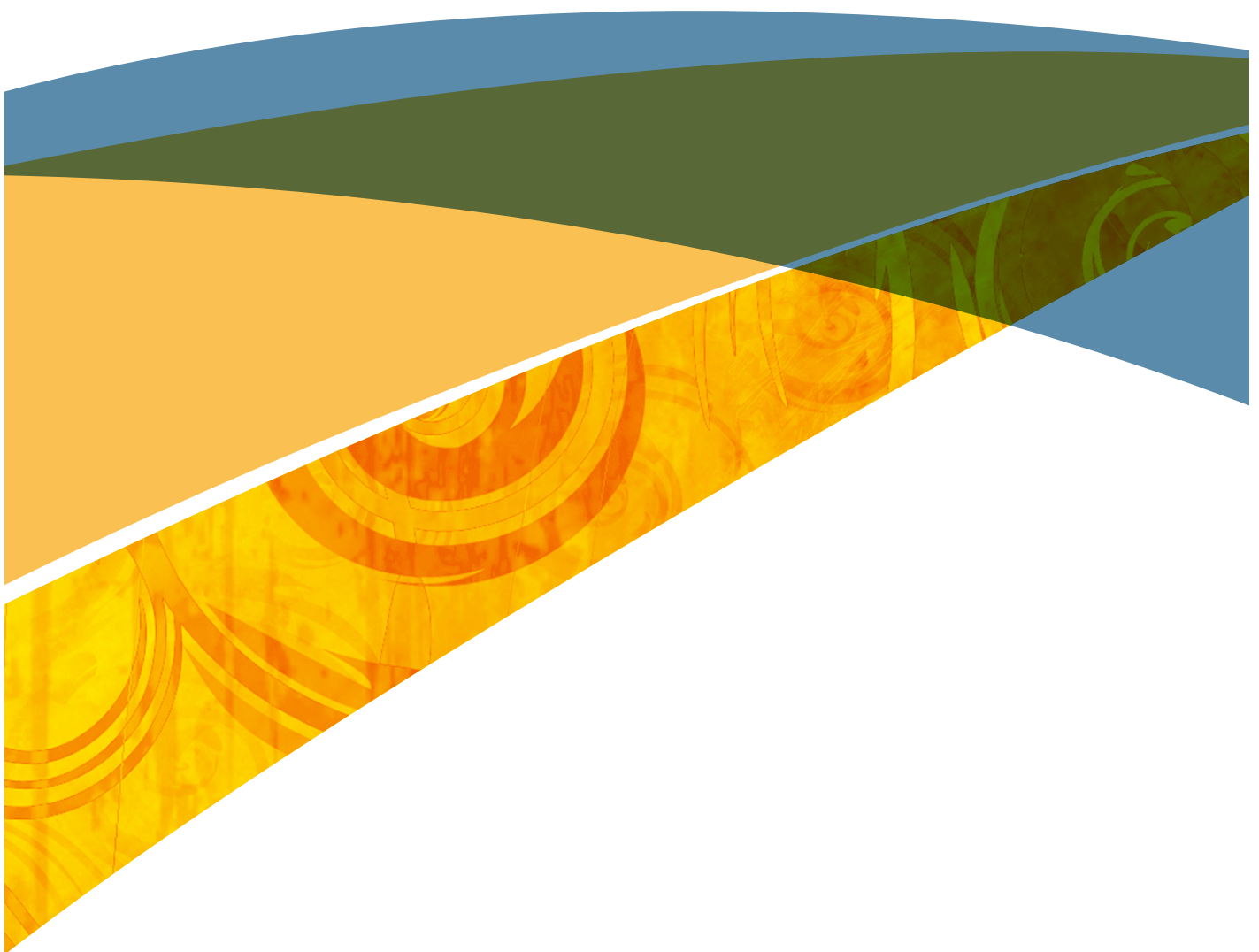




Intellectual
Property
Office

Consultation on reducing the duration of copyright in unpublished (“2039”) works in accordance with section 170(2) of the Copyright, Designs and Patents Act 1988





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Executive summary

Due to the complex transitional provisions in Schedule 1 to the Copyright, Designs and Patents Act 1988, some very old unpublished works are protected by copyright in the UK until 2039, even though their authors may have died hundreds of years ago.

