Reverting to Reversion Rights?
Reflections on the Copyright Act 1911

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With reversion rights on the legislative agenda of EU member states (due to Article 22 Digital Single Market Directive) this article uncovers the legislative history of reversion in the Copyright Act 1911. Reversion related to controversies surrounding the significant increase in the copyright term in 1911 (to the author's life plus 50 years). A significant post-mortem term was intended to enable authors to make meaningful provision for their families, but this would be undermined if 'rich publishers' could take an assignment for the full term. Accordingly, reversion was an essential part of the legislative package which facilitated significant term extension in 1911. The 1911 debates were also the occasion for the consideration of a proposal for reversion in the event of an assignee's bankruptcy. The article concludes by reflecting on the implications of the debates of 1911 for how we think about reversion and copyright policy today.

The reversion of copyright – the right of authors and performers to 'reclaim' copyright that has been assigned or exclusively licensed – is now a topical subject for discussion. European Union member states are obliged to implement the Copyright in the Digital Single Market Directive (2019/790) by 7 June 2021. While the implementation of other articles of the Directive has been subject to much attention,[1] little consideration has been given to Article 22, which obliges EU member states to provide a reversion right or 'right of revocation': authors and performers who have transferred their rights on an exclusive basis, will be able to revoke that transfer where there is 'a lack of exploitation' on the part of the transferee (often termed a 'use it or lose it' provision).

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[1] For a detailed resource page about the DSM Directive, including an overview of the legislative process, debates on key issues and a summary of the academic evidence concerning the Directive's provisions on the press publishers right, text and data mining and filtering, please see: https://www.create.ac.uk/policy-responses/eu-copyright-reform/ A further resource page tracking the national implementation of the Directive by all EU member states and links to key discussions surrounding the implementation of Art. 17, please see: https://www.create.ac.uk/cdsm-implementation-resource-page/

CREATe, the Research Council funded centre for copyright research at the University of Glasgow (to which this author is affiliated) has recently written an Open Letter to the European Commission and relevant authorities of all EU Member States, which is published in full as an Opinion in this issue of the *EIPR*. In a bid to foster public debate around the implementation of Article 22, the Open Letter presents this as 'an historic opportunity' to create 'meaningful new rights for creators' especially as a counter to practices of 'rights grabbing' (transfers of rights away from creators that are exceptionally broad e.g. all economic rights, worldwide and for the full term of copyright).[2] Indeed, the proper place of reversion rights in copyright laws generally is an aspect of CREATe's current research agenda, in its contribution to the Australian Research Council funded *The Author's Interest Project* led by Rebecca Giblin at the Intellectual Property Research Institute of Australia, University of Melbourne, which investigates ways better to take seriously the author's interest in copyright, so as to benefit both creators and broader society (www.authorsinterest.org). CREATe research to date includes a detailed mapping of current and historical reversion rights from the national laws of all EU member states, conducted by postdoctoral researcher Ula Furgal and published as a CREATe Working Paper, *'Reversion Rights in the European Union Member States'*[3] with its conclusions published as an article in this issue of the *EIPR*. Further, in 2019, another article about reversion rights was published in this journal – *Why were Commonwealth Reversionary Rights Abolished (and What can we Learn Where they Remain)?* by Joshua Yuvaraj and Rebecca Giblin – as part of *The Author's Interest Project.*[4]

Preliminary discussions over reversion rights with relevant stakeholders facilitated by CREATe reveal an assumption that the UK experience on this topic is unhelpful: UK law is thought to be rooted in the principle of freedom of contract, that generally precludes legally

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[2] The full text of this letter can be found on the CREATe website: www.create.ac.uk .

[3] U. Furgal, 'Reversion Rights in the European Union Member States' CREATe, Working Paper 2020/11 (available for free download on the CREATe website, www.create.ac.uk). A further resource page on reversion rights in EU member states can be found here: https://www.create.ac.uk/reversion-rights-resource-page/

[4] J. Yuvaraj and R. Giblin, 'Why were Commonwealth Reversionary Rights Abolished (and what can we learn where they remain)?' (2019) European Intellectual Property Review, 232-240. Other important scholarship on reversion rights includes L. Bently and J. Ginsburg 'The Sole Right Shall Return to the Authors: Anglo-American Authors Reversion Rights from the Statute of Anne to Contemporary US Copyright', (2019) Berkeley Tech. L.J. 1475-1600, P. Heald 'The Impact of Implementing a 25-Year Reversion/Termination Right in Canada' (2018) University of Illinois College of Law Legal Studies Research Paper No.20-18 and P. Heald 'Copyright Reversion to Authors (and the Rosetta Effect): An Empirical Study of Reappearing Books' (2017) available at SSRN.

