

RESPONSE TO IPO'S CONSULTATION  
ON REDUCING THE DURATION OF COPYRIGHT  
IN UNPUBLISHED ('2039') WORKS IN  
ACCORDANCE WITH SECTION 170(2) OF THE  
COPYRIGHT, DESIGNS AND PATENTS ACT 1988

The Society of Authors, 12 December 2014



## ABOUT THE SOCIETY OF AUTHORS

The Society of Authors exists to protect the rights and further the interests of authors. The SoA was founded in 1884 and today has over 9,000 members writing in all areas of the profession (from novelists to doctors, textbook writers to ghost writers, broadcasters to academics, illustrators to translators). Authors are eligible to join if they have been offered a contract from an independent publisher, broadcaster or agent, or have sold over 300 copies of a self-published book or 500 copies of an ebook. The SoA's members include many researchers and biographers. In addition, the SoA is privileged to act as literary representative of the estates of a number of distinguished writers including Bernard Shaw, Virginia Woolf, Philip Larkin, E. M. Forster, Rosamond Lehmann, Walter de la Mare, John Masefield and Compton Mackenzie. The Literary Estates Department handles the negotiation and administration of contracts for the full range of rights from print permissions to major stage productions and feature films. Commission income from this work helps to support the SoA's day to day work.

## THE ISSUE: BACKGROUND

### Pre 1989

In the UK, copyright comes into being as soon as a work is created, without any need for publication or registration. Copyright in most works begins on the date the work is made and runs for a fixed number of years (usually 70) after the end of the year in which the author died ('the general rule'). This has not always been the case: before the introduction of the Copyright, Designs and Patents Act 1988 (CDPA), published works were protected by copyright for a fixed number of years after the end of the year of the author's death. However, works which were not published until after the author's death were protected by copyright for a fixed number of years (usually 50) after the end of the year of publication. This meant that if the work was never published, copyright never expired.

### CDPA

The CDPA sought to simplify the way the term of copyright protection was calculated – and abolish the possibility of perpetual copyright – by implementing the general rule in most cases going forwards. However, special arrangements were made for works which had already been created under the old law and which remained unpublished when it came into force. Instead of copyright lasting forever, copyright in these works expires fifty years after the end of the year in which the new law came into force. The Copyright sections of the CDPA came into force on 1 August 1989, so copyright in affected works lasts until midnight on 31 December 2039 ('the 2039 rule').

The Government believes that this causes a problem and suggests that the existence of the 2039 rule creates a complex set of 'special case' works in UK copyright law. It suggests that people wishing to use copyright materials face greater administrative burdens than would be the case if all works unpublished as at 1989 fell within the relevant general rule and proposes reducing the 2039 rule so that works protected by it will lose copyright protection once 70 years has passed after the author's death ('the Proposal').

### Publication Right

However, implementation of the Proposal will not mean that such works are free for exploitation by all as, on expiry of copyright, works become eligible for publication by anyone, including persons other than the copyright owner. If those works are previously unpublished, then upon first publication these persons acquire a 25 year 'publication right'. That right belongs to the person who first publishes the work, and gives that person equivalent rights to a copyright owner. The publication right lasts for 25 years from the date of first publication or public communication of the work. It was introduced into

UK law in 1996 via the EU Directive on copyright term. Publication for the purposes of the publication right includes the issue of copies to the public, making the work available by means of an electronic retrieval system, rental or lending of copies of the work to the public, performance, exhibition or showing of the work in public, or broadcasting the work. In practice, this will mainly affect those works held in the collections of public institutions, and the identity of the acquirer of the publication right is likely to be the cultural institution which is currently the custodian of the work. The effect of the proposal will therefore be to transfer rights from copyright owners to cultural institutions.

## EXECUTIVE SUMMARY

The SoA agrees in principle that very old works should not benefit from copyright protection but is extremely concerned that the Proposal will not meet its stated aims and will unjustifiably remove rights from authors' heirs:

1. The Proposal is unlikely to lead to more publication due to the fact that other copyright anomalies will still exist,
2. Recent orphan works legislation have made it far easier to use old works where the owners cannot be traced and those procedures should be used rather than unnecessarily amending existing law,
3. The Proposal will cause administrative chaos in relation to works that have been published under the provisions of the 2039 rule. Works which have been published under the 2039 rule should retain copyright until 2039.
4. The SoA sees no reason why cultural institutions should gain a windfall advantage of a publication right which the owners never intended. This may cause problems for those who gave works to institutions but for reasons of privacy or otherwise did not wish those works to be published. It may also hamper the ability of researchers and others to freely quote from works which have gone out of copyright. The SoA proposes that the publication right should not be applicable to works that have previously been subject to the 2039 rule.

