transparent application of specified criteria). In setting up these structures, lessons could be learnt from the experience of existing “paid public domains,” which, inspired by the Hugoian ideal, already operate in a number of nations. Myriad variants exist: some require payments to be made in perpetuity while others are limited in time; some attract remuneration for commercial uses only; fees can be flat percentages of revenue, lump sums, or determined by an independent body; some apply only to certain classes of works. Rights may be controlled by the state, authors’ societies or unions. Some require prior permission, while others allow any use upon payment of a fee.¹⁴² It is possible to achieve many of the social and cultural advantages sought by paid public domains while minimising their detriments. For example, if it captured only those works in which authors had not indicated further interest, it would directly support authorship in a way that facilitated public use. And, if it operated only until the cessation of copyright, it would not interfere with the vibrancy of the public domain. That was not a consideration when most paid public domains were created, but is today, now that low marginal costs of copying and distribution make it feasible to enjoy and build

141. That fear led to the derailment of the German “paid public domain” proposal in 1965. See DAVIES, *supra* note 21, at 201. For a fuller history, see Paul Katzenberger, *Die Diskussion um das “domaine public payant” in Deutschland*, in Festschrift für Georg Roerber zum 10. Dezember 1981, at 193–230 (UFITA ed., 63d ed. 1982).

142. For details of these nations and the outlines of their schemes, see generally Committee of Non-Governmental Experts on the ‘Domaine Public Payant,’ UNESCO/WIPO, *Analysis of the Replies to the Survey of Existing Provisions for the Application of the System of ‘Domaine Public Payant’ in National Legislation* (Mar. 10, 1982), <https://perma.cc/7BKD-VFWV>; Peter Schonning, *Survey of the Term of Protection of Authors’ Rights: Toward More Universal Protection of Intangible Cultural Property*, 11(4) ENTM’T L. REV. 59 (2000); SÉVERINE DUSOLLIER, COMM. ON DEV. & INTELLECTUAL PROP., SCOPING STUDY ON COPYRIGHT AND RELATED RIGHTS AND THE PUBLIC DOMAIN 39–40 (2011); Cathryn A. Berryman, *Toward More Universal Protection of Intangible Cultural Property*, 1 J. INTEL. PROP. L. 293 (1994); see also Ryszard Markiewicz & Janusz Barta, *The New Polish Copyright Act – Standards and Particularities*, 26(3) INT’L REV. INDUS. PROP. & COPYRIGHT L. 337, 342 (1995) (describing the 1994 introduction of a paying public domain into Polish law, which required 5–8 per cent of gross income from the sale of copies of expired works to be paid into a ‘creativity promoting’ fund).

on more of those works than ever before. Infrastructure is critical, too: the system relies upon more-or-less universal access to low-cost registration processes, making it feasible only in the most developed nations.

To achieve their aims, it seems clear that the two core elements of the alternative bargain I propose—reversion to authors and transfer of abandoned works to an 'author's domain'—would need to have automatic operation. Automatic reversion is not a novel idea—take, for example, the Imperial Copyright Act of 1911, which throughout the British Empire saw works returned to authors' heirs twenty-five years after death.¹⁴³ From those origins, the current Canadian Copyright Act still provides for automatic reversion in similar terms.¹⁴⁴ A system of automatic reversion (to operate after twenty-five years) was also seriously proposed by the US Copyright Office in its 1963 draft Bill, although the proposal was eventually abandoned in favour of the current US termination right.¹⁴⁵ Automatic reversion has real advantages compared to the optionally invocable, use-it-or-lose-it version that was eventually adopted in the US. That right must be triggered by the author or heirs, and requires compliance with highly complex (and often unclear) notice procedures.¹⁴⁶ As a result, exercise is worth it only for that tiny proportion of works whose expected remaining commercial revenues outweigh the costs. Thus, it does little to help authors or broader society recapture that vast majority of works which no longer have that much value. But those are precisely the works which lie at the heart of copyright's collective action problem, and which could most benefit from rights being freed up for new investment and use. Similarly, it is the authors whose works have enjoyed less commercial success that are likely to benefit most from even modest new revenues flowing from recapture of their rights.

