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Understanding Rights Reversion

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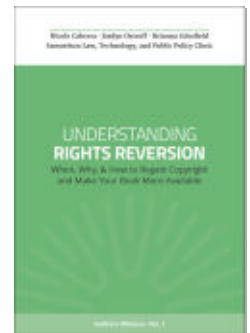
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Nicole Cabrera · Jordyn Ostroff · Brianna Schofield
Samuelson Law, Technology, and Public Policy Clinic

UNDERSTANDING **RIGHTS REVERSION**

When, Why, & How to Regain Copyright
and Make Your Book More Available

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Nicole Cabrera
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UNDERSTANDING RIGHTS REVERSION

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and Make Your Book More Available

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ALLIANCE**

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UNIVERSITY OF CALIFORNIA

Samuelson Law, Technology
& Public Policy Clinic

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A NOTE TO OUR READERS:

Please visit *Authors Alliance* on the web at <http://authorsalliance.org>. For more resources related to rights reversion, including templates and guidance on how to craft a persuasive rights reversion letter and examples of authors who have successfully reverted rights to give their works a new life, visit <http://authorsalliance.org/resources/rights-reversion-portal/>. Please consider supporting our work by joining us as a member or by making a donation.

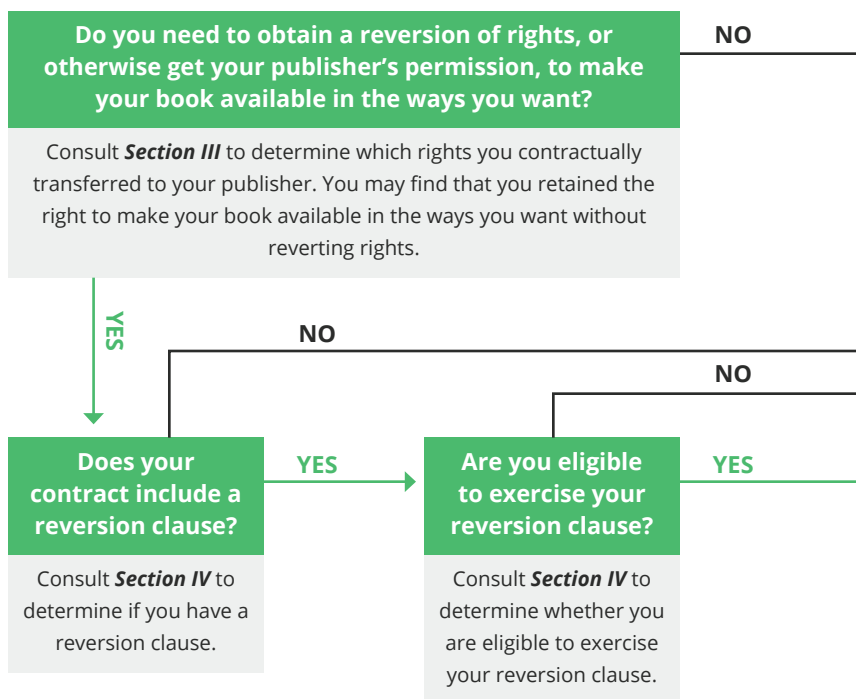
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WHAT DO YOU WANT TO DO WITH YOUR BOOK?

Consider some of the options available to you by consulting **Sections I & II**.



Proceeding without a right of reversion

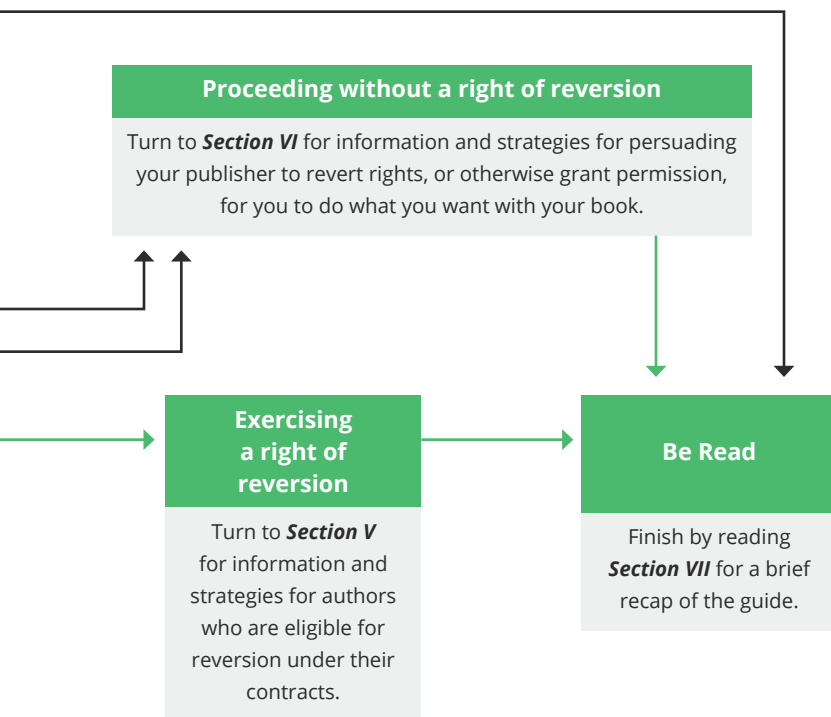
Turn to **Section VI** for information and strategies for persuading your publisher to revert rights, or otherwise grant permission, for you to do what you want with your book.

Exercising a right of reversion


Turn to **Section V** for information and strategies for authors who are eligible for reversion under their contracts.

Be Read

Finish by reading **Section VII** for a brief recap of the guide.




I. INTRODUCTION



AUTHORS COMMONLY TRANSFER SOME OR ALL of the rights in their works to their publishers when they sign their publishing agreements. In time, authors may regret transferring certain rights if their books fall out of print, sales drop, or their publishers stop marketing their books. In these circumstances, many authors who want to do something to make their books more widely available may be constrained by the terms of their publishing agreements.

For example, some authors may want to bring their out-of-print books back into print, while others may want to deposit their books in open access online repositories. Authors who have signed over some or all of the rights in their works to their publishers may not know how to make their works available in the ways they want.



Authors Alliance is a nonprofit organization that promotes authorship for the public good by supporting authors who write to be read.¹ Pursuant to this mission, *Authors Alliance* created this guide to help authors regain rights from their publishers or otherwise get the permission they need to make their books available in the ways they want. In this way, *Authors Alliance* seeks to enhance the public's access to works of cultural and research value.

WHO IS THIS GUIDE FOR?

Are you an author who would like to increase your book's availability? Have you already entered into a publishing agreement for your book?

If you answered “yes” to both of these questions, then read on! This guide addresses the needs of authors who wish to make their works available to a wider audience in ways that may be prohibited by the terms of their existing publishing agreements.

For example, this guide will help authors who want to do things like:


- Bring their out-of-print books back into print
- Publish digital versions of their books
- Make their books openly accessible

- Publish updated editions of their books
- Create new works derived from their books (e.g., translations, audio editions, cinematic adaptations, etc.)
- And much more.

This guide addresses common issues facing all authors who seek to increase their books' availability, regardless of whether an author has a literary agent. However, authors with agents may be restricted by the terms of their agency agreements from approaching their publishers directly—or they may prefer to have their agents speak with their publishers on their behalf. Regardless of what an agent–author contract might stipulate, authors who consult this guide will be better informed about strategies for making their books more available.

WHAT IS THIS GUIDE?

This guide is the product of extensive interviews with authors, publishers, and literary agents who shared their perspectives on reverting rights, the author–publisher relationship, and keeping books available in today's publishing environment. This guide compiles



information, strategies, and examples gleaned from these interviews to empower authors to take an active role in increasing their books' availability. For some authors, this may mean exercising or negotiating rights of reversion; for other authors, it may mean securing their publishers' permission to make their books available in the ways that they want, or working with their publishers to revive their books' availability.

“Sounds good, but what is a right of reversion?”

Technically, a *right of reversion is a contractual provision that permits an author to regain some or all of the rights in her book from her publisher* when the conditions specified in the provision are met. Although triggering conditions vary from contract to contract, many contracts provide for reversion when an author's book falls out of print, the number of copies sold falls below a certain threshold, or the book's revenue falls below a floor value.

An author may want her rights back even though the triggering conditions in her contract have not been met. Some authors' contracts do not even include a reversion clause. *In practice, an author may be able to obtain a reversion of rights even if she has not met the*

conditions stipulated in her contract or does not have a reversion clause.

Authors may need to obtain a reversion of rights or secure their publishers' permission to do what they want with their books in a variety of situations:

Annette Anglophile's once-popular series on England's queens has long been out of print. In honor of Queen Elizabeth II's eighty-eighth birthday, Annette hopes to personally print 100 special-edition copies of her biography of QEII and make them available for sale in her university's bookstore.

The University of Pompeii encourages its faculty members to contribute a copy of their published works to the school's institutional repository. Professor Plumes recently published a geological analysis of the volcanic ash trapped in some of the campus's oldest structures and is eager to submit a digital copy to the repository.

Henri Helvetica transferred to his publisher the electronic rights to his book on twentieth-century typefaces. Unfortunately, his publisher is not willing to invest in bringing his book to life as an e-book enriched with illustrations and hyperlinked text. Henri thinks he can improve sales and readership of his book if he places it with another publisher who is willing to make the investment.