## CONSULTATION QUESTIONS AND RESPONSES

In addition to answers on any or all of the consultation questions, which are summarised below, comments are invited on any element of this policy, and you are welcome to submit legislative drafting suggestions.

In addition, we would particularly welcome any information you are able to supply regarding:

- **The estimated number of works subject to the 2039 rule**

We have no way of estimating this but note that the impact assessment quotes the National Archives as estimating that it is likely that at least 58.5 million unpublished archival items exist in the UK for the period up to 1880, and a further 45 million exist for the period between 1880 and 1945. This equates to 103.5 million unpublished archival items that will be subject to the 2039 rule.

The National Archives comments that many 2039 works which remain unpublished are not currently being commercialised, but copyright owners may still choose to exploit their work at some future time, and are able to prevent anyone else from doing so. We would point out that is their right as copyright owner.

- **The proportion of such works for which the rule inhibits publication**

For many works, rather than inhibiting publication, the 2039 rule actually promotes it as copyright owners can exploit these works for financial reward. For works where owners cannot be traced there is the orphan works licensing scheme which has been in place since October this year and which is intended to make it far easier for institutions or others wishing to use orphan works.

- **The potential number of works which would be published if the rule were removed**

We do not know but we doubt that this would change significantly for the reasons set out below.

- **The scale of administrative burdens currently shouldered by cultural institutions in relation to 2039 works and the benefits to institutions of the removal of the 2039 rule**

See below. We believe that the administrative burden will remain if the 2039 rule is removed, particularly in relation to works that have been published. The only benefit to institutions is that they will receive the windfall publication right, allowing them to exploit for financial gain items in relation to which the donors never intended that they should control the copyright as well as the physical works.

- **Quantifiable costs to copyright owners**

The impact assessment says:

*the cost to copyright owners is unquantifiable as the value of copyright in a given work is dictated by a number of disparate factors including the type of work, its quality and provenance, and the market for similar works. **However the lack of commercial exploitation would indicate that there will be very little or no economic harm to copyright holders from this reduction in copyright term.** [Our emphasis]*

We find this assertion astonishing. The only evidence for lack of harm is a study carried out by the National Archives on migrant records<sup>1</sup> it is accepted that literary manuscripts might be an exception but it seems that no investigation has been carried out among literary agents or those who manage estates to consider the likely loss.

In fact works under the 2039 rule provide a significant source of income to rightsholders. Whilst it is difficult for the SoA to give a generalised picture, due to considerations of commercial confidentiality, it can be seen from Appendix A that the SoA alone manages the rights for around 30 literary estates that are affected by the 2039 rule. For each author affected there are many individual works involved (See examples in the box below). There is considerable interest in the publication of works by those authors, including not only manuscripts but letters, diaries and other such work and this has increased with digital publication. The SoA receives a steady flow of requests to use extracts from unpublished material (largely letters) held by various archives. In relation to just one estate the receipts from exploitation of work subject to the 2039 rule has been over £100,000 in the last 25 years. The loss of income over the next 25 years would be very significant. If this is extrapolated to all qualifying literary estates it is likely that many millions of pounds will be lost by rights holders. The Association of Authors' Agents has over 100 members and even if each of them only has the same number of estates affected as the SoA, there would be over 3000 estates affected.

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<sup>1</sup> 'The National Archives hold no data on the income currently derived by rights holders in respect of unpublished works created before 1880. However, in the only significant project they have engaged in involving non-Crown material of 1,114 documents (mostly non-official documents of post-1880 origin relating to migration to the UK) reviewed for possible reproduction on the project website: 395 were orphan (35.5%), 597 owners permitted use for free (53.5%), 45 owners refused use (4%) and 77 owners charged for use (7%). If this is typical of unpublished works created before 1880, it is likely that even fewer rights holders are actively exploiting pre-1880 literary works. The National Archives has no data for volumes or likely levels of income, but they note that with some very limited exceptions (notably literary manuscripts), incomes are unlikely to be high, as rights holders of high-value material have already had several decades to exploit their work.'

## EXAMPLES OF EFFECT ON LITERARY ESTATES MANAGED BY THE SoA

**Author A** There are many individual pieces (around 40) of short fiction that would be affected, as well as diaries and letters. The estate has received over £100,000 for exploitation of the previously unpublished works alone since 2039 and we would anticipate this continuing at the same rate for the 25 years to 2039

**Author B** Publication/production prospects are being pursued for a previously unpublished play, recently discovered in a cultural institution. If the proposed changes are imposed the Publication Right means that the benefit of this work will be enjoyed by the cultural institution rather than the heirs of the author

**Author C** Proposed selected letters drawing from unpublished material are under consideration for publication. Again the benefit would be transferred from the author's heirs to the cultural institution to which the author generously left his papers.