Automatic reversion would also avoid some of the problems currently plaguing contractual termination clauses. Typically, such clauses grant authors reversion rights where a book goes out of print. However, as the Authors Guild points out, they are often no longer working as intended:

[P]ublishers have cleverly managed to craft "out of print" clauses that make it almost impossible for authors to recapture their rights. Classic contract language states that a book is not out of print as long as it is "available for sale in any edition." So publishers "release" the book in a print-on-demand or electronic edition that's always available, even if few copies are actually sold. By relying on language originally intended to provide a real reversionary right, a publisher can now hold onto a book forever even if it's not actually doing anything with it. That is not how "out of print" was supposed to work.¹⁴⁷

Even if this was to be fixed, by, for example, revising reversion clauses to be based on a dollar value of sales instead of the increasingly-inapt notion of "out of

143. Copyright Act 1911, 1 & 2 Geo. 5 c. 46, art. 5(2) (U.K.).

144. Copyright Act, R.S.C. 1985, c C-42, § 14(1) (Can.).

145. See Patry, *supra* note 68, at 920–21; WILLIAM PATRY, *COPYRIGHT LAW AND PRACTICE* 463, 486 (1994).

146. See generally Reese, *supra* note 90 (describing in detail the formalities procedures and related uncertainties).

147. AUTHORS GUILD, *supra* note 84.

print,” it still does not fix the problem caused by the onus being on authors to take action to reclaim their rights. That onus means that the default is for works to remain locked up—*particularly* those that have the least commercial value (and thus are also the least likely to be subject of investment by publishers). By contrast, automatic reversion would distribute more rights to less financially successful authors. And, by delivering no-longer-wanted works directly into an “author’s domain,” it could generate a stream of revenues that could be used to support the creation of works which might not otherwise be able to be funded.

E. PUTTING IT ALL TOGETHER

That has been a lot of ideas—so how might the alternative bargain they depict fit together into a workable system? Many variations are possible, but here I sketch out one possible model (depicted graphically in Figures 4 and 5). It begins by describing parts of the system that would apply equally to all works, before stepping through elements specific to those of domestic and foreign origin. My purpose is to draw new attention to the possibilities for imagining a radically different copyright bargain within the existing treaty framework—not to provide a blueprint for implementation. Thus, I do not address practical issues of implementation (including cost and timing) and address potential issues such as holdouts only lightly. The system has been envisaged as extending only to works whose authors are their first owners.¹⁴⁸ Works “made for hire” raise perhaps even more troubling questions about the proper allocation of incentives and rewards, but this is not the forum for addressing them: their special characteristics, particularly for works involving many creators’ contributions, demand independent consideration. I have also deliberately chosen to focus on time-based mechanisms for securing rewards to authors, as being those that most clearly enable delineation between copyright’s rewards and incentives components. However, authors do of course have claims to fair remuneration within their initial grants as well, as have been recognized and supported by various mechanisms in European law.¹⁴⁹ I note the significant potential for such mechanisms to help secure authors further rewards from their copyrights (and commend them for further academic study), but they fall outside the scope of this paper.

1.All Works:

This alternative bargain would limit transfers and licenses to a maximum of twenty-five years, followed by automatic reversion to authors. Authors would still have the right to choose to dedicate works to the public domain, and those grants, like now, would be permanent. Since Creative Commons licenses essentially give

148. See 17 U.S.C. §§ 203(a), 304(c).

149. See Martin Senftleben, *More Money for Creators and More Support for Copyright in Society – Fair Remuneration Rights in Germany and the Netherlands*, 41 COLUM. J.L. & ARTS 413 (2018); Séverine Dusollier, *EU Contractual Protection of Creators: Blind Spots and Shortcomings*, 41 COLUM. J.L. & ARTS 435 (2018) (in this volume).

