RECONSTRUCTING COPYRIGHT REVERSION: RELEASING AUTHORS FROM THEIR OWN DEAD HANDS

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This Article presents a novel reconstruction of the reversionary rights that copyright law grants to authors through mechanisms including the termination of transfer provisions of the U.S. Copyright Act. These rights, which allow authors to reclaim copyrights they have licensed or sold under specified circumstances, have a long pedigree but a mixed reputation. They are typically justified as serving authors' pecuniary interests: the idea is that an author whose work becomes a surprise hit should get a "second bite at the apple" in the form of a chance to renegotiate to receive more compensation than the author received for the initial transfer. But even if these provisions worked as they were intended (which they often do not), it is not clear that they would serve most authors' pecuniary interests. They might primarily benefit superstar artists who are least in need of a bargaining power boost.

Even if reversion and termination rights serve little pecuniary purpose for most authors, they may nonetheless serve a purpose in terms of authorial autonomy. Specifically, this Article demonstrates how respect for the autonomy of an author's future self provides a stronger normative foundation for reversionary rights than the pecuniary justifications that have typically been offered (and critiqued). However, the particular way in which reversion is currently operationalized under U.S. law's termination of transfer provisions is not well-calibrated to this stronger normative rationale. We thus reconstruct reversion, explaining how it could be reformed to better serve the autonomy interests of authors' current and future selves.

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INTRODUCTION

Taylor Swift has some regrets. Relationship regrets. Songwriting regrets. Regrets about songs about relationships she regrets. But her most infamous regret is that she sold the rights to the recordings of her songs about relationships and regrets to record label Big Machine.[3]

The U.S. Copyright Act recognizes and regulates such sales—specifying the formalities required to make them effective.[4] It also recognizes and regulates regrets—allowing "authors" (a term the Copyright Act uses to identify creators of all types, including musicians like Swift) to reclaim copyrights they have sold to publishers, record companies, etc.

Taylor Swift did not invoke the relevant statutory provisions to address her regret, however. When she objected in 2019 to the sale of the Big Machine label (including the rights to the recordings of her first six albums) to a company run by music manager Scooter Braun,[5] the narrowly defined window during which she could reclaim her rights as provided by the statute was still decades away.[6] And the voluntary terms offered to

[3] *See, e.g.*, Taylor Swift, "This is Scooter Braun, Bullying me on Social Media When I Was at My Lowest Point. He's About to Own All the Music I've Ever Made" (June 30, 2019), https://taylorswift.tumblr.com/post/185958366550/for-years-i-asked-pleaded-for-a-chance-to-own-my; Ben Sisario & Joe Coscarelli, *Taylor Swift's Feud with Scooter Braun Spotlights Musicians' Struggles to Own Their Work*, N.Y. TIMES (July 1, 2019), *available at* https://www.nytimes.com/2019/07/01/arts/music/taylor-swift-master-recordings.html.

[4] 17 U.S.C. § 204(a) ("A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.").

[5] Sisario & Coscarelli, *supra* note 3.

[6] According to the New York Times, she signed the initial contract in 2005. *Id*.

return the rights to Swift were unacceptable to her because they would have required her to release future albums with Big Machine.[7]

Swift did find a solution that allowed her to shake off her regret. Although she had sold the rights to her recordings, she still owned the rights to the musical compositions on which those recordings were based. And so she was able to re-record the albums and release them with the new designation "Taylor's Version." Most of these re-recordings have crowded out the originals on the Billboard charts.[8] Fortunately for Swift, she has even more loyal fans than she has regrets. And thanks to those fans she also has a lot of money.[9] In the latest chapter of this saga, in 2025, Swift was able to buy back the rights to the initial recordings of her albums for an estimated $360 million.[10] "The best things that have ever been mine," she said, "finally actually are."[11]

It is not uncommon for authors to come to regret having signed away their copyrights.[12] Nor is it uncommon for the relevant statutory provisions to fail to help those authors reclaim their rights. What *is* uncommon is for authors to have the market power Taylor Swift has to exercise autonomous control over her artistic destiny despite those challenges. This Article explores the tenuous relationship between copyright law and authorial autonomy with the more typical author in mind.

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[7] *Id.*

[8] Hugh McIntyre, *Taylor Swift's Re-Recording Plan Has Worked Perfectly—Except When it Comes to "1989,"* FORBES (Jan. 16, 2024), *available at* https://www.forbes.com/sites/hughmcintyre/2024/01/16/taylor-swifts-re-recording-plan-has-worked-perfectlyexcept-when-it-comes-to-1989/ (last visited Sept. 27, 2025).

[9] Marc Schneider, Taylor Swift Buys Back Her Masters From Shamrock, Reclaiming Her First Six Albums, BILLBOARD (May 30, 2025), available at https://www.billboard.com/pro/taylor-swift-regains-control-master-recordings-shamrock/.

[10] Marc Tracy, *Taylor Swift Buys Back Rights to Her First 6 Albums*, N. Y. TIMES (May 30, 2025), *available at* https://www.nytimes.com/2025/05/30/arts/music/taylor-swift-buys-masters.html.

[11] *Id*.

[12] In an especially dramatic example of this type of regret and its ramifications, John Fogerty regretted assigning his rights to a record label that later sued him for infringing on the copyright in a song he had originally composed by composing a new song that deployed the same characteristic style. Fogerty ultimately prevailed on the infringement claim. *See* Melanie Davis, *The Unusual Story of John Fogerty Being Sued for Copyright Infringement of . . . John Fogerty*, AMERICAN SONGWRITER (Oct. 24, 2024), *available at* https://americansongwriter.com/the-unusual-story-of-john-fogerty-being-sued-for-copyright-infringement-of-john-fogerty/. The Supreme Court heard the case to address the standard for awarding attorney's fees in copyright cases, holding that the standard for deciding whether to award attorney's fees to the "prevailing party" should be applied even-handedly to prevailing plaintiffs and prevailing defendants. Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994). Thanks to Rob Merges for pointing out the relevance of this example.

Some observers view authorial autonomy as the point of copyright law.[13] For others, authorial autonomy is a means to the ultimate end of encouraging authors to engage in creative activity for the public good.[14] Yet others suggest that the appeal to authorial autonomy has often been used as a rhetorical ploy that poorly serves actual authors.[15] All of these views acknowledge that copyright law at least purports to give authors a degree of control over their works—and thus their lives—that would otherwise be difficult to achieve.

The authorial autonomy that copyright provides can be fleeting, however. As in the Taylor Swift example, copyrights are often transferred away—along with the control they initially bestowed. After an author transfers their copyright to a publisher, for example, they no longer can object when their work is reproduced, adapted, distributed, displayed, or performed. Even more dramatically, they cannot use their work in those ways themselves without permission from the publisher.

Of course, the fact that an author can alienate their own copyright is itself a facet of authorial autonomy. It frees the author to trade their rights for money (or credit, or whatever else they exact from the transferee). But it subjects the author's future self to a new set of constraints that can literally prevent them from rewriting their own life story.

Copyright law has long acknowledged the possibility that an author might come to regret transferring their copyright. Copyright law's prior dual term of protection under both the British Statute of Anne and the U.S. Copyright Act theoretically allowed an author who transferred the initial term of protection to revisit that decision upon reversion of the rights at the start of the renewal term. This particular form of reversion ended when the dual term of protection was replaced with a unitary life-plus-years term of

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[13] *See, e.g.*, Jane C. Ginsburg, *Humanist Copyright*, 6 J. Free Speech L. 91 (2025); *see also* Robert P. Merges, Justifying Intellectual Prop. 15 (2011) ("The basic foundations of IP law are individual autonomy and freedom."); *see also* Robert P. Merges, *Individual Creators in the Cultural Commons*, 95 Cornell L. Rev. 793, 794–95 (2010) ("With IP covering one's work product, one has greater freedom to direct the course of a creative project or even an entire career."); Abraham Drassinower, What's Wrong with Copying? 88 (2015) ("Copyright is a right to preclude another from repeating one's own speech. The mischief of copyright is a wrong to the author's autonomy as a speaking being.")

[14] *See, e.g.*, Peter Lee, *Autonomy, Copyright, and Structures of Creative Production*, 83 Ohio St. L.J. 283, 337-41 (2022) (discussing link between autonomy and creative production); *see also* Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 Va. L. Rev. 1745, 1769 (2012) (suggesting that moral rights for authors can "provide expressive incentives for creators to create, perhaps in ways that traditional pecuniary incentives do not").

[15] *See, e.g.,* Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright,* 118 Yale L.J. 186, 188 (2008); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 Mich. L. Rev. 1197 (1996); Peter Jaszi, *Toward A Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 Duke L.J. 455, 500-01 (1991); James Boyle, Shamans, Software, and Spleens: Law and the Construction of the Information Society (1996).

protection.[16] But reversion survives in the United States in the form of the termination of transfer provisions of the 1976 Act and its subsequent amendments.[17]

One termination provision, 17 U.S.C. § 203, permits termination of post-1978 transfers. A related provision, 17 U.S.C. § 304(c)-(d), permits termination of pre-1978 transfers (specifically to allow authors or their statutorily-specified heirs to reap the benefit of extra years of protection that Congress added to their copyrights subsequent to transfers). Both of these provisions create nonwaivable rights for authors (or heirs specified in the statute) to reclaim transferred copyrights decades later. The rights are not transferable and persist "notwithstanding any agreement to the contrary."[18]

These reversion and termination of transfer mechanisms have typically been justified in terms of money as opposed to autonomy. The idea is that authors often lack bargaining power—and knowledge of the market value of their works—when making initial deals with publishers. Authors whose works become surprise hits should therefore get a second bite at the apple—a chance to renegotiate to receive more compensation than the author received for the initial transfer. This has seldom worked in practice. Renewal rights were never very effective for this purpose in either Britain or the U.S. because authors assigned away their contingent renewals to publishers along with their transfers of the initial term (if they were aware of these rights at all), and courts enforced those assignments.[19] The current U.S. termination of transfer provisions try to forestall that possibility by trumping any "agreement to the contrary."[20] But the daunting timing and paperwork intricacies of the termination scheme make it difficult for authors to take advantage of their rights. And perhaps due to the dramatic implications of successfully terminating—effecting an outright transfer back to the author or statutory heir(s) of exclusive rights, with no indemnification to the original transferee—some courts enforce the right begrudgingly.[21]

Even if these provisions worked as they were intended, to give authors a second bite at the apple to negotiate higher compensation for use of their works, it is not clear that the provisions would serve authors' pecuniary interests, at least not in the aggregate. Some commentators have speculated that the uncertainty that reversions and termination rights create might yield lower compensation for all authors at the point when they initially transfer their copyrights. The vast majority of authors do not later exercise their reversion rights, the market for their works having dried up long before the reversion period (or even the notice period that precedes it). As a result, only a few fortunate winners benefit monetarily from the opportunity to renegotiate years later—because most authors' works

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[16] *See generally* Lionel Bently & Jane C. Ginsburg, *"The Sole Right ... Shall Return to the Authors": Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright*, 25 BERKELEY TECH. L.J. 1475, 1547-49 (2010).

[17] 17 U.S.C. § 203 (for post-1978 transfers); § 304(c)-(d) (for pre-1978 transfers). For a thorough history of these provisions and their use, see Bently & Ginsburg, *supra* note 16, at 1564-70.

[18] 17 U.S.C. §§ 203(b)(5) & 304(c)(5).

[19] See *infra* notes 32-33 and accompanying text.

[20] 17 U.S.C. §§ 203(a)(5) & 304(c)(5).

[21] For discussion of these cases, see, e.g., Peter S. Menell & David Nimmer, *Pooh-Poohing Copyright Law's "Inalienable" Termination Rights*, 57 J. COPYRIGHT SOC'Y U.S.A. 799, 802-03 (2010); Peter S. Menell & David Nimmer, *Judicial Resistance to Copyright Law's Inalienable Right to Terminate Transfers*, 33 COLUM. J.L. & ARTS 227 (2010); Bently & Ginsburg, *supra* note 16, at 1584-86 (describing "a depressing déjà vu: a return to the world of *Fred Fisher*").

no longer have much commercial appeal by the time the window to renegotiate has opened.

Whether or not reversion and termination rights serve their intended pecuniary purpose for most authors, they may nonetheless serve a purpose in terms of authorial autonomy. Authors' rights to reclaim their copyright may not typically be beneficial to authors' financial well-being, but they may nonetheless be important in authors' lives. Authors may benefit from the ability to use the work themselves. They may want to reissue works that have fallen out of print or even disseminate copies for free to spread their ideas.[22] They may want to reuse aspects of the work in order to revisit their initial ideas and perhaps explain how their ideas have changed.[23] They may want to deploy their characteristic style to new works without worrying about being accused of infringement.[24] They may want to disassociate their creative work (or themselves) from the publisher to whom they assigned it. Or they may want to disassociate themselves from works that no longer reflect their views. In other words, they may want to rewrite their own story notwithstanding the choices they made in the past.

