COPYRIGHT REVERSION TO AUTHORS (AND THE *ROSETTA* EFFECT): AMELIORATING THE PROBLEM OF DISAPPEARING BOOKS

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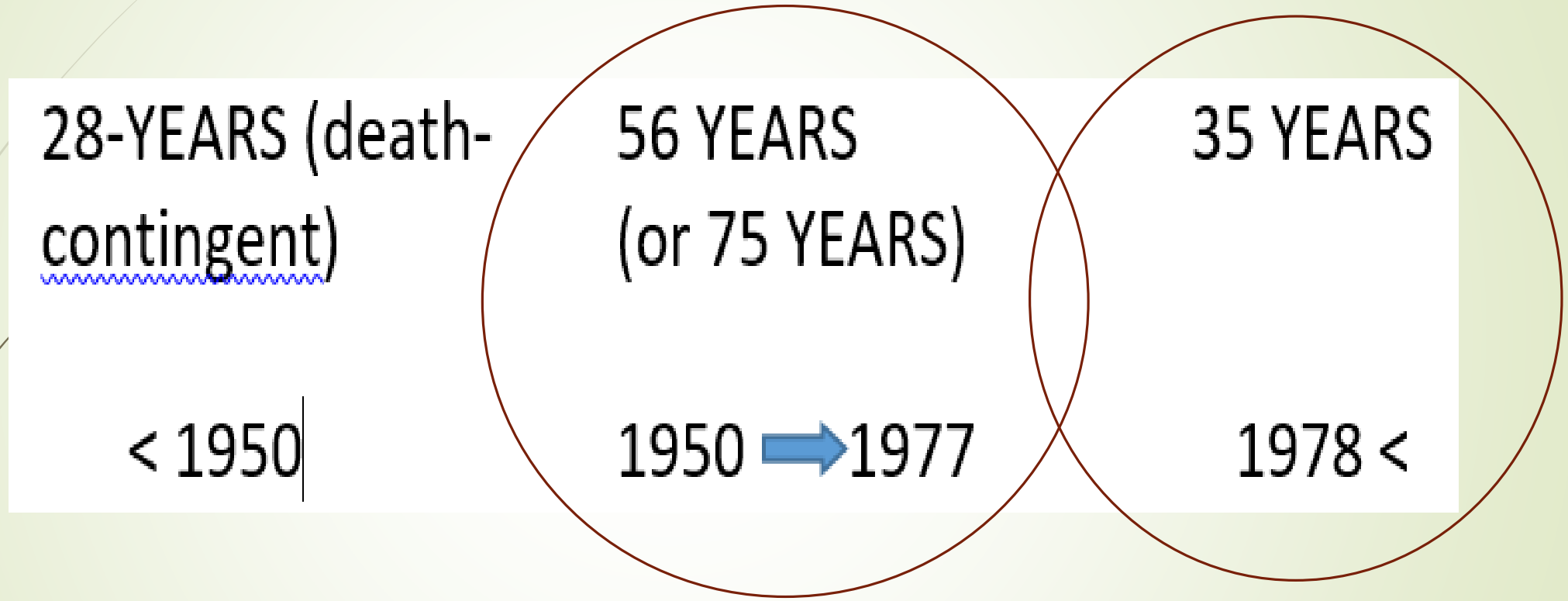
The Idea of Rights Reversion . . .

US Reversionary Schemes:



- Termination eligible works through 2017: 1950-61 & 1978-82

And, a Special, One-time Surprise Reversion of Rights to Authors!

Kurt Vonnegut

Random House, Inc. v. Rosetta Books, LLC, 283 F.3d 490 (2d Cir. 2002)

- Standard form publication agreement assigns all rights to a work "**in book form**" to publishers. **But** authors (not publishers) own copyrights in eBooks.

Other Reversionary Schemes

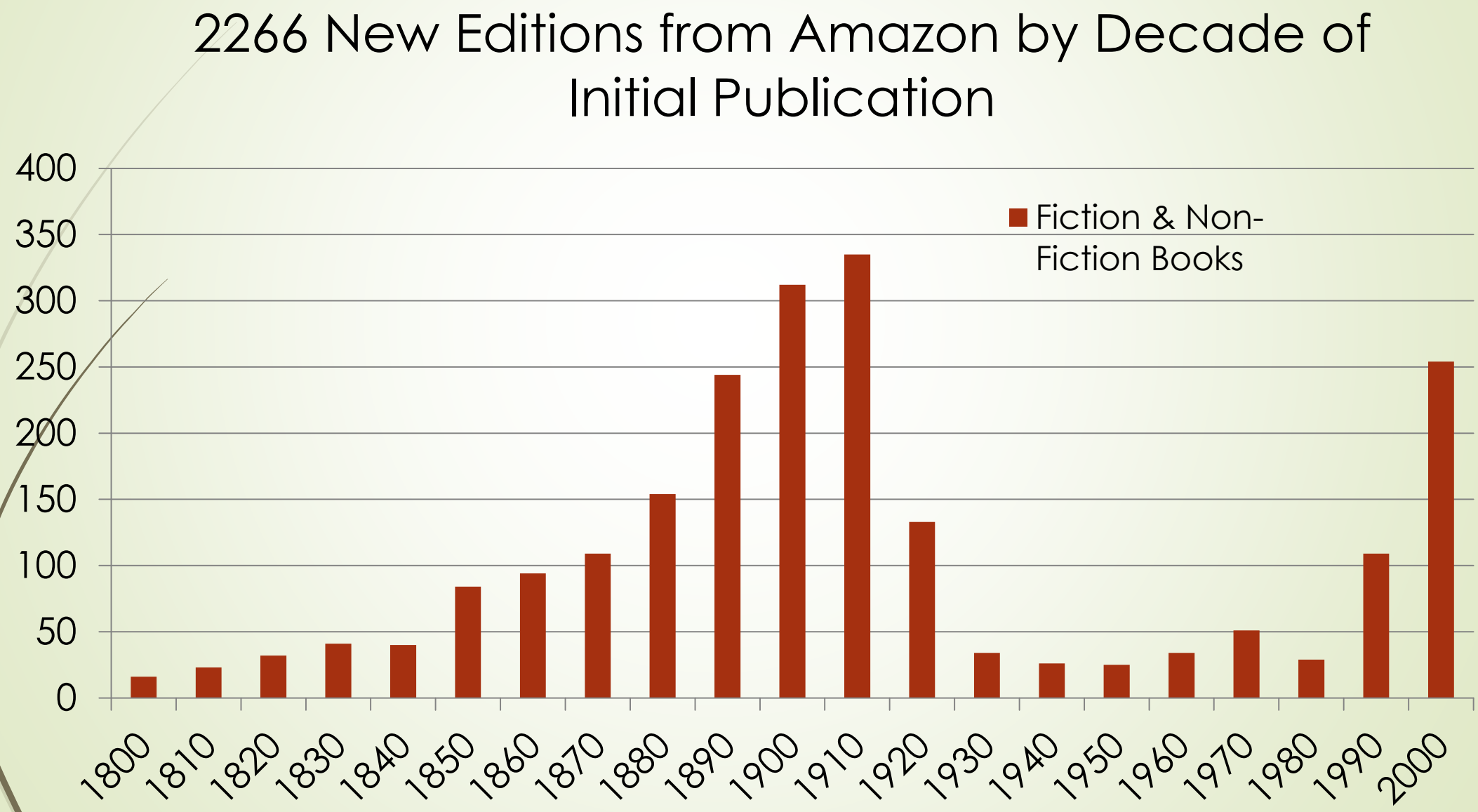
- UK Imperial Copyright, e.g. Canada, Hong Kong, New Zealand, & South Africa: Automatic reversion to heirs 25 years after the death of the author.
- Spain, same
- EU sound recordings: Reversion after 50 years, *if* the publisher is not making the work available.
- Germany: Various complex schemes allowing reversion at year 2 or 10.
- Many others, contract based . . .

An Economic Justification for Reverting Rights to Authors?

- "Term reversion could be a key tool for [enabling] artist-led cultural and social innovation [and may] provide incentives to creators to . . . free back catalogues."
  Martin Kretschmer, *Copyright Term Reversion and the "Use it or Lose it" Principle*, INT'L J. MUSIC BUS. RES. 2012.

- When are authors better stewards of books?