This is a problem for museums, libraries and archives, and the general public, who may wish to make use of these works, which due to their antiquity and unpublished nature are often of cultural or historical interest.

By way of example, this year we marked 100 years since the start of the First World War, and cultural institutions such as the Imperial War Museum, the British Library and the BBC were able to enrich our remembrance with exhibitions and programmes celebrating the heroism of those who fought and lamenting their loss.

However, due to the 2039 rule, thousands of copyright works such as war diaries, poems and letters from the trenches required a disproportionate effort to establish the identity of the copyright owner prior to publication. If the 2039 rule did not apply, much of this material would have been out of copyright and free to publish, to the benefit of wider society.

In 2013 Parliament approved powers to remove these complex rules so as to reduce the duration of copyright in certain unpublished works. This will simplify copyright law in the UK and encourage and enable the publication of previously unpublished older works, while continuing to protect the authors of unpublished works (and their families) for an appropriate period. The Government now intends to bring forward Regulations to implement this change and bring much needed clarity to one of the most obscure aspects of UK copyright law.



Note to respondents

When responding, please indicate whether you are responding as an individual or on behalf of an organisation. If you are responding on behalf of an organisation, please make it clear whom the organisation represents.

It is not necessary to respond to all the questions; you are welcome to provide answers only to those issues of most interest or relevance to you. The Government will note all responses and publish a response document in due course, but will not respond to comments on an individual basis.

The consultation will run for 6 weeks and the closing date for responses is Friday 12th December 2014. A response can be submitted by email or by post.

Please submit responses to:

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Copyright and Enforcement Directorate
Intellectual Property Office
Concept House
Cardiff Road
Newport

Tel: 0300 300 2000

Fax: 020 7034 2826

Email: copyrightconsultation@ipo.gov.uk

Confidentiality and data protection

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want other information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this, if you consider information you have provided to be confidential, it would be helpful if you could explain to us why this is the case. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the IPO.

The IPO will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

The context

This consultation deals with copyright in long-unpublished works.

In the UK, copyright comes into being as soon as a work is created, without any need for publication or registration. All copyright works created today are protected for a fixed period of time. When that time runs out, that work may be freely copied by anyone. 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. We call this **the general rule**.

Example 1: A novel written in 1990 whose author died in 2010 will be protected by copyright from 1990 until the end of 2080. This is true whether the work is published or not. On 1 January 2081, the novel may be copied freely.

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 after the end of the year of *publication*. This meant that if the work was never published, copyright never expired.

This was the case for literary, dramatic and musical works, as well as engravings and photographs. The length of the term of protection in sound recordings and films was also calculated from the date of publication, meaning copyright in unpublished sound recordings and films could also last forever.

Example 2: A novel written and published in 1950 whose author died in 1960 would have been protected by copyright from 1950 until 50 years after the end of the year in which the author died, or until the end of 2010.

However, if the work was not published until 1970, the work would have been protected by copyright from 1950 until the end of 2020.

Finally, if the work was never published, the work would still have been protected by copyright today.

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**. For most works, the general rule does not take the date of publication into account when determining the date on which copyright expires.

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. We call this **the 2039 rule**.

Example 3: A novel written in 1950 whose author died in 1960 and which was not published before 1 August 1989 will be protected by copyright from 1950 until the end of 2039.

The problem

The general rule was put in place to bring simplicity and clarity to copyright law, by ensuring that copyright lasts for a fixed period of time, and that the date on which copyright in a work expires can be easily calculated by reference to the relevant general rule. For example, copyright in all literary works expires 70 years after the year of the author’s death, and copyright in all sound recordings expires either 50 years after the year the work was made, or 70 years after the year of publication.

However, the existence of the 2039 rule undermines this objective by preserving a complex set of ‘special case’ works in UK copyright law. This means people wishing to use copyright materials face greater administrative burdens than would be the case if all works fell within the relevant general rule.

By way of illustration, the owner of copyright (who is not necessarily the author) in a work enjoys the exclusive right to deal with their work in certain ways, including copying and publication. These are called ‘the acts restricted by copyright’ and are found in Chapter II of the CDPA.