This Article demonstrates how respect for the autonomy of an author's future self provides a normative foundation for reversionary rights that is independent of the pecuniary justifications that have typically been offered (and critiqued). Reversion and termination rights, we argue, can and should serve as necessary *jurisdictional boundaries* of the current self's authority. Like other, seemingly unrelated limits on alienability in the contexts of marriage, co-ownership of land, and employment, reversionary rights follow from the idea that the *telos* of both property (including copyright) and contract is autonomy-enhancement. In other words, our thesis is that rather than impinging upon copyright, reversionary rights are founded on the same commitment to authors' autonomy that underlies both copyright and its alienability. This means that reversionary rights (if properly calibrated) can eliminate unequivocally autonomy-reducing features of copyright law.

However, the particular way in which reversion is currently operationalized under U.S. law's termination of transfer provisions is not well-calibrated to this alternative rationale. The right is both too rigid (operating only during a brief and belated window that may not correspond to the timing of an author's change of mind) and sometimes too

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[22] *See* Joshua Yuvaraj & Rebecca Giblin, Copyright Reversion: Reclaiming Lost Culture and Getting Creators Paid 1-3 (2025); Paul J. Heald, *Copyright Reversion to Authors (and the Rosetta Effect): An Empirical Study of Reappearing Books*, 66 J. Copyright Soc'y U.S.A 59, 64-65 (2018-19) ("After examining three different datasets totaling 1909 titles, I find strong support for the conclusion that the 35-year termination right of 17 USC § 203, along with the 56-year termination provision 17 USC § 304, result in a significantly increased availability of book titles to the public.").

[23] *See generally* Molly Van Houweling, *Authors Versus Owners*, 54 Hous. L. Rev. 371 (2016).

[24] *See supra* note 12 (discussing John Fogerty's dispute with his former recording company regarding his reuse of his own characteristic musical style); Kory Grow, *Flashback: John Fogerty Wins Rare Self-Plagiarism Suit in 1988*, Rolling Stone (Nov. 9, 2018), *available at* https://www.rollingstone.com/music/music-news/john-fogerty-self-plagiarism-lawsuit-creedence-clearwater-revival-752805/ ("One of the reasons he fought especially hard was because he was afraid that if Fantasy won, it would have set a dangerous precedent for songwriters. 'What's at stake is whether a person can continue to use his own style as he grows and goes on through life," he told *Rolling Stone* at the time.").

extreme (providing the beneficiary with an outright exclusive reversion when non-exclusive rights could in some cases be sufficient to vindicate their autonomy interests); and it does not distinguish between commercial transferees (who typically have no conflicting autonomy interests) and individual transferees (who often do have such interests).

Thus, we embrace the persistence of reversionary rights under U.S. law, their limitation to human beings, and the insistence on their inalienability and unwaivability. But our autonomy-focused reconstruction of reversion also requires reforming the law in several dimensions—broadening the right in some ways and narrowing it in others. We would eliminate timing constraints that make the current law ill-suited to correspond to authors' life choices, but we would also make the right less powerful vis-à-vis individual transferees in order to respect their life choices as well. We would further require compensation for exercise of the right in some cases. This requirement may seem odd if one attributes to reversion the role of remunerating authors, but not necessarily if we focus on making sure authors can revisit their choices for reasons more personal than pecuniary.

Although we focus here on U.S. law and its reconstruction, our account is relevant to other jurisdictions as well.[25] First, it is inspired by analogous rights in some European legal systems. But the correspondence between the pertinent doctrines of these countries and our autonomy-based theory is only partial, so our reform proposals may (and we think should) be relevant there as well. Moreover, other jurisdictions, such as South Africa and Canada, have considered instituting or reforming rights of reversion. These proposals, like existing U.S. law, do not fully vindicate authors' autonomy.[26] But they offer an opportunity to reform reversion to better serve this end.[27]

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[25] *See generally* Joshua Yuvaraj, "Copyright Reversion: Debates, Data, and Directions" (June 15, 2023), *available at* SSRN: https://ssrn.com/abstract=4973776.

[26] The South African parliament has passed a Copyright Amendment Bill (not yet signed by the President as of this writing) that provides for automatic termination of assignments of copyrights in literary or musical works after 25 years. *See* Copyright Amendment Bill cl. 25, *available at* https://static.pmg.org.za/B13F-2017.pdf ("[A]ssignment of copyright in a literary or musical work shall only be valid for a period of up to 25 years from the date of such assignment."). Although the automatic nature of this provision alleviates some of the practical difficulties that have limited exercise of termination rights under U.S. law, and the timing provides for earlier reversion than under U.S. law, it still gives short shrift to the autonomy interests of authors who change their minds in the first 25 years after assignment. It also gives short shrift to the autonomy interests of transferees who have compelling reasons to continue using a work after 25 years.

In Canada, current law provides for automatic reversion to the author's estate 25 years after the author's death. *See* Canadian Copyright Act, Section 14(1). This obviously does little to promote the autonomy of authors. A proposal has been floated in the Canadian Parliament to enact a provision similar to U.S. law, under which the right to terminate would arise 25 years after the transfer. *See generally* Paul J. Heald, *The Impact of Implementing a 25-Year Reversion/Termination Right in Canada*, 28 J. INTELL. PROP. L. 63 (2020-2021). For the reasons we elaborate below, we think this time-limited termination provision would be inadequate to promote the autonomy of authors, although it would be an improvement on current law.

[27] *See, e.g.*, Paul J. Heald, *The Effect of Copyright Term Length on South African Book Markets (with Reference to the Google Book Project)*, 7 S. AFR. INTEL. PROP. L. J. 71, 86-87 (2019) (describing possible expansion of reversion rights in South Africa that "would radically broaden

We reconstruct reversion in three parts. Part I describes the existing terrain, summarizing the history and doctrine of reversionary rights in Anglo-American copyright, as well as the scholarly critiques and judicial skepticism toward the conventional justifications offered for them. These rights may often fail to serve the pecuniary interests typically used to justify them; and courts have been reluctant to fully recognize the rights, perhaps due to their dramatic potential consequences in individual cases. Part II articulates our alternative normative justification: preserving the autonomy of an author's future self. Building on a theory of liberal property developed by one of us elsewhere, we sketch a humanistic theory of copyright that recognizes both alienability and reversion as crucial incidents. Taking authors' autonomy seriously, as this theory requires, offers principled guidelines for a reinvigorated law of copyright reversion. Part III develops these guidelines, explaining how the U.S. termination of transfer right might be reformed to better serve our alternative rationale.

I. THE EXISTING TERRAIN

A. History and Doctrine

1. The pre-history of termination of transfer in the United States.

The history of reversionary rights in Anglo-American copyright is tied up with the history of copyright duration. Under England's 1710 Statute of Anne, the first modern copyright statute, copyrights expired after fourteen years unless they were renewed by their authors for an additional fourteen-year term.[28] This renewal term automatically reverted to the author if they were still living upon expiration of the initial term.[29] The U.S. Congress borrowed this dual term of protection (and much else) from the Statute of Anne in the Copyright Act of 1790, setting the initial term of copyright at fourteen years, with an available renewal for fourteen years if the author was still alive at the end of the

authors' rights," including by giving control of pricing to authors, who sometimes complain about the high prices publishers charge for their books).

[28] Statute of Anne, 8 Ann., c. 19, § 2 (1710) (Gr. Brit.).

[29] *Id.* § 11. ("Provided always, [t]hat after the expiration of the said term of fourteen years, the sole right of printing or disposing of copies shall return to the Authors thereof, if they are then living, for another term of fourteen years.").

initial term and complied with renewal formalities.[30] This system of renewal and reversion meant, in theory, that an author who had transferred a copyright to a new owner could reclaim it when the initial fourteen year term expired.[31] In practice, however, authors in both Britain and the U.S. typically assigned away their contingent renewal terms to publishers along with their initial terms (and/or simply failed to recognize and exercise their rights).[32] Courts enforced those assignments, thus negating authors' theoretical ability to revisit their initial bargain by renegotiating over reverted renewal terms.[33]

This (ineffective) form of reversion ended in both Britain and the United States when the dual term of protection was replaced with a unitary life-plus-years term of protection (by the 1814 Act in Britain and the 1976 Act in the U.S.).[34] It was revived in Britain in 1911, by an Act that provided for reversion to the author's heirs 25 years after the author's death, but eliminated again in 1956.[35] Reversion has not been revived again in Britain;[36] it survives in the United States, however, in the form of the termination of transfer provisions of the 1976 Act described in the next section.

2. Termination of transfers under current U.S. law.

Section 304 of the Copyright Act allows termination of pre-1978 transfers in order to allow authors or heirs to benefit from extensions of copyright duration enacted after those

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[30] Reversion to the author, as opposed to an extended term for assignees, was less clear under the Copyright Act of 1790 than under the Statute of Anne, because the Copyright Act did not specify that the contingent renewal term would "return to the Authors," but rather that the exclusive right "shall be continued to him or them, his or their executors, administrators or assigns, for the further term of fourteen years." An Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of Such Copies, During the Times Therein Mentioned (May 31, 1790), 1 Stat. 124, ch. XV, §1. *See generally* Bently & Ginsburg, *supra* note 13, at 1550. The 1909 Act, by contrast, did not refer to the possibility of the renewal term going to "assigns." 1 Stat. 124, § 1 ("[T]he author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widowers or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work . . . ."). But it was eventually interpreted to allow advance assignment of the renewal term. *See generally* Bently & Ginsburg, *supra* note 13, at 1562 ("While the 1909 Act did not expressly resolve the assignability of the renewal term, the Supreme Court . . . ultimately ruled that the author's first-term assignment of the second term bound him to convey the renewal term to the original publisher.").

[31] *See generally* Bently & Ginsburg, *supra* note 16, at 1479.

[32] *See generally id*. at 1479.

[33] E.g. Carnan v. Bowles, (1785) 29 Eng. Rep. 45 (Ch.); Fred Fisher Music Co. Inc. v. M. Whitmark & Sons, 318 U.S. 643, 657 (1943); *see also* Bently & Ginsburg, *supra* note 16, at 1518-35; Kate Darling, *Occupy Copyright: A Law & Economics Analysis of U.S. Author Termination Rights*, 63 Buffalo L. Rev. 147, 152 (2015).

[34] An Act to Amend Several Acts for the Encouragement of Learning, 54 Geo 3, c. 156, §4 (Gr. Brit. and British Empire); An Act for the General Revision of the Copyright Law, Pub. L. No. 94-553, § 203 & 304, 90 Stat. 2541 (1976).

[35] *See* Joshua Yuvaraj & Rebecca Giblin, *Why Were Commonwealth Reversionary Rights Abolished (And What Can We Learn Where They Remain?)*, 41 Eur. Intell. Prop. Rev. 232 (2019).

[36] *See* Bently & Ginsburg, *supra* note 16; Yuvaraj & Giblin, *supra* note 35.

transfers.[37] For simplicity we focus our analysis on § 203, although much of our analysis applies to § 304 as well. Section 203 creates a non-transferable and non-waivable right for authors (or their statutory heirs) to reclaim transferred copyrights decades after the initial transfer. The key congressional report accompanying the 1976 Act describes the purpose of this mechanism as "safeguarding authors against unremunerative transfers," explaining that a "provision of this sort is needed 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."[38] The intricate details reflect a complex process of compromise about how to accomplish that goal.[39]

Section 203(a)(1), which sets forth the basic rule, prescribes that "[i]n the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination."[40] This termination right is available only during a specified five-year window that opens thirty-five years after the initial grant or after publication of the work under the term of the grant.[41] If the author has died, the right is owned and may be exercised by heirs specified by the statute (widow(er), surviving children, grandchildren of dead children, or—if none of these survive—"the author's executor, administrator, personal representative, or trustee").[42]

To trigger termination, at least a majority of the owners of the termination right must sign and serve an advance written notice on the current owner of the copyright.[43] The notice must state the effective date of the termination, which must be within the five-year period specified above.[44] The notice must be served on the copyright owner at least two years, and no more than ten years, before the specified effective date, and must be recorded in the Copyright Office before the effective date.[45]

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[37] H.R. Rep. 94-1476, 140 (1976) ("[T]he extended term represents a completely new property right, and there are strong reasons for giving the author, who is the fundamental beneficiary of copyright under the Constitution, an opportunity to share in it.").
[38] H.R. Rep. 94-1476, 124 (1976).
[39] *See id.* ("Section 203 reflects a practical compromise that will further the objectives of the copyright law while recognizing the problems and legitimate needs of all interests involved."); Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 890-93 (1987) (describing process of compromising leading up to adoption of termination of transfer provisions).
[40] Section 203 applies to transfers executed on or after January 1, 1978, the effective date of the Copyright Act of 1976. Earlier transfers of rights in works still under copyright as of that date are covered by the similar mechanisms provided by 17 U.S.C. § 304(c)-(d). *See generally* RESTATEMENT OF COPYRIGHT § 29 (tentative draft no. 3, 2022).
[41] "Termination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier." 17 U.S.C. § 203(a)(3).
[42] *Id.* § 203(a)(2).
[43] *Id.* § 203(a)(4).
[44] *Id.* § 203(a)(4)(A).
[45] *Id.* § 203(a)(4)(A).