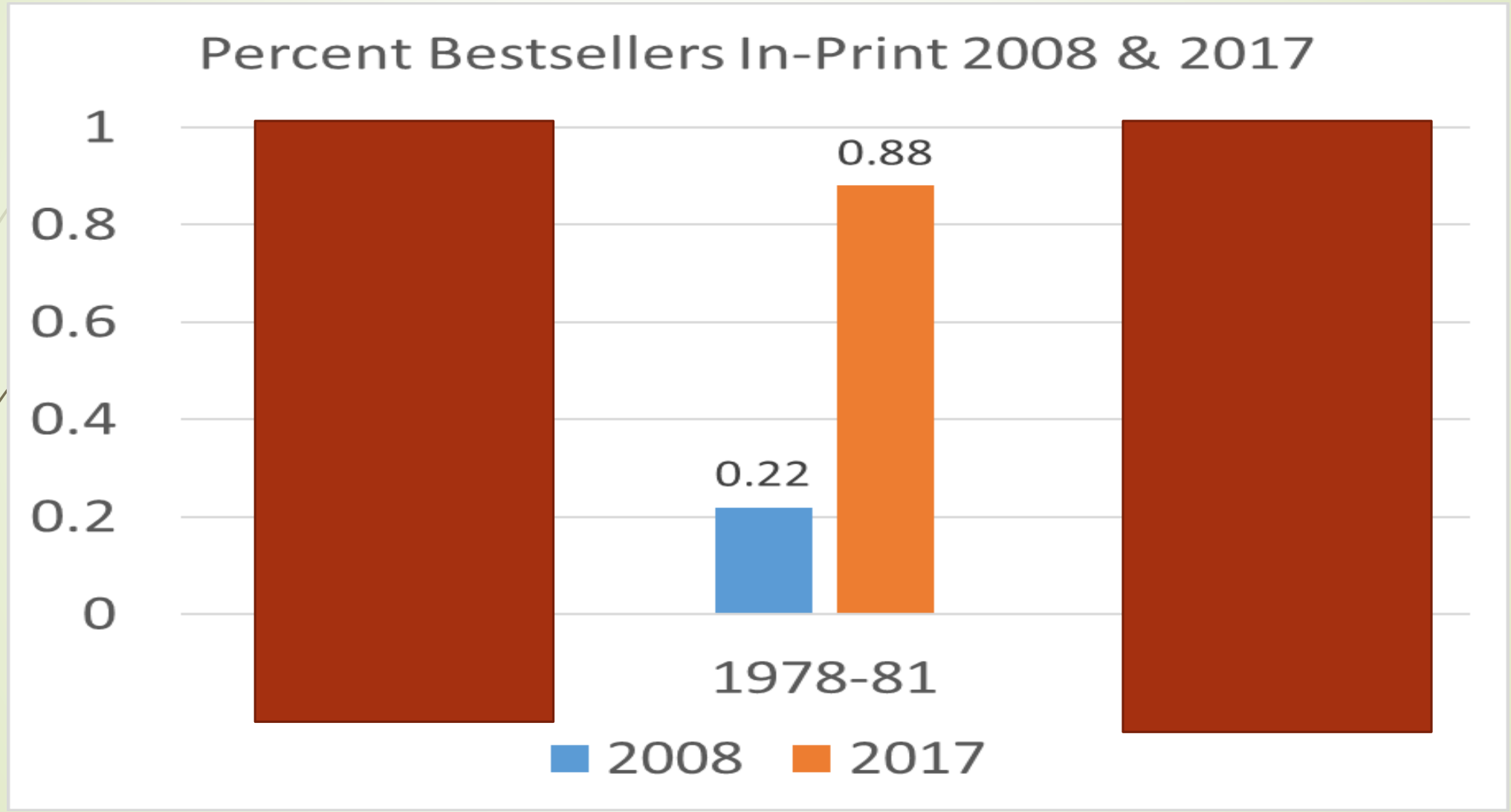
The Problem of the Disappearing Books



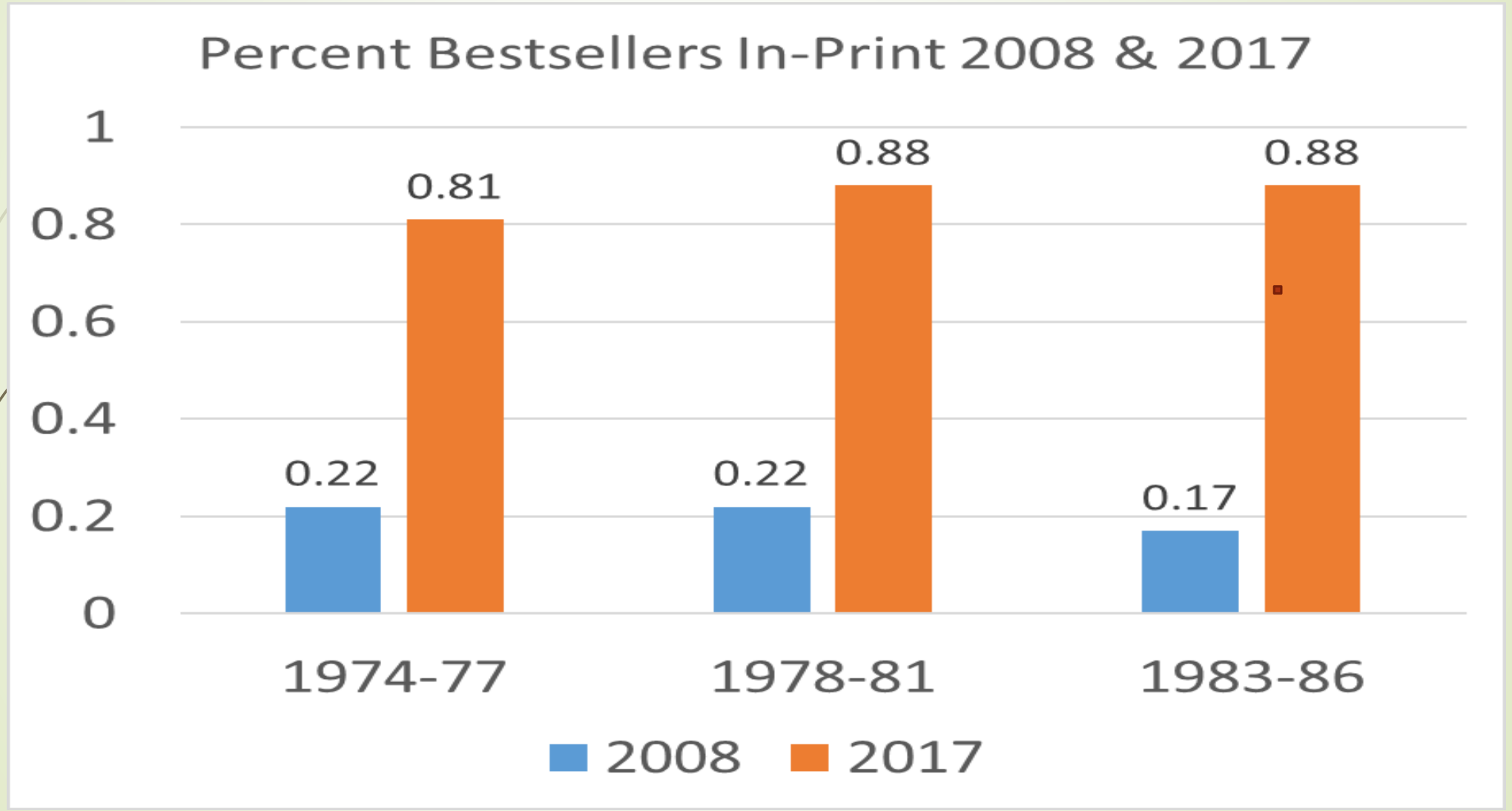
Market Failure?

- Smith article on money left on the table by the publishing industry . . . Why?
- Inertia
- Risk Aversion
  - Reformatting Costs
  - Transaction Costs
- Principal/Agent Problems

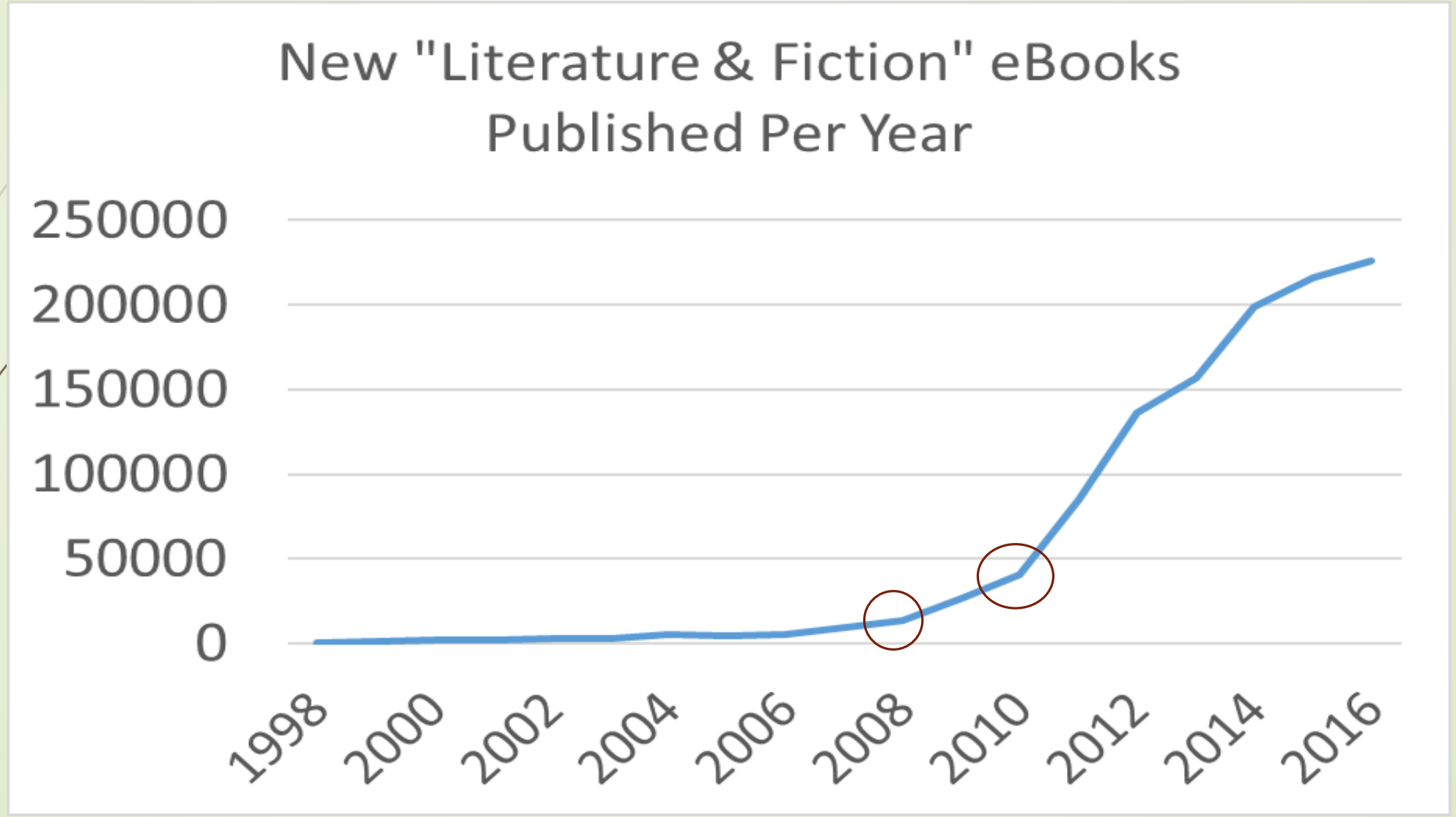
Increase in Availability of Back Catalogs of **Bestsellers**



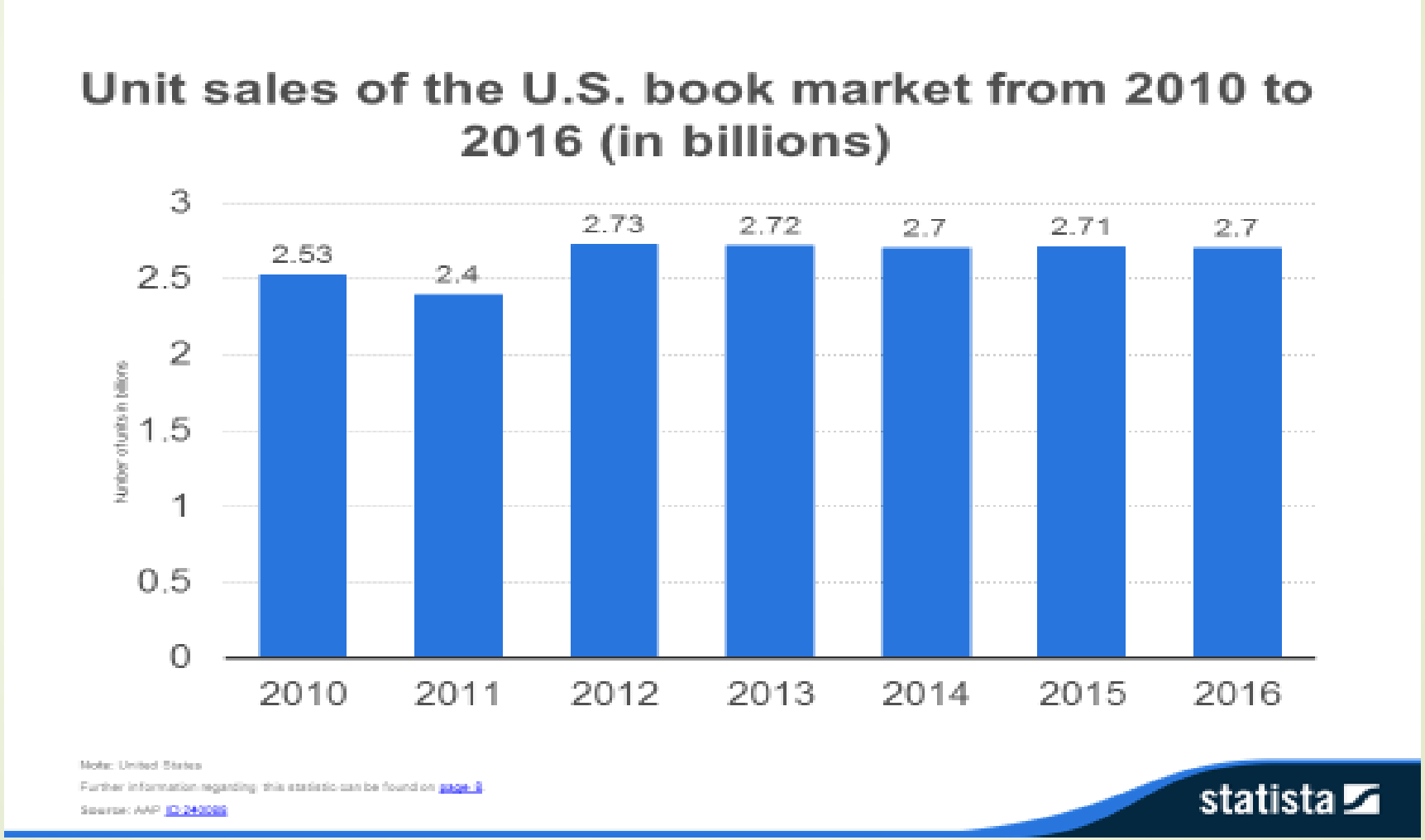
Increase in Availability of Back Catalogs of **Bestsellers**



Role of eBooks?