**Author D** We have recently entered into a publication contract for an edition of a play which includes the original third act of the play which was first published after 1989. If the Proposals were implemented this work would fall out of copyright causing difficulties in relation to the new agreement which was negotiated in good faith on the basis that copyright subsists.

**In line with Government policies on better regulation we will be committed to evaluating the impact of the policy going forward. Evaluation deadlines are set at five years post-implementation, and we will be looking to put together a data capture strategy for that five year period so as to be able to make a valid assessment at the end. Please let us know if you have any suggestions for measurable indicators, or are willing to contribute data to the evaluation.**

We would be prepared to supply data on a confidential basis. However, can we respectfully suggest that an evaluation be undertaken **before** such a radical move?

**Q1. Do you own any works subject to the 2039 rule or hold any in your collection? If so, how many?**

See above and Appendix A. The SoA is privileged to act as literary representative of the estates of around 60 distinguished writers including George Bernard Shaw, Virginia Woolf, Philip Larkin, E. M. Forster, Rosamond Lehmann, Walter de la Mare, John Masefield and Compton Mackenzie. The Literary Estates Department handles the negotiation and administration of contracts for the full range of rights from print permissions to major stage productions and feature films. Commission income from this activity helps to support the Society's day to day work. A number of those works are subject to the 2039 rule: the estates managed by the SoA are set out in Appendix A highlighting the authors affected. It will be seen that the Proposal will affect about half of the estates managed by the SoA, including such distinguished literary figures as George Bernard Shaw, James Joyce, Virginia Woolf and T.S. Eliot. All of those authors highlighted had unpublished literary works at the time of their death (including manuscripts, letters and diaries) which are subject to the 2039 rule.

**Q2. If you hold copyright works in your collection, please describe the rights clearance process at your institution, along with cost estimates if possible.**

N/A. The SoA is the rightsholder in relation to any copyright works it holds.

**Q3. Does the 2039 rule impact on this process, and if so, how?**

N/A

**Q4. If you are the copyright owner of a work subject to the 2039 rule, do you agree with this policy as outlined in this consultation document?**

No: The SoA cannot see any advantage for authors or copyright owners in revoking the present rules. The effect of revoking the rule is to remove property rights. For the reasons stated elsewhere in this

response, the SoA does not believe that the stated policy objective will be achieved by revoking the rule, so there is no acceptable basis on human rights grounds for an intervention with property rights.

The SoA wishes to emphasise that it supports the general rule whereby copyright lasts for the author's life plus seventy years. This seems to be a reasonable balance between the property rights of authors allowing them to exploit and receive compensation for their intellectual effort before allowing the works to be generally available to add to the sum of human knowledge.

Nevertheless, in 1989, the legislators were faced with a difficult decision when implementing the general rule about what to do in relation to works which had not yet been published and whose authors and heirs had a reasonable expectation that copyright in any unpublished works would not start to run until the works were published and who may have made business and other economic or policy decisions based on that expectation. The result was the 2039 rule. Not only did that preserve the status quo for a time limited period but it also harmonised the position with works that had been published after the death of the author but prior to 1989. That rule strikes a fair balance and has worked well for 25 years. There does not seem to be any need to change it now, particularly as authors and rights holders have relied on it to make arrangements in relation to affected works.

**Q5. Having regard to the enabling power, do you agree with the Government's proposed approach?**

No. See above. There is no need to reduce the period under the 2039 rule.

**Q6. If you consider that the copyright in affected works should expire a fixed period after commencement of the regulations, how long should that period be?**

We believe that there should be no change and copyright should last until 2039, particularly in relation to works that have already been published under the 2039 rule. We would point out that the change in rules is actually likely to lead to a more complex process for works which have already been published:

It is not intended that the regulations will deal with works published before the CDPA so further enquiries will still have to be made in relation to PUBLISHED works. It will also leave an anomalous position where works published before 1989 could potentially have longer copyright than works published after 1989. This is nonsensical and is likely to leave a more complex position than currently exists. This is best explained by reference to the IPO's explanation of searches which need to be undertaken:

## CURRENT PROCESS

*'In order to establish whether a work is still protected by copyright, for a literary work of known authorship, the general rule asks just one question:*