Annette, Professor Plumes, and Henri may need to regain some or all of the rights in their books from their publishers, or otherwise get their publishers' permission, in order to make their works available in these ways without violating their publishing contracts and/or copyright law.

Why Seek to Revert Rights?

Reversions help authors. Reverting rights can help authors keep their works available to be read in the ways they choose. Thus, reversions may benefit authors who want to increase their books' accessibility so they can continue to contribute to academic and cultural discourse. Reversions may be especially helpful for academic authors, who tend to value others' ability to


easily access and cite their works. Reversions may also benefit authors who wish to continue to derive financial benefit from works that are languishing with their current publishers.

Reversions help publishers. Publishers increasingly recognize that it sometimes makes financial sense to revert certain rights to authors. Reversion is frequently the most efficient solution for a publisher once it no longer derives much revenue from a work. For example, a publisher may revert rights when a book's accounting or warehouse costs outweigh the book's earnings.

Reversions serve the public interest. Society benefits from widespread access to scholarly works and the preservation of our cultural heritage. Public access to knowledge is restricted when works are out of print, un-digitized, or otherwise unavailable. Reversions of rights can help authors remedy these problems and increase readers' access to their works.

What This Guide Is Not

This is the first in a collection of guides by *Authors Alliance*. This guide is for authors who already have publishing agreements in place and who now wish to



exercise or negotiate a reversion of rights; it is not a guide to negotiating publishing contracts. Authors who want more information on publication contracts, termination of transfer, and more should consult our resource library.²

This guide provides general information and strategies for authors who wish to obtain a reversion of rights; it does not apply this advice to any individual author's specific situation. This guide is not legal advice nor does using this guide create an attorney-client relationship. Please consult an attorney if you are unsure how the information in this guide applies to your particular facts.

This guide does not address termination of transfer under the Copyright Act, which permits authors to terminate copyright assignments and licenses under certain conditions. Unlike termination of transfer, authors may exercise or negotiate rights of reversion without waiting for a statutorily prescribed period of time to pass. *Authors Alliance* has a suite of resources available for authors who seek further information about termination of transfer.³

How to Use This Guide

Flexible and easy to navigate, this guide prompts authors to read only the sections that are applicable to their circumstances. All authors should begin by reading **Sections II and III**. In **Section II**, authors learn about different ways that they might increase their books' availability. **Section III** helps authors determine whether they have transferred to their publishers the rights necessary to make their books available in the ways they want. Authors who learn in **Section III** that they have transferred the relevant rights should turn to **Section IV** to determine whether their contracts have reversion clauses and, if so, whether they are eligible to exercise them.


Authors who find in **Section IV** that they may revert rights pursuant to their reversion clauses should continue on to **Section V** to learn how to exercise their rights of reversion. Alternatively, authors who find in **Section IV** that they are ineligible to exercise their contracts' reversion clauses, and those whose contracts do not have reversion clauses, should turn to **Section VI**. **Section VI** shares proven strategies for persuading publishers to revert rights or grant permission to authors, allowing them to make their books available

in the ways they want. All authors should finish by reading **Section VII**.



Please continue to Section II on page 14 to learn about the different ways you might increase your book's availability.

II. HOW WILL YOU INCREASE YOUR BOOK'S AVAILABILITY?



THE FIRST STEP TO INCREASING A BOOK'S availability is taking the time to consider the formats and publishing methods that will best serve the particular book and author. Authors can best position themselves for success after obtaining a reversion of rights if they first develop a plan for increasing the accessibility of their books. As such, all authors should read and consider the options presented in this section before navigating through the rest of the guide.

THIS SECTION:

- Suggests different ways you can increase your book's availability in light of your specific circumstances and goals.
 - Shares different publishing methods that might help you achieve your goals.
-

WHAT FORMATS ARE RIGHT FOR YOU AND YOUR BOOK?

The methods that an author may employ to make her book available depend on her unique circumstances. A book's age, audience, sales, current availability, and subject matter all factor into how an author might plan to increase her book's availability going forward. So too does an author's background. For example, a university professor might prioritize sharing her research with the world or accruing citations and therefore opt to place her book in an open access repository. In contrast, an author who depends on royalties as her source of income may opt to keep her book available in traditional commercial markets. An author of a textbook or heavily illustrated work might worry that her book is prohibitively expensive and want to find a way to publish more affordable versions.

In the modern publishing world, there are more ways to increase a book's availability than ever before, and different authors might choose different formats to achieve their goals. The list below includes just some of the formats available to today's authors.

Electronic edition for e-readers and tablets

Some authors worry that if a work is not available online it might as well not exist in the electronic age. Authors concerned about making their works available to the digital generation, capturing a broader audience, or making their works more affordable may want their books to be available in an electronic format.

Furthermore, e-book technology has evolved rapidly over the last few years. In the past, publishers lacked the technology to publish illustrated texts as e-books. With the advent of tablet computers, even authors of illustrated books can tap into the e-book market to increase their books' sales and accessibility.

Enriched e-book

Enriched e-books—sometimes called enhanced e-books—include interactive features like videos, maps, interviews with the author, research materials, and much more. Authors who think their works would benefit from these types of features might consider making their works available as enriched e-books.

Traditional print format

Some authors may think that their books cannot reach their full market potential unless they are available in a traditional print format, even if the books are available electronically. For instance, authors with an older readership might find that their readers are not inclined to purchase and read e-books. These authors may want their books available in print in order to reach their target audiences.

Open access

Authors who prioritize their books' availability may wish to make their books openly accessible either on their websites or in open access or institutional repositories. Some authors may elect to deposit full or partial copies of their works in open access repositories and simultaneously publish their works in print form in order to draw in new readers and potentially boost their sales.

Creative Commons license

Authors who would like to make their works available for others to legally use, adapt, or share may choose to make their books openly accessible under a Creative

Commons license. Authors can control how others may engage with their works by selecting from one of Creative Commons' six available licenses.⁴

New work derived from an original book

Authors may wish to make their books available to different populations of readers by releasing their books in new formats or languages. Audio editions, braille editions, and foreign language translations are just a few examples of different types of derivative works. In addition, authors might want to create other works inspired by their books, such as video adaptations, plays, operas, and more. Derivative works may help books reach a wider audience as well as boost authors' sales.

New work that includes material from an earlier book (e.g., anthologies)

Some authors may want to include portions of their published works in new works. For example, creating an anthology that includes material from earlier works—or that combines the work of several authors—allows authors to reach new audiences. Anthologies

may be particularly attractive to essayists, poets, and short fiction authors.

Updated edition

Some authors may worry that their books will lose relevance, and thus stop selling, if they are not up to date. In particular, academic and nonfiction authors may want to update their works to reflect developments in their fields and to maintain their readership and sales.

Take a moment to consider these possibilities—and any other options available to you—and decide which formats might help you achieve your goals for your book.

HOW WILL YOU MAKE YOUR BOOK AVAILABLE IN THESE WAYS?

Authors should also consider how they will make their books available in the formats they choose. Publishers and literary agents warn that authors may find their books even less available if they obtain a reversion of

rights without first having a plan in place for how they want to publish their books. For example, authors who obtain a reversion without a plan might find it harder than they expected to publish their books themselves or place their books with new publishers.

That said, authors should also remain flexible about how they will achieve their goals for their books. According to many publishers, an author's request to revert rights sometimes prompts the publisher itself to make the author's book available in the way he wants. For example, if an author asks his publisher to revert rights so that he or another publisher can produce and sell an electronic edition, the original publisher may decide to publish the electronic edition instead. Likewise, if an author is disappointed with her book's sales and requests reversion, the publisher may be prompted to renew marketing efforts on the book's behalf.

Nonetheless, an author may ultimately prefer to contract with a new publisher, or take matters into her own hands by publishing and distributing her book herself, when she feels that her current publisher is not willing or able to take the steps necessary to make her book available in the ways she wants.



Please continue to Section III on page 24 to determine which rights you granted to your publisher and whether you need to revert rights to make your book available in the ways you want.

III. DO YOU
CURRENTLY HAVE
THE RIGHT TO DO
WHAT YOU WANT
WITH YOUR BOOK?

BEFORE EMBARKING ON ANY PLANS TO MAKE their books more available, authors should read their contracts carefully to determine whether they need to obtain a reversion of rights from their publishers. Some authors may not have granted their publishers all the rights in their books, and so might already have the rights they need to achieve their goals for their books without obtaining a reversion of rights or otherwise getting their publishers' permission.

Publishing contracts vary considerably in regards to what rights authors grant to their publishers. All authors should read this section to understand what rights they transferred to their publishers and whether they retained the rights they need to make their books available in the ways they want.