Flat Book Market: eBooks Cannibalize Bound Volume Sales



So, What's the Role of Reversion of Copyrights to Authors?

- Data set #1: Books by *NYT* bestselling authors
- Data set #2: Bestselling *NYT* books
- Data set # 3: Books reviewed by the *NYT*

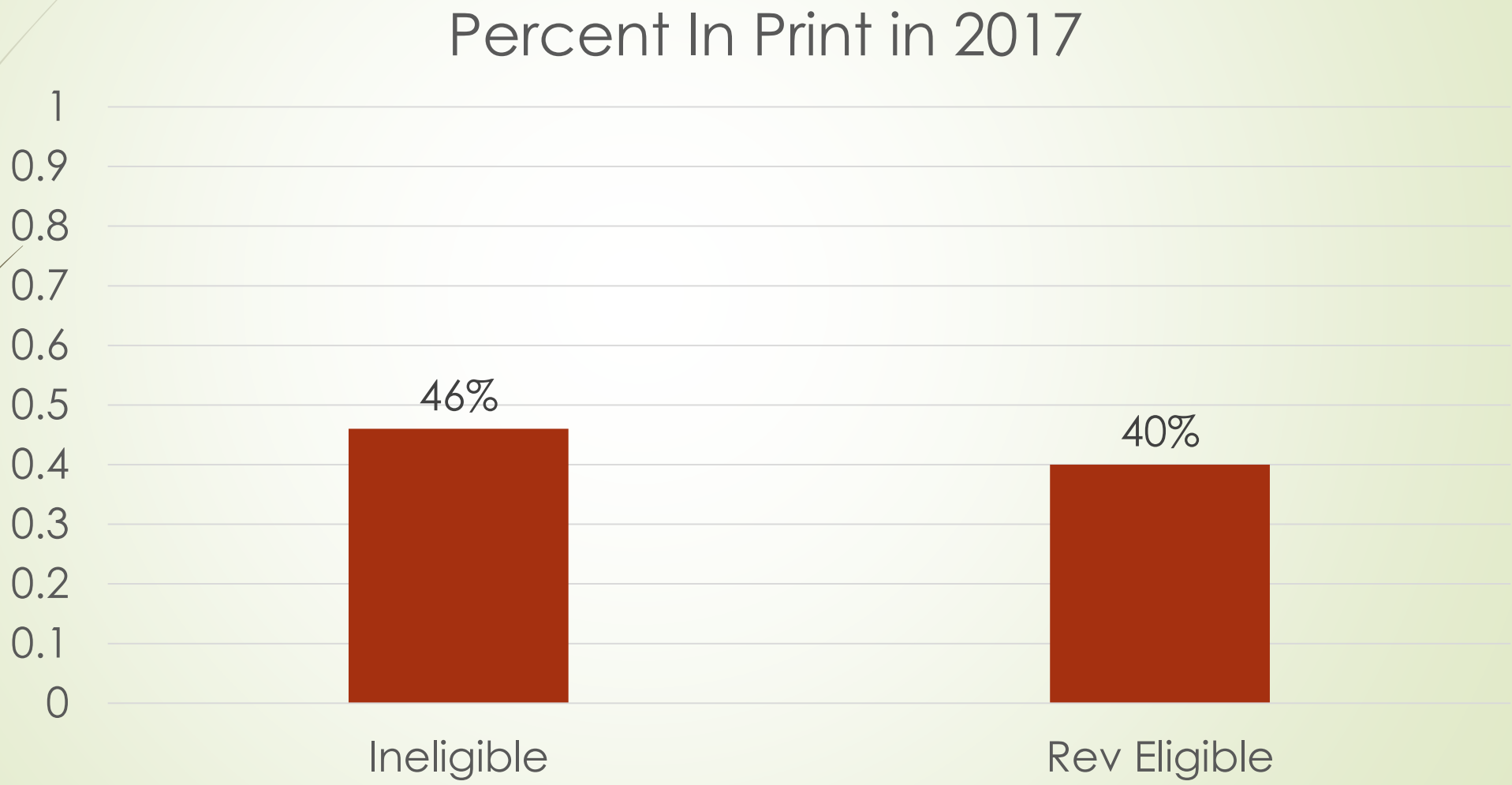
Data Source #1:
817 books published by 60 authors with at least one year-end, top-10 *NYT* bestseller

- **521** copyrights reversion eligible under 56-year rule of 17 USC § 304.
- **248** have reversion ineligible under the 56-year rule
- 48 books covered by other rules

Does Reversion Make a Difference? Helen MacInnes (1907-1985)

- **Subject to reversion** under 56-year rule of section 304:
  - *Above Suspicion* (1941)
  - *Assignment in Brittany* (1942)
  - *I and My True Love* (1953)
  - *Decision at Delphi* (1960)
- **Not subject to reversion** under 56-year rule of section 304:
  - *The Venetian Affair* (1963)
  - *The Salzburg Connection* (1968)
  - *Message from Malaga* (1971)
  - *The Snare of the Hunter* (1974)

No Significant Overall Difference . . .



Interesting Trend in the Data!

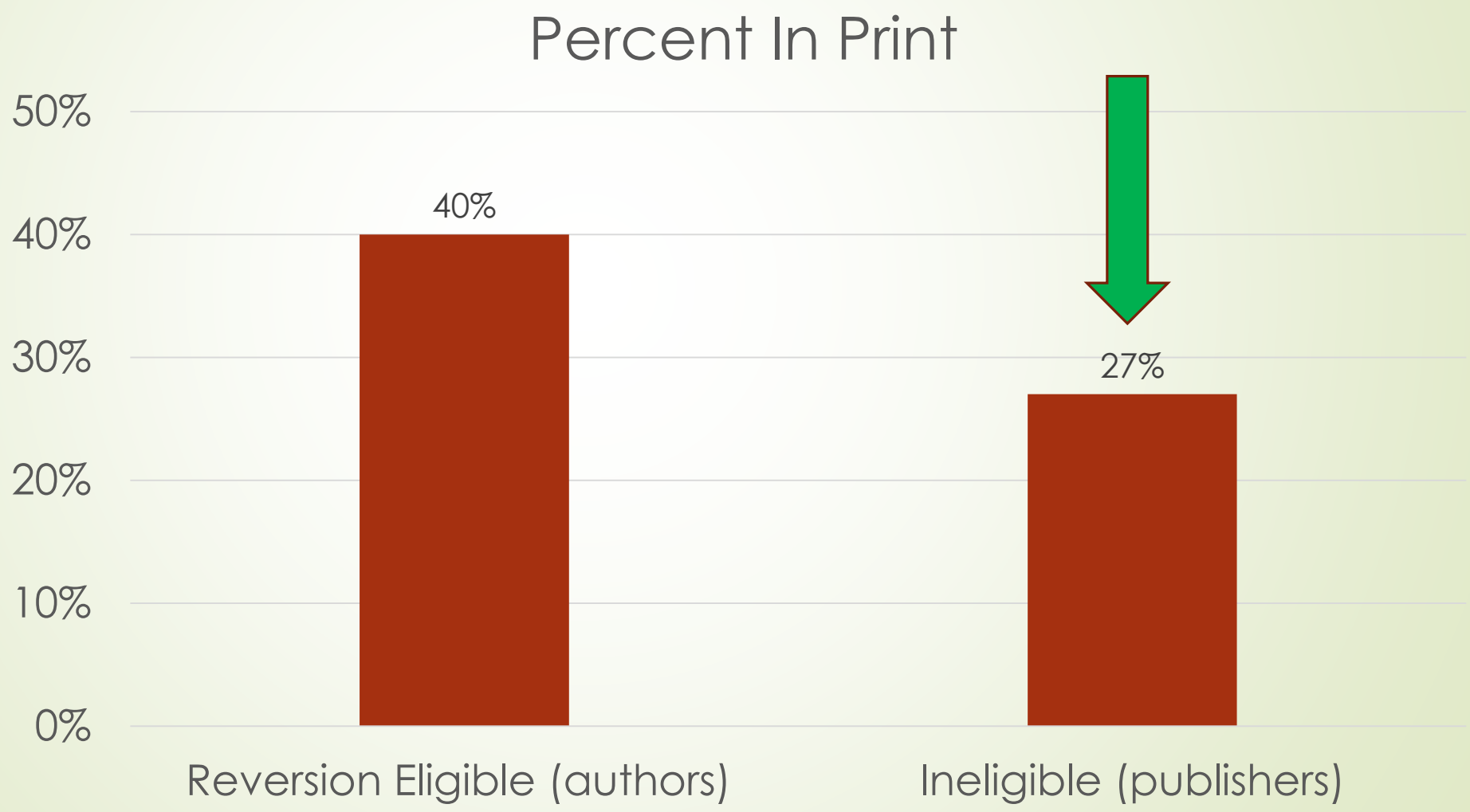
- 53 of 248 reversion ineligible books are only eBooks, and **45** of those **eBooks published by independent presses.**

- "Open Road [is] committed to bring back the backlist, making reverted titles and works that have never been converted to digital format widely available as ebooks . . . **This program is for authors whose rights have reverted**, whose titles have not previous been digitized, or who are looking to have their works available as ebooks."

45 “Rosetta” Books = 18% of Reversion Ineligible Titles

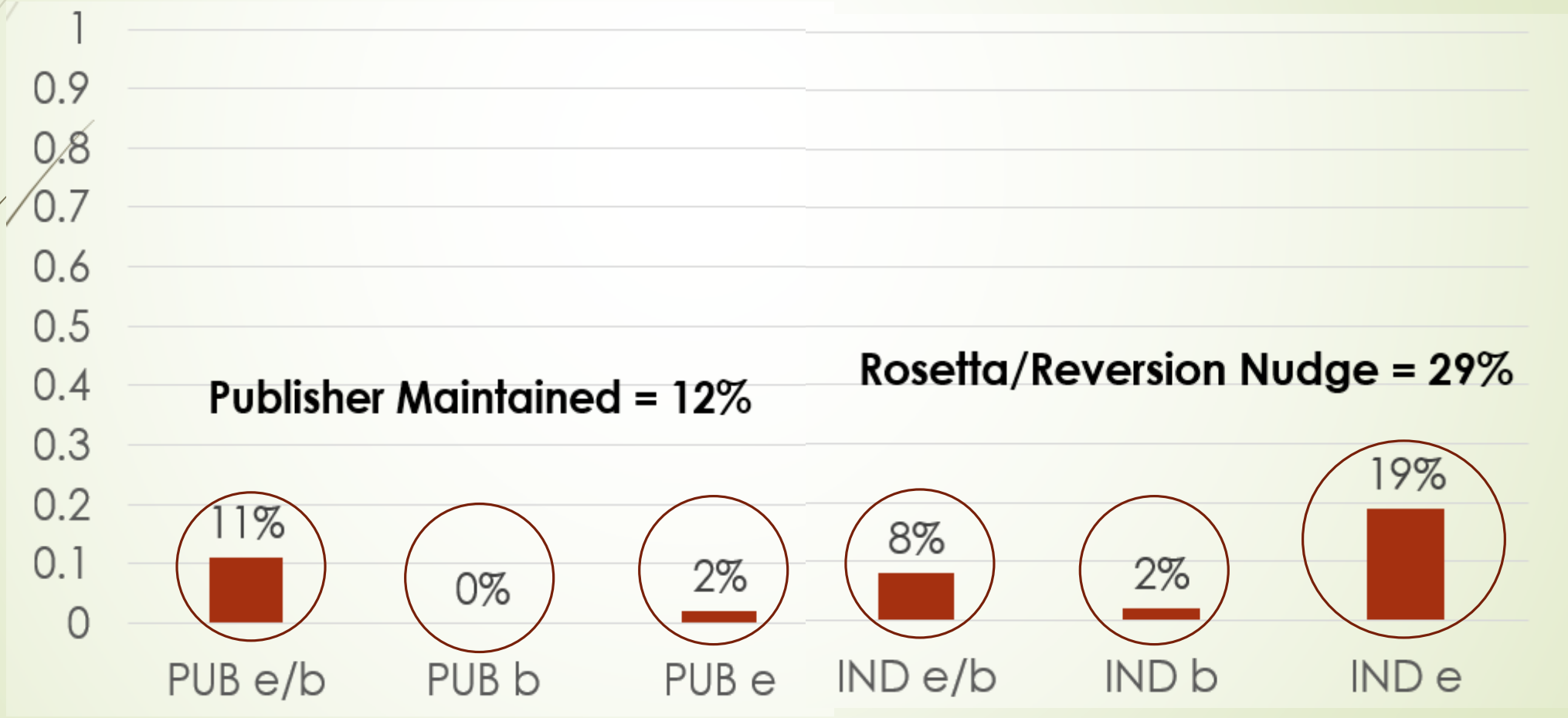
- *Rosetta* Books
  - Books with only an eBook version
  - Published by an independent press
  - Not subject to statutory reversion
- We should not credit the original publisher with keeping these works in print.