imposed constraints on contractual transfers like reversion rights.[5] However, as readers of the EIPR may know, the UK Copyright Act 1911 included reversion rights (in the proviso to section 5(2)):[6] where the author either assigned or made a 'grant of any interest' in copyright 'otherwise than by will' (i.e. any formal written licence[7]), copyright would automatically revert to the author's estate on the author's death, for the last 25 years of the copyright term (then, the term was life plus 50 years). Any contractual agreement to the contrary was 'null and void'.[8] There were two exceptions, where reversion rights did not apply: works where the author was not the first owner of copyright (e.g. works created by an employee in the course of employment)[9] and collective works (e.g. encyclopaedias, dictionaries, newspapers and magazines).[10] The reversion rights regime introduced in 1911 remains in force today, under the Copyright Designs and Patents Act 1988, in respect of copyright transfers made after the passing of the 1911 Act but before the entry into force of the Copyright Act 1956 (which abolished reversion rights, but only prospectively).[11]

The UK has indicated that, in view of its exit from the EU, it does not intend to implement the Digital Single Market Directive. In any event, the provision in Article 22 of the Directive, clearly differs from that contained in the 1911 Act. Under the 1911 Act, reversion was automatic, after the passage of a particular period of time (25 years after the author's death). By contrast, while the expiry of a particular period of time may be relevant under Article 22, the Directive envisages a 'use it or lose it' provision that must be activated by the creator serving notice on the assignee or licensee.[12] Notwithstanding these differences, understanding

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[5] On exceptions to this principle stemming from contract law, e.g. undue influence and unconscionability, see Yuvaraj and Giblin, 'Why were Commonwealth Reversionary Rights Abolished? (2019) EIPR 232, 232.

[6] Reversion rights were also included in the first copyright Act – s.11 of the Statute of Anne 1710 – but abolished in 1814. See Bently and Ginsburg 'The Sole Right Shall Return to the Authors' Ibid.

[7] See the commentary at para 5-119 of *G. Davies, N. Caddick and G. Harbottle 'Copinger and Skone James on Copyright' (17th Ed., Sweet & Maxwell, London)*.

[8] 1911 Act, proviso to section 5(2).

[9] 1911 Act, proviso to section 5(2) and section 5(1)a.

[10] 1911 Act, proviso to section 5(2) and s.35(1). On the nineteenth century history of the protection of collective works see E. Cooper (2018) 'Copyright in Periodicals in the Nineteenth Century: Genre and Balancing the Rights of Contributors and Publishers' Victorian Periodicals Review 661-678.

[11] Copyright Designs and Patents Act 1988 Schedule 1, para 27. On removal by the 1956 Act see Yuvaraj and Giblin, 'Why were Commonwealth Reversionary Rights Abolished?' (2019) EIPR 232, 234.

[12] See Art 22(1), (2) and (3) DSM Directive. Under Art 22(3), member states are obliged to provide that revocation can only be exercised 'after a reasonable time following the conclusion of the licence or transfer'. Further under Art 22(2)(b), member states may provide that revocation 'can only apply within a specific time frame', but that must be 'duly justified by the specificities of the sector or the type of work or other subject matter concerned'. Another difference between the Directive and the 1911 Act is that Article 22(5), unlike the 1911 Act (that declared all contractual derogations to be null

the UK's historic approach to reversion rights is useful both to thinking about the position of reversion rights in copyright laws generally, as well as to understanding aspect of the history of reversion rights in EU member states that were part of the British Empire in 1911, and to which the 1911 Act applied: Cyprus,[13] Ireland[14] and Malta[15].

In this article, I uncover the legislative history of reversion rights in 1911 and draw reflections for policy-making today. In doing so, I address a question left open by Yuvaraj and Giblin in their 2019 *EIPR* article. Yuvaraj and Giblin uncovered the history of the abolition of reversion rights stemming from the 1911 Act, in the UK, Australia and New Zealand, and their retention in Canada, but described the precise origins of the 1911 Act provision as 'mysterious' and unexplained by readily available sources.[16] This article fills this gap and, in that way, furthers our understanding of the history of the place of reversion rights in copyright law.

