



AUTHORS
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Honorable Joanmariae Louise Fubbs
Member of Parliament, Portfolio Committee on Trade and Industry
Parliament of the Republic of South Africa
Parliament Street
Cape Town 8000
South Africa

Via email to ahermans@parliament.gov.za

RE: Republic of South Africa Copyright Amendment Bill; Termination of Transfer Provisions

Dear Honorable Joanmariae Louise Fubbs:

Authors Alliance commends South Africa's Members of Parliament for considering a provision in the Copyright Amendment Bill that gives creators the right to terminate prior transfers of copyrights. Authors Alliance is a nonprofit organization representing the interests of authors who want to take advantage of opportunities of the digital age to share their creations with readers, promote the ongoing progress of knowledge, and advance the public good. Among other educational efforts, Authors Alliance provides resources and tools to help authors understand and exercise termination rights under U.S. law,¹ as well as reversions of rights² through contractual provisions and negotiation.

Creators are routinely asked to transfer the rights to their works by, for example, signing publication contracts that assign copyrights to their publishers "for the life of copyright". If they acquiesce, they may come to regret the decision. Several countries provide statutory termination rights to reacquire copyrights previously transferred to a publisher.³ For example, United States law allows authors to terminate transfers made on or after January 1, 1978 35 years from the

¹ Authors Alliance/Creative Commons Termination of Transfer Tool, <https://rightsback.org> (last visited Apr. 26, 2018); *see also Termination of Transfer*, Authors Alliance, <https://www.authorsalliance.org/resources/termination-of-transfer/> (last visited Apr. 26, 2018).

² *Rights Reversion*, Authors Alliance, <https://www.authorsalliance.org/resources/rights-reversion-portal/> (last visited Apr. 26, 2018).

³ *See* Heald, Paul J., *Copyright Reversion to Authors (and the Rosetta Effect): An Empirical Study of Reappearing Books* (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3084920 (see Appendix A for laws of various jurisdictions). *See also* CC Rights Back Resource (Beta), <https://labs.creativecommons.org/reversionary-rights/> (last visited Apr. 27, 2018) (forthcoming repository of resources about termination laws around the world).

date of the grant,⁴ notwithstanding any agreement to the contrary.⁵ Other countries provide “use it or lose it” provisions, which enable authors to reclaim rights that are not being exploited by the assignee.⁶ These termination rights allow creators to revisit decisions to transfer their copyrights, with attendant benefits flowing to authors and to the public.

Many creators, particularly those at the start of their careers, sell or license their copyrights for less than they are ultimately worth. If a work is tremendously successful, the commercial windfall is often enjoyed by the entity that exploits those rights, not the original creator. In these cases, the creator or the creator’s heirs may want to recapture rights to enjoy more of their work’s financial success. In the United States, termination of transfer provisions were enacted to address just this situation. Termination of transfer laws “safeguard authors against unremunerative transfers,” which is necessary “because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work’s value until it has been exploited.”⁷

The opportunity to realize monetary rewards is not the only benefit of termination provisions. Termination rights also give creators the ability to give new life to works that have outlived their commercial lives but are nonetheless historically and culturally valuable. As time passes, many creators find that their works are no longer as available as they might wish.⁸ Their books might be out of print, or their songs might not be digitized or available online. For creators who want their works to be widely shared and enjoyed, terminations are a powerful option for getting their works back out in front of audiences. These creators might choose to, for example, make their terminated works available to the public on open terms. Other authors may opt to re-release their works with commercial publishers. In fact, a recent empirical study reveals that the termination provisions in U.S. laws, together with a legal decision establishing that some authors retained e-book rights under standard publication terms in the pre-digital era, have significantly increased the availability of books to consumers.⁹

Authors Alliance highlights the experiences of authors who have regained the copyrights to their works on our website.¹⁰ With rights back in hand, these authors have made their works newly

⁴ Or, if the grant includes publication rights, 35 years from the date publication or 40 years from the date of the grant, whichever term ends earlier. 17 U.S.C. § 203. *See also* United Kingdom Copyright Act of 1911, section 5(2) (providing that transfers between July 1912 and June 1967 automatically revert to the author’s estate 25 years after the author’s death).

⁵ 17 U.S.C. § 203. For works where the copyright was in either its first or renewal term on January 1, 1978, *see* 17 U.S.C. § 304(c).

⁶ For example, “[i]n Denmark, Finland, and Sweden, the author may cancel the agreement if the assignee has not exploited the work within a reasonable time or at the latest five years after the date when the agreement was performed by the author.” Pascal Kamina, *FILM COPYRIGHT IN THE EUROPEAN UNION* 212 (Cambridge Univ. Press, 2d ed., 2016).

⁷ H.R. Rep. No. 94-1476, at 124.

⁸ *See* Heald, Paul J., *How Copyright Keeps Works Disappeared*, 11 J. of Empirical Legal Stud., 829 (2014).

⁹ Heald, *supra* note 3.

¹⁰ *Rights Reversion Success Stories*, Authors Alliance, <https://www.authorsalliance.org/category/resources/rights-reversions/rr-successes/> (last visited Apr. 26, 2018). To date, the reversion successes we have featured are the result

available as, for example, free downloads or low-cost print versions. These authors share that reverting rights has helped them reach more readers, continue to contribute to scholarly discourse, and ensure that their works' continuing impact and relevance are not limited by their commercial lives. In turn, the public benefits from ongoing access to knowledge and culture.

To realize these benefits, provisions that give authors the right to terminate transfers must be carefully drafted. A poorly drafted termination right could, for example, result in more works being orphaned (i.e. works for which copyright owners cannot be found for the purposes of asking permission to make uses that are within copyright owner's exclusive rights). Requiring triggering conditions and/or recordation of ownership information if the rights are reverted exclusively to the author¹¹ could help alleviate this issue. At the same time, reversion of *non-exclusive* rights to the author could be automatic, allowing authors to exploit their works without onerous formalities. Additionally, termination rights are best applied only to exclusive licenses or assignments, as authors whose works are subject only to non-exclusive licenses are still able to exploit their works.

In sum, including carefully crafted provisions in South Africa's copyright laws that allow creators to terminate prior transfers of copyrights will benefit authors and their audiences. We hope that these comments are helpful as the Members of Parliament consider the proposed termination provisions.

Respectfully,



Brianna Schofield
Executive Director, Authors Alliance

of authors exercising contractual provisions or negotiating with publishers. Our termination of transfer resources are relatively new, and we expect in time to feature similar results from authors making their works newly available as a result of exercising their statutory termination rights.

¹¹ The United States, for example, requires the party terminating the transfer to notify the assignee and record a copy of a notice of termination with the United States Copyright Office.