The *Rosetta* Effect on the Comparison!

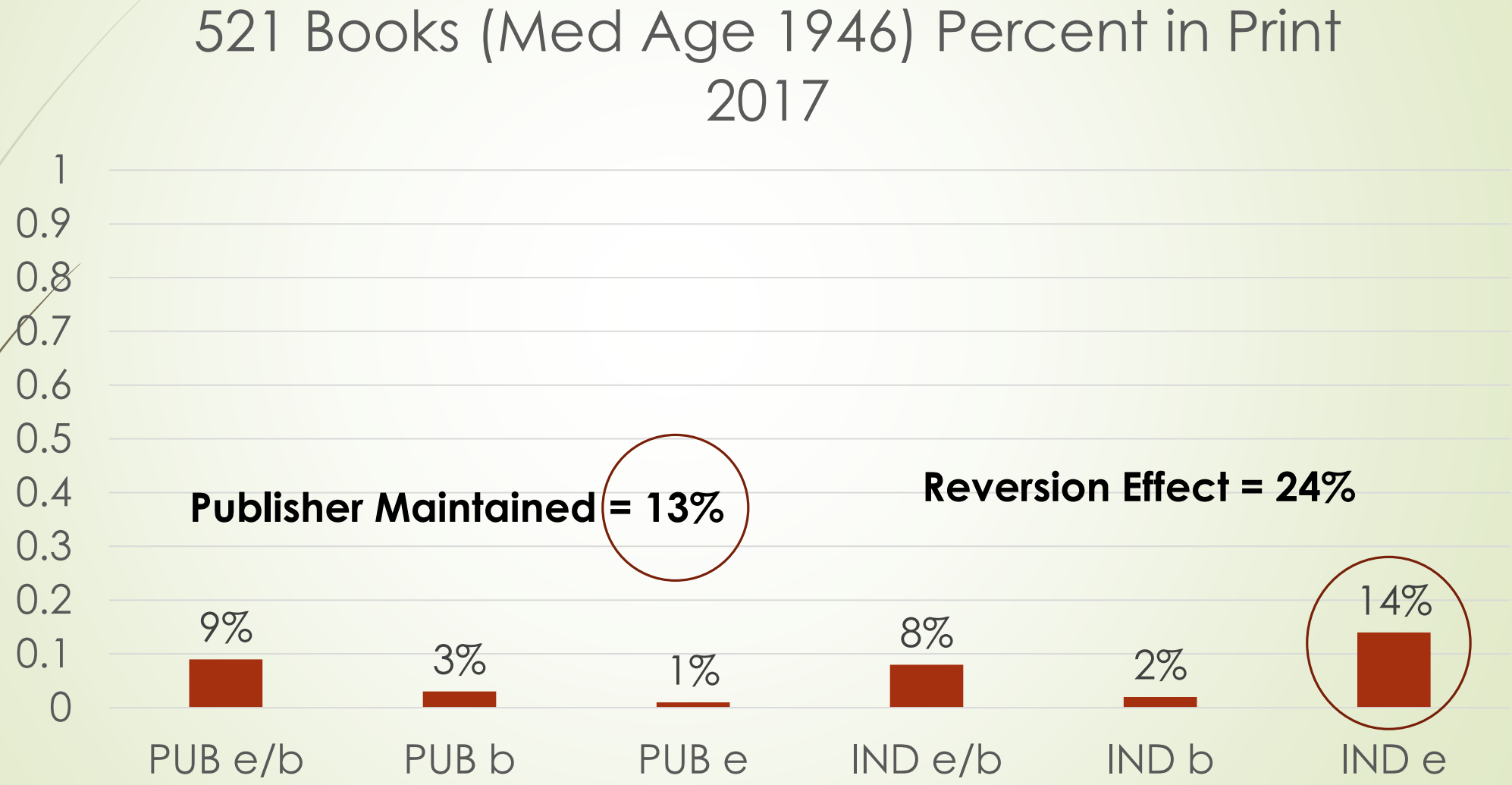


Reversion Ineligible Under the 56-Year Rule:

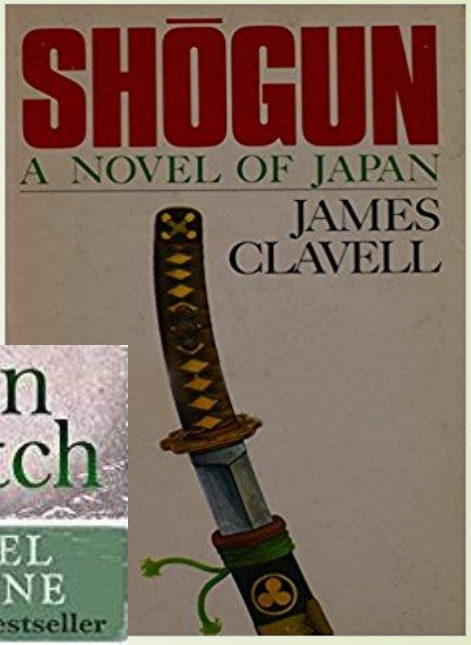
248 Books (Med Age 1967) Percent in Print 2017



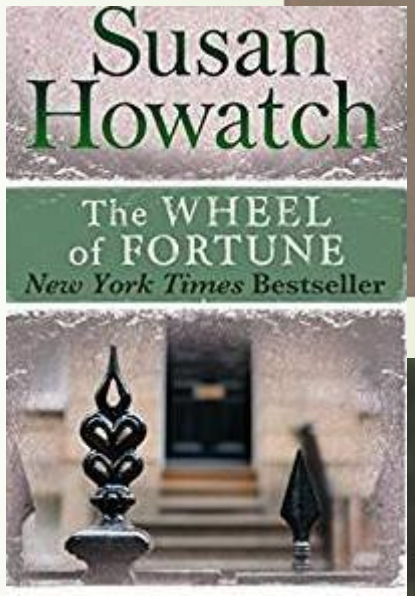
Reversion Eligible Under the 56-Year Rule

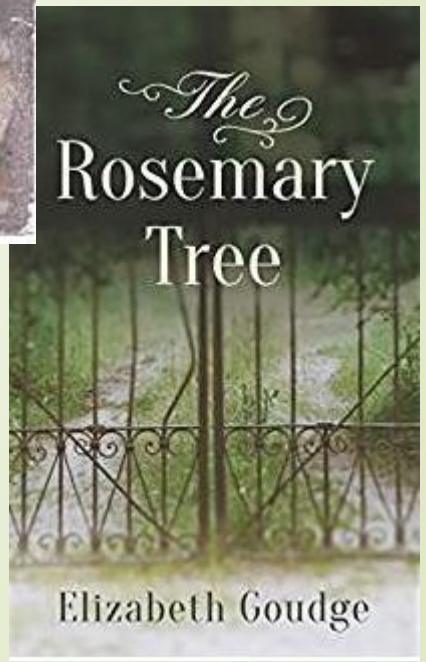


Data Set #2: 692 Books that All Cracked the *NYT* Bestsellers List

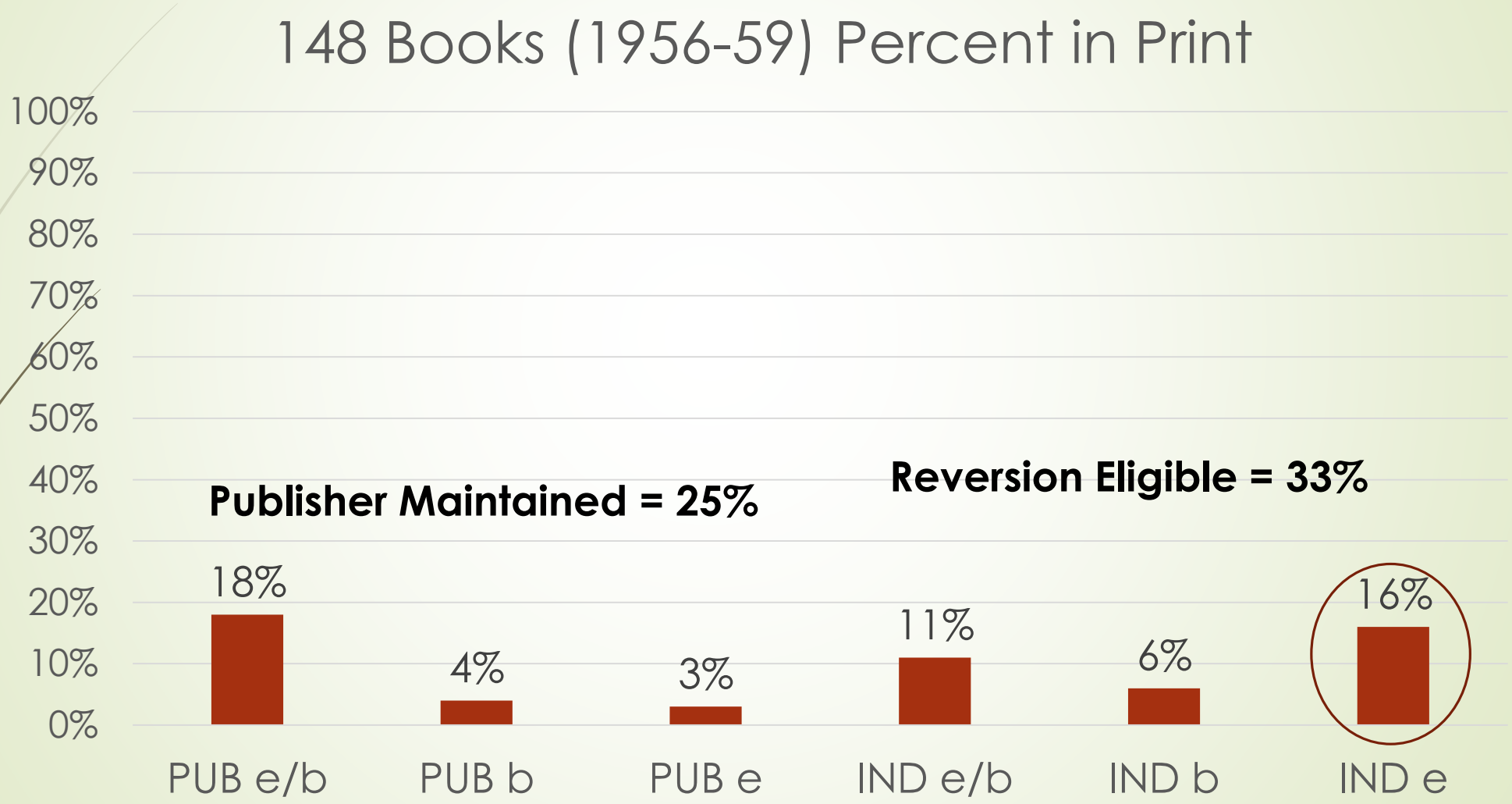


- Two §304 and three §203 subsets:
  - 148 books from **1956-59 (§304 eligible)**
  - 121 books from **1963-66 (ineligible)**
  - 124 books from **1974-77 (ineligible)**
  - 129 books from **1978-1981 (§203 eligible)**
  - 170 books from **1983-86 (ineligible)**