Setting Reversion Rights in Context: The Term Extension Debates of 1911

The inclusion of reversion rights in the 1911 Act was tied to one of the most controversial aspects of copyright reform at this time: the extension of the term of copyright. By 1911, copyright in the UK was governed by numerous subject specific statutes, passed during the course of the eighteenth to early twentieth centuries, and these applied different terms of protection to different subject matter. For instance, literary works were protected from

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and void) also allows for contractual derogation where that is based on a collective bargaining agreement.

[13] The Copyright Act 1911 applied in Cyprus by virtue of an Order in Council (1912 No.912) passed in June 1912. When Cyprus became independent in 1960, the Republic of Cyprus adopted the 1911 Act as its own copyright law, and this remained in force until 1976. See A. Demetriades and N. Epaminonda, 'Cyprus' in *B. Lindner and T. Shapiro 'Copyright in the Information Society: A Guide to National Implementation of the European Directive' (2nd ed., 2019, Cheltenham and Massachusetts: Edward Elgar)*, p.254, para 7.01-02.

[14] The Copyright Act 1911 applied to Ireland as part of the United Kingdom. The question of whether the Act applied also to the Irish Free State, created in 1922, was decided by the Irish Supreme Court and then appealed to the Judicial Committee of the Privy Council in *Performing Rights Society v Bray Urban District Council* [1930] IR 509 but the political difficulties of accepting a ruling of Privy Council led to the introduction of new legislation by the Irish Free State: the Copyright (Preservation) Act 1929 which stated that the 1911 Act, and all Orders made thereunder as at December 1921, were deemed to always have had and to continue to have, full force and effect in the Irish Free State. See T. Mohr, 'British Imperial Statutes and Irish Law: Imperial Statutes Passed before the creation of the Irish Free State', (2010) The Journal of Legal History, 31:3, 299 at 309-310.

[15] The Copyright Act 1911 applied to Malta until its repeal in 1967. See P. M. Grimaud and S. L. Azzopardi, 'Malta' in *Lindner and Shapiro, 'Copyright in the Information Society', (2019),* p.633 para 21.03.

[16] Yuvaraj and Giblin, 'Why were Commonwealth Reversionary Rights Abolished?', (2019) EIPR, 232, 233.

publication by the Literary Copyright Act 1842 for whichever was longer of 42 years or life plus 7 years,[17] paintings, drawings and photographs were protected from creation for life plus 7 years under the Fine Arts Copyright Act 1862[18], and engravings and sculptures were protected for a maximum of 28 years from publication (under the Engraving Acts and the Sculpture Copyright Acts respectively[19]). In 1908, the Berlin Revision of the Berne Convention, introduced an international standard for the term of protection: the author's life plus 50 years,[20] which reflected the approach taken by a majority of Union countries.[21]

In the UK, the Berne standard was seen as a significant extension of the copyright term and was of a length which the UK had not previously contemplated granting.[22] The 'lengthy' nature of this term extension was noted in the report of the Gorell Committee on Copyright in 1909[23] (that reported on the implementation of the 1908 Revision) and repeatedly mentioned in the parliamentary process culminating in the 1911 Act. In a confidential memorandum to the Cabinet (now held at The National Archives, London) the Bill's architect, Sydney Buxton M.P. the President of the Board of Trade, referred to term extension as the 'most important proposal' in the Berlin Revision of the Berne Convention, commenting that while 'at first sight this period may seem somewhat excessive', with appropriate safeguards against 'the abuse of a long term of copyright' (to which safeguards I return below) 'it should, I think, be adopted'.[24] In the parliamentary debates, the length of the term of life plus fifty years was a subject for

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[17] 5&6 Vict.c.45, s.3.
[18] 25&26 Vict. c.68, s.1.
[19] 1735 Engraving Act, 8 Geo. II c.13 s.1; 1767 Engraving Act, 7 Geo. III c.38 s.7; 1798 Sculpture Copyright Act, 38 Geo. III c.71 s.1; 1814 Sculpture Copyright Act, 54 Geo. III, c.56 s.1 and s.6.
[20] Article 7(1) Berne Convention (Berlin Revision) 1908. Article 7(2) provided that, where countries of the Berne Union did not to provide this term, protection would be regulated by the law of the country where protection was claimed, but that term would not exceed the term of the country of origin.
[21] As at 1908, when the Berlin Revision was concluded, there were a variety of different approaches to term amongst Berne Union states: the longest term was set by Spain, at life plus 80 years, but a majority of Union members adopted life plus 50 years (Belgium, Denmark, France, Luxemburg, Monaco, Norway, Tunis, Sweden though the latter only granted life plus 10 years for works of art). Other approaches to term by other Union countries were as follows: life plus 30 years granted by Germany, Switzerland and Japan; life or 40 years whichever is longer plus a royalty for 40 years was granted by Italy; life of the author and the widow or life and 20 years in favour of children or life and 10 years in favour of other heirs granted by Hayti.
[22] In the UK, the nineteenth century saw many failed proposals for copyright reform, and the longest term which had been put forward was the life of the author plus thirty years. See, for example, the proposals of the Royal Commission on Copyright: Copyright Commission: The Royal Commissions and the Report of the Commissioners; P.P. 1878 C-2036, C-2036-1 XXIV.163, 253, para. 40.
[23] Report of the Committee on the Law of Copyright; P.P. 1909 Cd.4976 (hereafter the 'Gorell Committee Report') p.15.
[24] 'Confidential Memorandum from Sydney Buxton M.P. to the Cabinet, July 1910, The National Archives, London, CAB 37/103, p.7 and p.8-9.