Finally, in an effort to reverse the result of cases enforcing assignments of contingent renewal rights, Congress made the right non-transferable and provided that it persists "notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant."[46] The statute does provide, however, that a majority of the owners of the termination right may make an agreement with the original grantee (or their successor) regarding the rights subject to termination once notice of termination has been served (i.e. potentially as soon as ten years before the termination window opens).[47]

Exercise of the termination of transfer right results in a complete reversion to the termination right owner(s) of all the rights under copyright law that were covered by the terminated grant.[48] There is a limited exception to this rule: allowing grantees who have prepared authorized derivative works to continue to use those works.[49] Apart from that narrow exception, and the broader carve-out for all works-made-for-hire,[50] termination means that the owner(s) of the termination right become the exclusive owners(s) of the copyrights, and the grantee(s) whose rights have been terminated may not exercise the covered rights without permission. They are entitled to no further compensation.

B. Conventional Rationales, Critiques, and Judicial Skepticism

1. Two related rationales

Why should the law mandate that authors receive a second bite at the apple to renegotiate copyright ownership? Two related rationales have typically been offered for the termination of transfer right under U.S. law. Both have to do with the fairness of the monetary compensation that authors receive for their copyrights. One rationale is that authors lack sophistication, resources, and bargaining power compared to the publishers and other grantees to whom they assign their copyrights, and are therefore likely to negotiate unfair deals in their initial negotiations;[51] the other is that the value of

[46] *Id.*§ 203(a)(5).
[47] *Id.* § 203(b)(4) ("A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the persons provided by clause (3) of this subsection and the original grantee or such grantee's successor in title, after the notice of termination has been served as provided by clause (4) of subsection (a).").
[48] 17 U.S.C. § 203(b).
[49] 17 U.S.C. § 203(b)(1) ("A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant").
[50] 17 U.S.C. § 203(a) (specifying that the termination right applies only "[i]n the case of any work *other than a work made for hire*") (emphasis added).
[51] *See, e.g.*, Staff of H.R. Comm. on the Judiciary, 87th Cong., Rep. of the Register of Copyrights on the General Revision of the U.S. Copyright Law 54 (Comm. Print 1961) ("[M]ost authors are not represented by protective organizations and are in a relatively poor bargaining position. . . . There are no doubt many assignments that give the author less than his fair share of the revenue actually derived from his work. Some provision to permit authors to renegotiate their disadvantageous assignments seems desirable."); *see also* Marvel Characters, Inc. v. Simon, 310 F.3d 280, 292 (2d Cir. 2002) (referring, in the context of the § 304(c) termination right, to "the need to protect "ill-advised" authors from publishers or other more sophisticated entities").

copyrighted works is difficult to assess, and that authors are therefore likely to receive little compensation even for works that ultimately become commercially successful.[52] These rationales, and the termination provisions' ability to serve them, have been critiqued on both practical and more fundamental grounds.[53]

2. Practical concerns

One source of discomfort is that the termination of transfer provisions cannot serve the proffered rationales because they are too hard for their intended beneficiaries to use.[54] Critics have observed that the provisions—particularly their timing and notice requirements—are dauntingly complex[55] and that exercising them is therefore

[52] *See, e.g.*, Mills Music, Inc. v. Snyder, 469 U.S. 153, 172-73 (1985) ("[T]he termination right was expressly intended to relieve authors of the consequences of 'ill-advised' and unremunerative grants that had been made before the author had a fair opportunity to appreciate the true value of his work product."); Horror Inc. v. Miller, 335 F. Supp. 3d 273, 284 (D. Conn. 2018), *aff'd*, 15 F. 4th 232 (2d Cir. 2021) ("The termination right was established to permit authors to access the long tail of proceeds from a successful work that they could not initially have anticipated when they conveyed away their rights."); H.R. Rep. 94-1476, 124 (1976) ("A provision of this sort is needed 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."); Staff of H.R. Comm. on the Judiciary, 87th Cong., Rep. of the Register of Copyrights on the General Revision of the U.S. Copyright Law 54 (Comm. Print 1961) ("[T]he revenue to be derived from the exploitation of a work is usually unpredictable, and assignments for a lump sum are still common."); RESTATEMENT OF COPYRIGHT § 29, Comment a (tentative draft no. 3, 2022) ("The termination rights provided in 17 U.S.C. § 203 are meant to protect authors from unremunerative transfers . . . ."). Lydia Loren examines these related rationales and concludes that the valuation problem was a more important justification than the unsophisticated author problem. *See* Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the "Inalienable" Right to Terminate*, 62 FLORIDA L. REV. 1329, 1346 (2010) ("[T]he more accurate understanding of the policy justification for the termination rights is the valuation problem inherent in estimating the commercial worth of a work before it has been exploited and in judging its commercial longevity."). As R. Anthony Reese emphasizes, the termination provisions are clearly also motivated in part by the desire to benefit deceased authors' dependent relatives. *See* R. Anthony Reese, *Reflections on the Intellectual Commons: Two Perspectives on Copyright Duration and Reversion,* 47 STAN. L. REV. 707, 732 (1995).

[53] For a useful and concise summary of critiques, see Chase A. Brennick, *Note: Termination Rights in the Music Industry: Revolutionary or Ripe for Reform?,* 93 N.Y.U. L. REV. 786, 793-94 (2018).

[54] On the importance of compliance with the applicable statutory formalities, see generally Joshua Yuvaraj, *An Empirical Study of Case Law Relating to 17 U.S.C. § 203*, 64 IDEA: L. REV. FRANKLIN PIERCE CENTER FOR INTELL. PROP. 678, 764 (2024) (summarizing empirical study of case law that "highlights the importance of complying with termination formalities").

[55] Jessica Litman situates this difficulty in the context of the negotiations leading up to the enactment of the provisions. *See* Jessica Litman, *Real Copyright Reform*, 96 IOWA L REV. 1, 36 (2010) ("In return for making termination inalienable, moreover, publishers and film studios insisted on making it difficult."); *see also* Pamela Samuelson, *Notice Failures Arising from Copyright Duration Rules*, 96 B.U. L. REV. 667, 679 (2016) (observing that "[t]hese rules would prove, in time, to be much more complex and burdensome than the renewal procedures" they replaced).

exceedingly difficult.[56] Difficulties include accurately calculating the timing of the narrow window in which termination can occur and counting back from that to comply with complex pre-termination notice requirements.[57] Courts have acknowledged this "legal thicket"[58] of "intricate provisions [that] oftentimes create unexpected pitfalls that thwart or blunt the effort of the terminating party to reclaim the full measure of the copyright in a work of authorship."[59] Empirical research confirms that only a small percentage of termination rights are exercised.[60]

Another practical concern is that these provisions are likely to create anticommons problems following reversion. Ownership of reverted copyrights can be divided between numerous statutory heirs, all of whom would have to agree in order to authorize a new

[56] *See, e.g.*, Kevin J. Greene, *The Future Is Now: Copyright Terminations and the Looming Threat to the Old School Hip-Hop Song Book*, 68 J. COPYRIGHT SOC'Y U.S.A. 45, 47 (2021) (arguing that "the current promise of copyright recapture is severely attenuated by the formalistic and complex labyrinth of copyright termination provisions, as well as music industry practices, customs, and outright resistance to copyright terminations" and observing that the system "disadvantages creators of all colors, but most of all African-American artists, who are both highly innovative and poorly resourced as a class"); R. Anthony Reese, *Termination Formalities and Notice*, 96 B.U. L. REV. 895, 898-99 (2016) (documenting difficulties posed by statutory formalities); Bently & Ginsburg, *supra* note 16, at 1563 (noting "practical impediments to successful exercise of the termination right"); Pamela Samuelson, et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY. TECH. L. J. 1175, 1241 (2010) (describing mechanism "so cumbersome and complicated that most authors will not realistically have a meaningful opportunity to terminate these transfers"); Ann Bartow, *Using the Lessons of Copyright's Excess to Analyze the Political Economy of Section 203 Termination Rights*, 6 TEX. A&M J. PROP. L. 23, 27-29 (2020) (calling for reform of "unnecessarily complicated" termination rights); Dylan Gilbert, et al., Making Sense of the Termination Right: How the System Fails Artists and How to Fix It, Public Knowledge (Dec. 2019), https://publicknowledge.org/policy/making-sense-of-the-termination-right-how-the-system-fails-artists-and-how-to-fix-it/ (detailing several sources of complexity); Joshua Yuvaraj, Rebecca Giblin, Daniel Russo-Batterham, and Genevieve Grant, *U.S. Copyright Termination Notices 1977–2020: Introducing New Datasets*, 19 J. EMP. LEGAL STUD. 250, 285 (2022) (finding evidence of practical difficulties exercising termination rights).

Note that even critics of the current regime acknowledge that termination rights need not be exercised in order to provide at least some authors with bargaining power they can use to renegotiate their original contracts. *See, e.g.*, Greene, *supra* note 56, at 62 ("For major artists like Sir Paul McCartney and Prince, beginning the termination process is a game that leads, invariably, to a seat at the table to renegotiate a new and better deal. But major labels are vehemently resisting the termination efforts of lesser artists . . . ."); Jane C. Ginsburg, *Fifty Years of U.S. Copyright: Toward A Law of Authors' Rights?*, 50 AIPLA Q.J. 635, 646 (2022) (explaining that "authors and their grantees may be bargaining in the shadow of the author's inalienable termination right").

[57] *See* Reese, *supra* note 56, at 899-90; see YUVARAJ & GIBLIN, *supra* note 22, at 77-79.

[58] Baldwin v. EMI Feist Catalog, Inc., 805 F.3d 18, 19 (2d Cir. 2015).

[59] Siegel v. Warner Bros. Ent., Inc., 542 F. Supp. 2d 1098, 1117 (C.D. Cal. 2008).

[60] *See* Christopher Buccafusco, Brent Lutes, & S. Sean Tu, *Reclaiming Rights: An Empirical Analysis of Copyright Reversion*, DUKE L.J. (forthcoming 2026); YUVARAJ et al., *supra* note 56.

grant of exclusive rights (e.g. to a new publisher).[61] This difficulty is compounded by the fact that potential users of the work may have insufficient information to identify and transact with the new owner(s).[62]

These are both important challenges, which are exacerbated in a global context in which exercise of U.S. termination rights might be further complicated by conflicting non-U.S. law.[63] But they do not seem damning, at least not to some defenders of reversion rights.[64] The termination of transfer provisions could be simplified to make them easier to use.[65] They could arise earlier, increasing the odds that authors will still be living and thus reducing complications that arise when rights are inherited.[66] They could also arise automatically after the passage of a specified period, eliminating the burden of the current requirements for triggering the rights.[67] And the recording system for providing notice to third parties about the status of terminated rights could be improved.[68]

The optimistic view of the termination of transfer provisions' potential pecuniary impact is captured by Justin Hughes and Robert Merges, who acknowledge the complexity of the provisions but argue that "if the section 203 and 304(c) provisions

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[61] SAMUELSON, et al, *supra* note 56, at 1241 ("[B]ecause the statute divides the termination interest among the successors it names and then requires majority action by those interest holders in order to terminate a transfer, it creates opportunities for deadlock and miscalculation."); Guy A. Rub, *Stronger than Kryptonite? Inalienable Profit-Sharing Schemes in Copyright Law*, 27 HARV. J. L. & TECH. 49, 115-23 (2013) (discussing post-termination fragmentation of rights). *But see* Darling, *supra* note 33, at 175 (suggesting that anticommons problem might be mitigated by the work-for-hire doctrine, which "is designed (and used in practice) to cover most of the works with a multitude of creators").

[62] *See* REESE, *supra* note 56, at 922-23 (noting deficiencies of recording system for terminated grants).