A third party wishing to do one of these acts, such as publish a work, must first establish whether the work is still protected by copyright, and if it is they must seek the permission of the copyright owner.

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?
- did publication take place before 1 August 1989?

If the answers to these questions reveal that the work is still protected by copyright, a third party must identify the copyright owner, and obtain their permission, in order to publish the work. Many works falling within the 2039 rule will be very old, and it may be very difficult, time consuming, and often impossible, to identify the copyright owner or obtain the relevant permissions.

In some cases it is possible for works subject to the 2039 rule to be protected for hundreds of years longer than if the work fell within the general rule.

Example 4: Suppose an unpublished manuscript by William Shakespeare (d.1616) was discovered in 2014. If the general rule applied, the work would have been protected until 1686 and could be freely published today.

However because the 2039 rule applies, the work cannot be published lawfully without the permission of the copyright owner (whom it may be impossible to identify) until 1 January 2040.

With regard to cultural institutions such as libraries, museums and archives, when a user seeks access to a 2039 work with a view to publication, either they or the institution must undertake a difficult and time consuming process to locate the copyright owner. This may be a costly process for works whose author died more than 70 years previously. If the rights holder cannot be identified, which will often be the case given the age of many of these works, the user and the institution must undertake a risk based assessment as to whether a copyright owner is likely to turn up and claim damages for the infringement.

In practice, there appears to be little public awareness of the 2039 rule, and most people are likely to expect very old works to be out of copyright. Therefore, many will already reproduce such materials without seeking permission to do so, in breach of the law.

It would appear that the UK is the only EU Member State where such material remains protected by copyright and is not freely available in the public domain, which puts our cultural institutions and those who would make use of their collections at a significant disadvantage when compared to European counterparts.

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

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

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

Example 5: Copyright in the published works of Lord Byron (d.1824) expired in 1894, but he was also author of many unpublished works. These fall within the 2039 rule, and may not be published without permission of the copyright owner until 1 January 2040.

The aims

The Government proposes to standardise and simplify the rules on duration of copyright by bringing works currently subject to the 2039 rule within the relevant general rule. This policy is intended to achieve, without unreasonable costs to business or rights holders:

1. a reduction in the administrative burden and legal risk taken on by cultural institutions, private enterprises and individuals wishing to reproduce and publish previously unpublished works;
2. an increase in the publication and dissemination of these works, which may be of economic, historical, or cultural value; and
3. improved clarity in UK copyright law, and consistency with others in Europe.

Q4 If you are the copyright owner of a work subject to the 2039 rule, do you agree with this policy?

As set out in the Impact Assessment at Annex B, for works whose copyright would have already expired had they been subject to the general rule, this policy will result in copyright in that work coming to an end.

Example 6: A published literary work whose author died in 1940 would have fallen out of copyright in 2010, but that same work, if not published before 1989, would remain protected by copyright until 2039. The Government intends that copyright in such a work would terminate either on implementation of these reforms, or following a fixed period thereafter.

For other works, the date on which copyright expires will be brought forward in time, in line with the date on which copyright would have expired if the work was subject to the general rule.

Example 7: Under the current law, a published literary work whose author died in 1950 would fall out of copyright in 2020, but that same work, if not published before 1989, would remain protected by copyright until 2039. The Government intends that such a work should be protected until implementation of these reforms, or following a fixed period thereafter, whether published or unpublished.