criticism. For example, in the House of Commons, the proposed term was referred to as 'very excessive',[25] as 'a very great extension… that is too long'[26] and in the House of Lords as a 'term of copyright that is enlarged and lengthened'[27], 'too long a period'[28], a 'serious matter'[29] and as a 'great extension'[30] and a 'considerable change' to the length of copyright.[31]

Two concerns were repeatedly articulated about term extension: first, that it was not in the public interest, and secondly, that it favoured assignees of copyright, not the author's interests. These two points, and the provisions introduced to address them, are now considered in turn.

Increase in Term and the Public Interest

In the debates culminating in the 1911 Act, term extension was repeatedly expressed to be damaging to the public interest, particularly the interests of the public in having access to cheap public domain works.[32] For instance, in the House of Commons, Mr Booth M.P. argued that opposition to term extension was a 'battle of the poor and of freedom': 'while this Bill is in progress, I had communications from all over the country, from working men, who properly consider' term extension to be 'an attack on their right and privilege to enjoy cheap literature'.[33] Similar concerns were raised in the House of Lords debates, that 'the length' of the copyright term would 'militate against the ready publication of cheap books'.[34] Lord Courtney, for example, pointed to 'the extreme inconvenience to which the reading public of the future would be exposed' by term extension: 'The reading public of the future would be unable to find that access to literature which we and our fathers before us have enjoyed until a much longer period

[25] Hansard, HC, vol. 23, col. 2621, 7 April 1911, Mr Joynson-Hicks M.P. (who had been a dissenting member of the Gorell Committee).
[26] Hansard, HC, vol.28, col. 1906, 28 July 1911, Mr Booth M.P..
[27] Hansard, HL, vol.10, col. 46, 31 October 1911, Viscount Haldane (who took charge of the Bill in the Lords).
[28] Hansard, HL, vol.10, col. 48, 31 October 1911, Lord Gorell. Lord Gorell's report had advocated adopting the term of life plus 50 years. Here he was referring to the provisions (discussed below) that limit 'the benefit of the copyright' for the full term, which he explained as 'may be owing to the view that fifty years is too long a period'.
[29] Hansard, HC, vol.28, col. 1906, 28 July 1911, Dundas White M.P., referring to the proposed term as 'a very great extension… that is too long'.
[30] Hansard, HL, vol.10, col. 50, 31 October 1911, Lord Courtney.
[31] Hansard, HL, vol. 10, col. 127, 14 November 1911, by Lord Courtney.
[32] For a discussion of the public interest in the debates of 1911 more generally see I. Alexander, Copyright and the Public Interest (Hart Publishing, 2010), Chapter 7.
[33] Hansard, HC, vol. 28, col. 1903, 28 July 1911.
[34] Hansard, HL, vol.10, col. 133, 14 November 1911, Lord Gorell (summarising the argument made by the Bill's critics).

has elapsed'.[35] Indeed, in the House of Lords, reference was made to the 'oratory' of Lord Macaulay 'on a great occasion similar to this'.[36] Thomas Babington Macaulay M.P. (who was also a popular writer in the nineteenth century) had famously opposed term extension in parliamentary debates culminating in the Literary Copyright Act 1842, presenting copyright as a 'monopoly' and a form of 'taxation' on the reading public.[37] There was also a colonial dimension to these arguments: representatives of the self-governing dominions (Canada, Australia, New Zealand, South Africa and Newfoundland), as well as minsters representing the India Office and Colonial Office, had been consulted at a Colonial Copyright Conference in 1910, and their consent to increased term was 'conditional on the enactment of some provision' to ensure 'that after the death of the author the reasonable requirements of the public be met as regards the supply and terms of publication of the work and permission to perform it in public.'[38]

