

UNDERSTANDING RIGHTS REVERSION

Audience FAQs & Answers for Presenters

Does the rights reversion process you described apply to journal articles?

In theory, it is possible to get rights back for a journal article through rights reversion. In practice, it is much less likely that a contract for a journal article will include a rights reversion clause. And because journal publishers typically rely on long-term revenue streams for journal articles (for example, through ongoing subscription access to past journals or paid access to individual articles), it is less likely the publisher will agree to revert rights. Authors of journal articles may have more success requesting permission from the journal publisher to do something specific (i.e., distribute copies of the journal article to their students) rather than revert full rights.

Authors of journal articles who want their rights back can also explore termination of transfer provisions under U.S. law which allow creators to get rights back after a certain period of time. This topic is outside of the scope of this workshop, but you can visit the Authors Alliance website to learn more about termination of transfer.

Is it always straightforward to determine whether a work is “out of print” under the terms of a contract?

Before the availability of e-books and print-on-demand technology, a triggering condition that relied on a book’s out-of-print status was fairly straightforward: The condition was usually satisfied when the publisher stopped printing physical copies of the book and had no copies of available for sale. However, in the past decade, the definition of “out of print” has become less straightforward: Is a book out of print if it is only available as an e-book or via print-on-demand technology? Can anything be truly out of print these days?

In more recent contracts, publishers often address this ambiguity by clearly specifying which book formats qualify as “in print.” For example, a contract may specify that a book is not out of print if it is available in print-on-demand or electronic formats. Still others specify triggering conditions that are linked to the amount of revenue earned or the number of copies sold.

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

Is it always clear whether electronic rights were transferred under the terms of a contract?

In older contracts, there may be some ambiguity about whether electronic rights were transferred to the publisher. Before the advent of digital publishing, contracts did not explicitly address e-books and other digital editions. Instead, contracts frequently granted the publisher the right to “print, publish, and sell the work[s] in book form.” One court has held that this language did not constitute a grant of electronic rights to the publisher and, therefore, the publisher did not have the right to publish e-books.¹

However, this does not mean that an author must explicitly grant electronic or digital rights in order for his publisher to be able to publish his work as an e-book. For example, the same court in a different case interpreted an older contract granting the publisher the right “to publish... in book form” to have conveyed the exclusive right to license e-book versions of the work because the contract included a separate clause that implicitly granted the publisher certain rights associated with use by “electronic means now known or hereinafter invented.”²

Since this is a developing area of the law, you might consider consulting an attorney if you are unsure whether your contract transfers electronic rights.

Is there anything I need to keep in mind if I have an agent?

Authors with agents may be restricted by the terms of their agency agreements from approaching their publishers directly—or they may prefer to have their agents speak with their publishers on their behalf. Regardless of what your agent-author contract might stipulate, learning more about rights reversion and understanding the steps outlined in this presentation can help you be better informed prior to approaching your agent or publisher.

What if my publisher is no longer in business?

Occasionally, an author seeking a reversion of rights may learn that her publisher has gone out of business or bankrupt. Sometimes, it is possible to identify the publisher’s successor in interest that you can approach: Typically, this is another publishing company that acquired the original publisher’s rights. If you are unable to identify a new rightsholder, it adds complexity to the rights reversion process because you cannot notify the current rightsholder of your intent to seek a reversion of rights. In this case, you may be the author of an orphan work (a work for which the owner cannot be identified or located) and may need to consult a lawyer to assist with your case.

¹ Random House, Inc. v. Rosetta Books, 150 F. Supp. 2d 613 (S.D.N.Y. 2001).

² HarperCollins Publishers LLC v. Open Road Integrated Media, LLP, 7 F. Supp. 3d 363, 367 (S.D.N.Y. 2014).

Is the reversion process different for books published by trade publishers vs. academic presses? What about for a small vs. a large press?

While the process for requesting a reversion of rights is the same regardless of the type of publisher, there are some considerations to keep in mind.

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

It is also worth noting that, in general, smaller publishing houses may need to pinch more pennies to stay afloat and therefore may be more hesitant than larger publishers to give up rights to books in which they have invested.

Is there a benefit to convincing my publisher to do something new with my book rather than reverting rights and doing it myself?

A reversion request may prompt the publisher to reinvest in the book's commercial life. For example, a publisher may renew marketing efforts on the book's behalf, make it available in print-on-demand format, or digitize the book and make it available electronically. If your priority is to increase your book's presence in the market, it may be worth being open to your publisher's renewed efforts, rather than reverting rights. After all, your publisher has business and marketing expertise that you may not. (If your publisher does not already have digital rights and agrees to make it available in digital form, you will want to put a new contract in place.)

If a renewed marketing effort does not align with your goals (say, for example, you want to release a freely available version online), it is still possible that your publisher may be willing to accommodate your goals. For example, some academic presses are starting to make books in their backlist openly available and may be willing to include your work in these initiatives. This can save you the time and effort of making your work digitally available online.

Is it a common practice for publishers to ask for payment to revert rights?

It is not unheard of for a publisher to ask for payment in exchange for reverting rights, particularly if a book has not earned out its advance or the publisher anticipates future revenue from the book.

I'm interested in reverting rights in order to make a copy of my book available online. Where can I get a copy of the digital files?

The easiest way to make your reverted book available will be with your own files, or those recovered from your publisher. If you no longer have the original files, you can ask your publisher to share a digital copy with you, if it has one available. Sometimes your publishing contract may specify that your publisher will provide a copy upon reversion, so it can be helpful to check your contract.

It may also be possible that your book has been scanned as a part of a mass digitization effort through organizations like HathiTrust, Google Books, or the Internet Archive—though your book is probably not yet fully viewable online. Authors who get their rights back can approach these entities to ask them to make their books fully readable online. Authors Alliance has further details available for authors interested in this option linked on its rights reversion resource page.

My book includes cover art and other illustrations supplied by the publisher. Do I need to get their permission to continue to use those items?

When reverting rights, it is helpful to ask your publisher for both the physical materials and any the intellectual property rights you may need for future printings. (Some contracts may even specify that the publisher is required to provide authors with these items upon reversion.) The items that you may need include not only the digital design files and rights for the text you created, but also the files for art and other materials created by third parties, as well as the permission to use these items. Of course, when it applies, authors may also rely on fair use to incorporate third-party works in their works.

Are there any considerations I should bear in mind if I wrote my book with co-author(s)?

If you revert rights to a co-authored book and the book is a “joint work,” rights will typically revert to both/all authors. At that point, each of you can independently transfer your ownership interest in the work, or you can grant other people a nonexclusive license to make specific uses of the work. (Unless there was an agreement to the contrary, each of you then has a duty to give any other author a per capita share of revenues made from exploitations of the work.)

If your co-author(s) do not want to revert rights, it is also possible to ask the publisher to just grant you a non-exclusive license to do what you want with the work.