[63] *See, e.g.* Gloucester Place Music Ltd. v. Le Bon, England and Wales High Court of Justice [2016] EWHC 3091 (Ch) (2016) (holding that termination under 17 U.S.C. § 203 breached contracts under English law). *See generally* YUVARAJ & GIBLIN, *supra* note 22, at 84-85 (discussing issue).

[64] For a range of suggestions for improving reversion rights around the world through adoption of "best-practice principles for copyright reversion mechanisms," see *id*. at 149-74.

[65] REESE, *supra* note 56, at 910-14 (suggesting reforms to "make it less daunting for authors or their successors to exercise their termination right"); Litman, *supra* note 55, at 48 ("Authors should be entitled to terminate any copyright grant they make, on five years notice, at any time beginning fifteen years after the date of the grant and continuing for the life of the copyright."); Gilbert, et al., *supra* note 56 (suggesting reforms including automatic vesting of termination right); Amy Gilbert, Note, *The Time Has Come: A Proposed Revision to 17 U.S.C.* § *203*, 66 CASE W. RES. L. REV. 807, 845–46 (2016) (suggesting a simplified notice requirement).

[66] GILBERT, ET AL., *supra* note 56 ("Shorter terms would make it more likely that artists can exercise termination rights while they are still creatively active. This would reduce the number of complex disputes involving heirs, and increase the likelihood that documentary evidence, witnesses, etc. are available in the event of a dispute leading to litigation."); SAMUELSON ET AL., *supra* note 56, at 1242 ("One example of a simpler termination mechanism is to limit the termination right to the author himself during his lifetime."); *see also* Tonya M. Evans, *De-Gentrified Black Genius: Blockchain, Copyright, and the Disintermediation of Creativity,* 49 PEPP. L. REV. 649, 671(2022) ("Without automatic reversion and a shorter period before authors can even begin the process of termination, most of the value of the copyrights has long been extracted before the notice period begins.").

[67] *See, e.g.*, GILBERT, ET AL., *supra* note 56, at 26.

[68] *See* REESE, *supra* note 56, at 923-24 (suggesting reforms).

work as intended, they are powerful redistributive tools for authors and their families,"[69] and by Kevin Greene, who suggests that automatic termination could serve as a form of reparations for Black artists, while acknowledging that under current law "the promise of copyright recapture is all but illusory except for the most sophisticated and well-financed."[70]

3. Principled objections

While these responses may overcome the practical critiques of reversion under the current U.S. rules, they are subject to more fundamental objections. This more profound skepticism perceives reversion rights as inefficient, counterproductive, patronizing, and founded on baseless assumptions about the desperation and haplessness of authors.[71]

For example, critics have argued that the termination of transfer doctrine is counterproductive as a mechanism for promoting the economic well-being of authors, as it may lower initial compensation for transfers,[72] redistribute resources from poor authors at the beginning of their careers to successful and well-off authors at the end of theirs,

[69] Justin Hughes & Robert P. Merges, *Copyright and Distributive Justice*, 92 NOTRE DAME L. REV. 513, 566-67 (2016).

[70] *See, e.g.*, Kevin J. Greene, *The New Copyright Manifesto: The Case for Reparations for African American Music Artists*, 85 U. PITT. L. REV. 921, 951-53 (2024) (proposing automatic termination as one form of economic reparations for Black artists).

[71] *See, e.g.*, RUB, *supra* note 61, at 83 ("While comprehensive empirical research on the wealth of creators is lacking, the empirical evidence that does exist seems to contradict the myth of the starving artist."). *But see* Joshua Yuvaraj & Rebecca Giblin, *Are Contracts Enough? An Empirical Study of Author Rights in Australian Publishing Agreements,* 44 MELBOURNE UNIVERSITY LAW REVIEW 380 (2019) (arguing based on their empirical study of publishing contracts that mandating minimum rights is likely to be the most efficient way for both publishers and authors to reach optimal terms).

[72] Michael Karas & Roland Kirstein, *Efficient Contracting Under the U.S. Copyright Termination Law,* 54 INT'L REV. L. & ECON. 39, 47 (2018) ("[W]e have proved mathematically the informal argument in the literature that overall remuneration from initial negotiations is strictly lower for terminating authors due to the internalization effect."); STERK, *supra* note 15, at 1220 ("[A]ny publisher knows that any copyrights it has acquired, if valuable, will expire after thirty-five years. Nothing in the statute prevents publishers from taking that fact into account in setting the prices they are willing to pay to authors."). *But see* Rebecca Giblin, *A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid*, 41 COLUM. J.L. & ARTS 369, 397 (2018) ("Where reversionary rights currently operate (e.g., after thirty-five years in the US, or twenty-five years after the author's death in Canada), I have been unable to locate any data suggesting that those authors receive less than counterparts in equivalent jurisdictions.").

and impose upon authors the risks of the uncertain future value of their works.[73] The regressive potential of the right is especially pronounced because poorly-resourced authors are especially unlikely to be able to navigate the complexities of exercising the right.[74] Defenders of the termination rights counter that publishers and other transferees are unlikely to discount initial transfers based on termination rights with such long time horizons,[75] and that the daunting complexities can be reduced by adopting the reforms described above.

Other critics train their fire on what they see as unfounded and patronizing assumptions about authors. Justice Frankfurter voiced this concern when he held in *Fred Fisher Music Co.* that advance assignments of the author's renewal term were enforceable under the 1909 Act. Justice Frankfurter rejected the idea that "authors are congenitally irresponsible," or that they are "so sorely pressed for funds that they are willing to sell their work for a mere pittance."[76] He also suggested that reversion rights might have the unintended consequence of reducing compensation for authors: "If an author cannot make an effective assignment of his renewal, it may be worthless to him

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[73] *See, e.g.*, Kal Raustiala & Christopher Sprigman, *The Music Industry Copyright Battle: When is Owning More Like Renting?*, Freakonomics (Aug. 31, 2011), http://www.freakonomics.com/2011/08/31/the-music-industry-copyright-battle-when-is-owning-more-like-renting; RUB, *supra* note 61, at 54, 83-84, 100-01; DARLING, *supra* note 33, at 165-66; LOREN, *supra* note 42, at 1353; STERK, *supra* note 15, at 1229; Kevin J. Hickey, *Copyright Paternalism*, 19 VAND. J. ENT. & TECH. L. 415, 448-51, 464-65 (2017); FROMER, *supra* note 14, at 1807. *But cf.* KARAS & KIRSTEIN, *supra* note 72, at 45 (concluding based on a formal model that "the termination right would not necessarily force authors into lotteries, at least no more so than in the conventional copyright systems"). *See generally* Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1373 n. 143 (1989) (describing debate).

[74] *See, e.g.,* GREENE, *supra* note 56, at 47 (arguing that the complexity of the current provisions ensures "that all but the most sophisticated, well-financed and privileged authors will never exercise termination rights" and that they thus "act as a kind of reverse redistribution, taking rights from the least advantaged and conveying those rights to hegemonic corporate interests"); Evans, *supra* note 66, at 664 (arguing that "the termination provisions serve as a de facto formality that impedes the ability of all but the most well-resourced, well-represented, and savvy creatives"); Tuneen E. Chisolm, *Whose Song Is That? Searching for Equity and Inspiration for Music Vocalists Under the Copyright Act,* 19 YALE J. L. & TECH. 274, 327 (2017) (noting speculation, in the specific context of sound recordings, that termination rights might primarily benefit "superstar artists").

[75] *See, e.g.*, HEALD, *supra* note 26, at 83-85 (explaining that "[u]nder a wide range of assumptions about depreciation rates for copyrighted works and predictions of applicable discount rates, publishers earn the vast majority of profits during the first 25 years of the life of a copyright" and that, therefore, "[t]he value of the 'product' the publisher is purchasing from the author at the time of contracting is essentially the same whether the purchase lasts for 25 years or much longer"); Kristelia A. Garcia & Justin McCrary, *A Reconsideration of Copyright's Term*, 71 ALA. L. REV. 351, 398 (2019) ("Our finding of a relatively short term of commercial viability for information goods further suggests that intermediaries--i.e., record labels, film studios, book publishers, etc.—are compensated for their risk rather early on in the term, such that they are unlikely to be negatively impacted by a policy of rights eversion.").

[76] Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 656 (1943).

when he is most in need. Nobody would pay an author for something he cannot sell."[77] Although Congress clearly disagreed with Justice Frankfurter's assessment, and aimed to reverse the result in *Fred Fisher Music Co.* with its 1976 reforms, some of this judicial skepticism lingers.

4. Judicial resistance to inalienable termination rights

Qualms like those expressed by Justice Frankfurter may explain why judges tend to interpret current law—with its express and inalienable termination rights—in a way that blunts its impact. Even after Congress attempted to reverse the result in *Fred Fisher Music* by insisting that termination rights survive "notwithstanding any agreement to the contrary," courts have hesitated to invalidate some attempts to contract around the rights. In particular, courts have allowed authors' successors in interest to rescind and renegotiate grants in advance of termination, thus eliminating the termination right (and, in some cases, the rights of statutory heirs designated in the termination provisions).[78] Some observers have suggested that allowing termination rights to be rescinded in this way flouts the express statutory language and intent of Congress.[79] Others disagree, suggesting that advance rescission and renegotiation can vindicate the "second bite" purposes of the statutory provisions.[80] Others have celebrated the judicial skepticism of a

[77] *Id.* at 657.

[78] Milne v. Stephen Slesinger, Inc., 430 F.3d 1036 (9th Cir. 2005); Penguin Grp. (USA) Inc. v. Steinbeck, 537 F.3d 193, 202 (2d Cir. 2008). In addition to enforcing contracts that have the practical effect of negating the termination right, some courts have come to questionable conclusions that works were made for hire, to which the right does not apply. *See, e.g.*, Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 143 (2d Cir. 2013); Fifty-Six Hope Rd. Music Ltd. v. UMG Recs., Inc., No. 08 CIV 6143 DLC, 2010 WL 3564258 (S.D.N.Y. Sept. 10, 2010) (denying renewal rights to Bob Marley's heirs under 1909 Act); 2 PATRY ON COPYRIGHT § 5:45 (critiquing *Fifty-Six Hope Rd.*). *But see* Scorpio Music S.A. v. Willis, No. 11-cv-1557 BTM (RBB), 2012 WL 1598043 (S.D. Cal. Sept. 15, 2015) (rejecting challenge to termination right in case in which music publishers had originally argued that work was made for hire but ultimately dropped that argument); Horror Inc. v. Miller, 15 F.4th 232 256 (2d Cir. 2021) (allowing termination after rejecting work for hire argument).

[79] *See, e.g.*, Menell & Nimmer, *Pooh-Poohing*, *supra* note 21 (describing cases that "have eviscerated that clear congressional command"); Menell & Nimmer, *Judicial Resistance*, *supra* note 21; Bently & Ginsburg, *supra* note 16, at 1584-86 (describing "a depressing déjà vu: a return to the world of *Fred Fisher*); Alfred C. Yen, *Private Ordering and Notice Failure in the Shadow of Termination*, 96 B.U. L. REV. 927, 928 (2016) (arguing that "courts should ignore contractual private ordering designed to eliminate authors' termination rights").

[80] *See, e.g.*, RESTATEMENT OF COPYRIGHT § 29, cmt. i (tentative draft no. 3, 2022) ("Those decisions are consistent with the legislative history of the 1976 Act indicating that Congress did not intend for the statute to 'prevent the parties to a transfer or license from voluntarily agreeing at any time to terminate an existing grant and negotiating a new one[.]' H.R. Rep. No. 94-1476, at 127."); *Milne,* 430 F.3d at 1046 ("The [trust that had succeeded to the author's copyright interests] recognized the perceived right to terminate as a valuable bargaining chip, and used it to obtain an advantageous agreement that doubled its royalty share relative to [the transferee's] share. Thus, the 1983 agreement exemplifies the increased bargaining power that Congress intended to bestow on authors and their heirs by creating the termination right under the 1976 Copyright Act.").

doctrine that they argue cannot be justified by the concerns for authors' pecuniary well-being that are typically offered in its favor.[81]

Our view is that at least some courts have enforced contracts regarding termination rights in a way that is in significant tension with the statute's "notwithstanding any agreement to the contrary" command.[82] At the same time, we understand (although we do not fully share) the academic and judicial skepticism about the conventional rationales for the doctrine. Setting aside this debate, our goal is to describe another justification for allowing authors to reevaluate their past copyright choices that does not require evaluation of claims about their poverty, unsophistication, bargaining power, or financial foresight. That is the topic to which we now turn.