THIS SECTION:

- Helps you understand the rights authors originally have in their works, and the rights they can grant to their publishers.
 - Gives you the information you need to interpret the scope and duration of your grant of rights to your publisher.
 - Alerts you to the implications of reversion and third-party content.
 - Teaches you how to use this information to decide if you already have the right to make your book available in the ways you want, or if you first need to obtain a reversion of rights from your publisher.
-

BACKGROUND

Copyright in an original literary work initially vests with the author of the work.⁵ Copyright ownership includes a bundle of rights. For example, a copyright owner has the exclusive right to: make copies of the work; prepare derivative works (e.g., audio editions, revised editions, dramatic adaptations, etc.); sell, lease, or otherwise distribute copies of the work; and perform or display the work publicly.⁶ These exclusive rights

are subject to a number of limitations.⁷ The owner of these rights may authorize or license someone else to do these things with her work while still retaining copyright ownership. Alternatively, she may transfer her entire copyright or certain rights under her copyright to someone else.⁸ When an author signs a publishing contract, she usually transfers some or all of her rights to her publisher. If an author transfers her copyright in its entirety to her publisher or grants her publisher an “exclusive license,” the author can no longer exercise these exclusive rights without the publisher’s permission unless her actions fall within one of the exceptions built into copyright law.⁹

Before you settle on a course of action for making your book more available, you must determine what rights you granted to your publisher in the first place, and under what conditions. Therefore, it is wise to find your contract early in the process. Authors who cannot find their contracts should request copies from their publishers.



If neither you nor your publisher can locate your contract, you may still be able to revert rights; turn to Section V on page 58 to learn more about exercising a right of reversion.

WHAT RIGHTS DID YOU TRANSFER TO YOUR PUBLISHER?

Read your entire publishing contract to determine what rights you transferred to your publisher. Publishing contracts often divide rights into “primary rights” and “subsidiary rights.” This information is often included in clauses with titles like “Grant of Rights,” “Publication Rights,” “Subsidiary Rights,” and/or “License.” Remember, though, that all contracts are different and that your contract may capture this information under other headings or across several different clauses. An author may also be able to infer what rights he granted to his publisher by looking at the royalty or fee split provisions in the contract. For example, if a contract provides that the author will receive 50% of net receipts from the sale of audio rights, then it is likely that the author transferred audio rights to his publisher.

Here are some primary and subsidiary rights that you may have granted to your publisher:

PRIMARY RIGHTS

- Print rights
- Digital and/or electronic rights
- and more...

SUBSIDIARY RIGHTS

- The right to incorporate content into an anthology or other work
- The right to publish the book's first and second serials
- Translation rights (a.k.a. foreign language rights)
- Audio rights
- Performance rights
- and more...

If an author finds that he granted his publisher the rights he needs to achieve his goals for his book, he will need to initiate a conversation with his publisher about reverting some or all of those rights. On the other hand, an author generally retains the primary or subsidiary rights he did not grant to his publisher, and is therefore free to exercise them. For example:

Martin Maritime granted his publisher exclusive, worldwide rights to publish all print, electronic, and digital editions of his fictional account of love on the high seas. Recently, a film student approached Martin about making a movie based on his work. Martin suspects a film version of the novel will boost sales of his book, not to mention bring the story to a wider audience. Because Martin had not granted his publisher the right to make or license motion pictures based on the novel, he was able to grant the student's request himself, without reverting any rights from his publisher.

A Note About Digital and/or Electronic Rights

Authors of books with older contracts should note that there is some ambiguity about what contractual language constitutes a grant of electronic rights. Before the advent of digital publishing, contracts did not explicitly address e-books and other digital editions. Instead, contracts frequently granted the publisher the right to “print, publish and sell the work[s] in book form.” One court has held that this language did not constitute a grant of electronic rights to the publisher and that, therefore, the publisher did not have the right

to publish e-books.¹⁰ However, this does not mean that an author must explicitly grant electronic or digital rights in order for his publisher to be able to publish his work as an e-book. For example, the same court in a different case recently interpreted an older contract granting the publisher the right “to publish... in book form” to have conveyed the exclusive right to license e-book versions of the work because the contract included a separate clause that implicitly granted the publisher certain rights associated with use by “electronic means now known or hereinafter invented.”¹¹ In analogous situations, courts have found that rights to later-developed technologies may be transferred—even if the contract did not explicitly grant the right—when the contract can be reasonably read as transferring that right.¹² Since this is a developing area of the law, you might consider consulting an attorney if you are unsure whether your contract transfers electronic rights. For example:

In 1998, Oscar del Oro granted his publisher exclusive, worldwide rights to publish *Prospecting: A History of the Wild West* “in book form.” He would now like to independently release the book in an electronic format. His publisher insists that the phrase “in book form” includes electronic formats, but Oscar does not believe it does since the contract was written before the advent of digital publishing. In order to avoid a dispute, Oscar may want to negotiate with his publisher to reach an agreement about whether he transferred electronic rights, possibly with the help of an attorney.

More recent publishing contracts typically convey print, electronic, and digital rights to the publisher. As digital publishing has grown, publishers have become increasingly reluctant to allow authors to keep electronic and digital rights.

Exclusivity

Just because an author transfers a right to a publisher does not necessarily mean that only the publisher can exercise that right. An author’s grant to a publisher can be exclusive or non-exclusive. If a publisher has

exclusive rights to publish a book in a certain format, then no one else can publish the book in that format—not even the author himself—without first getting permission from the publisher. However, if the publisher has a non-exclusive right to publish a book in a certain format, territory, or edition, then the author can also pursue options to publish his book in those ways alongside the publisher. Typically, publishing contracts grant exclusive rights to the publisher.

Keep in mind that exclusivity may differ among the different primary and subsidiary rights granted in the same contract. For example, a contract might grant the publisher the exclusive right to publish in one format and the non-exclusive right to publish in another format.

Territory

Publishing contracts usually specify in what territories the author's grant of rights to the publisher applies. For example, an author might transfer worldwide print rights to his publisher. This means that the publisher can print, publish, and sell the book in print form throughout the world or license those rights to other publishers. Alternatively, the rights might be limited to

the United States, North America, or some other geographic territory. This may be relevant in a situation in which an author granted regional rights to his publisher but now wishes to make his book available in another territory. Since he retained the right to publish his book in territories outside the specified region, he can make his book available in those territories without reverting rights. For example:

Roberta Robin granted her publisher exclusive, North American rights to publish all print editions of her children's guide to ornithology. Roberta heard from a friend and fellow bird-lover in the U.K. that there is no similar guide for children across the pond, so she wants to shop her book around to British publishers in the hope that one will publish the guide in the U.K. Since Roberta only transferred her publisher rights to sell the book in North America, she can transfer rights to sell the book in the U.K. to a British publisher without reverting any rights from her current publisher.

Duration of Grant

In addition to varying by territory and exclusivity, grants of rights also vary by duration. Typically, book contracts grant rights to publishers for the term of the author's copyright. However, some contracts limit the grant of rights to a certain term of years, after which the rights granted to the publisher will revert to the grantor. For example:

Olive Octave granted her publisher exclusive, worldwide rights to publish all print, electronic, and digital editions of *Scales of Justice: the Intersection of Musical Education and the Law*. The term of Olive's grant was limited to seven years from the date of publication. Now five years into the grant's term, Olive would like to make *Scales of Justice* openly accessible. Olive will have to negotiate with her publisher for permission to post her book online, negotiate to revert rights prior to her contract's expiration date, or wait two years until the term of her grant expires.

A Note About Third-Party Content

Many authors' books incorporate content created by third parties, including diagrams, illustrations, photographs, and cover art. These authors may not have the legal right to continue to use third-party content after reverting their rights or otherwise making their books available in new ways. Authors should check the terms of the agreements governing their use of third-party content before making their books available in ways that retain third-party content. Authors who do not have—or are unable to relicense—rights to third-party content will need to consider how they will replace the content. For example, an author who is unable to relicense her book's original jacket or cover art might commission a new jacket or cover art or purchase a pre-made cover available online.


WHAT CAN YOU DO WITH THE RIGHTS YOU RETAINED?

Now that you have considered what you want to do with your book to make it more available and understand the scope and duration of the rights you transferred to your publisher, you can determine whether or not you need

your publisher to revert rights or grant you permission to implement your plan.

Generally, an author retains the rights that he has not granted to his publisher. If an author did not grant the relevant rights to his publisher, he may already have the rights he needs to do what he wants with his book and may not need to approach his publisher for reversion or permission.

However, if he transferred the rights he needs and his publishing contract prevents him from doing what he wants with his book, he may need to discuss reverting rights or securing permission from his publisher to make his book available in the ways he wants. An author who is unsure if he has the rights to do what he wants with his book may need to come to an agreement with his publisher about the proper interpretation of his grant of rights.

 **If you determine that you do not currently have the right to do what you want with your book, please continue to Section IV on page 40 to determine whether you have a right of reversion.**



If you determine that you already have the right to do what you want with your book, please turn to Section VII on page 102.

IV. ARE YOU
ELIGIBLE TO REVERT
RIGHTS UNDER THE
TERMS OF YOUR
CONTRACT?

PLEASE READ THIS SECTION IF, AFTER READING **Section III**, you determine that you do not already have the rights necessary to make your book available in the ways that you want.

THIS SECTION:

- Introduces common types of reversion clauses.
 - Prompts you to determine whether your contract contains a reversion clause.
 - Describes how the publishing industry interprets various types of reversion clauses.
 - Helps you determine whether you are eligible to obtain a reversion of rights under the terms of your contract's reversion clause.
-

DOES YOUR CONTRACT HAVE A REVERSION CLAUSE?