- in which year did the author die?*

*However, due to the 2039 rule, it is also necessary to ask:*

- was the work made before 1 August 1989?*
- was the author's death before 1969? (Due to the 1995 Regulations extending the term of protection from fifty to seventy years, the 2039 rule only applies where the author died prior to 1969).*
- has the work been published with the authorisation of the copyright owner?'*

**Under the current rules, if the answer to all these questions is yes then the next question is identified as 'did publication take place before 1 August 1989?'** but that is not correct. The question should be *'did publication take place after the author's death but before 1 August 1989?'*

- If the answer is yes then copyright lasts for 50 years from publication and the work may still be in copyright. That copyright could potentially last up to 2039 depending on the date of

publication. (CDPA, Schedule 1, paragraph 12(2))

- If the answer is no then copyright currently lasts until 2039 whatever the date of publication.

#### **New process under the Proposal**

*'If the rules are changed as suggested in order to establish whether a work is still protected by copyright, for a literary work of known authorship, the general rule asks just one question:*

- *in which year did the author die?"*

However, under the new regulations, it will also be necessary to ask:

- was the work made before 1 August 1989?
- was the author's death before 1945? (if the 2039 date is changed to 2015 then the relevant date of death will not be 1969 but 1945)
- has the work been published with the authorisation of the copyright owner?"

If the answer to this question is yes then the next question would be

Did publication take place after the author's death but before 1 August 1989?

- If the answer is yes then copyright lasts for 50 years from publication and the work may still be in copyright. That copyright could potentially last up to 2039 depending on the date of publication.
- If the answer is no then copyright would expire at the date given in the regulations whatever the date of publication.

#### **Q7. Are you aware of any other works subject to the 2039 rule because of the 1775 Act, and have you any objection to abolishing these rights?**

No. We have no objection to copyright being abolished in very old works, say those over 200 years old.

#### **Q8. Do you consider that this policy would encourage or facilitate the publication of previously unpublished works?**

We believe that the policy will have a negative effect on the publication of previously unpublished works. Those who were copyright owners under the 2039 rules will no longer have a financial incentive to arrange for publication of these works if their rights are taken away.

For others who might wish to publish, it seems likely that many works covered by the transitional term provisions will already have been published or performed, either before or after 1989. If they have been published before 1989 the Proposal will not apply. Even for those published after 1989 the consultation document indicates, and we strongly agree, that it could be unfair to cut short a term for a work that is under exploitation. It will therefore still be necessary to carry out the sort of rights clearance procedures that the Government's policy approach is trying to avoid with the result that the policy will fail to achieve its key objective of making rights clearance easier and will only succeed in removing property rights from authors for no good reason. We would point out that the Government has very recently, after a long consultation period, finalised a system for dealing with orphan works. It is therefore very easy for institutions and those who wish to use works to either trace them or register them as orphans and use them.

Finally the effect of the publication right means that researchers, biographers and others will still be unable to publish important material that they discover as it is likely that cultural institutions will claim



publication rights as a condition of access. It is our experience that cultural institutions often seek to charge higher fees than those charged by estates so this may well have an adverse effect on publication. As the purpose of a library or cultural institution is, to put it into the words of the mission statement of the British Library "*to advance the world's knowledge*", we would seek an assurance from cultural institutions backed by legislation that they will not seek to limit or prevent publication or impose fees based on the Publication Right to historians, biographers and other researchers.

**Q9. Have you any plans to publish previously unpublished works following the implementation of this policy? If so, how many?**

Yes. We will continue to publish works in which we control the rights. However, if that copyright is withdrawn we shall cease to exploit the rights. In some cases the works will be held by cultural institutions and they may gain an unfair windfall and the rights to publish the works which the authors always intended would be exercised by their heirs.

**Q10. Are you affected by or aware of a situation where copyright works have been deposited with a third party on the belief that the 2039 provisions would remain in place to protect the work, and if so what is the likely impact to you of the policy?**

Yes. We are extremely concerned that those who deposited works with a third party did not anticipate Government changing its policy or the rules protecting such work from publication. Many authors place works in cultural institutions for safe-keeping on the physical work but entrust their heirs and literary executors with managing the intellectual property rights. It is unfair and unnecessary to remove those rights. We would suggest that it is made clear in legislation that institutions must remain bound by any terms of deposit, even after copyright has expired and that any references to copyright in terms of deposit should be taken to be a reference also to publication right. We note that many agreements we have seen in relation to deposit are silent on the Publication right.

We are also concerned about the impact on privacy and on confidentiality, see our response to Q11.