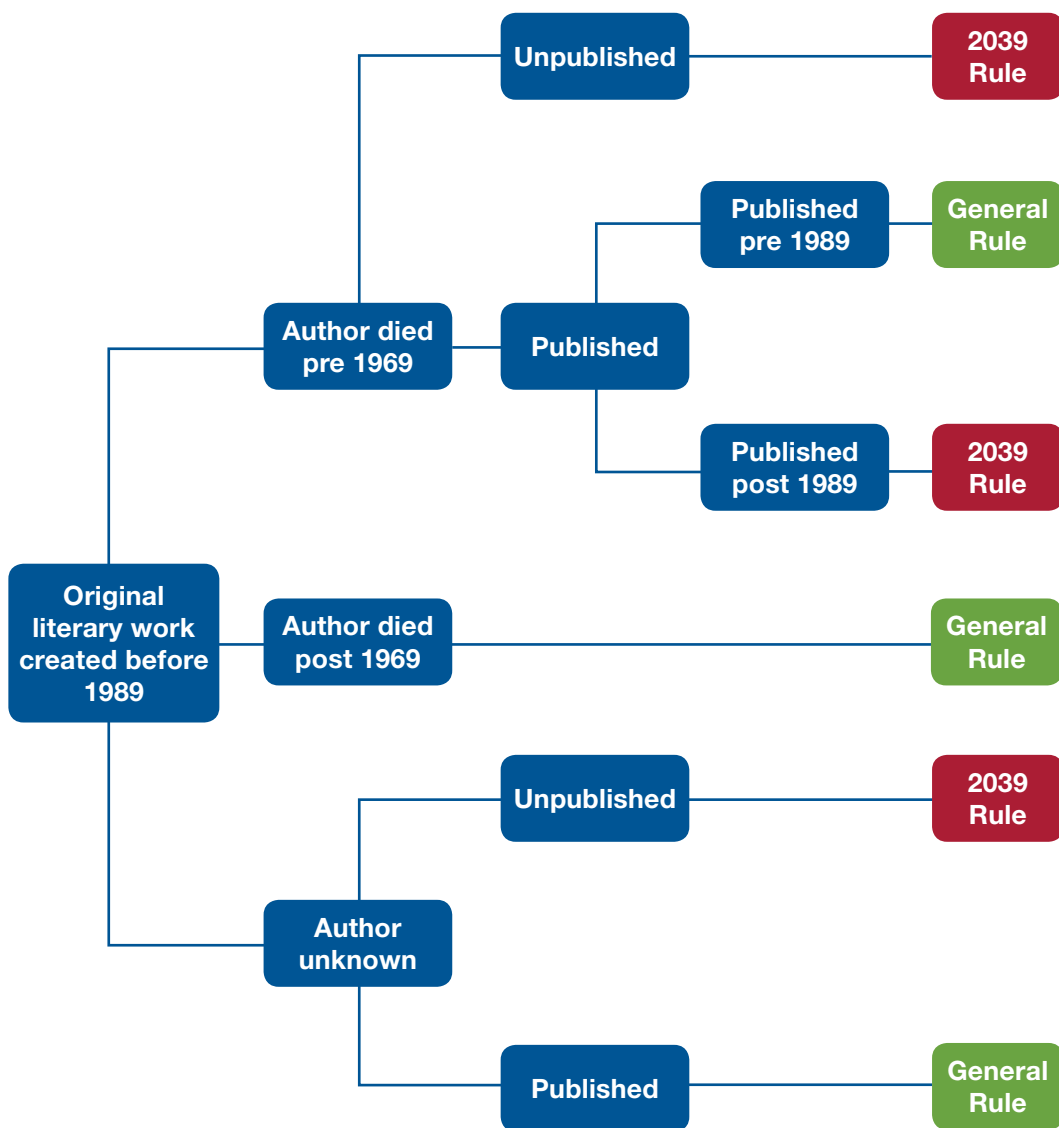
Example 8: A sound recording made in 1965 and released as a record that year would be protected by copyright until 2035, but if records were never issued to the public it would be protected until 2039. The Government intends that such a work should be protected until implementation of these reforms, or following a fixed period thereafter; however, subsequent publication may serve to extend the term in accordance with the general rule on duration of copyright in sound recordings.

The following diagrams represent the current rules for determining when copyright expires in an original literary work. They show the stark contrast in legal complexity between works created before and after the CDPA came into force. As can be seen, there is a marked increase in the number of factors which must be considered for a work created before 1989 as compared to a work created after 1989. Determining whether copyright has expired in a work is clearly simpler for works which can be presumed to be subject to the general rule. These diagrams only relate to original literary works, the rules for other works may differ slightly.

Diagram 1: Duration of copyright for works created after 1989



Diagram 2: Duration of copyright for works created before 1989



The Government aims to apply the same rules on copyright duration to works created before and after 1989, so that unpublished works are no longer protected for a longer period of time than published works, and copyright clearance becomes a simpler process for all works:

Diagram 3: Duration of copyright for works created before 1989



The detail

Enabling powers

Power to remove the 2039 rule in respect of some works, so as to standardise the term of protection afforded to unpublished and published works existing at 1 August 1989, was set out in the Enterprise and Regulatory Reform Act 2013 (“ERR Act”), section 76.