To meet these concerns, two compulsory licensing provisions were included in the 1911 Act. The first, contained in section 4 and stemming from 1910 Bill (drafted immediately after the 1910 Colonial Conference) made compulsory licences available at any time after the author's death where a complaint was made to the Judicial Committee of the Privy Council that the copyright owner had refused to republish or allow public performance of the work, and that 'by reason of such refusal the work is withheld from the public'. The terms of the licence would be set by the Judicial Committee of the Privy Council.[39] The second provision, also presented to Parliament as guarding against the danger of works being 'withheld from the public' and to avoid 'an attempt to keep up the price at a monopoly figure',[40] but drafted so as to be available in *all* cases, was contained in the proviso to section 3: copyright would 'not be

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[35] Hansard, HL, vol.10, col. 128, 14 November 1911, Lord Courtney

[36] Hansard, HL, vol. 10, col. 52, 31 October 1911, Viscount Midleton.

[37] See *C. Seville 'Literary Copyright Reform in Early Victorian England' (1999, CUP)* p.60 and 65. The 1842 Act increased the term of protection for literary copyright to the life of the author plus 7 years or 42 years from publication, whichever was longer. Prior to this, under the Copyright Act 1814, the term of literary copyright was 28 years from publication, or the author's lifetime if this was longer. Macaulay proposed a life term, with a minimum term of 42 years which could be enforced by the author's family if the author were to die before this. See Seville, Ibid, p.6 and p.66-67.

[38] Imperial Copyright Conference: Memorandum of Proceedings, 1910, Cd. 5272, July 1910, para7(e). An 'effective provision' of this nature was expressed to be 'essential' in view of the significant increase in term. Ibid.

[39] Section 4, 1911 Act. For an earlier draft see Copyright Bill 1910 (P.P. 1910 Bill 282) cl.2, but this allowed for complaints also to be made to an authority in the self-governing dominions, in respect of reproduction in that dominion. The Gregory Committee reported in 1952 that no applications under section 4 were ever made, see Report of the Committee, 1951-52, Cmd. 8662 (hereafter 'the Gregory Committee Report') at paragraph 22.

[40] Hansard, HL, vol.10, col. 131, 14 November 1911, Viscount Haldane.

deemed to be infringed' during the final 25 years of the copyright term by the 'reproduction of works for sale' so long as the person reproducing the work gave prior written notice of such reproduction and paid a royalty rate of 10% on sale to the copyright owner.[41] As a confidential Government memorandum from 1911 explains, a precedent for compulsory licensing was provided by section 5 of the Literary Copyright Act 1842,[42] and as Catherine Seville has shown, the latter was introduced following Macaulay's 'show-stopping speech' expressing concern at the 'dangers of the suppression of works, hinting darkly of civil turmoil'.[43] The objections to term increase raised by Macaulay in his famous parliamentary oratory of the early 1840s, then, continued to have a resonance in 1911.

Term Extension and the Author's Interest

The second concern raised by term extension was that it would in fact benefit publishers - who would take an assignment of the full term of copyright – and not authors. As Lord Courtney argued, on the second reading of the Bill in the House of Lords:

> No case has been made out for this great extension, nor do I think it will operate as a rule to the advantage of authors. The authors will have sold their copyright to the publisher, who are the people really interested in this matter.[44]

This was a problematic argument for proponents of the Bill. Viscount Haldane, who took charge of the Bill in the Lords, noted the great benefit of the Bill to publishers, who were 'getting protection and advantages under this Bill of a new kind', including an 'enlarged and lengthened' term.[45] Yet, one of the arguments in favour of term extension was to enable authors

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[41] 1911 Act s.3, proviso. This provision was introduced when the Bill was debated in the Standing Committee of the House of Commons in May 1911: see Report from Standing Committee A on the Copyright Bill with the Proceedings of the Committee, 13 July 1911; P.P. 1911, p.22, proposed by Sydney Buxton M.P., and Copyright Bill (as amended in Standing Committee A); P.P. 1911 Bill 296, cl.3.

[42] 'Confidential: Copyright Bill: Differences between Bill and Existing Law', 18 May 1911, BT 209/474, The National Archives London.