Once an author determines what she would like to do with her book and that she has transferred the necessary rights to her publisher, her next step is to determine whether her contract has a reversion clause. A **reversion clause** is a contractual provision that empowers an author to regain some or all of the rights in her book from her publisher when certain triggering conditions are met. When an author regains rights to her work pursuant to a reversion clause, she is exercising a **right of reversion**. Reversion provisions can generally be found in clauses with titles like “Reversion of Rights,” “Out of Print,” or “Discontinuance.” Occasionally, reversion provisions may be found in a “Termination” clause.

Below are annotated examples of a few different kinds of reversion clauses, drawn from real contracts:

Clause #1: If the Work shall become out of stock and will not be reprinted and is unavailable for sale in any English language edition issued or licensed by the Publisher [**Triggering Condition**], then the

Author may give notice in writing to the Publisher to reprint or reissue the Work [**Written Notice Requirement**]. If no agreement is reached for the reprinting or reissuing of the Work within 3 months of the Author's request, all the Publisher's rights in the Work shall terminate [**Timeline**].

For the avoidance of doubt, a Work shall not be considered out of stock or unavailable if it is available in whole or in part by print on demand or online or on CD-ROM or in any other electronic format [**"Out of Stock or Unavailable" definition**].

Clause #2: If the Work has been declared out of print by the Publisher in the United States [**Triggering Condition**], the Publisher may, but shall not be obligated to, offer to revert rights to the Work to the Author.

Clause #3: Should the Publisher fail to keep the full-length work in print [**Triggering Condition**], and after written demand from the Author [**Written Notice Requirement**], decline or neglect to bring it back into print within six (6) months the Author may terminate

this Agreement and all rights granted hereunder shall revert to the Author [*Timeline*].

The Work shall be deemed in print if available in any of Publisher's full-length print editions available through normal U.S. trade channels. If the Work is only available as an Electronic Book or through a form of print upon demand capability, the Work shall not be deemed in print unless such Electronic Book and/or print upon demand capability shall generate combined sales of no less than 250 copies per year [*"In print" definition*].

As you can see from these examples, reversion clauses vary greatly from contract to contract. Your reversion clause may not closely resemble the examples listed above. Furthermore, not all contracts include a reversion clause. You should read through your entire contract to determine if it includes a clause that allows for reversion of rights when certain conditions are met.



If your contract has a reversion clause, please continue reading this section.



If your contract does not have a reversion clause, please turn to Section VI on page 24.

WHAT CONDITIONS MUST BE MET BEFORE YOU CAN EXERCISE YOUR REVERSION CLAUSE?

As the above examples illustrate, reversion clauses have triggering conditions that must be satisfied before an author's work is eligible for reversion. In order to determine whether your work is eligible for reversion under the terms of your contract, you must first identify the conditions in your contract and understand what they mean.

Below are descriptions of some of the most common triggering conditions. Consult the list below to determine what types of triggering conditions your reversion clause includes, as well as for explanations of how publishers tend to interpret these conditions.

Out of Print

Out-of-print triggering conditions are common in reversion clauses. Under this type of clause, a book becomes eligible for reversion when the publisher ceases to keep the book “in print.” Before the advent of

print-on-demand and digital technology, this usually meant that the triggering condition for reversion was satisfied when the publisher stopped printing copies of the book and had no copies of available for sale.

However, in the past decade, the definition of “in print” has become less straightforward: Is a book “in print” if it is only available as an e-book? What about if it is only available via print-on-demand technology? Can anything be truly “out of print” these days?

In more recent contracts, publishers often answer these questions by clearly specifying which book formats qualify as “in print.” For example, *Clause #1* specifies that a work is not considered “unavailable” if it is available in print-on-demand or electronic formats. Note that *Clause #1* does not use the terms “in print” or “out of print,” but nonetheless operates as an out-of-print clause.

Other contracts, however, do not define which book formats keep a book “in print.” This is especially true of older contracts that predate digital publishing and print-on-demand technology. With these contracts, authors and publishers may have to negotiate an interpretation of what “in print” means. *Clause #2*, which does not define “out of print” or even

require that the publisher revert rights once a book goes out of print, is an example of this type of clause that is especially prejudicial to authors.

Authors should note that some publishers use other criteria to determine whether a book is in or out of print. For example, some out-of-print clauses stipulate that a book is “in print” if it sells a certain number of copies or earns a certain amount of revenue in a given period of time. This type of clause is addressed next.

Copies Sold/Revenue Earned

In order to avoid difficulties in interpreting what the phrases “out of print” or “in print” mean, many publishers have shifted to reversion clauses based on the number of copies sold or amount of revenue earned. Under these clauses, books become eligible for reversion if the number of copies sold or revenue earned in a given period of time falls below a certain threshold. An author whose contract includes this kind of reversion clause should check whether it specifies which formats count towards that threshold. For example, does the sale of e-books contribute to the

total number of copies sold or revenue earned? What about print-on-demand copies?

Generally, if a contract does not specify which formats count towards the threshold, it means that the publisher counts all formats. Nonetheless, authors should reach out to their publishers for clarification.

Stock Threshold

Some reversion clauses include triggering conditions that are based on the publisher's stock of a book. Under these clauses, a book becomes eligible for reversion if the publisher's stock of the book falls below a specified threshold.

Term of Years

As discussed in **Section III**, authors sometimes grant rights to their publishers for a term of years, rather than for the entire term of copyright. When that period of time elapses, the rights revert to the author. Unlike reversion clauses, this information might not appear in a "Reversion of Rights," "Out-of-Print," or "Termination" provision; rather, it will likely appear in a provision titled "Duration of Grant," or alongside the grant of rights itself.

The above list of triggering conditions is not exhaustive. Your contract's reversion clause may not look exactly like one of these examples, and it may include different triggering conditions entirely. Many contracts include hybrid reversion clauses that combine different types of triggering criteria. For example, **Clause #3** includes an out-of-print triggering condition, which applies to the availability of the traditional print format of the book, alongside a copies-sold triggering condition, which applies to the electronic and print-on-demand versions of the book. Read your reversion clause carefully to determine what conditions must be met for you to be eligible to revert.

HAVE THE CONDITIONS OF YOUR REVERSION CLAUSE BEEN MET?

After establishing which triggering conditions are included in your contract, you should determine whether these conditions have been satisfied and whether your work is therefore eligible for reversion under the terms of your contract. Ascertaining whether your triggering conditions have been met may require you to engage in some investigation and fact-finding. Below, you will find guidance on what steps you

should take to determine whether your work is eligible for reversion based on the type of triggering conditions included in your reversion clause. Authors with hybrid reversion clauses should consult the list for each relevant triggering condition.

Out-of-Print

If your book's out-of-print status triggers your reversion clause, check to see if your contract specifies the formats in which your book must be available to qualify as "in print." If your contract does not explicitly define what it means for a book to be considered "in print," you should reach out to your closest contact at your publishing house—often this will be your editor—to gather information about what your publisher understands "out of print" to mean. After speaking with your editor or a person in the publisher's contract department, you may disagree with your publisher's interpretation of "out of print" and therefore remain uncertain of whether your contract's triggering condition has been met. In this case, you should still gather information about the formats in which your book is available.

You should then assess whether your publisher has made your book available in the formats that qualify as keeping the book “in print.” For example, if your book must be available in the traditional print format to be considered “in print,” you should check online marketplaces as well as your local bookstores to determine whether your book is available for sale in that format. If you find that your book is not available in the format(s) required to keep the book in print, then the triggering condition may be met and you might be eligible for reversion—even if your book is available in other formats.

If your contract defines your book as “in print” when it sells a certain number of copies or earns a certain amount of revenue in a given period of time, please consult the *Copies Sold/Revenue Earned* section below.

Copies Sold/Revenue Earned

If your reversion clause is triggered when your book’s sales or revenue fall below a certain threshold, you should consult your royalty statements to determine the number of copies sold and the revenue earned. Typically, publishers have a contractual obligation

to account to authors for the sales of their books—generally on a semi-annual basis. In these cases, you have a right to demand a statement of account from your publisher if the publisher fails to send regular royalty statements.

You are eligible for reversion if your royalty statement shows that the number of copies sold or revenue earned is below the minimum threshold established in your contract.

Stock Threshold

If your reversion clause is triggered when your publisher's stock of your book dips below a certain threshold, you should try to find out how many books your publisher has in stock. This can be difficult to determine because this information does not usually appear on royalty statements. If you want to check your publisher's stock, you might first try asking your editor or other close contact at your publishing house. However, your publisher may be reluctant to release this information, so you can also try calling your publisher's distribution and ordering center. Publishers usually post this phone number on their websites, on the pages through which booksellers place orders for

publishers' books.¹³ Before you call, you should have your book's full title and International Standard Book Number (ISBN) on hand.

Publishers occasionally notify an author that his book is being “remaindered,” offering print copies of the books to the author at the remainder price. This does not necessarily mean that your publisher will not retain any stock of your book; your publisher may simply be lightening its inventory while retaining some stock to sell at list price. Other times, the remaindering notification means that all print copies will be remaindered or destroyed—in this case, an author whose triggering condition is based on the publisher's stock threshold is eligible for reversion. If you receive a remaindering notification, ask your publisher if it will retain any stock of your book.