effect to authors' intentions to conditionally dedicate a work to the public domain, they would continue to operate as now, outside the twenty-five year limit. Transfers and grants of exclusive rights would be void unless registered by the grantee, creating a new ownership database to facilitate future clearance of rights (and helping to locate and notify authors when reversion occurs). Registrations could include not just the scope of transfer and duration, but also details of the original grantor and grantee, effectively generating a Berne-compatible register of initial creations (albeit limited to those which had been the subject of transfer).¹⁵⁰ Derivative works created under license prior to reversion could be treated like those created prior to exercise of a termination right under U.S. law—i.e. they could continue to be distributed but no further new adaptations made.¹⁵¹ Where rights revert to authors, there is always a possibility that one or more might “hold out” permission to license. To address that, the U.S. termination law could again be usefully adapted. When it was being negotiated, film companies had argued that exercise of rights ought to require unanimity. The Authors League urged against this out of concern that it “would likely render the exercise of the right in co-authored works unworkable.”¹⁵² Their view prevailed, and the current law provides that assignments of licenses signed by the majority of owners are binding on all.¹⁵³ A similar rule, adopted here, could ameliorate the potential for hold outs. That, combined with the proposed author's domain (which would enable works to continue to be used even where owners are non-responsive) could reasonably be expected to make considerably more works available than is the case under current practice. Wholesale return of rights to authors would strongly support the emergence of new business models, including new direct licensing options. For example, book authors might be given the option of directly licensing their titles to national digital public libraries in exchange for per loan remuneration at the point of registration.

150. Ginsburg, *supra* note 138, at 1616–17.

151. 17 U.S.C. §§ 203(b)(1), 304(c)(6)(A).

152. Bently & Ginsburg, *supra* note 127, at 1568.

153. *See* 17 U.S.C. §§ 203(b)(3), 304(c)(6)(C).

2. Domestic Works:

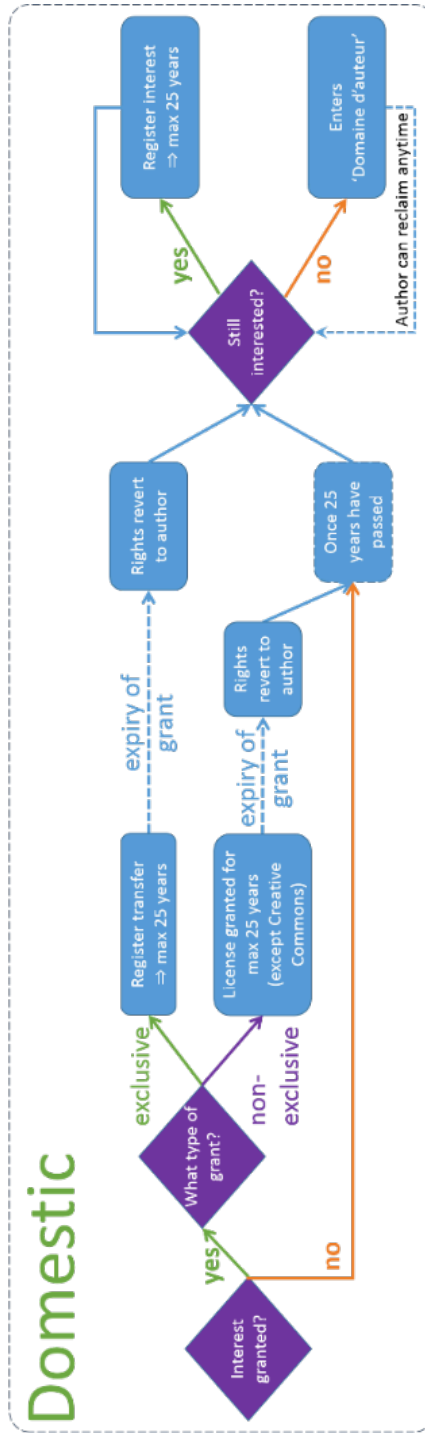


Figure 4: Depicting the fundamentals of the proposed alternative bargain as it would apply to domestic works