[43] Seville, Ibid., p.31 and 231. Section 5 of the 1842 Act empowered the Judicial Committee of the Privy Council to grant compulsory licenses after the death of the author, on such terms it thought fit, where a complaint was made that a book had been 'withheld from the public'

[44] Hansard, HL, vol. 10, col. 50, 31 October 1911, Lord Courtney. See also Ibid, col. 49, Lord Courtney: 'I believe that this change in the law will not be found to operate at all to the advantage of authors, speaking broadly. It will be found to operate to the advantage of publishers only, who will get an extended period of the copyright in the books which they publish.' For further concerns about ensuring that term increase did not simply further 'the interests of the rich publisher and dealer' see the speech of Mr Booth M.P. (debating an amendment relating to transitional provisions): Hansard, HC, vol. 29, col. 2153, 12 August 1911, Mr Booth M.P..

[45] Hansard, HL, vol. 10, col. 46, 31 October 1911, Viscount Haldane.

to make meaningful provision for their families. As Sydney Buxton M.P. had argued in his speech introducing the Bill into the House of Commons on its second reading, the advantage of the term of life plus 50, was that it 'covers the full life' of the author's 'immediate descendants and children, who ought to have consideration'.[46] A similar point was made by Viscount Haldane in presenting the Bill to the Lords: where books had only become famous in the final years of an author's life, the then current term (in the case of books, possibly lasting only 7 years after the author's death) 'does not enable adequate provision' to be made for the author's family.[47] Accordingly, as one member of the Gorell Committee, Henry R. Clayton, noted in his 'reservation' to the majority report: 'The suggestion in favour of prolonging the period of copyright' was 'for the author's benefit' and this would require a means of 'adjusting, where necessary, the respective rights of the author and the assignee'.[48] These concerns explain the inclusion of reversion rights in proviso to section 5(2) of the 1911 Act.[49]

Accordingly, the combined effect of the reversion right (in the proviso to section 5(2)) and compulsory licensing provision (in the proviso to section 3, considered above) was that, in respect of 'reproduction of the work for sale', the 10% royalty payable in the last 25 years of the copyright term would be payable to the author's estate and not to an assignee (or other transferee). As Lord Haldane explained the interrelation of the two provisions, after again noting the criticism that the Bill was 'making the term of copyright too long':

> …so far as publication is concerned, the only thing that remains [in the last 25 years of the copyright term] is a right to receive royalties and the only question … is whether that right to receive royalties should go to the publisher or to the author; and with every respect to the publisher we think he has enough when he has an absolute right for life and twenty-give years after the author's death. It is the author's descendants we are trying to help. [50]

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[46] Hansard, HC, vol. 23, col. 2598, 7 April 1911, Mr Buxton M.P., President of the Board of Trade.
[47] Hansard, HL, vol. 10, col. 43, 31 October 1911, Viscount Haldane.
[48] Gorell Committee Report p.30. Clayton concluded that this was 'impracticable' and would 'seriously affect the continuity of publications'.
[49] This provision was introduced when the Bill was debated in the Standing Committee of the House of Commons in May 1911: see Report from Standing Committee A on the Copyright Bill with the Proceedings of the Committee, 13 July 1911; P.P. 1911, p.26, proposed by the Solicitor General, and Copyright Bill (as amended in Standing Committee A); P.P. 1911 Bill 296, cl.5(2).
[50] Hansard, HL, vol. 10, col. 159, 14 November 1911, Lord Haldane.

In this context, as Viscount Haldane continued, the object of reversion rights was 'simply that the author is not to be allowed to contract himself out of what we think a fair standard of rights'.[51]

Reversion Rights on Bankruptcy

Interestingly, and forgotten to us today, the 1911 debates were an occasion for debate of another type of reversion right: reversion on bankruptcy of an assignee. This was proposed by Sir Gilbert Parker, a Member of Parliament who was also a popular novelist,[52] in the following terms:

> 'In the case of an assignee of copyright becoming bankrupt the royalties due under the agreement to the author shall continue to be paid to the author by any purchaser of the rights of such assignee if the work is thereafter published, and if not thereafter published, the copyright shall at once revert to the author.'[53]

The particular hardship raised by Sir Parker was that illustrated by the case of *In Re Grant Richards, Ex parte Deeping* decided by the High Court in 1907. An author, Warwick Deeping, had assigned copyright in his book *Uther and Igraine* to a publisher, in consideration for the payment of royalties on sale of the work. Bingham J held that, on bankruptcy of the publisher, the copyright vested in the trustee in bankruptcy who could 'do with it what he pleased' in carrying out his duties. The only recourse which Mr Deeping had, was to bring an action for breach of contract for the trustee's failure to pay royalties for the sales during the period that the trustee was carrying on the publisher's business.[54] Referring to this case, Sir Parker reported to the House of Commons that the purchaser of the copyright (from the trustee in bankruptcy)