Reversion Eligible Under the 56-Year Rule



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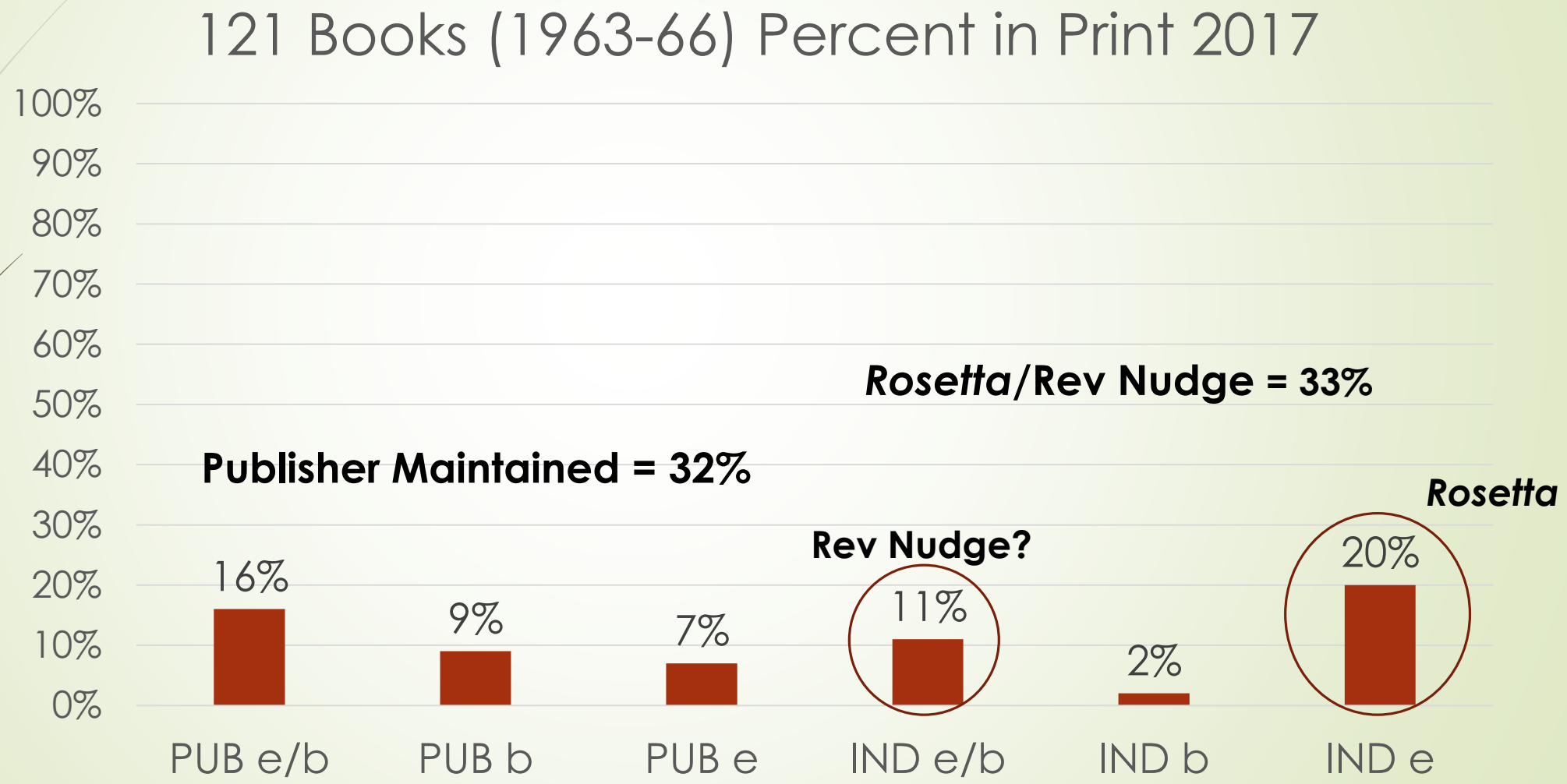
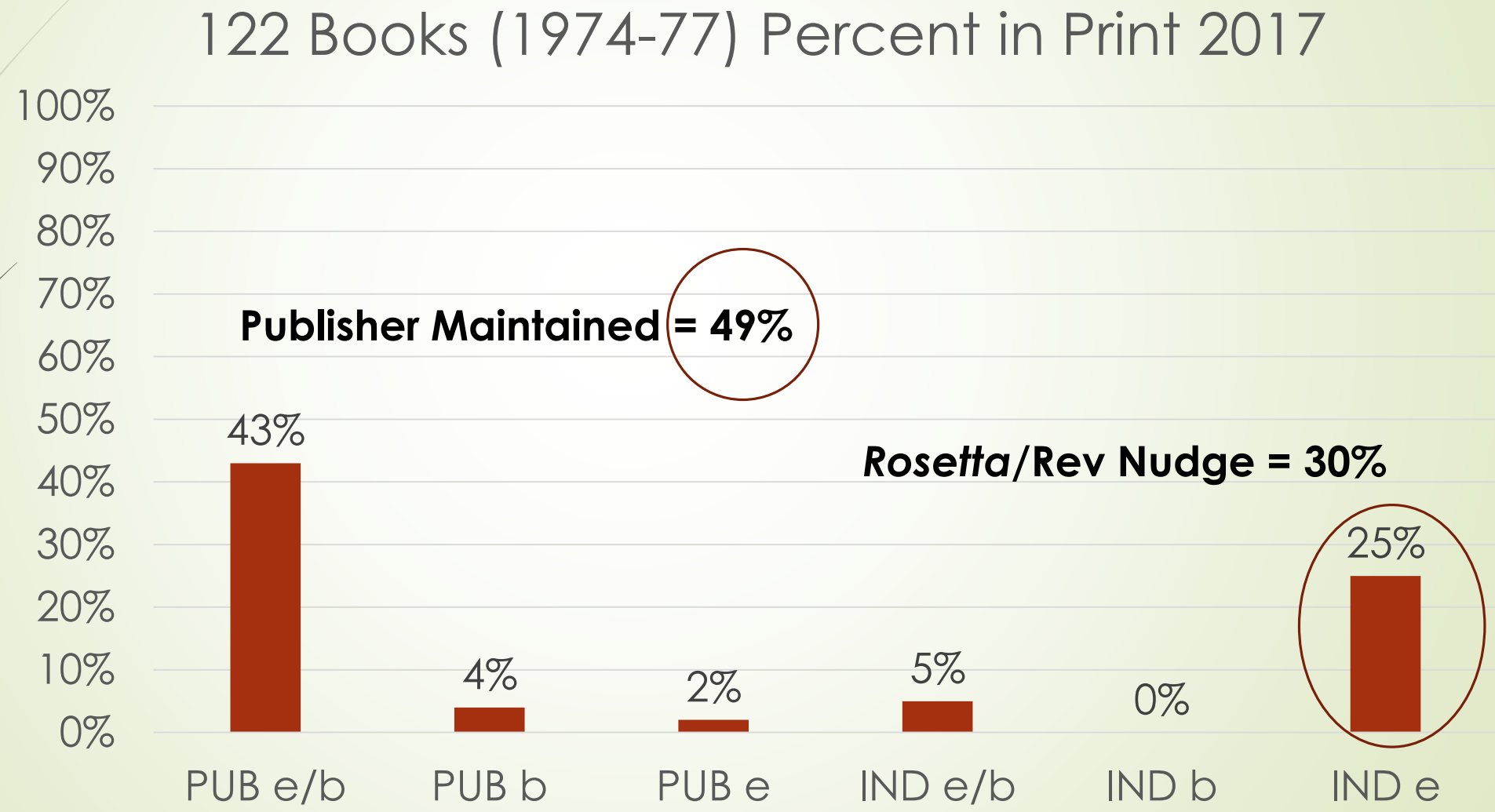


Will We See Different Results under the 35-Year Rule?

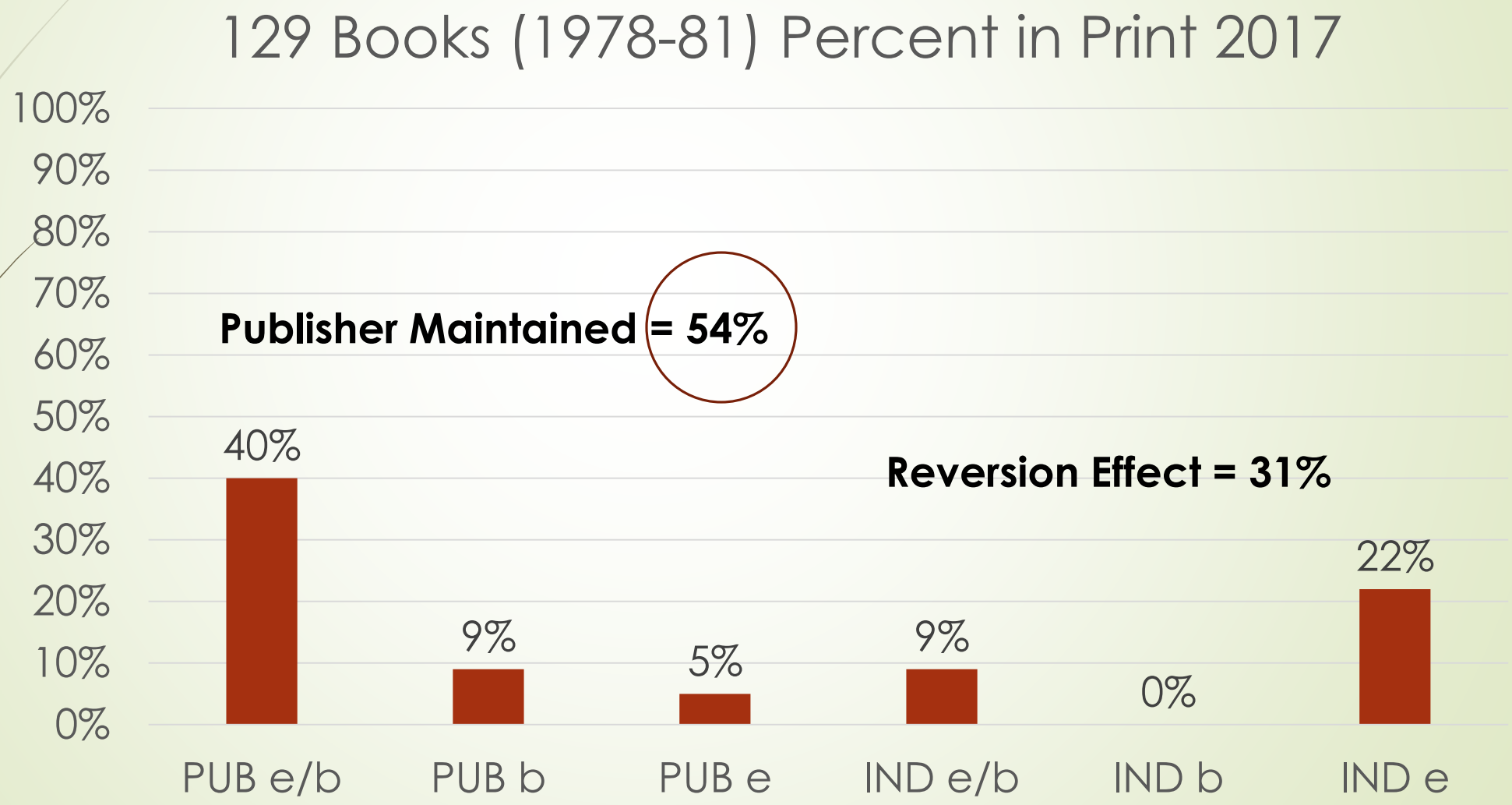
- Hard to adjust for the fact that newer books are likely to be more attractive for the original publisher to keep in print .. .