Upon reversion, the proposed system asks domestic authors to register their continuing interest. Since those works would already be recorded on the registry, this could be as simple as asking authors to click a link to indicate their desire to maintain their rights in full. Registration would eventually be asked also for non-transferred works too. Since this is an element of domestic Berne departure there is no legal reason why registration could not be required very quickly (or even immediately) after creation. However, as I have written elsewhere, requiring registration too soon can result in unfair harms to authors, and so twenty-five years is again proposed as the trigger point.¹⁵⁴

Registered works would remain the property of authors to exploit (or not) as they choose. Works that remain unregistered after reversion (for transferred works) and twenty-five years (for all others) would enter a “*domaine d’auteur*” for appropriate exploitation by the cultural steward. The registry would provide prospective licensees with certainty about ownership: published works of twenty-five years old or more that did *not* appear in the registry would be known to be included in the author’s domain. Prospective licensees could then negotiate with the cultural steward for permission to use, with the proceeds put towards the direct support of authorship (in accordance with appropriate governance and transparency processes as outlined above). Such a registry would significantly facilitate rights clearance by making it easier for buyers and sellers to connect.

This alternative bargain assumes a robust and flexible exceptions framework that enables fair uses along the lines of the U.S. model (i.e. taking into account factors such as the character of the use, nature of the work, amount taken and market impact).¹⁵⁵ After all, the fact that a cultural steward *could* licence everything in the proposed “author’s domain” is not to suggest that she *ought* to. Heeding Lemley’s warning that the full internalisation of a work’s positive externalities may not only invite rent-seeking but could actually reduce them as well, a cultural steward would need to carefully balance its joint aims of promoting access and generating revenues, by, for example, having a mission to enable rather than prohibit appropriately public-interest furthering uses.¹⁵⁶

In this conception, authors could reclaim their rights from the author’s domain at any time. If, for example, a work found a new audience from its inclusion therein, it would be a matter of the author giving appropriate notice to any current licensees (ascertainable from the registry) and re-asserting full copyright. This again differs from the U.S. termination for post-1978 transfers, which disappears entirely if authors do not exercise it within the notice window.¹⁵⁷ If, say, a prospective licensee wanted to ensure exclusivity (or negotiate directly with the author), they

154. Giblin, *supra* note 3, at 199–200; *see also* Gangjee, *supra* note 58, at 240–42 (discussing the relative merits of requiring formalities at the time of publication versus after an initial period of formality-free protection).

155. *See* 17 U.S.C. § 107.

156. *See generally* Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005).

157. *See* 17 U.S.C. § 203(b)(6).

could seek out that person, alert her to the value in her work and encourage her to register her interest.

3. Foreign Works:

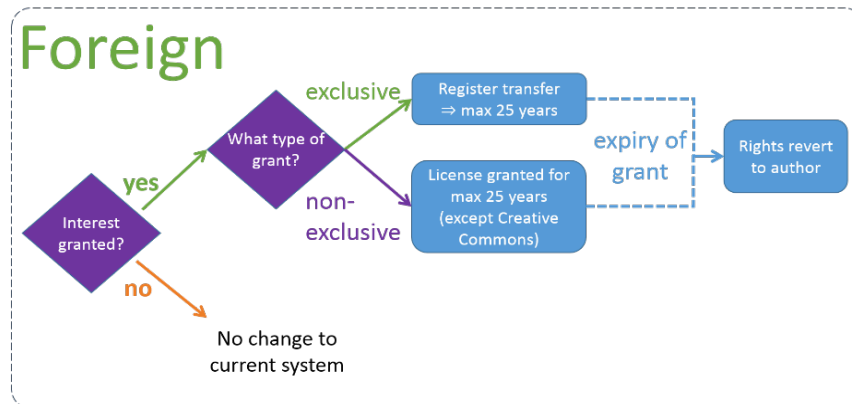


Figure 5: Depicting the fundamentals of the proposed alternative bargain as it would apply to foreign works