That section, amending section 170 of the CDPA, provides that the Secretary of State may by regulations amend Schedule 1 to the CDPA so as to reduce the duration of copyright in existing works which are unpublished. The power does not extend to photographs or films, so these works do not form part of this consultation.

The power goes on to state that the regulations may provide for the copyright to expire –

- with the end of the term of protection of copyright laid down by Directive 2006/116/ec or at any later time (i.e. the term may not be reduced to less than the minimum term granted by the EU Term Directive);
- subject to that, on the commencement of the regulations or at any later time.

The Government intends to use this power to replace the 2039 rule with the relevant general rule either on commencement of the regulations, or following a fixed period thereafter. It may deviate from this in order to make transitional provisions as discussed below.

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

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?

Works affected by the 2039 rule

The 2039 rule applies to different types of works in different ways, as set out in Schedule 1 to the CDPA and summarised below:

A Anonymous or pseudonymous works

Anonymous and pseudonymous literary, dramatic, musical or artistic works (other than photographs) are subject to the 2039 rule if unpublished prior to 1989. If between 1 August 1989 and 31 December 2039 the work is made available to the public, copyright in the work expires in accordance with the relevant general rule.

Anonymous and pseudonymous works in which copyright subsists may be used without risk of infringement if the conditions in section 57 are satisfied.

B Works of which the author has died

Literary, dramatic and musical works of which the author has died and which had not been published, performed in public, offered for sale to the public or broadcast as of 1 August 1989 are subject to the 2039 rule, as are unpublished engravings of which the author has died. This is true even if they are subsequently published after 1989.

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. Where the author died after 1969, the term of protection afforded by the 1995 regulations would be longer than that provided for under the 2039 rule. In these cases the 1995 Regulations prevail and the 2039 rule does not apply.

We expect the majority of works affected by this policy to fall into this category.

C Unpublished photographs taken on or after 1 June 1957

These works are subject to the 2039 rule, and remain so even if subsequently published, but photographs are unaffected by this policy so are outside of the scope of this consultation.

D Unpublished sound recordings made on or after 1 June 1957

These works are subject to the 2039 rule unless published between 1989 and 2039, in which case they fall within the general rule for sound recordings (50 years from the end of the year of making or 70 years from the end of the calendar year of publication).

E Films which have neither been published nor registered under the Cinematograph Films Act 1938 and subsequent legislation.

These works are subject to the 2039 rule unless published between 1989 and 2039, in which case copyright expires fifty years after the end of the calendar year in which it is published. Films are not covered by the policy and so are outside of the scope of this consultation.

F 1775 works

The Copyright Act 1775 granted perpetual copyright to some works given or bequeathed to the universities of Oxford, Cambridge, St Andrews, Glasgow, Aberdeen, Edinburgh, and the colleges of Eton, Westminster and Winchester. The CDPA replaced these perpetual copyrights with the 2039 rule. The 1977 Whitford Committee identified only two works subject to the 1775 provisions and which were still in print. Both are now freely available online.

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?

G Crown copyright works

The Copyright Act 1911 created Crown copyright, vesting in any work prepared or published by or under the direction or control of the reigning monarch or any Government department, whether before or after commencement of the Act.

Crown copyright remains a part of copyright law today, and the duration of copyright in literary, dramatic, musical and artistic Crown copyright works is governed by section 163 of the CDPA. This provides for copyright to expire 125 years after the end of the calendar year in which the work is made, or earlier if published commercially within the first 75 years. Other Crown copyright works are subject to the same term of protection as non-Crown copyright works. Crown copyright belongs to Her Majesty, and The National Archives are responsible for Crown copyright generally.

Crown copyright literary, dramatic or musical works that were unpublished prior to commencement of the CDPA are subject to the 2039 rule if this is longer than the term provided by the general rule. Crown copyright engravings and photographs taken on or after 1 June 1957 are subject to the 2039 rule, Crown copyright films and sound recordings which are unpublished (or unregistered) are subject to the 2039 rule unless published between 1989 and 2039 in which case copyright expires 50 years after the end of the calendar year of publication.