Term of Years

If your grant of rights is limited to a term of years, you should re-read your contract to verify the term of the grant. Check your contract to see if, once the specified number of years passes, the rights revert to you automatically or if you must write to your publisher to request reversion. Some contracts require the author

to notify the publisher that he would like the rights reverted; otherwise, the publisher may be entitled to continue publishing the work even after the specified period of time elapses.

Use the information you have gathered to determine whether the terms of your reversion clause are met. If the triggering conditions are satisfied, then you are eligible to revert rights. Consider the following examples:

Carla Carlsbad is disappointed to learn that her memoir is no longer available in a traditional print format. Nonetheless, *My Life as a Spelunker* is available for sale as an e-book and as a print-on-demand book. Carla is not entitled to reversion under the terms of her contract because her reversion clause defines a work as “in print” if it is available in any format.

Sybil Soothsayer's collection of poems inspired by the Oracle of Delphi was published in 2005. Her contract specifies that she is eligible for reversion if *Pythia*'s annual print sales drop below 250 copies. After checking her royalty statements, Sybil discovers that *Pythia* has enjoyed no sales for the past several years. Sybil determines that she is therefore eligible to revert rights because *Pythia*'s annual print sales dropped below the minimum threshold specified in her reversion clause.

You are eligible to obtain a reversion if, like Sybil Soothsayer, your contract's triggering conditions have been met. On the other hand, if—like Carla Carlsbad—your triggering conditions have not been satisfied, you are not eligible to obtain a reversion of rights pursuant to your contract. However, you may still be able to negotiate with your publisher to revert rights or otherwise make your book available in the ways that you want.



If you determine that you have met your contract's triggering conditions and that you are therefore eligible for reversion, please continue to Section V on page 58.



If you determine that you have not met your contract's triggering conditions and that you are therefore not eligible for reversion under the terms of your contract, please turn to Section VI on page 70.



If you are unsure whether you are eligible for reversion under the terms of your contract, please continue to Section V on page 58.

V. EXERCISING
A RIGHT OF
REVERSION UNDER
THE TERMS OF
YOUR CONTRACT

PLEASE READ THIS SECTION IF, AFTER READING **Section IV**, you determine that you are eligible to exercise a right of reversion under the terms of your contract.

You should also read this section if you remain unsure whether you qualify for reversion under the terms of your contract, either because you and your publisher cannot locate your publishing contract or because you are unsure whether your contract's triggering conditions have been met. In these situations, you should nonetheless notify your publisher of your desire to revert by making the best possible argument as to why you qualify for reversion and by following the guidelines set forth in this section. You should also consult **Section VI** for information and persuasive

strategies that may be useful should you need to negotiate with your publisher.

THIS SECTION:

- Describes the steps you should take before requesting a reversion of rights.
 - Explains the process of exercising a right of reversion.
 - Imparts rules to guide your interactions with your publisher.
-

WHAT STEPS SHOULD YOU TAKE BEFORE EXERCISING A RIGHT OF REVERSION?

Before requesting a reversion of rights, an author should take the time to gather additional information about his publisher's plans for his book so that he can evaluate whether reversion is his best option. Authors who determine in **Section IV** that they are eligible to exercise a contractual right of reversion will have already collected some of this information about their books' sales and availability.

First: Have a plan in place for your work following reversion.

As discussed in **Section II**, it is important that authors take the time to consider the best format and publishing options for making their books available. Authors who obtain a reversion without having a plan in place for their books might find it more difficult to publish their books themselves, or place their books with new publishers, than they originally expected. As a result, these authors might find that their books are actually less accessible after obtaining a reversion of rights. On the other hand, authors who have a plan in place before reversion are more likely to successfully increase their books' availability.

Second: Find out what your publisher plans to do with your book in the future. An author should speak with her closest contact at her publishing house—perhaps her editor—to learn more about whether her publisher has any plans for her book that will meet her goals without needing to obtain a reversion of rights. This conversation can help an author determine whether exercising her right of reversion is truly her best option for increasing her book's availability. For example, an author who would like to release a digital version of

her book may find that her publisher is already in the process of digitizing its backlisted titles for release as e-books, as many publishers are now doing. A conversation with her publisher may move her book to the top of the pile for digitization, thus satisfying her goal for her book without reverting rights.

Consider asking questions like:

- Does the publisher plan to reprint the book? If so, when?
- Is the publisher willing to digitize the book?
Does the publisher plan to exercise any subsidiary rights (e.g., release an audio book, license a foreign translation, etc.)?
- Does the publisher have any plans for another marketing push for the book?

If, after collecting this information, an author remains unsatisfied with her book's status or her publisher's ability to meet her goals, she may decide that obtaining a reversion of rights is the best way to increase her book's availability. However, reversion may not be right for an author who concludes that her publisher is making sufficient efforts on behalf of her book or who

discovers that her publisher is willing to make the book available in the ways she wants.

HOW TO EXERCISE YOUR RIGHT OF REVERSION

Authors who decide to seek a reversion of rights must first notify their publishers of their intent to seek a reversion of rights. Authors should then follow up with their publisher as necessary until they receive confirmation of reversion. Authors should maintain a professional and polite tone in all of their communications with their publisher.

Occasionally, an author seeking a reversion of rights may learn that her publisher has gone out of business or bankrupt. This adds complexity to the rights reversion process because you may be unable to identify anyone to notify of your intent to seek a reversion of rights. In this case, you may be the author of an orphan work¹⁴ and may need to consult a lawyer to assist with your case.

Notification of intent to seek a reversion of rights

Generally, authors must provide their publishers with basic written notice of their intent to seek to obtain a

reversion of rights pursuant to their reversion clause. Many, but not all, contracts provide that the publisher will continue to hold the rights to the book for a certain period of time, perhaps three or six months, following the author's notice. During this time, the publisher has the opportunity to bring the book back into print, or otherwise try to modify the book's sales or availability. If the publisher does increase availability such that the reversion clause's triggering conditions are no longer met, then the author will no longer be eligible to revert rights. For example:

Julian Jingoist authored an illustrated compilation of twentieth-century American campaign posters. A year after publication, sales of *Yesterday's Visions of Tomorrow's America* dropped below the minimum threshold articulated in his reversion clause. In accordance with the terms of his publishing agreement, Julian provided his publisher with written notice of his intent to revert, at which point his publisher had six months to increase his book's sales. During these six months, his publisher conducted a marketing push that resulted in a dramatic increase in sales of *Yesterday's Visions*. Now,

Julian's sales are far above his reversion clause's minimum threshold. As a result, Julian is no longer eligible to exercise his reversion clause.

A publisher's decision to reprint or otherwise increase a book's availability may prove a satisfactory solution to the problems that prompted an author to request reversion in the first place—even if, like Julian, the author's original goal was to revert rights to his book.

Timeframe for reversion

The amount of time it takes for publishers to respond to reversion requests varies. It can frequently take several months, or even a year, for a publisher to confirm reversion after an author provides notice of his request. This is especially true of larger publishing houses, which may wait to grant an author's request until each relevant department—such as Marketing, Editorial, Sales, etc.—approves reversion. Additionally, some publishers bundle reversion requests together and examine them only a few times a year for efficiency. In contrast, some publishing houses process reversion requests in a timelier manner.

In any case, authors may need to repeatedly follow-up with their publishers. Authors should remain in contact with their publishers until they receive confirmation that their requests for reversions have been granted.

KEEP IN MIND

All authors—whether they are reverting rights pursuant to a reversion clause or negotiating an agreement with their publisher—benefit from being reasonable, flexible, and persistent in their discussions with their publishers.

Be Reasonable: Many publishers view an author's reversion request as the beginning of a conversation and explain that they want to do what is best for the author and his book. To that end, publishers are more responsive to authors who are reasonable and professional than authors who are aggressive or accusatory. As discussed above, being reasonable might entail giving your publisher the opportunity to try to reprint or otherwise increase your book's availability prior to reverting rights.

Be Flexible: Authors should be open to their publishers' renewed efforts on behalf of their books. As discussed above, publishers sometimes respond to an author's reversion request by reinvesting in the book. A publisher's decision to do this can be a solution to a book's lack of availability.

Be Persistent: Many authors who have successfully obtained a reversion of rights recommend that other authors be persistent in their communications with their publishers. Requests can fall through the cracks or move slowly through a publisher's internal channels. Authors should periodically be in contact with their publishers to check on the status of their requests.

An Author's Success Story: Persistence

Michael Capobianco is an *Authors Alliance* member and the author of several science fiction novels. Over the years, he has successfully obtained a reversion of rights to five titles from various trade publishers. Each of his contracts' reversion clauses required that he notify his publishers of his intent to revert rights. His publishers then had six months to bring his books back into print. At the close of

these six-month periods, Mr. Capobianco would be entitled to a reversion of his rights provided his publishers had not brought his books back into print.

Although Mr. Capobianco's publishers made no effort to bring his books back into print, it took almost a year for him to get back the rights to some of his books. In response to his publishers' delays, he had to be persistent and send multiple letters requesting reversion. After reversion was eventually finalized, Mr. Capobianco was able to successfully resell the rights to one of his books to another publisher.



Please turn to Section VII on page 102.

VI.
HOW TO PROCEED
WITHOUT A RIGHT
OF REVERSION

PLEASE READ THIS SECTION IF, AFTER READING **Section IV**, you determine that you do not have a right of reversion—either because your contract does not have a reversion clause or you are not eligible to exercise your reversion clause. Armed with the right information and strategies for negotiating an agreement with your publisher, you may still be able to achieve your goals for your book.