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[51] Ibid. Reversion rights of a different nature were considered by Parliament in the legislative process culminating in the 1842 Act. In 1838. Sergeant Talfourd, the Bill's chief advocate, proposed a retrospective clause preventing assignees from obtaining the benefit of term extension. However, this was opposed strongly opposed by the book trade. Accordingly, the final compromise regarding the Act's retrospective application (contained in s.4 1842 Act) was that an author or author's personal representative and the publisher could enter into a written agreement whereby both parties would 'accept the benefit' of the Acts in respect of a particular book, thereby providing some opportunity for a renegotiation of that contract. See further, Alexander 'Copyright and the Public Interest', p.95. On reversion rights in the Statute of Anne 1710, s.11, see Bently and Ginsburg 'The Sole Right Shall Return to the Authors' (2010) Berkeley Technology Law Journal 1475, 1480-1541, and Yuvaraj and Giblin 'Why were Commonwealth Reversionary Rights Abolished?' (2019) EIPR 232, 232.

[52] D. Atkinson, 'Parker, Sir (Horatio) Gilbert George, baronet (1860-1932)', Oxford Dictionary of National Biography, (2011, OUP).

[53] Hansard, HC, Vol. 29, col. 2135, 17 August 1911, Sir Gilbert Parker MP.

[54] *In Re Grant Richards, Ex p. Deeping* [1907] 2 KB 33, 35.

was not bound to pay the royalties to the author under the original publishing agreement. Sir Parker expressed this to be a 'great injustice to the author', 'a serious grievance.. which ought to be put right' and he proposed that copyright law should instead provide that, on bankruptcy of an assignee, copyright would automatically revert to the author.[55] Sir Parker's amendment was supported by another M.P. and the Government's representative, the Solicitor General Sir J. Simon, expressed 'a good deal of sympathy' for the proposal, particularly in view of the 'actual hardship' caused in the case of Mr Deeping. However, it was not included in the Bill because it was seen as 'quite outside the scope of a Copyright Bill'.[56] Therefore, Sir Parker's proposal was not included in the Bill, not because there was a substantive objection to the principle of reversion to the author on bankruptcy of a publisher, but because the proper place for such a proposal should instead be a bankruptcy measure.

Conclusion

This article has revealed the inclusion of reversion rights, in the proviso to section 5(2) of the 1911 Act, was not an isolated measure. Rather, reversion rights were closely related to the debate of one of the most controversial aspects of copyright reform at this time: the increase of the term of copyright to the author's life plus 50 years. In the debates of 1911, an important argument in favour of term extension, was that a post-mortem term of 50 years would enable authors to make proper provision for their families. However, the Bill's critics pointed out that in practice this would merely benefit assignees, like publishers, who would take an assignment of the full term of copyright. Reversion rights were a means of meeting this criticism, and making the significant increase of the copyright term palatable, by suggesting that the interests of authors were promoted.

In fact, as many readers of this article will know, the drafting of the reversion rights provision in the 1911 Act was such that, in practice, little protection was provided for authors and their descendants. The proviso to section 5(2) stated that, on the death of the author, the reversionary interest would 'devolve' on the author's 'legal personal representatives as part of his estate'.[57] Accordingly, under the 1911 Act, the reversionary interest was an asset which an

[55] Hansard, HC, Vol. 29, col. 2136, 17 August 1911, Sir Gilbert Parker MP. It was suggested that the position might have been different if the purchaser had notice of the publishing contract.
[56] Hansard, HC, vol. 29, col. 2137, 17 August 1911, Sir J. Simon MP.
[57] In *Peer International v Termidor Music* [2006] EWHC 2993 (Ch) Lindsay J held that the words of the proviso to section 5(2) meant that title to the reversionary interest could only be acquired where there had been a grant of probate to personal representatives in the UK. In absence of this, title vested