In practice, much Crown copyright material is available under the Open Government Licence, so we do not expect there to be a significant impact as a result of removing the 2039 rule in respect of Crown copyright works.

H Copyright vesting in certain international organisations

The CDPA provides copyright protection for some works which otherwise wouldn't be protected in the UK because they were made by employees of international organisations. Such works which were unpublished as of 1 August 1989 are subject to either the 2039 rule or the term it would have received under the 1956 Act, whichever is the shorter.

Publication

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”.

The publication right is an economic right which comes into being when an unpublished work in which copyright has expired is published for the first time.

It 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, and is based on a right that previously existed in German law to encourage the publication of previously unpublished works.

The 2039 rule means that the copyright in most unpublished works has not yet expired, regardless of the age of the work. Therefore it is not possible for the vast majority of works to currently benefit from the publication right in the UK. However, termination of the copyright in 2039 works as a result of this policy would mean that many hitherto unpublished works would benefit from protection under the publication right when published for the first time.

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. However, private owners of works protected by copyright – such as letters and manuscripts – can also benefit from the publication right. These private owners may be individuals or businesses.

In some cases the owner of the physical item and the owner of the copyright in that item will be the same person. This may be the case for example where the owner of an item is a private individual who is related to the creator of the work, such as someone who owns their grandfather's war diaries. In such a case, the person will be in a similar position as under the current law, as they will be able either to prevent publication of the work (by controlling the physical item) or to publish it and benefit from a period of protection under the publication right.

However, the Government is aware that some copyright works subject to the 2039 rule may have been placed in legal deposit libraries, universities and archives for safekeeping or research purposes on the assumption that copyright would protect the

wider dissemination of the work. The owners of copyright in works which expires as a result of this policy may lose control of the work.

For example, this may be the case for private family archives held in the collections of third party organisations. The Government would like to learn more about the potential impact on the owners of these works and whether special provision should be made for such collections.

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

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

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?

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?

Example 9: A novel whose author died in 1940 and which has never been published would remain protected by copyright until 2039. The Government intends that copyright in such a work would terminate on either implementation of these reforms, or following a fixed period thereafter.

At that stage, the first person to publish the work, whether they were the copyright owner prior to implementation or a third party with no connection to the work, would acquire the 25 year publication right.

Publication of 2039 works after 1989

Some works in category B above may have been first published after 1989 on the assumption that copyright would run until 2039, owing to the work’s status as an unpublished work pre-1989. The Government’s policy would have the effect of shortening the duration of copyright in these works.


Further, because the publication right arises on first publication of a previously unpublished work, such a work would no longer be eligible to receive the 25 year term of protection provided for by the 1996 Regulations. Accordingly, it may be just to make special provision for transitional cases such as these.

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

Unpublished sound recordings

By virtue of the definition of ‘publication’ for the purposes of the 2039 rule, certain films and photographs which are currently under commercial exploitation via film and picture libraries may be considered ‘unpublished works’.

Due to their commercial exploitation these works are excluded from the policy, as it is not the Government’s intention to undermine existing markets which have developed



to allow the exploitation of unpublished works. It may be that similar arguments apply to sound recordings. Currently, the nature of the market for pre-1989 sound recordings, and the extent to which commercially-exploited sound recordings would be considered to be “published” under the relevant definition, is unclear, as is the impact of this policy on owners of sound recordings. It should be noted in this context that sound recordings do not benefit from the publication right.

As one of the Government’s aims with this policy is to provide greater clarity and consistency to copyright law, both in the UK and the EU, the Government would prefer to apply the policy to sound recordings as well as other works unless there were a clear case not to do so.

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?

On the other hand, most sound recordings falling within the 2039 rule (i.e. those made between 1957 and 1989, unpublished when the CDPA came into force, and remaining unpublished today) will contain works which will remain protected by copyright in the literary and musical works under the general rule (this will be true of all works created post-1969, and most created between 1957 and 1969). Therefore the practical benefits to third parties of reducing this protection will be more limited, as these other rights will need to be cleared. Moreover, libraries, archives and museums, would appear to have a greater interest in publishing older works of cultural and historical significance.