THIS SECTION:

- Describes the steps to take before opening negotiations with your publisher.
 - Provides rules to guide your negotiations with your publisher.
 - Shares strategies to achieve your specific goals in light of your book and contract.
-

An author may be able to make her book available in the ways she wants even if her contract does not include a reversion clause, or if she is not eligible to exercise her contract's reversion clause because its triggering conditions have not been met. Publishers are often willing to negotiate reversion, or grant an author the necessary permission, under these circumstances so that she can achieve her goals for her book. For example:

Jacqueline Jacquard's historical analysis of textile workers during the Industrial Revolution was published in the 1980s. Sadly, *The Tales They Weave* has been out of print for years and her publisher has no plans to reprint the book, so Jacqueline would like to make it available to readers herself. Despite not having a reversion clause in her contract, her publisher agreed that it made financial sense to revert rights so that it could avoid future accounting costs for *The Tales They Weave*. She has since made her work available on her website for others to use and share according to the terms of her Creative Commons' Attribution-Noncommercial license.

Zarah Zephyr is the author of a series of outdoor meditation guides. Her contract for her fourth book in the series provided for reversion if the publisher's annual revenue dropped below \$600. After consulting her most recent royalty statement Zarah realized that she was not eligible for reversion under her contract since her book earned more than \$600 in the last year. Nonetheless, Zarah successfully convinced her publisher to revert the electronic rights to the book because her publisher had no plans to release an e-book. Zarah now plans to partner with a digital publishing company to release and sell an electronic version of the book.

Alternatively, authors may be able to get their publishers' permission to make their books available in the ways they want without reverting rights. For example:

Dominic Dalliance authored an art history text on allegorical representations of love in sixteenth-century Italy. *Cupid's Folly* is required reading for Dominic's college course, though his students always complained about its high cost. Dominic decided to try to seek a reversion of rights so that he could make it available to his students for free. Though Dominic's work was not eligible for reversion under his contract, his publisher agreed to grant him permission to post his entire book in his course e-reserves, so long as access remains limited to students authenticated through his university's system.

Publishers' Perspectives on Negotiating Reversion

Publishers are willing to consider an author's request to revert rights on a case-by-case basis, even if the author's contract does not include a reversion clause or the author is ineligible to exercise his contract's reversion clause. Both trade and academic publishers explain that they view their authors as partners and that they want to work with their authors to do the right thing for the author and for the book. As a result, many publishers prefer to treat these negotiations as conversations in which they try to understand what an

author wants to do with his book and determine what they can do to help the author achieve his goals.

Different types of publishers tend to consider reversion requests in different ways. Below are a few trends observed in the course of outreach to publishers, agents, and authors. Keep in mind, though, that an individual publisher may vary substantially from its peers.

All Publishers: Across the board, publishers are most likely to agree to revert rights for books that are old and not selling because they feel there is no longer a market for these books. If this describes your book, consider explaining to your publisher that it is no longer deriving profits from your book and, therefore, it should revert rights so that you can try to increase your book's availability.

In contrast, publishers are less likely to agree to revert rights to a book that is relatively new or is still actively selling. That said, authors whose books fall into these categories may still be able to obtain a reversion of rights or negotiate mutually satisfactory agreements with their publishers. Continue reading this section for additional tips and suggestions for persuading your

publisher to revert some or all of the rights to your book, or otherwise grant you permission to do as you wish with your book.

Academic Presses: Many academic presses consider it to be part of their mission to keep their works in print. As a result, they may be more hesitant than trade publishers to revert rights to authors, even when a book is selling poorly. However, academic presses are still motivated by their bottom lines—at least to some extent—and may be persuaded by many of the same economic arguments as trade publishers.

Small Presses: Smaller publishing houses may need to pinch more pennies to stay afloat and therefore may be more hesitant than larger publishers to give up rights to books in which they have invested. This is not universally true, though, and some authors believe that big publishers are actually less likely to think outside of the box when it comes to making authors' books available. In fact, some micro-presses have emerged in response to authors' demands for flexible publishing alternatives. These presses tend to include more author-friendly terms in their publishing agreements.

Ultimately, whether a publisher decides to revert rights typically depends on the book's age, sales, revenue, and market size, as well as the publisher's relationship with the author and the manner in which the author presents his request. Although there is no one-size-fits-all approach for convincing a publisher to revert rights when it is not contractually obligated to do so, this section shares information and strategies that have proven successful for other authors.

WHAT STEPS SHOULD YOU TAKE BEFORE REQUESTING REVERSION?

Before requesting a reversion of rights, an author should take the time to gather information about the status of her book so that she can come to an informed conclusion as to whether reversion is right for her. The information she gathers now may later help persuade her publisher that it is reasonable and fair for it to comply with her reversion request should she ultimately decide to request reversion. Authors whose contracts include a reversion clause may have already collected some of this information in **Section IV** as part of their efforts to determine whether they were eligible to exercise reversion.

First: Have a plan in place for your work following reversion.

As discussed in **Section II**, it is important that authors take the time to consider the best format and publishing options for making their books available. Authors who revert without having a plan in place for their books might find it more difficult to publish their books themselves, or place their books with new publishers, than they originally expected. As a result, these authors might find that their books are actually less accessible after obtaining a reversion of rights. Conversely, authors with plans in place for their books will be able to take steps to increase their books' availability immediately after obtaining a reversion of rights.

Second: Consult your royalty statements. Authors should consult their royalty statements to determine the number of copies sold as well as their books' revenue. Publishers typically have an obligation to account to authors for the sales of their books, generally on a semi-annual basis. If a publisher fails to send regular royalty statements, the author generally has a right to demand a statement of account from her publisher.

Information about your book's sales and revenue may later prove useful in persuading your publisher to revert rights.

Third: Find out what your publisher plans to do with your book in the future. Before requesting a reversion of rights, an author should reach out to her closest publishing contact—her editor, for example—to collect more information about the publisher's plans for her book. In the course of this conversation, an author should try to procure the information she needs to decide whether reversion is her best option for increasing her book's availability. Additionally, an author should be mindful of any information she gleans that might be useful in persuading her publisher to revert rights. Some possible questions include:

- Does the publisher plan to reprint the book?
If so, when?
- Is the publisher willing to digitize the book?
- Does the publisher plan to exercise any subsidiary rights (e.g., release an audio book, license a foreign translation, etc.)?
- Does the publisher have any plans for another marketing push for the book?

- How many copies of the book is the publisher holding in stock?

However, since some publishers may not answer this question, authors can also try calling their publishers' distribution and ordering center. Publishers usually post this phone number on their websites, on the pages through which booksellers place orders for publishers' books.¹⁵ If you choose to call, you should have your book's full title and International Standard Book Number (ISBN) on hand. Authors should not necessarily interpret publishers' decision to carry small amounts of stock as evidence of the publishers' disregard for their books, though.¹⁶

Occasionally, an author seeking a reversion of rights may learn that her publisher has gone out of business or bankrupt. This adds complexity to the rights reversion process because you may be unable to identify the person with whom to negotiate to seek a reversion of rights. In this case, you may be the author of an orphan work¹⁷ and may need to consult a lawyer to assist with your case.

Fourth: Weigh the information and decide whether reversion is appropriate. This information should arm authors with the facts they need to negotiate persuasively with their publishers if they decide to request reversion. An author may decide that obtaining a reversion of rights is his best option for increasing his book's availability if he is unsatisfied with his book's sales, his publisher's plans for his book, or if his publisher is unsuited to helping him achieve his goals for his book. However, reversion may not be sensible for an author who concludes that his publisher is making sufficient efforts on behalf of his book, who is satisfied with his book's sales and availability, or who discovers that his publisher has plans to revive his book.

GOLDEN RULES FOR REQUESTING REVERSION

Authors who, after reviewing their books' sales figures and availability and identifying their publishers' plans for their books, decide that they would like to request reversion of rights should be mindful of four golden rules: ***Be Reasonable, Be Flexible, Be Creative, and Be Persistent.***

1. Be Reasonable

Publishing houses are sometimes financially constrained from making books available in all the ways an author may want. That said, publishers are also rational and sympathetic, and are often willing to negotiate reasonable agreements with authors to increase their books' availability. Authors enjoy a greater likelihood of success if they adopt a reasonable posture during the course of their negotiations and try to appeal to their publishers' sense of reason.

An Author's Success Story: Be Reasonable

Katie Hafner is an *Authors Alliance* advisory board member and the author of several nonfiction works, including *A Romance on Three Legs: Glenn Gould's Obsessive Quest for the Perfect Piano*. Ms. Hafner's contract included a reversion clause that provided for reversion if her book sold fewer than 250 print or electronic copies in the course of a year. By early 2014, *A Romance on Three Legs* was no longer offered for sale in a print edition, though it was still selling more than 250 copies annually as an e-book. As a result, Ms. Hafner was not eligible to revert rights under the terms of her contract.

In March 2014, Ms. Hafner emailed her publisher to express her dissatisfaction that *A Romance on Three Legs* was no longer available in print form. She asked her publisher to either revert rights or reprint the book. Ms. Hafner appealed to her publisher's sense of reason by explaining that her book's target audience was less likely to purchase an e-book than a traditional print copy, and she even attached copies of her fans' requests for printed copies. Though Ms. Hafner was persistent in her correspondence with her publisher, she remained friendly and professional. In turn, Ms. Hafner felt that her publisher was reasonable and willing to come to an agreement.