Penguin Random House

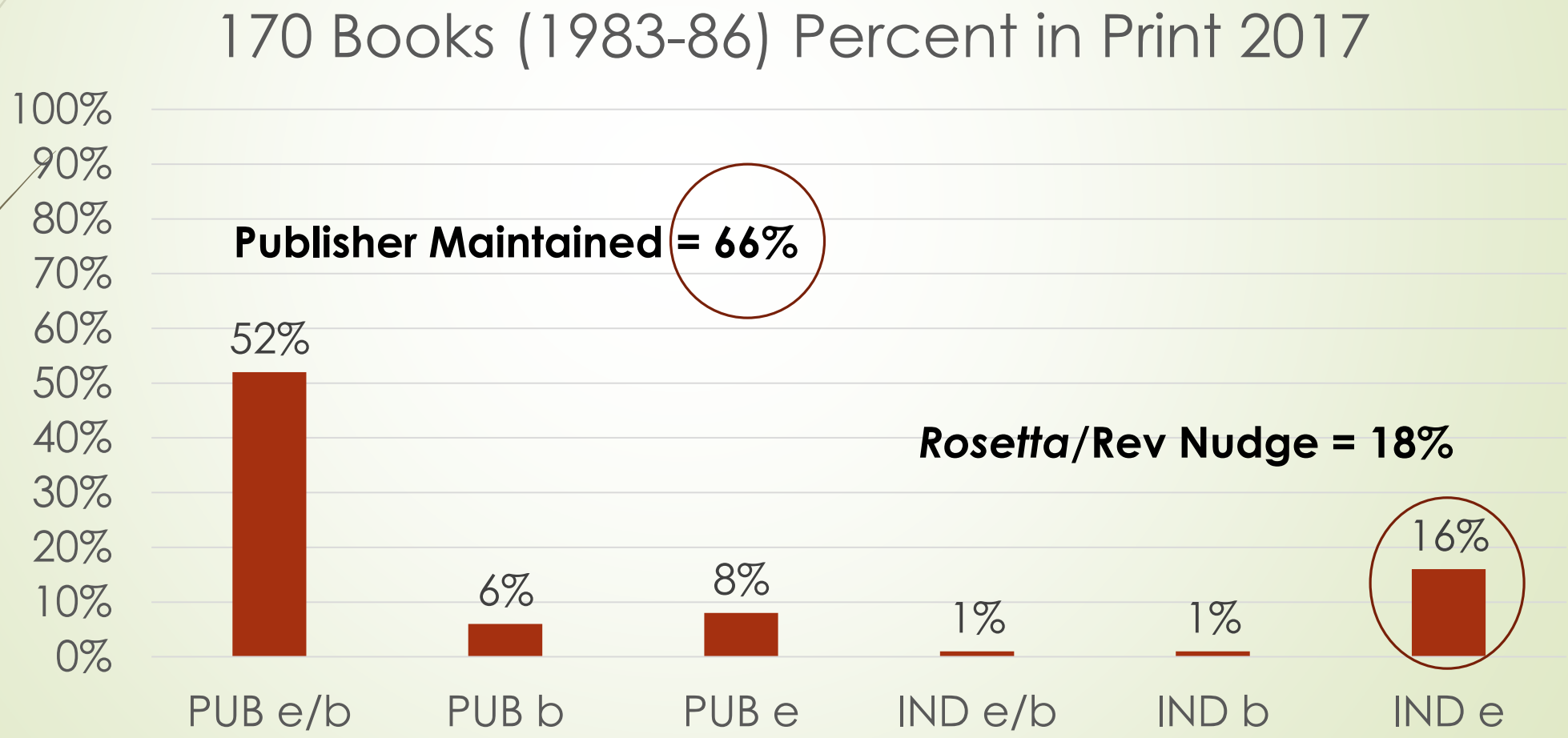
Reversion Ineligible Under the 56-Year Rule



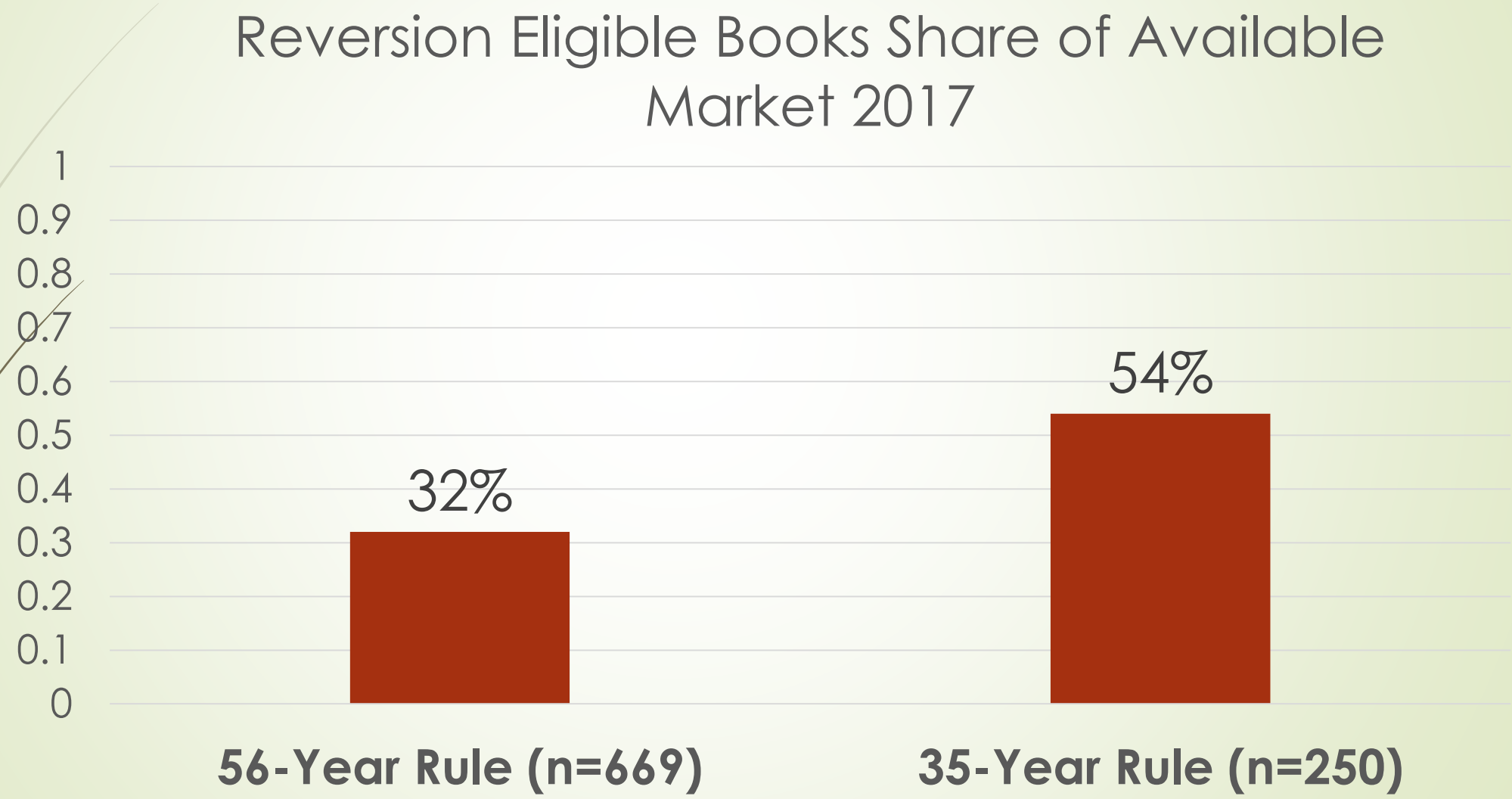
Reversion Eligible Under the 35-Year Rule



Reversion Ineligible Under the 35-Year Rule



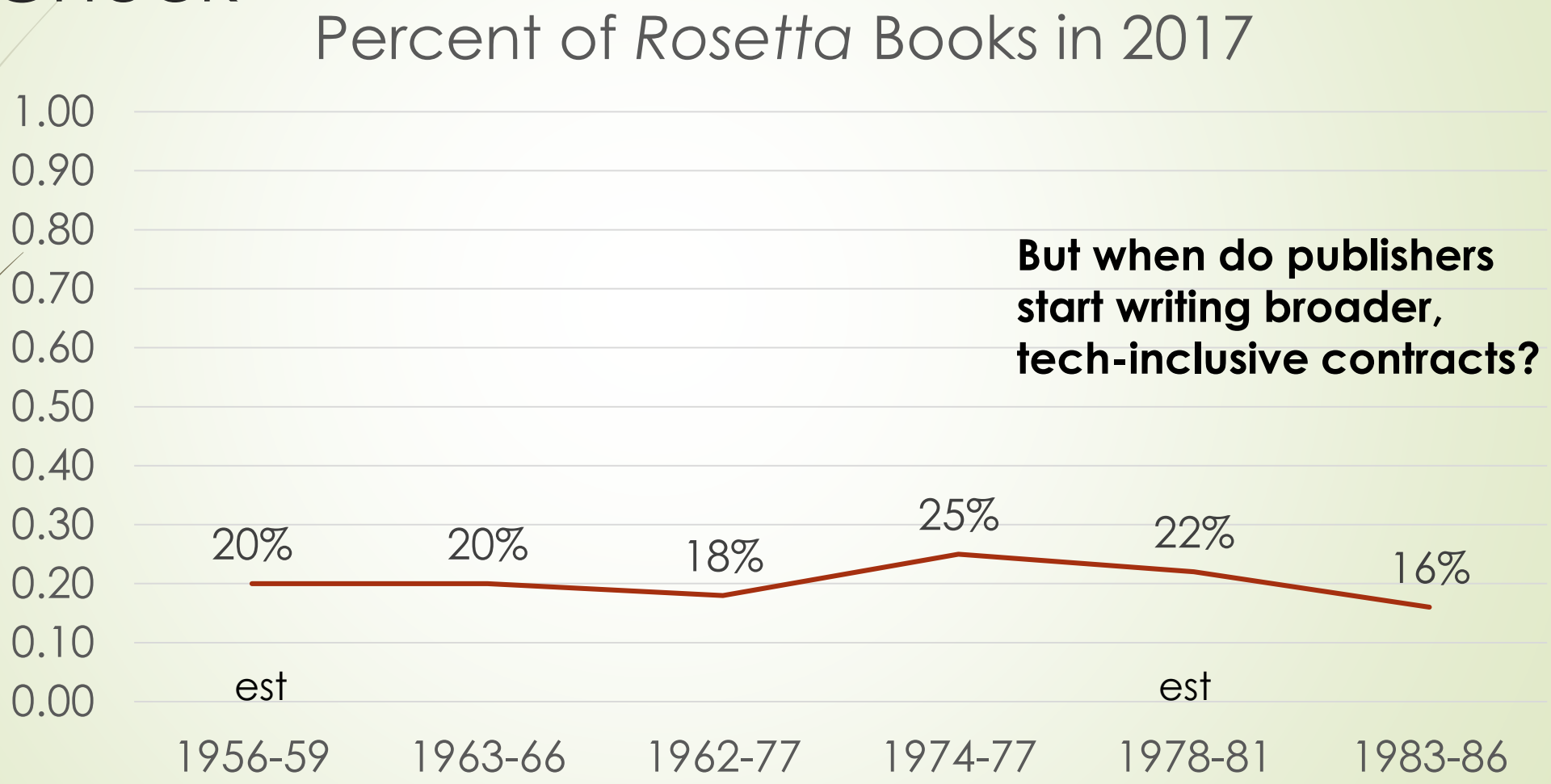
Comparison of 56-year & 35 Year Rules



35-Year v. 56-Year Rules

- 21 years is an entire generation
- Problems coordinating heirs
- Independent presses may have trouble finding heirs
- Authors can be direct beneficiaries under section 203
- 56-year applies to older (less popular?) books