II. PRESERVING THE AUTONOMY OF THE AUTHOR'S FUTURE SELF

A. The Task

Pecuniary justifications for reversion and termination rights are, as we have just seen, contested.[83] To critics, this means that existing law—or at least the way it is currently understood—should be changed. One way to do so would be to eliminate these rights, or at least to fortify the skeptical line of cases that limits their impact. We offer an alternative way of moving forward. We argue that taking authors' rights seriously can justify reversion and termination rights regardless of the strength or weakness of the conventional pecuniary justifications; indeed, this alternative justification makes such rights an important feature of an autonomy-centered copyright law, the requirements of which we describe in Part II.B.3 below.

Our argument here could form a component of a broader case for having this type of autonomy-centered copyright law: a liberal society, founded on the commitment to people's equal right to self-determination, should shape its copyright law around this core commitment by developing the law so that it better complies with this ideal.[84] Here, our claim is (much) more modest. We present an autonomy-based account that can justify the presence of reversion and termination rights throughout the long history of copyright and guide its future development.

Because reversionary mechanisms also exist outside the Anglo-American copyright tradition, our account is partly inspired by comparative law. To be sure, some of these mechanisms appear to be motivated, like the U.S. termination of transfer provisions, by

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[81] *See, e,g*., DARLING, *supra* note 33 at 205 (arguing that "a narrow interpretation of author termination rights may be in the interest of both utilitarian and distributive-based policies").

[82] 17 U.S.C. §§ 203(b)(5), 304(c)(5).

[83] *See supra* text accompanying notes 71-81.

[84] Put differently, we have in mind a *reconstructive* interpretive theory of copyright law. Such a theory has no pretense to divine the intentions of the judges and lawmakers who developed the doctrine. Rather, it builds on existing practices while suggesting a new perspective on the law that both reaffirms core aspects of existing doctrine and proposes justified reforms. Reconstructive interpretive legal theories do not aim to supplant existing practices, but they are typically reformist because they inevitably rely on a normative judgment about which doctrinal facts count as core and which as marginal. *See* Hanoch Dagan, *Two Genres of Interpretive Legal Theories, in* UNDERSTANDING PRIVATE LAW 49 (Evan Fox-Decent et al. eds., 2024).

concern with fair remuneration to authors;[85] and other reversionary rights are designed to ensure that the transferred rights are actually exploited as contemplated by the

[85] *See, e.g.*, Directive (EU) 2019/790 of the European Parliament and of the Council of 17 Apr. 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/E, at art. 20(1) ("Member States shall ensure that, in the absence of an applicable collective bargaining agreement providing for a mechanism comparable to that set out in this Article, authors and performers or their representatives are entitled to claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights, or from the successors in title of such party, when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances."). *See generally* Yifat Nahmias, *The Cost of Coercion: Is There a Place for "Hard" Interventions in Copyright Law?*, 17 NW. J. TECH. & INTELL. PROP. 155, 179 (2020) ("Success clauses, as the title suggests, provide the author with the right to modify the remuneration stipulated in the contract when the intermediary sees disproportional profits. This form of intervention--meant to protect the author who could potentially fail to benefit from the exploitation of her work--is common in European countries."); Ula Furgal, *Reversion Rights in the European UnionMemberStates*, *available at* https://eprints.gla.ac.uk/240713/1/240713.pdf (last visited Sept. 27, 2025). For example, French law permits the termination of transfers based on failure to pay royalties to the author. *Id.* at 12 (citing French IP Code arts. L132-17-3, L132-17-3-1 & L132-17-4). Dutch law includes a "best seller" provision that aims to compensate authors when their works become surprise hits. *See* Martin Senftleben, *More Money for Creators and More Support for Copyright in Society-Fair Remuneration Rights in Germany and the Netherlands*, 41 COLUM. J.L. & ARTS 413, 431 (2018) (explaining that "[i]n 2015, the Dutch legislator . . . opted for an *ex post* fair remuneration rule allowing authors to insist on additional remuneration in case a 'serious' disproportionality arises in light of the revenue accruing from the work's exploitation (Art. 25d(1) Aw)"). German law similarly requires modification of transfer agreements that result in remuneration to the author being "disproportionately low in comparison to the proceeds and benefits derived from the use of the work." German Act on Copyright and Related Rights, § 32a. German law also provides that authors should receive separate remuneration when a transferee uses the work for a "new type of use" that was unknown at the time of the transfer agreement (§32c); and it converts exclusive licenses to non-exclusive licenses after ten years unless the original contract provided for ongoing royalties. *Id*. § 40(a) (providing, in part, that "[w]here the author has granted an exclusive right of use against payment of flat-rate remuneration he shall nevertheless be entitled to exploit the work in another manner after the expiry of ten years. The first owner's right of use shall continue as a simple right of use for the remainder of the period for which it was granted"). *See generally* Ruth Towse, *Copyright Reversion in the Creative Industries: Economics and Fair Remuneration*, 41 COLUM. J.L. & ARTS 467, 483 (2018) (discussing this provision).

transfer—e.g. that publication contracts result in actual publication.[86] Yet a third category of reversionary rights is different in kind and closer to the way we think reversion rights should be reconceptualized.[87]

Provisions in this last category of reversionary rights–often understood as moral rights–allow authors to revoke transfers based on a change of heart. For example, in Germany "[t]he author may revoke a right of use vis-a-vis the rightholder if the work no longer reflects the author's conviction and the author can therefore no longer be expected to agree to the exploitation of the work."[88] Similarly, the French "right to repent and retract" provides that "[n]otwithstanding transfer of his economic rights, an author, even after publication of his work, has the right as against the transferee to correct or to retract his work."[89] Spanish law provides for a "right to withdraw the work from circulation for reasons of changed intellectual or moral convictions"[90] and the "right to alter the work,

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[86] For example, the EU Directive on Copyright in the Digital Single Market includes a "Right of Revocation," requiring member states to "ensure that where an author or a performer has licensed or transferred his or her rights in a work or other protected subject matter on an exclusive basis, the author or performer may revoke in whole or in part the licence or the transfer of rights where there is a lack of exploitation of that work or other protected subject matter." Provisions of this type are often referred to as "use it or lose it" provisions. They are not triggered by the passage of a particular period of time, per say, but rather by the transferee's failure to exploit the work. Art. 22 does permit member states to include temporal windows in their implementing law, however: "Member States may provide that the revocation mechanism can only apply within a specific time frame, where such restriction is duly justified by the specificities of the sector or of the type of work or other subject matter concerned." And the right of revocation does not arise until a reasonable period of time has passed during which the transferred rights have not been exploited: "Member States shall provide that the revocation provided for in paragraph 1 may only be exercised after a reasonable time following the conclusion of the licence or the transfer of the rights. The author or performer shall notify the person to whom the rights have been licensed or transferred and set an appropriate deadline by which the exploitation of the licensed or transferred rights is to take place. After the expiry of that deadline, the author or performer may choose to terminate the exclusivity of the contract instead of revoking the licence or the transfer of the rights." Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market, O.J. (L 130) (2019), art 22.

[87] *See generally* Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 32 (1994) (describing how Continental doctrine respects authors' ongoing autonomy interests "by according authors the right to withdraw a work from publication or to make modifications after the work is disseminated").

[88] German Copyright Act § 42. *See generally* Franz Hofmann & Michael Grünberger, *Germany* § 7, in INTERNATIONAL COPYRIGHT LAW AND PRACTICE (Burton Ong ed., LexisNexis 2025) ("Section 42 of the Copyright Act conditionally entitles an author to revoke contractual engagements to protect his personal and intellectual interests… Under this provision an author… may revoke any grant of a right of use if the work…subject to the grant no longer reflects his or her views and if he or she therefore can no longer be expected to consent to the exploitation of the work . . . The right of revocation in this case may not be waived in advance, and its exercise may not be contractually precluded.").

[89] Pascal Kamina, *France* § 7[1][d], in INTERNATIONAL COPYRIGHT LAW AND PRACTICE (Burton Ong ed., LexisNexis 2025); *see also* French Intellectual Property Code art. L121-4.

[90] Germán Bercovitz, et al, *Spain* § 7[1], in INTERNATIONAL COPYRIGHT LAW AND PRACTICE (Burton Ong ed., LexisNexis 2025) (quoting art. 14 of the Spanish Copyright Act).

subject to respect for the acquired rights of third parties and the requirements of protecting the cultural legacy."[91]

While these comparative examples resonate with our account, we do not suggest merely transplanting the German, French, or Spanish mechanisms into our copyright law. To explain the reforms we do propose, we need to refine the proper rules of autonomy-based reversion rights, by articulating the principles animating an autonomy-based copyright theory and explaining why it entails both copyright alienability and reversionary rights. As we explain in the Section that follows, according to an autonomy-based conception of copyright, alienability and reversionary rights are not accidental and potentially contradictory features of the doctrine; quite the contrary: they rely on the same normative foundation, which also justifies copyright at the outset. This is why such a theory can yield principled doctrinal guidelines, which can direct, as Part III demonstrates, a coherent law reform.

B. Liberal Property and Authors' Autonomy

The role of autonomy as a putative justification of copyright is, as we have noted early on, both familiar and contested. The literature, which we do not attempt to canvass here, draws on seminal contributions of both Hegel and Kant and at turns both celebrates and questions the coherence of copyright law.[92] We appreciate the skeptical accounts of existing theories of autonomy as an animating principle for copyright,[93] but also refuse to give up on the powerful intuition that, as Robert Merges argues, "[t]he basic foundations of [copyright] are individual autonomy and freedom"[94]—which we understand to include especially, but not exclusively, the autonomy and freedom of individual creators. This focus on autonomy and freedom resonates with a theory of liberal property that one of us

[91] *Id*. For a survey of laws in European member states, see Furgal, *supra* note 85 ("The laws of nine Member States provide an opportunity to terminate an agreement due to moral rights considerations. All of those provisions follow a similar pattern, making the termination conditional upon the compensation or the security of compensation of the licensee or transferee, and granting the licensee or transferee the priority right in case the author decides to resume exploitation of her work (an offer should be made to the licensee or transferee under the same conditions as those of the terminated agreement; priority right can be limited in time). The contents of the moral rights trigger itself is phrased differently in each jurisdiction, but it usually concerns author's interests…, author's convictions or opinions… , author's honour and reputation… , or simply moral reasons….").

[92] For an examination of the termination of transfer provisions focused in particular on the consistency and inconsistency with the copyright-related views of Hegel and Kant, *see* Zachary Shufro, *Terminating Copyright,* 63 IDEA: L. Rev. Franklin Pierce Ctr. for Intell. Prop. 1 (2022).

[93] For a particularly powerful recent critique, see Mala Chatterjee*, Property, Speech, and Authorship: A Dilemma for Personhood Theories of Copyright, in* Cambridge Volume on Intellectual Property & Private Law (forthcoming 2025), *available at* https://ssrn.com/abstract=4901468 (last revised Mar. 2, 2025).

[94] Merges, *supra* note 13, at 15; *see also Robert P. Merges, Autonomy and Independence: The Normative Face of Transaction Cost*s, 53 Ariz. L. Rev. 145 (2011).

developed elsewhere.[95] We turn now to explaining the applicability of that theory to copyright.

1. From autonomy to property

Our starting point is, we hope, not controversial: people are entitled to act on their capacity "to have, to revise, and rationally to pursue a conception of the good."[96] Individuals should be free to plot their own course through life—to have some measure of self-determination, of writing and re-writing their own life-story.[97] Autonomy requires freedom from unreasonable interference with one's life choices.[98] But it is also dependent upon both material conditions and a sufficiently diverse set of alternatives.[99] This is why in a genuinely liberal society people are entitled to a system of law *supportive* of their ability to shape a life they can view as their own, rather than merely one that respects their capacity for uncoerced choice.

An important part of this task of supporting autonomous life choices is assigned to public law: the most basic preconditions of personal self-determination are undoubtedly health, education, and means of subsistence—the baseline minima of which should be provided by the state.[100] Nonetheless, private law also bears an irreducible responsibility in empowering people to lead their chosen life plans.[101] Property law, more specifically, has a distinctive role in this fundamental obligation of the law: it facilitates the aspects of self-determination that involve long-term projects harnessing the types of external resources to which property rights can attach. Liberal property theory shows how this autonomy-enhancing *telos* is crucial to both ensuring property's legitimacy and elucidating property law's core features.[102] Here we focus on the aspects of this theory that are particularly pertinent to our account of the place of copyright in a liberal scheme of property.

2. Liberal property, in brief

Property is conducive to people's self-determination because self-determination is an intertemporal achievement, consisting of planning and carrying out projects, which requires a temporal horizon of action. Property follows suit by conferring upon people some measure of durable private authority over resources: a normative power to determine what others may or may not do with the resource. This authority over things

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[95] *See* HANOCH DAGAN, A LIBERAL THEORY OF PROPERTY (2021); Hanoch Dagan, *Liberal Property Theory, in* HANDBOOK ON PROPERTY LAW & THEORY 197 (Chris Bevan ed., 2024), on which this section and the following ones in this Part heavily rely.