Ultimately, Ms. Hafner's publisher offered to reprint a limited number of traditional print copies. *A Romance on Three Legs* is now available for purchase in print.

It's a conversation, not a fight.

Once you have decided that you want to obtain a reversion of rights, you should broach the topic with your publisher by initiating a conversation. It can be helpful for authors to explain to their publishers

what they want to do with their books and why is it important to them.

A publisher might have a reasonable justification for hesitating to grant an author's request. For example, publishers may be more reluctant to revert rights to books for which they have licensed some of the book's subsidiary rights to other parties. Additionally, some publishers may be less likely to revert rights to books for which the author has a substantial unearned advance against royalties. Even if a book sells only a few copies a year, the publisher may view those few copies as an important mechanism for recouping its advance to the author. However, not all publishers emphasize unearned advances in their decisions to revert rights to authors, and very few require authors to pay back their unearned advances before reverting rights.

If your publisher is reluctant to revert rights: keep a cool head and remain reasonable. Several publishers admit that an author's personality influences their willingness to come to an agreement. Simply put, publishers are more likely to grant an author's request when the author maintains a civil, professional demeanor. Similarly, it is important that authors not mislead their publishers about their post-reversion

plans or otherwise act in a way that their publishers will later view as unfair. Publishers want to work with their authors; help your publisher work with you by being a congenial negotiation partner.

Make a persuasive argument.

Though this is not an exhaustive list, publishers have indicated a willingness to revert rights when authors present compelling arguments—provided they are applicable to the author's situation—such as the following:

The publisher has failed to make use of its rights in the book.

Publishers have indicated a willingness to revert rights when an author highlights his publisher's failure to use or license some of the rights it holds to the book. An author should explain that he would like the opportunity to try to put those rights to work. Beware of using accusatory or hostile language; rather, simply point out that your publisher has been sitting on the rights for a number of years and that you feel it is in your best interest to revert. For example:

Six years ago, Pratush Paleozoic transferred to his publisher worldwide print, electronic, and digital rights, as well as the right to publish or license all foreign translations of *The Era of the Cambrian Explosion*. Pratush believes that many international secondary schools would purchase his book if it were available in certain foreign languages. Pratush approached his publisher and asked for reversion of translation rights on the grounds that the publisher had held the rights for six years but had never put them to use to reach an international market.

The publisher has mismanaged the book. Publishers may also be willing to revert rights if the author can establish that the publisher has mishandled his book and thereby prevented the book from realizing its full market potential. For example, a publisher may revert some or all rights if the author can show that it mismanaged the foreign rights to his book by failing to renew expired foreign licenses.

The book is no longer profitable for the publisher. Many publishers are willing to revert rights to authors once a book is no longer profitable. Publishers incur numerous

costs, including accounting and storage expenses, for their titles. An author whose royalty statements indicate that his book is no longer selling, or is only barely selling, should premise his reversion request on the fact that the publisher is no longer making enough money on his book to justify these costs. Under these circumstances, an author should present his request as uncontroversial and reasonable.

The author depends on his book's sales as his source of income. Some authors have successfully appealed to a publisher's sense of reason by reminding the publisher that they depend on their royalties as their principal source of income. If a publisher refuses to make a book adequately available, the author should remind his publisher that his livelihood is at stake and that he would like to obtain a reversion of rights so that he can try to increase the market for his book.

Cite to precedent.

One reason that literary agents are frequently successful in their reversion requests on behalf of their authors is their ability to point to precedent. Literary agents have the institutional knowledge needed to remind a

publisher that it reverted rights to Author X and that it should therefore revert rights to Author Y since the circumstances are similar.

Authors can also point to precedents. To do so, authors should speak to their friends and colleagues to see if any were able to revert rights from a publisher under circumstances similar to their own. Authors can then use this information to persuade their publishers to revert rights.

Value your networks.

Another reason that literary agents are frequently successful in their reversion requests is that they often have long-standing relationships with publishers and both parties are incentivized to maintain goodwill. Just as publishers value their relationships with literary agencies, they also value their relationships with authors and their institutions. One academic publisher explained that academic authors are often a part of a network of scholars and writers; publishers want to stay in that network's good graces by doing right by authors when they can. In the course of your negotiations with your publisher, remember that your publisher wants to

maintain a good relationship with you and your colleagues.

Provide your publisher with notice of intent to seek a reversion of rights.

Just as authors appreciate it when their publishers act reasonably, so too do publishers hope and expect that their authors will conduct themselves in a similar fashion. In particular, publishers appreciate when authors provide advance notice of their intent to seek a reversion of rights because it gives a publisher the opportunity to try to meet its authors' expectations prior to reverting rights.

2. Be Flexible

Flexibility is key to many authors' successful efforts to increase their books' availability. Being open to solutions other than the ones they initially have in mind will increase authors' likelihood of coming to mutually satisfactory agreements with their publishers. Authors demonstrate flexibility when they consider compromises, like the ones articulated below, with their publishers, instead of insisting on obtaining a reversion all of the rights to their books.

An Author's Success Story: Be Flexible

Barbara Waxer is a member of *Authors Alliance* as well as an author and college instructor. She writes software textbooks and other books about internet use and copyright law. Ms. Waxer wanted to release a shortened version of one of her books on copyright for use in community college courses. However, her contract had a non-compete clause that prevented her from publishing new works that might compete with the sales of her book under contract. Her publisher also refused to revert the rights to the book because it was still in print, although it was barely selling.

After much back-and-forth, and with some assistance from a lawyer, Ms. Waxer came to a satisfactory agreement with her publisher that: (i) waived the non-compete clause in her contract, allowing her to teach online classes in copyright and media use and to create and sell new works on copyright, and (ii) granted her permission to use her book's content in her classes and new works as long as she credits her publisher.

Ms. Waxer is satisfied with this agreement because she can now use her book's content to

take advantage of new market opportunities. Her story demonstrates that a full reversion of rights is not always necessary and that flexibility may help authors achieve their goals for their books.

Be open to publishers' renewed efforts.

When an author approaches a publisher to revert rights, the publisher may respond by reprinting the book instead of reverting rights to the author. If the author's priority is to increase his book's presence in the market, this may be a good solution.

A reversion request may also prompt the publisher to reinvest in the book in other ways. For example, a publisher may renew marketing efforts on the book's behalf, make it available in print-on-demand format, or digitize the book and make it available electronically. Again, depending on the author's original goals, these may be satisfactory solutions to the problem of a book's limited availability.

Revert only the rights you need.

An author can also demonstrate flexibility by reverting only the rights necessary to achieve his goals for his book, rather than reverting all the rights in the book.

An Author's Success Story: Reverting Only the Rights You Need

Jeff Hecht, an *Authors Alliance* member, is the author of several books on lasers and optics. The fifth edition of his book, *Understanding Fiber Optics*, was published in 2005. Eventually, sales of *Understanding Fiber Optics* dropped and someone approached Mr. Hecht about collaborating on a sixth edition. When Mr. Hecht brought this proposal to his publisher, it declined a sixth edition because it did not believe that it could effectively market any new editions of the book. Instead, his publisher agreed to revert the rights to all future editions of *Understanding Fiber Optics*.

The publisher kept the rights to the first five editions, and has kept the fifth edition available through print-on-demand technology. Mr. Hecht is happy with this arrangement because he continues to receive moderate royalties on the fifth edition from his original publisher, but is free to place the next edition with another publisher.

Mr. Hecht's story is an example of a reasonable compromise, one that allowed Mr. Hecht to do what

he wanted with his work, but did not require the publisher to give up all rights to the work.

Authors should note, however, that publishers are often reluctant to revert certain rights if doing so might cannibalize the publishers' markets. For example, publishers are often unwilling to revert only electronic rights to an author out of concern that the author might release a cheaper electronic version of the book, potentially displacing the publisher's print sales of the book.

Be open to permission rather than reversion

An author may be able to achieve her goals by getting permission to do what she wants with her book rather than reverting rights. Securing a publisher's permission to deposit a work in an open access repository is a prime example of a situation where an author may not need to revert rights to achieve her goals. In fact, some publishers may be responsive to the argument that open access availability might actually boost publishers' sales of books that are lagging in the marketplace.¹⁸ In addition, some academic presses view open access and institutional repositories as an important part of their mission to keep works available to be read, and are

beginning to experiment with creating or partnering with open access repositories.¹⁹

If your publisher is reluctant to allow you to make your work available in an open access repository out of a concern that it would undercut its market for the book, your publisher may still be open to allowing you to deposit your work in a limited-access institutional repository. For example:

Professor Silvio Silverlake wanted to deposit his novel about a fictional production company in an open access repository so that it could reach a wider audience. Much to his chagrin, his publisher refused to grant permission because the book was still selling and the publisher was unconvinced that its availability in an open access repository would boost print sales. However, his publisher agreed to Silvio's next proposal that he deposit the novel in his university's repository, which is only accessible by members of the campus community.