For foreign works, the scope for change is considerably narrower. As described above, the scope of grants could still be limited to twenty-five years duration, followed by reversion to authors. Given Berne/TRIPS' flexibilities around ownership, transfers and exclusive grants could also be required to be registered. The ownership information in that registry could then be used to *encourage* foreign authors to also register their ongoing interests upon the termination of transfer. However, foreign authors could not be *required* to do so without contravening Berne's Article 5. And, for that vast majority of works that was never transferred, registration could not be required at all. As is currently the case now, bulk licensing of rights would likely need to rely on collective management organisations in foreign states to administer reverted rights domestically (e.g. to facilitate mass uses of academic publishing). Authors could also voluntarily opt in to domestic collective management. We would need to combine that with appropriate mechanisms for dealing with orphan works in much the same way as we need to do under current approaches.

IV. THE BACK DOOR IN AND THE FRONT DOOR OUT: POSSIBILITIES FOR SUBVERSION AND GROWTH

A. SUBVERTING AUTHOR-PROTECTIVE LAWS: THE “BACK DOOR” IN?

The alternative bargain sketched above relies on various elements requiring domestic departure from Berne, as permitted under the principle of independence of protection.¹⁵⁸ That makes determination of works’ country of origin a matter of crucial importance—and raises possibilities for subversion that need to be addressed.¹⁵⁹

Article 5(4) provides that a work’s country of origin is the country where it is first published, or, where it is published simultaneously (i.e. within thirty days of first publication) in multiple Union countries, by the country with the shortest term.¹⁶⁰ The rules took their current form in 1967’s Stockholm Act, when the Union comprised just fifty-eight members, and have since remained unchanged.¹⁶¹

Berne permits members to regulate their own works according to domestic law, but requires them to accord minima-satisfying coverage to foreign Union works.¹⁶² If any country was to mandate a seriously author-protective scheme such as the one sketched within this paper, opportunistic investors would no doubt seek to bypass it by manipulating the country of first publication and taking the “back door” in to treatment as a foreign work. If investors simply first published in Country B at least thirty days before publishing in Country A, would that force Country A to afford its own nationals’ works treatment as foreign works? If so, it could seriously hamper Country A in introducing the broader registration requirements that would support rights clearance and provide the catch-all that would fund and make workable the system described within this paper—as well as weaken Berne’s core principle of independence of protection.

However, it is not at all clear that this Article 5 would be thus subvertible. Berne does not specify what happens where a work’s country of origin differs from an author’s country of nationality.¹⁶³ It has been argued that such cases might be treatable as having two countries of origin—that of first publication and that of nationality.¹⁶⁴ As Ginsburg and Ricketson explain, “the basis of the suggestion is the assumption that the Berne Convention is not to be interpreted as breaking the bonds between Union countries and their citizens, as it is only concerned with the relations of Union countries to foreign authors.”¹⁶⁵

158. See Berne Convention, *supra* note 113, arts. 5(1), 5(3).

159. I develop these issues in more detail elsewhere: see Rebecca Giblin, ‘A future of international copyright? Berne and the front door out’ in *Interconnected Intellectual Property* (Graeme Austin, Andrew Christie, Andrew Kenyon and Megan Richardson eds., forthcoming 2018).

160. *Id.* art. 3(4).

161. RICKETSON & GINSBURG, *supra* note 2, at 121, 278–81.

162. *Id.* at 287.

163. *Id.* at 283.

164. *Id.* at 283–84 (citation omitted).

165. *Id.* at 284.