[96] JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 19 (2001).

[97] *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 369 (1986).

[98] *See* ISAIAH BERLIN, *Two Concepts of Liberty, in* FOUR ESSAYS ON LIBERTY 118, 126, 132-33 (1969)

[99] *See* Raz, *supra* note 97, AT 372, 398.

[100] *See* Hanoch Dagan, *Autonomy and Pluralism in Private Law*, *in* THE OXFORD HANDBOOK OF NEW PRIVATE LAW 177, 181 (Andrew Gold et al. eds., 2020).

[101] *Id.*

[102] This short subsection summarizes the arguments developed by one of us at length elsewhere. *See* DAGAN, *supra* note 95.

(both tangible and intangible) dramatically affects people's ability to plan and carry out meaningful projects—on their own or with the cooperation of others.

Liberal law further augments property's autonomy-enhancing potential because it constitutes a variety of stable frameworks of interpersonal cooperation, as different property types support divergent forms of interpersonal relationships from which people can choose. Property law offers, as it should, more than one option to people who want to become homeowners (e.g., fee simple or a condo), or engage in business (e.g., partnership or corporation), or enter intimate relationships (e.g., marriage or cohabitation). Thus, properly configured, it functions as an empowering device for self-authorship, enabling people to act upon their own goals and values, their objectives, and their life plans. By conferring on individuals the power to invoke various property types that facilitate differing life plans, a liberal property law makes a crucial contribution to people's ability to realize the right of self-authorship.

Indispensable as it is, this autonomy-enhancing service is also the source of property's daunting legitimacy challenge. By proactively empowering owners, property law generates new normative powers, which imply new liabilities on others. This means that for law's demand that non-owners defer to owners' authority to be legitimate, that private authority must serve people's self-determination, which the state is obligated to facilitate, and everyone must respect. A liberal property law must therefore ensure that no private authority can be claimed that exceeds what is required for owners' self-determination. Moreover, because owners' legitimate claims are premised on the maxim of reciprocal respect for self-determination, their authority must be consistent with the self-determination of others.

Therefore, the notion of private authority cannot exhaust the idea of *liberal* property. A genuinely liberal property law should proactively augment people's opportunities for both individual and collective self-determination, while carefully restricting their opportunities for interpersonal domination. Many of the implications of this prescription are not pertinent for our limited purposes. Here, it is enough to highlight the three pillars of liberal property—the features that distinguish it from property *simpliciter*: carefully delineated private authority, structural pluralism, and relational justice.

(1) liberal property carefully circumscribes owners' private authority so that it is adjusted to its contribution to self-determination;
(2) it includes a structurally pluralist inventory of property types to offer people real choice; and
(3) it complies with the prescriptions of relational justice to ensure that ownership does not offend the maxim of reciprocal respect for self-determination on which property's legitimacy is grounded.

3. Autonomy-based copyright

Copyright is one member in the broad inventory of property rights contemporary law offers; and, like others, it should, per liberal property theory, be designed in line with property's autonomy-enhancing *telos*.[103] An important guideline in this critical task comes from a qualitative distinction that runs through much of our private law: between

[103] *Id.* at 58, 70.

people's *ground projects* and their *sheer preferences*.[104] Ground projects are the projects that make people who they are and give meaning to their lives, such as their religious, ethical, professional, and familial choices.[105] These constitutive features of people's lives and choices are not on par with their preferences for mundane goods or daily services or with the various means (notably money) that enable them. For private law to be autonomy-enhancing, its doctrinal makeup must, and to some degree already does, reflect this qualitative distinction between ground projects and sheer preferences.[106]

In and of itself, this prescription does not justify copyright law. Liberal property implies that there need to be *some objects*—not necessarily material—that people should be able to form plans about and thus to self-determine. But it does not set up a list of objects that necessarily fall within this category of constitutive resources. Therefore, liberal property by no means implies a demand to either shrink or refrain from expanding the intellectual public domain. Moreover, it recognizes that the objects of property may—and sometimes should—change over time and space. In other words, whereas having *some* constitutive property types is essential for property's autonomy-enhancing *telos*, adhering to the conventional ways of securing a temporal horizon of action is not. Our personal investment in external resources is mediated by the socially constructed repertoire of constitutive resources, and therefore the taxonomy splitting resources into constitutive and fungible must not be viewed as inevitable. It is appropriate and even desirable to periodically reconsider and, if necessary, revise our constitutive-fungible taxonomy.

That said, insofar as copyright is included in the repertoire of our property types and given its current social meaning as a potentially constitutive medium of the self, an autonomy-based theory of copyright vindicates the intuition with which this section started. To be sure, we do not deny that utilitarian and other instrumental considerations may justify some of the rights law confers upon your garden-variety commercial copyright owner. But this justification is, by definition, only *indirectly* connected to autonomy, which means that while some measure of private authority over these resources may be important, it need not—indeed, it often must not—be particularly exacting.[107] The authority of commercial copyright owners—and, for that matter, its duration—must not go beyond what its indirect contribution to people's self-determination requires. Moreover, because excessive authority is autonomy-reducing (for non-owners), *diluting* the authority of *these* owners may well be necessary, and not

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[104] *See* HANOCH DAGAN & AVIHAY DORFMAN, RELATIONAL JUSTICE: A THEORY OF PRIVATE LAW 48-49 (2024).

[105] *Id.*

[106] *Id.*

[107] Many in the IP field argue, for example, that the interests of big media companies are often at odds with the goal of rewarding creative individuals. From this perspective, "policies that truly favor individual creators must necessarily oppose the interests of large media companies, in part by reducing the emphasis on IP rights. An overstated simplification might be: in the digital era, if it hurts Disney, it's good for the little guy." MERGES, *supra* note 13, at p. 222. Some in the IP field, however, disagree. "My goal here is to break apart the logic of this syllogism. In my mind, big media companies are not the sworn enemy of all those who contribute to creative works. They are not even necessarily the enemy of 'little guy' creators, individuals and small groups working outside the confines of big media." *Id.*

only acceptable. Individual human authors, however, are different. For them the creative works at hand can be perceived as receptacles of their personalities, external projections of their life stories. Here control directly serves autonomy and thus must not be easily overridden, although here too we must consider the countervailing autonomy concerns of non-owners.

Respecting authors' autonomy need not imply that copyright should be inalienable. Quite the contrary: it explains and indeed justifies authors' power to alienate, as we explain below. But respecting autonomy does not, indeed must not, require a regime of unlimited alienability. Where alienability threatens to severely undermine the self-determination of people's future selves, a genuinely liberal regime adjusts the authority of the current self. Thus, while a liberal law, which complies with its obligation to empower us, should confer upon authors the power to alienate, it must also circumscribe that jurisdiction over authors' future selves insofar as this is needed to avoid overwhelming the autonomy of those future selves. We begin with the autonomy-based case for alienability and then turn to explaining its inherent limitations.

C. Defending Copyright Alienability

Tony Honoré's inclusion of the power to alienate, specifically the power to sell (and mortgage) as a typical—even canonical—incident of "the 'liberal' concept of 'full' individual ownership,"[108] can serve as our starting point. To be sure, some property rights can neither be sold nor given away,[109] and others can be given away, but not sold.[110] Liberal systems do not necessarily attach unlimited power to alienate to property rights, but these are widely understood as exceptions to the rule.[111] Alienability typifies ownership in our time, when property systems are dynamic. But for liberal property, this dynamism is neither coincidental nor contingent. It derives from the two critical ways in which alienability is potentially conducive to people's autonomy. Alienability allows individuals the mobility that is a prerequisite for self-determination; and it expands the options available to individuals to function as the authors of their own lives. Both autonomy-based rationales apply to copyright just as much as they do to other property types.

First, the possibility of liquidating one's holdings enables geographic, social, familial, professional, and political mobility, which is often a prerequisite for meaningful autonomy. Effective mobility is critical in vindicating people's right to exit; it makes their right to withdraw from or refuse further engagement with others meaningful. The possibility of exit protects people from the predicament of being trapped in oppressive

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[108] *See* A.M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE: A COLLABORATIVE WORK 107, 107, 118 (A.G. Guest ed., 1961).

[109] *See, e.g., Moore v. Regents of Univ. of Cal.*, 51 Cal. 3d 120, 166 (Cal. 1990) (Mosk, J., dissenting) (licenses and prescription drugs).

[110] *See, e.g.,* CAL. FISH & G. CODE, §§ 3039, 7121 (Lexis 1990) (fish or wild game caught pursuant to license).

[111] *See, e.g.,* JOHN DWYER & PETER MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE 2 (1998). *But see* Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403 (2009) (seeing alienability limits as less exceptional).

relationships. But even if mistreatment is not a concern, exit is essential to autonomy because it enables the substantial mobility crucial to a self-directed life.[112]

Second, alienability is also central to self-authorship because it facilitates people's ability to legitimately enlist one another in the pursuit of private goals, purposes, and projects, both material and social, thus enhancing their ability to be the authors of their own lives. Thus, contract, the centerpiece of the market, "allows persons to create obligation where there was none before," thereby giving free individuals "a facility for extending their reach by enlisting the reliable collaboration of other free persons."[113] Alienability expands the range of meaningful choices people can make to shape their own lives. It enhances our ability to be the authors of our lives by expanding our repertoire of secure interpersonal engagements beyond the close-knit communities.[114]

An autonomy-enhancing market extends both functions by further broadening the scope of choices between differing projects and ways of life. Indeed, alienability through the market system allows people "to make their own judgments about what they want to buy or sell, how hard they want to work, how much they want to save, what they value and how they value it, and what they wish to consume."[115]

All of this clearly applies in the context of copyright: alienability gives authors the potential to get paid for their intellectual creations—and thus to amass the resources to fund their life choices—even if they do not choose to produce and sell copies of their works themselves. Authors can instead, if they choose, sell their rights to publishers or other intermediaries and direct their own efforts toward more creating (or other endeavors) instead of disseminating their works.

D. Authorial Rights to Restart[116]

1. The autonomy claims of the future self

A commitment to people's autonomy must not defeat alienability, we've just argued, because self-determination relies on, or is at least critically facilitated by, alienability. This justifies the law's willingness to coercively enforce transactions and other voluntary commitments individuals undertake and why it is generally unmoved by sheer regret following bad choices. This also means that self-determination necessarily entails some authority of a person's current self over their future self. But this authority must not be boundless.

To see why, we must recognize that self-determination requires not only that people have the right to write the story of their lives, but that they also have the right to *re*-write

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[112] *See* Albert O. Hirschman, Exit, Voice, and Loyalty 21-29 (1970); Leslie Green, *Rights of Exit*, 4 Legal Theory 165, 171, 176 (1998); Michael Walzer, *The Communitarian Critique of Liberalism*, 18 Pol. Theory 6, 11-12, 15-16, 21 (1990).

[113] Charles Fried, *The Ambitions of Contract as Promise*, *in* Philosophical Foundations of Contract 17, 20 (Gregory Klass et al. eds., 2014).

[114] *See generally* Hanoch Dagan & Michael Heller, The Choice Theory of Contracts (2017).

[115] Debra Satz, Why Some Things Should Not Be for Sale: The Moral Limits of Markets 8 (2010).

[116] This section draws on Hanoch Dagan & Michael Heller, *Specific Performance: On Freedom and Commitment in Contract Law*, 98 Notre Dame L. Rev. 1323, 1345-48, 1368-69 (2023).

that story and start afresh. Writing one's life story implies that one's "prior intentions provide a rational default for present deliberation."[117] But self-determination implies that our inter-temporal constancy should be limited. While new "ordinary desires and preferences" may not suffice, the constancy that self-determination implies should nonetheless be "defeasible constancy: constancy in the absence of supposed conclusive reason for an alternative."[118]

This is why a liberal legal regime, which offers people the normative power to alienate their property rights (and make other contractual commitments) in order to enhance their autonomy, should always be alert to its potentially detrimental implications for the autonomy of people's future selves.[119] To allow some space for the *defeasibility* of inter-temporal constancy, people sometimes must be free to change their minds. Accordingly, a genuinely liberal law must not *fully* ignore the impact of people's transactions and commitments on their future selves.[120]

2. Autonomy-based limits on alienability

To avoid instantiating a carte blanche that facilitates the ability of people's current selves to fully dominate their future selves, liberal private law must safeguard the autonomy of people's future selves by carefully defining the scope of the enforceable commitments a current self can undertake. This prescription guides contract law. It explains why the law is particularly vigilant in precluding the enforceability of categories of commitments that do not significantly serve the parties' current selves, and that contractual liability does not go beyond what this service requires.[121]

Because *any* act of self-authorship constrains the future self—any life-plan requires taking one's commitments seriously—the law's task of both bolstering and limiting people's ability to commit is always subtle, and there is no easy formula for resolving this difficulty. But this does not necessarily imply an impasse, nor does it suggest that its resolution needs to be done on an *ad hoc* basis. Instead, liberal law applies qualitative judgments and identifies *categories* of limitations on people's freedom to change their minds that should not be enforceable (in general or under certain conditions) because they overly undermine the autonomy of their future selves.