Rosetta Books as an Historical Popularity Check

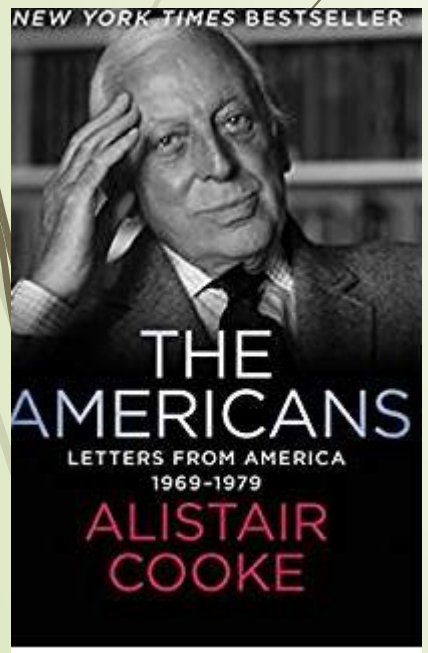


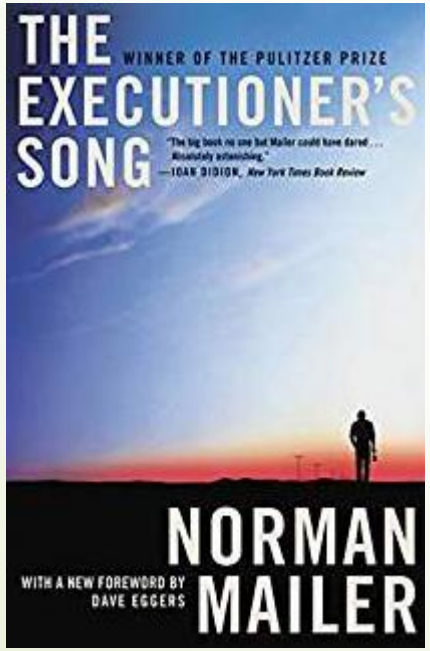
Rosetta v. Statutory Reversions?

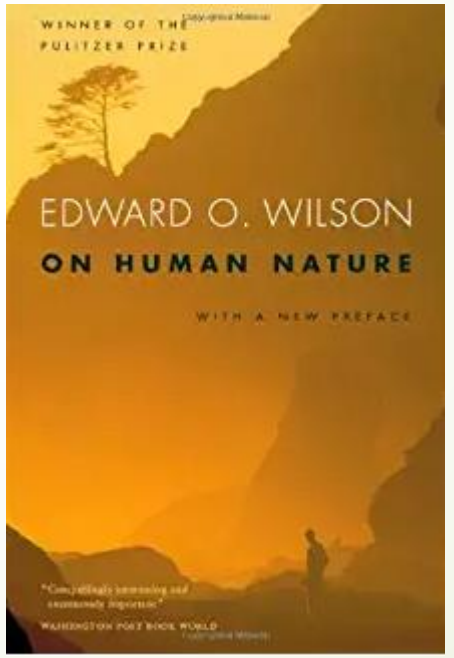
- *Rosetta* does more work than either US statutory reversion scheme.
- Effect is independent of time.
- *Rosetta* reversion was automatic
- *Rosetta* reversion occurred as a single, exogenous shock.
- **Effect did not apply to all book contracts**

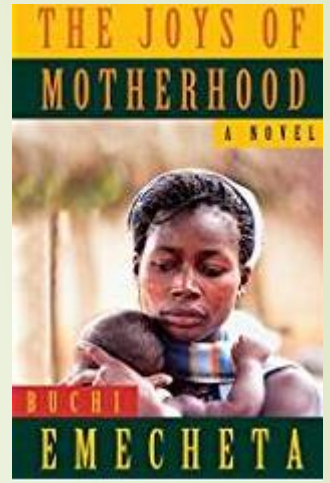
Data Source #3: 454 Books Reviewed in the *NYT Book Review* from 1978-84

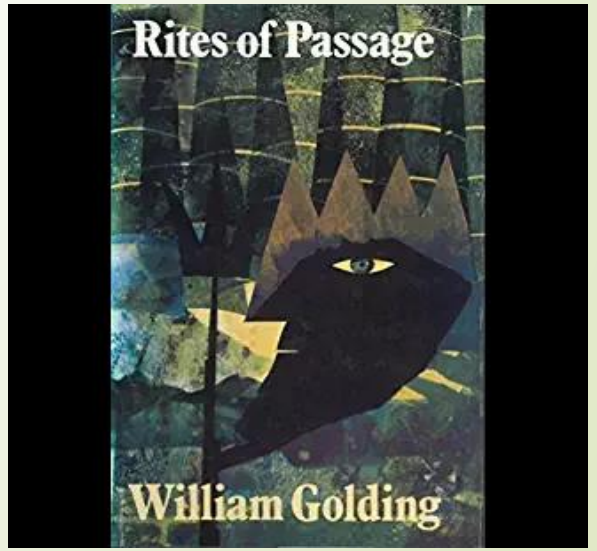
- **Mix of fiction and non-fiction**
- **Fewer bestsellers**