If a country was to adopt this interpretation, and regulate their own nationals' works regardless of place of first publication, that would be effectively challengeable only by another Union member bringing an action via WTO dispute settlement mechanisms. This is an unlikely prospect. In over two decades of operation, TRIPS has seen very little litigation so far—even in cases where breach and damage were clear. Here, they would be murky at best. Further, the mechanisms that might be complained of are ones that, by directly supporting authors and facilitating exploitation, would directly support the aims of both Berne and TRIPS. Any such challenger would also be on the wrong side of the powerful author-protective rhetoric discussed earlier in this paper.

B. WHAT ABOUT PROSPECTS FOR TAKING IT FURTHER? THE FRONT DOOR OUT

The above shows that there is nothing to prevent a country from choosing to regulate its own works in ways that depart from Berne/TRIPS—and that we have reached a point where it may well make sense to do so. Thus, just as there was a back door into Berne, so too there is a front door out.

However, even if a country was to implement an author-protective copyright law with elements of domestic Berne departure, that only takes us so far. Copyright is territorial. An enacting country could apply the scheme within its own borders, and defeat attempts to bypass them via application of other jurisdictions' contract law.¹⁶⁶ But still, private international law problems would arise from individual nations seeking to enforce author-protective copyright laws beyond their borders, meaning that the benefits of this reimagined bargain could likely be achieved only for its nationals and others who publish there. How could it be taken further?

Article 20 only permits Union members to enter into future international agreements where they do not detract from Berne's prohibitions and minimums. That prevents countries from agreeing to depart from Berne's minima for each other's nationals. However, there is nothing to stop them from agreeing to *each regulate their own nationals* in a harmonized and cooperative way—that happens to involve elements of domestic departure from Berne. If a few significant copyright-producing countries were to take the front door out together, and each implement an alternative copyright bargain of the kind I have described, the impact could be dramatic. Significantly, they could share their domestic registries to create a comprehensive treaty-compatible ownership database. Rights would be freed up to give authors a bigger slice of the pie and support new distribution models and markets. And instead of the default being that we lose most of our artefactual heritage as collateral damage to investors hoping to one day strike the jackpot, it would be there to nourish the next generations of authors.

166. See generally Jane C. Ginsburg & Pierre Sirinelli, *Private International Law Aspects of Authors' Contracts: The Dutch and French Examples*, 39 COLUM. J.L. & ARTS 171 (2015) (discussing private international law issues arising in the copyright context, including the territorial complexities introduced by the Internet).

I do not pretend that the idea of an author-focused international instrument incorporating elements of domestic Berne departure is anything but radical. But it might be that we eventually reach a point where that becomes the best remaining way to get authors paid, reclaim our lost culture, and move past that incessant mournful lament of, “but Berne doesn’t let us do that.”

V. CONCLUSIONS

Given how significantly copyright’s costs and benefits have changed since TRIPS was settled, it’s remarkable that we have done so little to change the bargain’s fundamentals. The paths Berne and TRIPS have left open to meaningful reform are admittedly narrow and even tortuous. As I have shown however, there are steps we can take towards more enabling conceptions of the treaties, in order to better satisfy both their own objectives and domestic policy interests.

The alternative I sketched here is not the one I would have drawn had I been free of constraints.¹⁶⁷ However, built upon updated assumptions that better reflect that world we actually inhabit today, it holds out new possibilities for doing a better job of incentivising works’ initial creation and ongoing availability while simultaneously securing more rewards to authors.

I am currently leading a project to empirically test some of the key hypotheses set out in this work. In the medium-term, that work will cast new light on how the Berne/TRIPS flexibilities, particularly around ownership, can help solve copyright’s most vexing problems. In the meantime, this analysis might assist in two ways. First, it encourages readers to challenge claims about the law’s current operation and effects of proposed reforms. Second, it demonstrates how taking authors’ interests seriously can open pathways to greater access for the broader public too—showing the falseness of the “authors vs. users” dichotomy and taking advantage of copyright’s non-zero-sum potential.

167. Giblin, *supra* note 3.