author's personal representatives would, in most cases, usually sell to pay off the author's debts or to wind up the estate generally. As the authors of *Copinger Skone James on Copyright* note, in practice, the amount that a purchaser would pay for reversionary rights upon death of the author 'was not likely to have been very large': the rights would not accrue until 25 years later and even then, the same work could be reproduced (under the compulsory licence proviso to section 3) at a royalty of 10%.[58] In view of this, it is perhaps unsurprising that the abolition of reversion rights by the 1956 Act (on a prospective basis only[59]) did not occasion much debate; abolition was recommended by the Gregory Committee on Copyright in 1952 with little specific discussion, presented as a simple consequence of the proposed removal of the compulsory licensing proviso to section 3 (which was clearly incompatible with Article 7 of the Brussels Revision of the Berne Convention concerning the term of protection).[60] Indeed, while the 1956 Act and the Copyright Designs and Patents Act 1988 preserved reversion rights under the 1911 Act retrospectively (i.e. in respect of transfers between 1912 and 1957) their implications for assignees have been lessened by the fact that these later Acts are understood to permit authors to assign the reversionary interest during their lifetime.[61]

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in the public trustee under section 9 of the Administration of Estates Act 1925; a declaration of copyright ownership could not be granted on the basis of an assumed equitable right derived from the author's descendants.

[58] *Davies et al, Copinger on Copyright*, para 5-126. The authors of Copinger describe the benefits of reversion rights, in this context, to be of an 'illusory nature'. There are also reports of widespread ignorance on the part of the personal representatives of authors' estates, who often 'simply did not realise' that the reversionary interest existed. See S. Edwards, J. Love and M.A. Manger 'Regaining Ownership of Copyright: Traps for the Unwary in UK and US Copyright Law, Reed Smith Client Alerts, 15.3.2018, available at: https://www.reedsmith.com/en/perspectives/2018/03/regaining-ownership-of-copyright-traps-for-the-unwary .

[59] Schedule 7 para 28(3) Copyright Act 1956. For litigation within recent memory where the claimant's title derived from the reversionary interest under the proviso to section 5(2) 1911 Act see the litigation from the 1980s involving Redwood Music: *Chappell v Redwood* [1980] 2 All ER 817 (HL); *Redwood Music v Chappell* [1982] RPC 109 (QBD).

[60] Gregory Committee Report, paragraph 15. The Report states at paragraph 23: 'the advantages of continued adherence to the Union and to the latest Convention are overwhelming, and greatly outweigh any possible advantages which might flow from the repeal of the provisions in the existing law' (referring to compulsory licences in proviso to section 3 and section 4). The Report continues: 'The omission of the proviso to Section 3 of the Act would appear to involve the omission also of the proviso to Section 5(2), which would seem to have been inserted so as to give the royalty under Section 3 to the personal representatives of the author.' For critique of this approach see Yuvaraj and Giblin, 'Why were Commonwealth Reversionary Rights Abolished?' (2019) EIPR, 232, 234-235.

[61] Patten J in *Novello v. Keith Prowse* [2004] EWHC 766 (Ch) held that, after the entry into force of the 1956 Act, the author could dispose of the reversionary interest by assignment and this decision was upheld on appeal: [2004] EWCA Civ 1776. An express statutory provision, allowing for the author to dispose of the reversionary interest by assignment after 1 August 1989, is included in the Copyright Designs and Patents Act 1988, Schedule 1 para 27(2).

Notwithstanding the specifics of the proviso to section 5(2), recounting the legislative history of the 1911 Act is beneficial to us today. History reminds us that the long term of protection that copyright works enjoy today – now life of the author plus 70 years[62] – is far from timeless or inevitable. As Viscount Haldane, who took charge of the Bill in the House of Lords expressed 'the most minute consideration' had been given to term increase, and the approach taken 'was arrived at only after a great deal of discussion and negotiation.'[63] In these negotiations, ensuring that a measure was included which at least purported to ensure term extension benefitted authors, not assignees (like publishers) was a pre-requisite for the acceptance of term extension by legislators in 1911. Accordingly, in this context it was fully accepted that fetters on freedom of contract were appropriate to safeguard authors' interests. Further, reversion rights were considered in a wider range of circumstances than those enacted in the proviso to section 5(2): reversion to the author on bankruptcy of an assignee was also debated, and while this proposal was not adopted, no substantive objection was raised to the inclusion of such a measure as a matter of principle. In this way, history takes us away from the assumption that the approach in the UK (as well as common law EU member states like Cyprus, Malta and Ireland to which the 1911 applied) has always been simply one of freedom of contract and may free us to think again today about whether copyright truly serves authors' interests and if so, whether contractual restrictions on exploitation might appropriately redress that balance.

[62] Copyright Designs and Patents Act 1988, s.12, implementing the EU Term Directive 93/98/EEC.
[63] Hansard, HL, vol. 10, col. 130, 14 November 1911.