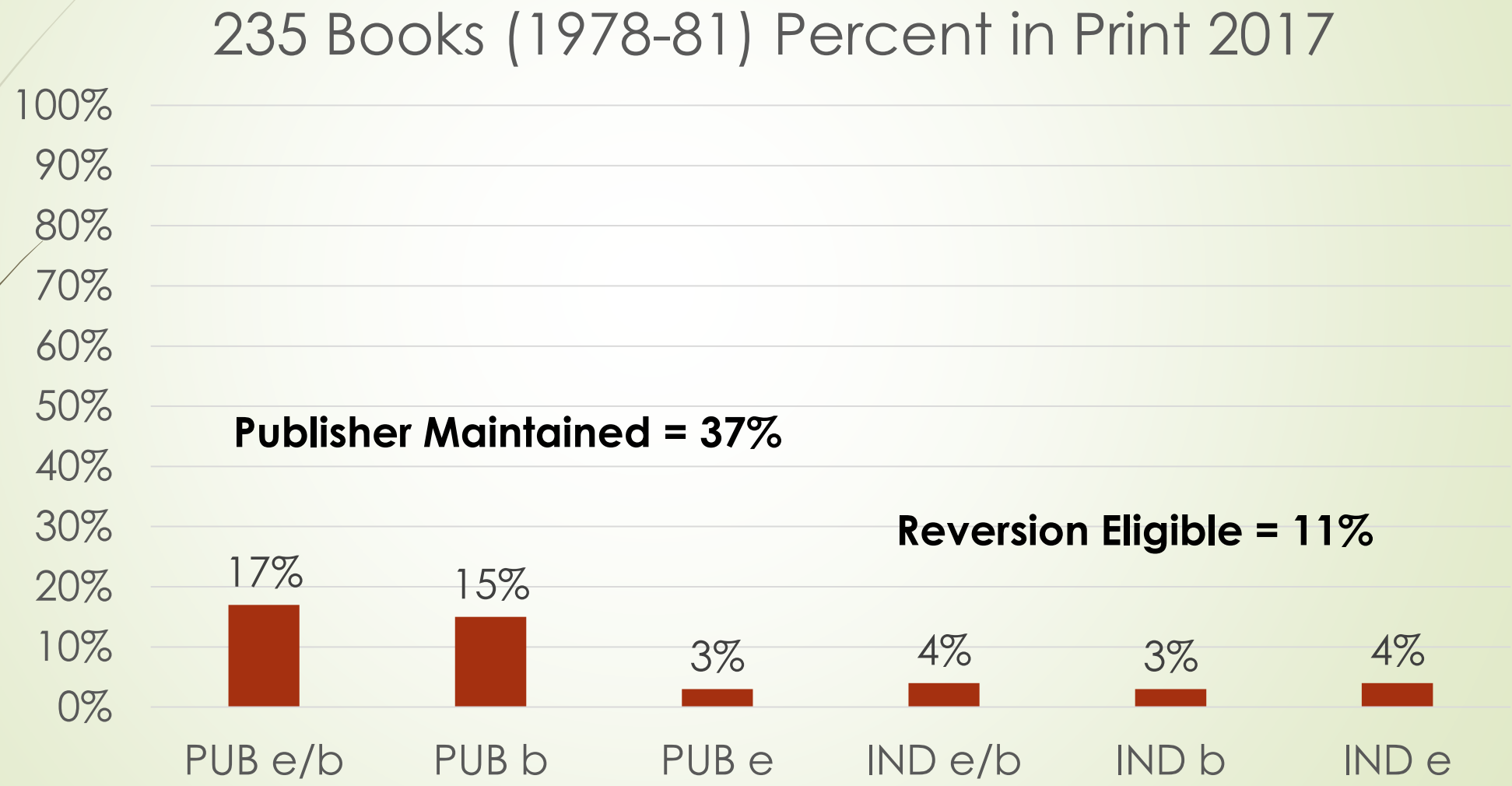








Reversion Eligible Under the 35-Year Rule



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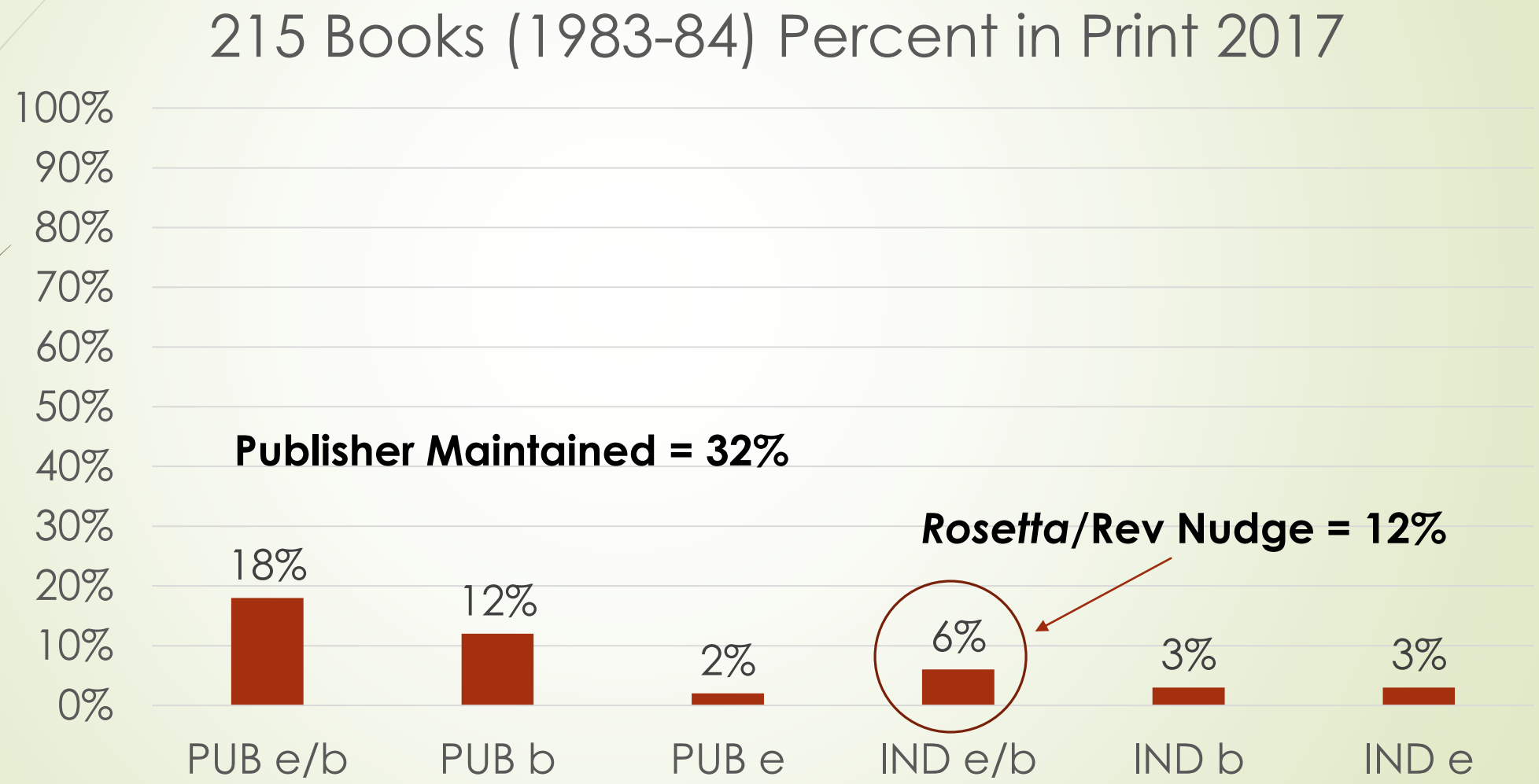
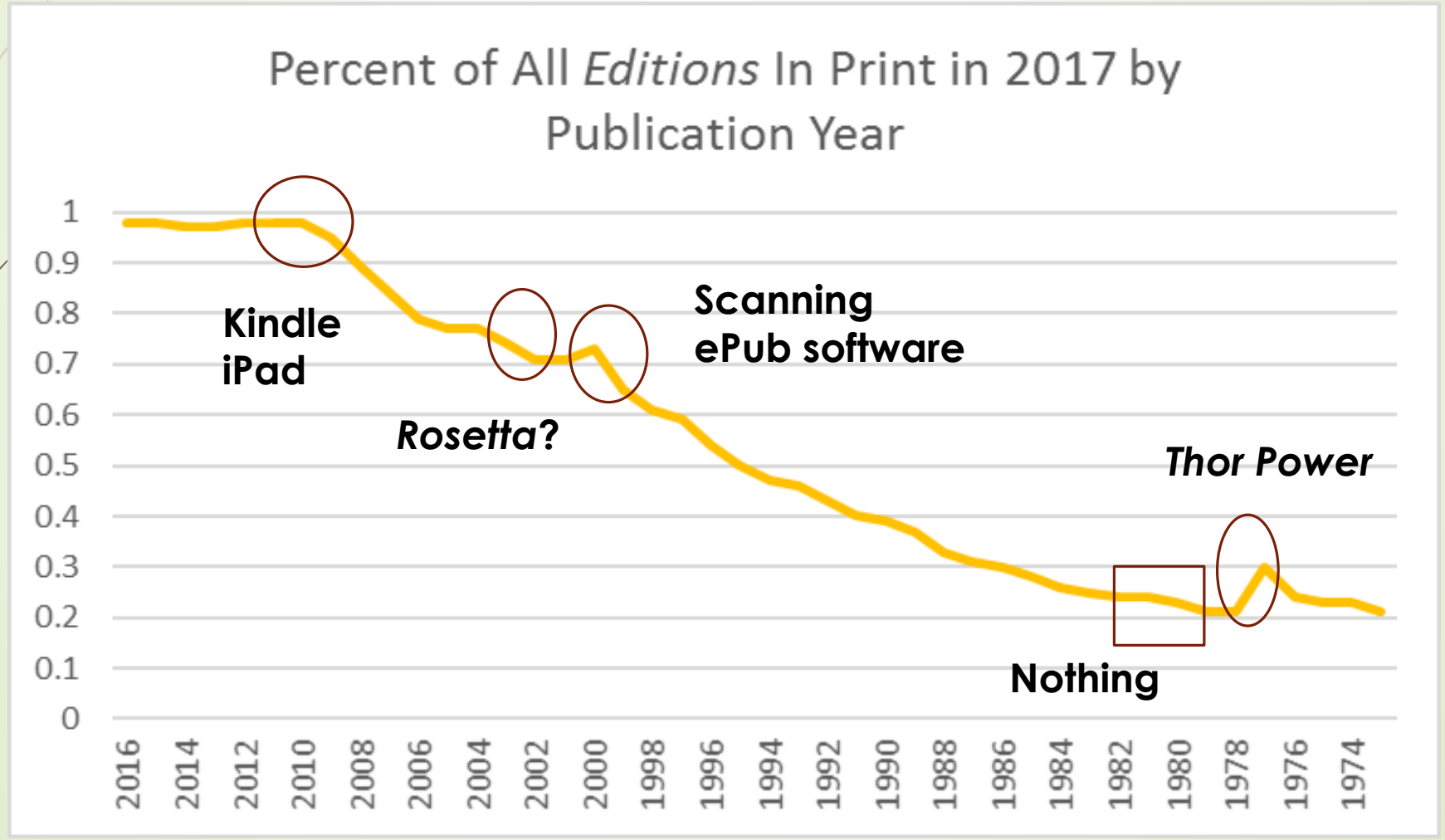


What about a (noisy) sample of all fiction?



Rosetta Effect in a More Random Sample?

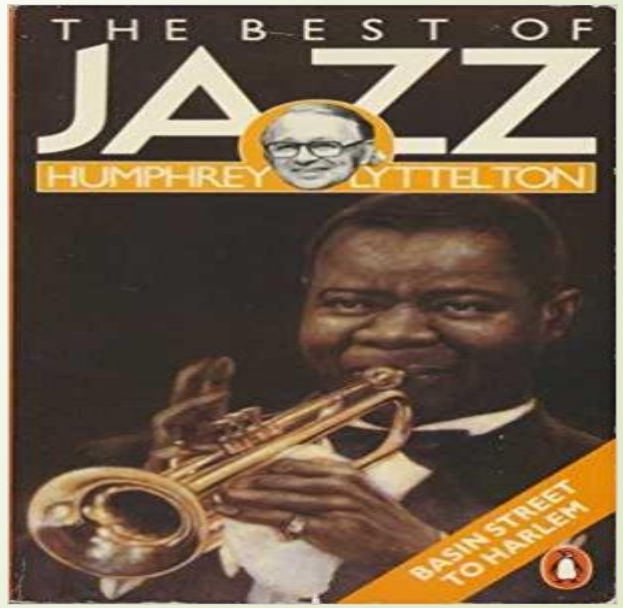
- Amazon advanced search for all eBook versions of fiction books "published" in 1987 (n=207)
- Filtered out all eBooks not initially published in the 1980's (remaining n=77)
- Of the 77 remaining eBooks published in the 1980's, **14%** were published by the author or an independent press.

Question: Does the *Rosetta* Effect have a dark side?

- Do Publishers stop publishing bound volumes because author-controlled eBooks eat into their profit margin?
- Unlikely because the publisher owns the bound volume rights and has leverage to keep eBook rights.
- Not an ongoing problem because publishers have drafted broader contracts since 2002.

Question: Do Authors Drop the Ball More than Publishers?

- How often is a book in print right before reversion and then goes out of print after?
- Of 181 NYT reviewed books in Dataset #1 still in print that reverted to author ownership, only **one book** was in print in year 30 and out of at year 2017.
- None of 129 bestsellers . . .



The *Thor* Effect! *Thor Power Tool v Commissioner* (**1979**)

- Change in inventory depreciation rules causes publishers to lighten their warehouses
- Not an issue in today's print-on-demand world

Caveat: Filing Requirement for Perfecting Termination . . .

- The copyrights in only 8/129 bestsellers from 1978-81 have been formally terminated!
- Reliance on communications by publishers

Date of Recordation: 2016-09-20

Copyright Document: V9925 D994 P1

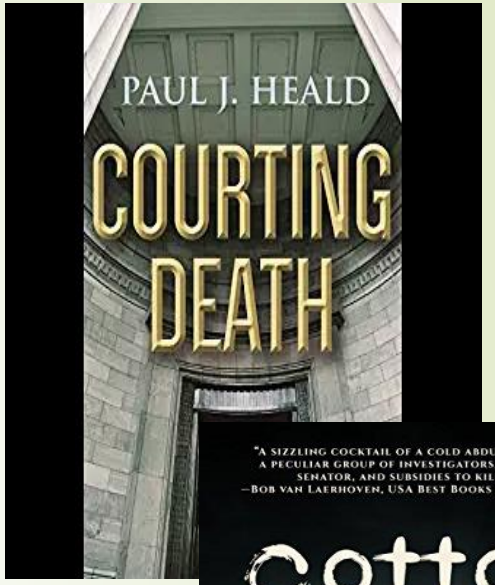
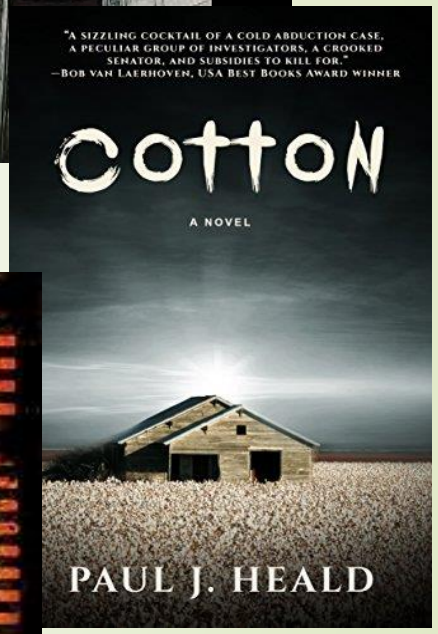
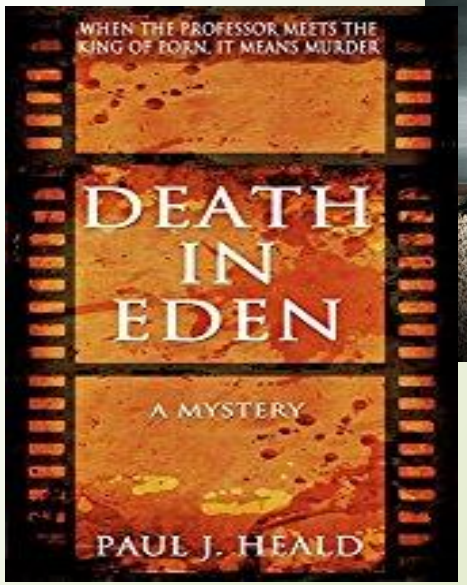
Number Not Verified: TX441945 (1980)

Title: The Ninja / By Eric Van Lustbader; Reg. TX441945 (1980); Termination date provided: 30Sep18.

Notes: Notice of termination of grant under 17USC Section 203; date and manner of service of notice: 20Sep16,

Party 1: Eric Van Lustbader

Party 2: Twentieth Century Fox Film Corporation, as successor in title to Fox-Zanuck/Brown Productions

CONCLUSION

- Increased availability is a plausible rationale for advocating author reversion rights, especially given Berne constraints
- Various EU and Commonwealth schemes should be tested.