3. Be Creative

Authors should think creatively about whether their specific circumstances might give them some additional leverage in their conversations with their publishers, and about the tactics they might take to advance their particular goals. All authors' books, contracts, and goals are different, and since publishers consider requests for reversion on a case-by-case basis, it is important for authors to think broadly during their conversations with publishers. Here are some examples of creative approaches that have been successful for other authors:

Buy-out books on multi-book contracts.

Some authors may want to revert rights to one or more books on a multi-book contract. An author might gain some leverage in his reversion negotiation if he is willing to pay back the advance for the unpublished books on the contract in an effort to revert rights to another book on the contract. For example:

Kendra Kinder signed a contract for three children's books with her publisher. The first two books in the series, *Family Fun in Frankfurt* and *Happy Holidays in Hamburg*, were released in 2010 and 2012, respectively. Kendra has not yet completed the series' third book, *Mommy and Me in Munich*. Kendra was not happy with her publishing experience so far, and wanted to move all three books to another publisher. Though initially reluctant to grant Kendra's reversion request, her publisher was ultimately persuaded, in part by Kendra's offer to pay back the portion of the advance allocated to the third book on her contract. This allowed the publisher to recoup at least some of its expenses under the contract.

Check to see if your publisher has released competing works.

Some authors' contracts include clauses that prevent their publishers from releasing works that are similar to or compete with the author's book. If a publisher violates this type of clause, the author may be able to use this as leverage in her reversion request. In fact, it is sometimes persuasive for an author to point to her publisher's release of competing works, even if

her contract does not include this type of clause. For example:

Gracie Gardner is the author of a successful introductory text on botany. She recently noticed that her publisher had released three other intro-level books on botany that compete with hers. Gracie would like to revert the rights to her book so she can place it with a publisher who will give it higher priority. Gracie presented numerous arguments for reversion to her publisher. Ultimately, though, Gracie's publisher agreed to revert the rights to her when she pointed out that it was now marketing books that directly competed with her own, even though her contract did not have a clause forbidding her publisher from releasing competing works.

Talk to your publisher about digitizing your backlisted title.

Many publishers are currently going through their backlists and digitizing books that hold promise for the electronic market. Rather than trying to obtain a reversion of electronic rights, authors might consider

requesting that their publishers move their books to the top of the pile to be digitized.

Authors might also consider producing the electronic files themselves. Some publishers have indicated that they are willing to use author-produced files to make e-books, especially if the publisher cannot afford to produce the files or does not think the book makes a particularly good candidate for digitization. For example:

Judah Joules really wants his publisher to make his book on the history of electricity available for sale as an e-book. Although his publisher is slowly digitizing some of its backlisted titles, it does not plan to digitize Judah's book because it does not think it will sell enough electronic copies to justify the investment in digitizing the file. Judah is fairly tech-savvy, though, and is able to produce the digital file for his book on his own. Since the publisher does not have to spend money to produce the file, it agreed to use Judah's file to make the e-book.

4. Be Persistent

Publishers have myriad competing demands on their employees' time and attention. Many authors who have successfully obtained a reversion of rights had to contact their publishers several times before their request was granted. This demonstrates that authors should be prepared to be persistent during the negotiation process. However, authors should be careful not to bombard their publishers with emails and phone calls; they should wait a reasonable amount of time before following up so as to allow their publishers adequate time to consider their requests.

Consider engaging a professional.

As this guide demonstrates, an author does not need to be represented by a literary agent or an attorney to successfully increase his book's availability. That said, publishers are sometimes more responsive to literary agents' requests than to unrepresented authors' requests. Like agents, lawyers can also expedite the negotiation process with stubborn publishers. When confronted with particularly intractable publishers, even the most persistent author might find it helpful

to consult with someone experienced in the publishing industry.

Authors should be aware, though, that some publishers have expressed reservations about dealing with lawyers. Some publishers feel that the presence of a lawyer escalates tensions and stalls negotiations. Additionally, publishing contracts are quite different from other kinds of contracts, and the conventions of the publishing industry are unique. Not all lawyers are familiar with these idiosyncrasies, so they can sometimes sour the negotiations. Therefore, if you do choose to hire a lawyer, it may be wise to find one experienced in the publishing industry.

GO FORTH AND NEGOTIATE!

Determining that you are not eligible to exercise your reversion clause, or that you do not have one, does not mean that you lack options for increasing your book's availability. So long as you remain reasonable, flexible, creative, and persistent, you may be able to negotiate agreements with your publishers to advance your goals.




Please continue to Section VII on page 102.

VII. BE READ

TODAY'S TECHNOLOGIES ALLOW AUTHORS TO exercise more control than ever before over the fate of their books, provided they secure the rights or permission necessary to make their books available in the ways they want. Yet, many authors have not tried to revert rights or sought the necessary permission from their publishers because they do not know how to do so. As this guide and the stories of authors like Michael Capobianco, Katie Hafner, Barbara Waxer, and Jeff Hecht demonstrate, authors can—and do—make their works available in the ways they want.

This guide equips authors with the knowledge they need to revert rights or, alternatively, secure their publishers' permission so they can take advantage of the opportunities available in today's publishing world. Authors should look to the rules and strategies included



in **Sections V** and **VI** before exercising or negotiating reversions of rights or otherwise seeking permission from their publishers to do what they want with their books. With these rules and strategies in mind, authors can confidently engage in meaningful discussions with their publishers to ensure that their books remain available to be read for generations to come.

ENDNOTES

1. For more information, please visit the *Authors Alliance* website: <http://www.authorsalliance.org/about>.
2. Authors Alliance, *Resources*, <https://www.authorsalliance.org/resources/>.
3. The Copyright Act, 17 U.S.C. §§ 203, 304 (2012). Termination of transfer is very time sensitive. There is only a brief window where authors are eligible to terminate their transfers. For more information, see Authors Alliance's termination of transfer resources at <https://www.authorsalliance.org/resources/termination-of-transfer/> and the Authors Alliance/Creative Commons Termination of Transfer Tool at rightsback.org.
4. For more information about Creative Commons licenses, please visit the Creative Commons website. Creative Commons, *About The Licenses*, <https://creativecommons.org/licenses/> (last visited Nov. 11, 2014).
5. Under the “work for hire” doctrine, when a work is prepared by an employee within the scope of his or her employment—and in other limited circumstances—the author is the employer rather than the employee. 17 U.S.C. § 201(b). Many universities, however, have adopted policies recognizing that faculty own the copyrights in their scholarly works. Columbia University's Copyright Advisory Office, *Your Copyrights*, <http://copyright.columbia.edu/copyright/copyright-ownership/your-copyrights/> (last visited Nov. 11, 2014). In addition, if more than one author collaborates on a work, the copyright in the work may vest equally in all of the authors, who become joint owners of the copyright. 17 U.S.C. § 201(a).
6. 17 U.S.C. § 106.

7. See 17 U.S.C. §§ 107–122.
8. Id. at § 201(d).
9. For more information, see *Authors Alliance, FAQ: Authorship and Ownership in U.S. Copyright Law*, <http://www.authorsalliance.org/2014/05/20/authorship-and-ownership-faq/>.
10. *Random House, Inc. v. Rosetta Books*, 150 F. Supp. 2d 613 (S.D.N.Y. 2001).
11. *HarperCollins Publishers LLC v. Open Road Integrated Media, LLP*, 7 F. Supp. 3d 363, 367 (S.D.N.Y. 2014).
12. See, e.g., *Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.*, 145 F. 3d 481 (2d Cir. 1998); *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F. 2d 150 (2d Cir. 1967).
13. For example, the phone number for Harvard University Press’s distribution and ordering center is posted here: <https://www.hup.harvard.edu/order/>. The contact information for Macmillan’s ordering center is posted here: <http://us.macmillan.com/bookseller-services/ordering>.
14. Orphan works are works that are difficult or impossible to associate with active rightsholders who might revert rights or otherwise give permission for their use.
15. See *supra* note 13.
16. In the wake of *Thor Power Tool Co. v. Commissioner of Internal Revenue*, 439 U.S. 522 (1979), publishers have elected to keep low stocks because the Supreme Court eliminated a tax loophole, thereby making it more expensive for publishers to carry inventory over from year to year.

17. See *supra* note 14.
18. In the course of our interviews, some publishers explained that they believe open access availability can increase sales of certain books. Additionally, the OAPEN Library, a European open access platform, published a study showing that open access availability increases online usage and discovery, and has no negative effect on book sales. Ronald Snijder, *Publishing in Open Access increases usage and has no effect on book sales* (Oct. 23, 2013), <http://project.oapen.org/index.php/news/59-publishing-in-open-access-increases-usage-and-has-no-effect-on-book-sales>.
19. For example, many university presses make works available on the OAPEN Library. The OAPEN Library, <http://www.oapen.org> (last visited Nov. 11, 2014). Some publishers are launching their own open access platforms. For example, Bloomsbury Academic makes selected books available through open content licenses. Bloomsbury Publishing, *Bloomsbury Open Content*, <http://bloomsbury.com/us/academic/online-resources-and-ebooks/bloomsbury-open-content/>, (last visited Nov. 11, 2014). The University of California Press released an open access monograph platform in 2015. *University of California Press Expands into Open Access with Innovative Journal and Monograph Programs*, University of California Press (Jan. 20, 2015), http://www.ucpress.edu/content/pr/collabra_luminos_012015.pdf.

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