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[117] *See* Michael E. Bratman, *Time, Rationality, and Self-Governance*, 22 PHIL. ISSUES 73, 74 (2012).
[118] *Id.* at 82.
[119] *Cf.* Aditi Bagchi, *Contract and the Problem of Fickle People*, 53 WAKE FOREST L. REV. 1, 3 (2018); Dori Kimel, *Promise, Contract, Personal Autonomy, and the Freedom to Change One's Mind*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT 96, 99-101 (Gregory Klass et. al eds., 2014).
[120] As the text clarifies, the concern for the autonomy of the future self does not imply an endorsement of the idea of multiple selves, namely: the disintegration of the self; quite the contrary. The integrity of the self, rather than its separation to different selves, is what justifies both property rights and contract enforcement, and significance of planning to self-determination implies that the current self and the future self are the same self. The discussion of the future self is a discussion of the self in the future and law's responsibility to enable it to rewrite its course.
[121] *See, respectively,* Hanoch Dagan & Ohad Somech, *When Contract's Basic Assumptions Fail*, 34 CAN. J.L. & JURISP. 297 (2021) (explaining rules that excuse performance altogether based on changed circumstances); Dagan & Heller, *supra* note 116 (explaining the limited doctrine of specific performance).

Private law's core distinction, noted above, between ground projects and sheer preferences is instructive here as well. It nicely accounts for the way the law limits alienability in the contexts of marriage, co-ownership of land, and employment. All three cases typically involve ground projects and in all of them there are strict limits on people's ability to commit themselves in a way that blocks the ability of their future selves to change their minds. The law of spousal contracts refuses to enforce arrangements that jeopardize a spouse's decision to exit, prohibiting any "provision that by its terms disfavors a party *because* that party initiates the divorce action."[122] The law governing co-ownership of land renders the rights to sell one's share of co-owned land and to initiate a partition action semi-inalienable, allowing their contractual suspension only for limited periods.[123] Finally, contract law—not only in the common law, but also in civil-law jurisdictions, where specific performance is the default remedy for breach of contract—steadfastly resists granting specific performance for personal service contracts.[124]

3. Autonomy-based reversionary rights

The constitutive quality of marriage, co-ownership of land, and employment justifies the law's treatment of the future self's change of mind regarding these contexts as a conclusive reason, which justifiably overrides the current self's choices. The constitutive role that authors' creative works can play in their lives implies that copyright should follow suit. Individuals who have liquidated the authorial rights in their creative works by selling them to commercial owners should be able to change their minds. Because for these corporate transfer*ees* copyright typically serves only an instrumental role, authors who want to rewrite their life story by revisiting their ideas in a new way or reviving the work to reflect how their ideas have changed, or to dissociate their creative works (or themselves) from the current copyright owners, should be able to do so.[125]

Even if reversion rights, as their critics insist, are not be the optimal tools for addressing concerns about authors' pecuniary well-being, they are viable–indeed important–tools for securing the autonomy of authors' future selves (short of the autonomy-reducing possibility of complete inalienability).[126] Thus conceptualized, reversionary rights serve as necessary *jurisdictional boundaries* of the current self's authority. Rather than being paternalistic impositions aimed at protecting (real or imagined) "garret-poverty" authors, reversion and termination follow from the idea that

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[122] *See* Hanoch Dagan, *Intimate Contracts and Choice Theory*, 18 EUR. REV. CONTRACT L. 104, 118-20 (2022).

[123] *See* Hanoch Dagan & Michael Heller, *The Liberal Commons*, 110 YALE L.J. 549, 568-69, 597-600 (2001).

[124] *See* Hanoch Dagan & Michael Heller, *Can Contract Emancipate? Contract Theory and The Law of Work*, 24 THEORETICAL INQ. L. 49, 68-70 (2023).

[125] Note that this description of *corporate* transferees does not apply to all transferees, some of whom are individuals with their own autonomy-based interests in using the rights they have acquired. *See infra* note 138 and accompanying text.

[126] *Cf.* MARGARET JANE RADIN, CONTESTED COMMODITIES ch.7 (1996) (arguing that in many cases we should break away from the binarism of complete commodification vs. complete noncommodification and apply in their stead strategies of incomplete commodification).

autonomy-enhancement is the *telos* of both property (including copyright) and contract, so that the architecture of both bodies of law must not include features that are unequivocally autonomy-reducing. Because reversion and termination—like the limits on alienability in the contexts of marriage, co-ownership of land, and employment—are best justified by the same commitment to authors' autonomy that underlies both copyright and its alienability, they can, and indeed should, be reformulated along these lines.

III. REFORMULATING REVERSION FOR THE FUTURE SELF

Reversionary rights designed around the goal of enhancing authors' autonomy (while respecting the autonomy of other individuals), would retain some features of current U.S. law permitting termination of transfers. But they would eliminate or modify a few others. Some of these reforms would mirror approaches taken in other countries. Others are more novel.

A. Agreeable Starting Point

We begin with the autonomy-enhancing features of the status quo. The termination of transfer provisions of the current U.S. Copyright Act permit termination by individual human beings or their representatives (when the author dies without heirs and the right is exercised by the author's "executor, administrator, personal representative, or trustee"). The right to terminate is, as the autonomy-enhancing rationale we advance requires, inalienable and unwaivable. To allow an author to alienate the very right that allows them to revisit their choices about alienation would fully sacrifice the autonomy of the future self in favor of the current (alienating/waiving) self.

This termination right is *not* available to corporate transferors, whether or not they are classified as "authors" under the statutory scheme (as they can be under the work-for-hire doctrine). This limitation is again consistent with our concern with the autonomy of individual people charting the course of their lives—a concern that does not generally extend to corporate transferors.[127]

Termination is also not available to individual people who transfer copyrights that they own by virtue of having transacted with the author (or some other previous owner). These individuals could plausibly have autonomy-related reasons for wanting to revisit their prior decision to transfer a copyright. But, as a class, these transfers by non-authors are far less likely to implicate the transferors' ground projects than transfers made by authors—for whom ownership of copyrights can both literally and figuratively determine their ability to re-write their life stories. (Consider the extreme case of an author who has transferred the rights to their own autobiography.)

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[127] *See generally* MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY 60-69, 74-78 (1986) (analyzing the very narrow scope for business corporations' claims of rights). There are, to be sure, circumstances in which individuals' plans are best achieved by using a corporate form that transcends its economic function. A proper treatment of this matter, which runs throughout our law, requires a principled theory of artificial persons. Indeed, an autonomy-based theory of incorporated persons is urgently needed in legal theory more broadly, but this is beyond our task here.

The desirability of the current law's provision of termination rights to statutorily-specified heirs of authors is a more difficult question under our theory. The specified heirs are all people (or standing in for people in the case of the author's executor, etc.). And so they have a stronger claim to autonomy than corporations. But like your garden-variety individual transferees, they are not authors of the works in question. These works may be meaningful to them in a way that makes the fate of the works an aspect of their own life stories. But this will not always be the case; to some of these heirs, the works in question may be no more meaningful than cash or other fungible assets they inherit. And there are notorious cases of heirs deploying copyrights in ways that threaten the autonomy of others (e.g. of scholars studying an author's life and work).[128]

This observation provides support for the argument—typically offered for more pragmatic reasons—that termination rights should be available *only* for authors who regret having transferred away their copyrights, and should expire when an author dies.[129] We do not adopt this view because we think that at least in the case of conflicts between heirs of authors and corporate transferees, there may often be compelling autonomy-based reasons to allow the heir to revisit an author's prior choice in order to preserve both the author and the heir's autonomy.[130] Indeed, the power to bequeath is best justified by the way it enables people to "invest—both financially and emotionally—in a series of projects that define their personal and ethical identity," which "extend beyond their own existence."[131] And the idea of inheritance, at its best, serves this justification by creating an "intergenerational bond project," in which heirs reciprocate the bequest "by remembering the giver, respecting her choices, and supplying her with a path for continuity."[132] The current law's provision for termination by *statutorily-specified* heirs serves this justification, but only to the extent that the statutory heirs are the people to whom the author would have bequeathed the right to terminate had they considered it. An autonomy-enhancing adjustment would be for the right to pass in the first instance to any

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[128] *See generally* Deven R. Desai, *The Life and Death of Copyright*, 2011 WIS. L. REV. 219; Robert Spoo, *Ezra Pound's Copyright Statute: Perpetual Rights and the Problem of Heirs*, 56 UCLA L. REV. 1775 (2009); Eva E. Subotnik, *Copyright and the Living Dead?: Succession Law and the Postmortem Term*, 29 HARV. J.L. & TECH. 77 (2015); *see also* William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907 (1997) (arguing that many features of copyright law, including the extended copyright term of life-plus-seventy-years, enrich corporate IP owners and the distant descendants of long-ago creators, at the expense of living authors).

[129] *See, e.g.,* SAMUELSON, et al., *supra* note 56, at 1242 ("One example of a simpler termination mechanism is to limit the termination right to the author himself during his lifetime. Under one implementation of this approach, the author would have an unwaivable, inalienable right during his lifetime to terminate a copyright grant after some period of years after that grant. But only the author would have the power to terminate a transfer. After the author's death, the statutory termination right would be unavailable.").

[130] Under 17 U.S.C. § 304, certain transfers made not by authors but by heirs are also eligible for termination.

[131] Robert Lamb, *The Power to Bequeath*, 33 L. & PHIL. 629, 646, 652 (2014).

[132] Shelly Kreiczer-Levy, *Inheritance Legal Systems and the Intergenerational Bond*, 46(3) REAL PROP., TR. & EST. L.J. 495, 504 (2012).

natural person specified in the authors' will, and only if there is no such person to the statutory heirs.[133]

B. Reinforcing the Humans/Corporations Divide

So far, so good. But to be fully consistent with our autonomy-based rationale, current law would also need to be more significantly reformulated along several dimensions. First, it should be more consistently attentive to the autonomy concerns of individual human beings as opposed to corporate copyright owners.[134] This would involve several different reforms.

First, individual humans who create works that are deemed to be owned by corporations (by virtue of the work-for-hire doctrine) should be allowed to reclaim non-exclusive rights to use those works.[135] As it stands, the default rule is that these creators have no rights to use their own works in ways that implicate copyright—neither when copyright arises nor at any time in the future—unless they have negotiated to acquire such rights. The creator's future self may have ground projects that require revisiting their previous creative works; recognizing their autonomy to change course in this way requires allowing them to revisit the choice to create works-for-hire.[136] At the same time, limiting such creator's reversion rights by making them nonexclusive would acknowledge the practical benefits of allowing employees and commissioning parties to exploit works that combine the contributions of many creators without having to repeatedly navigate thickets of individual rights.[137] There may be cases in which exercise

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[133] Regarding the tension between the current provisions and authors' testamentary freedom, see, *e.g.*, Tonya M. Evans, *Statutory Heirs Apparent?: Reclaiming Copyright in the Age of Author-Controlled, Author-Benefiting Transfers*, 119 W. VA. L. REV. 297 (2016); Lee-ford Tritt, *Liberating Estates Law from the Constraints of Copyright*, 38 RUTGERS L.J. 109 (2006).

[134] It is not unusual for law to make such distinctions between corporate and individual human actors when formulating law with an aim toward enhancing autonomy. Consider, for example, the evolving distinction between residential leases that are by now replete with "non-waivable rights and obligations [that] may have little to do with the history of lease concepts," and commercial leases which type lacks any such "wholesale substitution." *Compare* 1 FRIEDMAN ON LEASES § 1:2.1 (Patrick A. Randolph, Jr. ed., 5th ed., rel. 20, 2012) (describing modern approach to residential leases), *with id.* § 1:2.2 (describing commercial leasing). *See also* HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION 68-70 (2004) (an emerging case law places a heavy responsibility on financial institutions for mistaken payments they made to individuals).

