

A Message from Your Future: Reversion of Copyright in Canada

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Reversion is one of the most overlooked aspects of Canadian copyright law.

A business that validly acquires copyright may believe that it holds copyright for the entire term of protection, only to later discover that copyright in a work reverts automatically to the author's heirs on the 25th anniversary of the author's death if certain conditions are met. Without an understanding of what the future holds, or a strategy to address it, there can be unpleasant surprises, and unintended consequences, decades after the agreement is signed and money is spent exploiting the copyright.

The issue can be particularly troublesome for audiovisual producers, who often acquire rights in existing literary works and spend millions of dollars making and marketing movies based on that underlying material. Those producers, as well as their licensees and assigns, may lose their rights — and, with those rights, their ability to create sequels and remakes or even to exploit their original productions in Canada — a few decades later.

Parties cannot contract around reversion. However, they can plan for it and manage the risks.

What is Reversion?

The concept of reversion was first introduced in the United Kingdom, although it has since been abolished there. Its rationale at inception was clear: to help the families of deceased authors by protecting them against improvident deals made during an author's lifetime. Reversion was intended to allow an author's estate to realize the full value of the author's work and give them a second chance at entering into agreements that properly reflected that value.

Today, reversion is a uniquely Canadian concept. Section 14(1) of the *Copyright Act* provides that any assignment or grant of copyright that an author makes during their lifetime, other than in the author's will, terminates 25 years after the author dies if certain conditions are met. In other words, the rights an author transferred while alive may revert to their heirs on the 25th anniversary of the author's death.

Reversion happens automatically, whether the parties realize it or not. The author and the grantee cannot contract out of reversion to prevent it from happening. In addition, the author is not allowed to transfer the

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“reversionary interest” — that is, the right to take ownership of copyright when it reverts — during their lifetime.

Further, the author’s estate does not have to give notice or take any steps to get the rights back. The reversionary interest simply devolves to the author’s legal representatives, as part of the author’s estate, as soon as the author dies. From that point on, the estate is free to assign the reversionary interest at any time, even though the copyright itself does not revert until 25 years after the author’s death.

Reversion is Different from Termination

Reversion is often compared to termination rights in the United States. While the concepts have a similar outcome, in that they both end a previous transfer or grant of copyright after a certain amount of time has passed, they are not the same.

The most important distinction is when and how the rights take effect. While US termination rights can be exercised beginning 35 years after the author’s initial transfer of copyright—even if the author is still alive—reversion in Canada occurs 25 years after the author dies. And the US legislation does not terminate a transfer or grant automatically; certain advance notification requirements must be met. That is very different from Canada, where reversion occurs automatically, 25 years after the author’s death, with or without notice from the owner of the reversionary interest.

Conditions for Reversion

But reversion does not occur in every scenario. There are a few conditions that must be met for it to happen, including the following:

- ***Reversion applies only to an assignment or exclusive licence.*** A non-exclusive licence or a bare permission to use is not subject to reversion.
- ***The author of the work must have been the first owner of copyright in it.*** In many cases, this condition is met because the default rule in Canada is that an author is the first owner of copyright in their work. However, there are some exceptions, the most common being a work made by an employee in the course of employment. In that case, if certain conditions are met, the first owner of copyright is the employer, not the author, and the work is not susceptible to reversion.
- ***The subject matter of the assignment or grant must be something that the Copyright Act considers a “work.”*** That includes most literary, dramatic, musical, and artistic creations, but does not include other subject matter, such as sound recordings or performers’ performances.
- ***The work cannot be a “collective work,”*** which is defined in the *Copyright Act* as a work that incorporates distinct parts by different authors (such as a newspaper, encyclopedia, or magazine). Reversion also does not terminate a licence to publish a work as part of a collective work. Despite

persistent speculation on this point, though, Canadian courts have not considered whether a motion picture, which is often the product of contributions by many different authors, is a collective work.

Planning Ahead

Reversion can create difficulties and uncertainties for a business that has long-term plans for a work it acquires from an author. The uncertainty can also trickle down to the business's licensees and assigns. For this reason, parties may try different strategies to plan for reversion before it happens.

In some cases, reversion can be managed at the beginning of the relationship between the author and the acquiring business. For example, a business might arrange to have an author first enter into an employment agreement with a loan-out company, with the aim of ensuring that copyright is first owned by the loan-out company, not the author. For that matter, the acquiring business itself might even purport to enter into an employment agreement with the author.

However, whether a work is truly made by an employee in the course of employment involves a fact-specific inquiry, which is not always cut and dried. If a court later determines that the arrangement was not a real employment relationship, or that the work was not created within the scope of employment, the arrangement may not have the desired effect. This approach will also be less helpful for pre-existing works, such as a film studio securing the rights to a pre-existing book.

In other cases, reversion can be managed after the author has died. Although an author cannot assign the reversionary interest during their lifetime, their estate may do so anytime after the author's death. Sometimes, there are strategic reasons to negotiate with the heirs shortly after the author dies, well before copyright actually reverts.

There are other possible strategies for avoiding or managing the risk of reversion, including strategies involving jurisdictional considerations, licensing considerations, and equitable principles. However, these strategies have not yet been tested in court.

Whether they are buying or selling existing copyrights, commissioning new works for commercial use, or exploiting copyrights in other ways, owners and users of copyright alike should think proactively about how to factor reversion into their short and long-term business strategies. Careful planning today, with the help of an experienced Canadian copyright lawyer, can help avoid unnecessary problems in the future.