**Q11. Do you consider there to be any issues involving privacy or confidentiality in the content of works which were previously protected by copyright until 2039 but fall out of copyright as a result of this policy?**

Yes, we consider there are important issues of privacy and confidentiality affecting these works. Many authors bequeath collections to museums and other institutions on the basis that they can use copyright to prevent confidential items from being revealed. Many deliberately do not publish letters and diaries in their lifetimes and for a long time thereafter to protect the privacy of themselves or others still living after their deaths, particularly in our experience, their partners, children and grandchildren. Given the limitations of the UK moral rights regime, adoption of this policy should be subject to a requirement to evaluate the impact on the author's reputation and on that of their heirs and relations, prior to publication. Unpublished works are sometimes unpublished for a good reason, they include private letters and personal diaries and the author's decision on the publication of these should not be overridden by this policy.

**Q12. Do you consider that transitional provisions are required in respect of works subject to the 2039 rule but published after 1989?**

Yes. If the Proposal is implemented then transitional provisions would clearly be necessary to minimise the costs to business in relation to works which have been published after 1989 on the assumption that protection would last until 2039. As can be seen from our answers above, we believe that this cost could run to many millions of pounds. As implementation of the Proposal will not lead to certainty or ease of clearance due to the Rules in relation to works published prior to 1989 and the existence of the Publication Right we would suggest that it would be more coherent and rational to keep the 2039 rule which is in line with other works published after their authors' death but before CDPA. The problem will then, as originally intended, disappear by 2039 and until then cultural institutions can clear works in accordance with the new orphan works regulations.

**Q13. Should these regulations apply to unpublished sound recordings? (Please give reasons for your answer.)**

**Q14. Are you the owner of relevant sound recordings, or the copyright in them? If so, are you able to share information about the present state of the market for unpublished sound recordings?**

**Q15. Do you agree that the likely impact of this policy in respect of sound recordings is minimal (whether as a benefit or a cost)?**

We have not answered questions 13-15 as they are not of relevance to our members.

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## APPENDIX A

Literary Estates controlled by SoA. Deaths post 1969 in bold

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- Constance BABINGTON SMITH d. 2000
- David BARRETT d. 1998
- **Brendan BEHAN (Stage, screen and audio rights) d. 1964**
- **Clive BELL d. 1964**
- **Julian Bell d. 1937**
- Quentin BELL d.1996
- Anthony BERKELEY d. 1971
- **Laurence BINYON d. 1943**
- **Freeman Wills CROFTS d. 1957**
- **Walter DE LA MARE d. 1956**
- **Norman DOUGLAS d. 1952**
- **T. S. ELIOT (Stage, screen and audio rights – plays) d. 1965**
- St. John ERVINE d. 1971
- Elisaveta FEN (Stage, screen and audio rights) d. 1983
- E. M. FORSTER (Publication rights) d. 1970
- **Winifred FORTESCUE d. 1951**
- **Rose FYLEMAN d. 1957**
- **John GALSWORTHY d. 1933**
- Catherine GASKIN d. 2009
- Robert GITTINGS d. 1992
- **Harley GRANVILLE-BARKER d. 1946**
- L. P. HARTLEY d. 1972
- **A. E. HOUSMAN d. 1936**
- **W. H. HUDSON d. 1922**
- **Holbrook JACKSON d. 1948**
- **W. W. JACOBS d. 1943**
- **James JOYCE d. 1941**
- **Robert KEMP d. 1967**
- Philip LARKIN d. 1985
- Rosamond LEHMANN d. 1990
- **Rose MACAULAY d. 1958**
- Compton MACKENZIE d. 1972
- **Katherine MANSFIELD d. 1923**
- **John MASEFIELD d. 1967**
- **H. J. MASSINGHAM d. 1957**
- **John Middleton MURRY d. 1957**
- **Alfred NOYES d. 1958**
- Sax ROHMER d. 1983
- Cecil ROBERTS d. 1976
- **Kenneth ROBERTS (Publication rights) d. 1957**
- **Bernard SHAW d. 1950**
- **Montagu SLATER d. 1956**
- **James STEPHENS d. 1950**
- G. B. STERN d. 1973
- **Lytton STRACHEY d. 1932**
- Alison UTTLEY d. 1976
- Philip VELLACOTT (Stage, screen and audio rights) d. 1997
- E. F. WATLING (Stage, screen and audio rights) d. 1990
- Eric WILLIAMS d. 1990
- Leonard WOOLF d. 1969
- **Virginia WOOLF d. 1941**
- **W. B. YEATS (Screen and radio rights) d. 1939**