[135] *Cf.* LITMAN, *supra* note 55, at 55 ("In order to safeguard authors' opportunities to exercise their broadened termination rights, we should probably narrow and perhaps eliminate the category of commissioned works made for hire under the second prong of the definition in §101."); YUVARAJ & GIBLIN, *supra* note 22, at 164 (noting "the ongoing link that can exist between creators and their outputs," in the employment context and suggesting that policymakers consider "including provisions that could allow employee creators to claim at least some rights, in appropriate cases," for example, "by granting the employee a right to a non-exclusive licence over uses that do not undermine the [employer's business purpose").

[136] There is much more to be said about the work for hire doctrine from the humanistic perspective we are starting to develop here. But this must wait for another day.

[137] *See generally* MERGES, Autonomy and Independence, *supra note 94, at 154-55* (explaining how transaction costs can justify applying the work-for-hire doctrine to group projects). *Cf.* Anthony J. Casey & Andres Sawicki, *Copyright in Teams*, 80 U. CHI. L. REV. 1683, 1725-26 (2013)

of this reversion right would nonetheless harm those parties—imagine a software developer who wants to use a program they wrote as a work-for-hire to start a new business in competition with their former employer. Such use could trigger a requirement to compensate under circumstances we describe in more detail below.

A second reform related to the distinction between humans and corporations would limit instead of expanding the termination right. Our reformulation would constrain the ability to exercise the right to the detriment of individual human (as opposed to corporate) *transferees*. For these transferees, there may be compelling autonomy-based reasons to allow continued exploitation of the originally transferred rights. Using the work as specified in the original transfer may now be written into their life stories. Consider a singer who has acquired the copyright to a musical composition that has become their signature song, for example. One way to address this concern would be for termination rights vis-à-vis individual transferees to always be non-exclusive. That is, upon application of the termination right the author (or heir) would be able to exercise the right that had originally been transferred, but the transferee would be able to continue to exercise that right as well.[138]

With regard to corporate transferees, there is typically no compelling autonomy-based rationale for permitting continued exploitation of the work by the transferor. But there are circumstances in which reversion would interfere with the investment-backed expectations of corporate transferees in a way that could have negative consequences for transferees and authors alike (e.g. resulting in lower compensation for authors negotiating transfer agreements in the first place). And so our reformulation would mitigate this consequence by allowing corporate transferees to continue to (non-exclusively) exercise the transferred rights following termination, *unless* the holder of the termination right compensated them for damages caused by an exclusive reversion.[139] (Under some circumstances we would also require the holder of the termination right to compensate for a nonexclusive reversion, as explained below.) To clarify, this option of an exclusive reversion upon payment of compensation would not be available where the transferee is an individual human being. In such a case the author or heir could regain only non-exclusive rights, to be shared with the individual human transferee.[140] This compromise would allow the author or heir to do autonomy-enhancing

(explaining how the current work-for-hire doctrine could be modified to more successfully promote collaborative creative production).

[138] Note that current law includes a limited version of this model, allowing transferees (corporate or individual) who have prepared derivative works under the terms of the original transfer to continue to exploit those works even following exercise of the termination right. *See* 17 U.S.C. § 203(b)(1) ("A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant."); *id.* § 304 (c)(6)(A).

[139] *Cf.* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1116 (1972) (describing how, under their "fourth rule," an entitlement may be protected only by a liability rule).

[140] On its face, such a bifurcated regime might trigger evasion strategies, whereby the first transferee is an individual human who then transfer to a corporation. But for such a strategy to be practical for the corporation, this second transfer is likely to occur shortly after the first one, so that even the simplest anti-evasion rule would be able to neutralize it.

things like producing new versions of the work that reflect changed views. But it would not constrain the autonomy of the transferee by forbidding them from continuing to use the work as well.

C. Liberalizing Timing; Adding Compensation

The final set of reforms are related to each other, and both draw on the European experience we mentioned earlier.[141] One critical change from current U.S. reversionary doctrine involves the correspondence of the right to terminate with the changed preferences of the future self. A key reform here would be to liberalize the rules about the window of time during which the right may be exercised. Another would be to add a compensation requirement for some applications of authors' reversionary rights.

The current window that opens only for five years and only decades after the initial transfer is both too short and too late to realistically correspond to most authors' (or even heirs') desire to change the course of their lives. (Indeed, many authors' lives will be over by the time the window opens.) To fully respect the autonomy of authors' future selves, termination should be available at any time (and, as many others have suggested, should be easier to exercise and better documented by the Copyright Office). This would follow the model of those rights to alter and/or retract that are available to authors in Germany, France, and Spain who have had a change of conviction, regardless of when that change occurs. These rights in Europe typically require the author to compensate the transferee for any damages suffered due to the reversion of rights and to give the transferee a right of first refusal if the author resumes publication of the work or a modified version.[142]

Requiring authors or heirs who exercise a termination right to provide compensation to the transferee under at least some circumstances is not inconsistent with our autonomy-based theory and could help to avoid undermining other interests in our pursuit of individual autonomy. Our proposal to allow termination at any time could seriously undermine investment incentives for transferees (e.g. publishers) if their rights could be lost before they had had an opportunity to recoup their investment. This could ultimately disserve the autonomy interests of authors if publishers were no longer interested in buying their rights. We would address this concern by (1) requiring authors or heirs exercising an exclusive termination right to compensate the transferee for damages caused by the termination;[143] (2) requiring authors or heirs exercising a *nonexclusive* termination right to compensate the transferee for damages caused by any termination that occurs within five years after the transfer. This admittedly arbitrary time limit

[141] *See supra* text accompanying notes 85-91.

[142] *See generally* Furgal, *supra* note 85 ("All of those provisions follow a similar pattern, making the termination conditional upon the compensation or the security of compensation of the licensee or transferee, and granting the licensee or transferee the priority right in case the author decides to resume exploitation of her work (an offer should be made to the licensee or transferee under the same conditions as those of the terminated agreement; priority right can be limited in time).").

[143] We would not impose this compensation requirement on terminations that satisfy the timing requirements of the current termination of transfer provisions. Although we share some of the skepticism about those provisions described above, we recognize that they may in some cases allow authors to be more fairly compensated for blockbuster works—an interest that is not our focus but that we do not discount. Our proposals could be adopted as an augmentation to, as opposed to a substitution for, the current regime.

represents an acknowledgement that even the option of terminating transferees' exclusivity shortly after the transfer might generate the detrimental incentive effects just noted, which might ultimately disserve authors' autonomy.[144]

As just mentioned, such a compensation requirement is typical under the laws of European countries that provide for reversion based on an author's changed conviction.[145] Some European laws also require compensation when reversion rights are exercised for other purposes. For example, German law includes a right of revocation based on the transferee's failure to exercise the granted rights. This "use-it-or lose it" provision (some version of which is now required for all EU member states[146]) requires compensation "insofar as this is fair and equitable."[147]

We predict that in many cases of termination, e.g. where an author wants to revisit or reissue a work that (like most works) is no longer commercially profitable, reasonable compensation would be zero (or very low).[148] This compensation requirement would only

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[144] For a parallel idea, of a cooling-off period prior to the application of one's right to start afresh, in the context of co-ownership, see Dagan & Heller, *supra* note 123, at 599-600. In both cases, a particularly hasty demand to change course might indicate a strategic motivation, rather than an authentic change of mind.

[145] Spain requires "indemnification of the holders of exploitation rights for damages and prejudice" and "[i]f the author later decides to resume exploitation of his work, he shall give preference, when offering the corresponding rights, to the previous holder thereof, and shall offer terms reasonably similar to the original terms." *See* Bercovitz, et al., *supra* note 90. French law provides that "[the author] cannot in any event exercise this right absent prior indemnification of the transferee of any damages that his correction or retraction might have caused the latter to incur. When, after the exercise of the right of correction or retraction, the author decides to publish his work, he must first offer his exploitation rights to the transferee whom he originally chose and on the conditions originally decided upon." *See* 1 International Copyright Law and Practice FRA § 7 (2024). German law requires the author to "adequately compensate the holder of the exploitation right." And "[s]hould the author wish to resume exploitation of the work after revocation, he shall be obliged to offer a corresponding exploitation right to the previous holder of the exploitation right on reasonable conditions." § 42(4) German Copyright Act, translation available at https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/de/de236en.pdf.

[146] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 Apr. 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/E, at art. 22(1).

[147] Hofmann & Grünberger, *supra* note 88, § 4. 1 International Copyright Law and Practice GER § 4 (2024) (explaining that "[t]he author is required to compensate the person affected if and insofar as this is fair and equitable"); §41(1) German Copyright Act, translation *available at* https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/de/de236en.pdf (last visited Sept. 27, 2025) ("Where the holder of an exclusive right of use does not exercise the right or only does so insufficiently and this significantly impairs the author's legitimate interests, the author may revoke the right of use. This shall not apply if the non-exercise or the insufficient exercise of the right of use is predominantly due to circumstances which the author can be reasonably expected to remedy."); *id.* § 41(6) ("The author shall compensate the person affected if and insofar as this is fair and equitable.").

[148] *See generally* Heald, *supra* note 26, at 86-87 (explaining, in the Canadian context, that a 25-year termination right "will encourage authors to bring back titles that have fallen out-of-print—a clear public benefit with no cost to the original transferee").

have teeth in those cases in which the transferee is engaged in commercial exploitation of the work and the termination is exclusive (or within the first five years). In many of these cases, the party exercising the right would also have the opportunity to exploit the work (or a revised version) commercially, making it realistic to expect them to compensate for this opportunity. (In such a case we can imagine mechanisms for enforcing the compensation requirement as a lien on future revenue, as opposed to an up-front payment.) The difficult case would be one in which an author or heir wants to terminate a transfer of rights in a commercially viable work in order to stop all further exploitation of the work. Imagine a commercially popular book that expresses views that the author wishes to completely abandon. Termination of the publisher's right to reproduce and distribute that book could cause significant monetary harm to the publisher. But the author might not be in a position to compensate the publisher in light of the author's plan to cease exploitation of the work. To solve this problem, we propose that authors (and heirs) have, separate from their termination right, the right to require a transferee to either remove attribution to the author from future copies of the work or to qualify the attribution to indicate the author's renunciation of the work. Exercise of this right would not require compensation.

CONCLUDING REMARKS

Taylor Swift did not need a viable autonomy-based reversionary right to exorcise her regrets over selling the rights to the recordings of her songs to Big Machine. But very few authors are similarly situated. They lack the resources (in terms of rights, money, and fandom) to replicate her re-recording and buy-back solutions, and the current regime of copyright reversion is most likely of very little help. It is practically unsuited to its purported task of addressing asymmetrical bargaining power between most authors and their publishers. And even if it were recalibrated to effectively give authors a "second bite at the apple," it is unclear whether this bite would be justified on that basis and whether it would actually serve most authors' pecuniary interests.

Yet, the resilience of these rights, here and elsewhere, is telling, and justifies reconstructing reversionary rights on a better normative foundation. We think that this foundation comes from the liberal commitment to people's equal right to self-determination, which underlies the rights to property (and contract), and thus also to copyright. The inalienable and unwaivable right to terminate a transfer of one's copyright is no different from similar private law rights which people have to repudiate their prior decisions that purport to preclude their ability to change course. Like people's decisions to enter marriage, co-ownership of land, and employment, an author's choice to transfer their copyright involves their ground project: creative works play a constitutive role in authors' lives. Therefore, here as well, a genuinely liberal private law limits, as it should, the jurisdiction of the current self over their future self. Properly understood, reversionary rights are guardians of authors' right to *re*-write an important aspect of their life-story.

As autonomy-based rights, reversionary rights can properly be held only by authors who are natural persons or by their heirs (or, better, natural persons they specified in their will). Further reforms are necessary, however, in order to fine-tune existing termination doctrine in line with its reconstructed function:

1. Termination rights should be available at any time.

2. Workers should be allowed to reclaim non-exclusive rights to use creative works which are subject to the work-for-hire doctrine.
3. Individual human transferees should retain non-exclusive rights to continue exercising the transferred rights, even following reversion.
4. Authors or heirs exercising a termination right to revert exclusive rights should be required to compensate the transferee for damages caused by the termination.
5. Authors or heirs exercising a termination right to revert non-exclusive rights should be required to compensate the transferee for damages caused by any termination that occurs within five years after the transfer.
6. Authors or their heirs should be able, without paying compensation, to require owners to remove attribution from future copies of the work or qualify it by indicating the author's renunciation of the work.

Reversionary rights, like analogous doctrines across private law, serve first and foremost a profound aspect of people's self-determination. Self-determination requires plans and thus commitments which necessarily curb the autonomy of people's future selves. But autonomous people must have the right to alter their plans and sometimes even to replace them completely. Even (or maybe especially) authors should have the right to re-write the story of their lives.