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)?

ANNEX A

Consultation questions

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
- The proportion of such works for which the rule inhibits publication
- The potential number of works which would be published if the rule were removed.
- The scale of administrative burdens currently shouldered by cultural institutions in relation to 2039 works
- The benefits to institutions of the removal of the 2039 rule
- Quantifiable costs to copyright owners

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.

- Q1. Do you own any works subject to the 2039 rule or hold any in your collection? If so, how many?**
- Q2. If you hold copyright works in your collection, please describe the rights clearance process at your institution, along with cost estimates if possible.**
- Q3. Does the 2039 rule impact on this process, and if so, how?**
- 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?**
- Q5. Having regard to the enabling power, do you agree with the Government’s proposed approach?**
- 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?**
- 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?**
- Q8. Do you consider that this policy would encourage or facilitate the publication of previously unpublished works?**
- Q9. Have you any plans to publish previously unpublished works following the implementation of this policy? If so, how many?**



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

ANNEX B

Impact assessment (IA)

Title: Reducing the duration of copyright in certain unpublished works IA No: BISIPO008 Lead department or agency: The Intellectual Property Office Other departments or agencies:	Impact Assessment (IA)
	Date: 04/08/2014
	Stage: Consultation
	Source of intervention: Domestic
	Type of measure: Secondary legislation
Contact for enquiries: andrew.wall@ipo.gov.uk	

Summary: Intervention and Options	RPC Opinion: Green
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Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Two-Out?
£0m	£0m	£0m	Yes
			Measure qualifies as OUT- Zero Net Cost

What is the problem under consideration? Why is government intervention necessary?

Under the transitional provisions of the Copyright, Designs and Patents Act 1988, unpublished works created on any date prior to 1 August 1989 remain protected by copyright until the year 2039. As a result these works may be protected for much longer than 70 years after the end of the calendar year in which the author died, as is the general rule for most works. A proportion of these works, such as medieval manuscripts and pre-war diaries, have historical, cultural, or economic value, but an often complex and time-consuming rights clearance process is necessary before they can be published. If rights cannot be cleared (e.g. if copyright owners cannot be identified), they cannot be lawfully published. In the interests of fairness, legal clarity, and reduced cost to business, cultural institutions and individuals, Government intervention is necessary to standardise the term of copyright protection for published and unpublished works.

What are the policy objectives and the intended effects?

The policy objective is to provide that copyright works are subject to the same rules on duration regardless of their publication status prior to 1989, in order to: (a) reduce the administrative burden and legal risk taken on by cultural institutions, private enterprises and individuals wishing to reproduce and publish previously unpublished works; (b) encourage the publication and dissemination of these works, which may be of economic, historical, or cultural value; and (c) provide greater legal certainty, as unpublished works created before 1989 will no longer be treated differently to all other copyright works, so users of copyright material will be able to rely on the same rules on duration of copyright, regardless of the publication status of the work they intend to use.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Option 1: Do nothing.

Option 2a: (Preferred) Reduce the duration of copyright in 2039 works (other than photographs and films), to bring the term of protection for these works within the relevant general rule from the date of commencement.

Option 2b: Reduce the duration of copyright in 2039 works (other than photographs and films), to bring the term of protection for these works within the relevant general rule at some future time.

Option 3a and 3b: As per 2a and 2b but excluding sound recordings from the policy.

Will the policy be reviewed? It will be reviewed. If applicable, set review date: 05/2020					
Does implementation go beyond minimum EU requirements?			No		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro Yes	< 20 Yes	Small Yes	Medium Yes	Large Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded: N/A		Non-traded: N/A

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible SELECT SIGNATORY: _____ Date: _____

Summary: Analysis & Evidence

Policy Option 2a

Description: (Preferred) Reduce the duration of copyright in 2039 works (other than photographs and films), to bring the term of protection for these works within the relevant general rule from the date of commencement.

FULL ECONOMIC ASSESSMENT

Price Base Year 2014	PV Base Year 2014	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: NA	High: NA	Best Estimate: NA

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	NA	NA	NA
High	NA	NA	NA
Best Estimate	NA	NA	NA

Description and scale of key monetised costs by 'main affected groups'

It has not been possible to monetise the costs due to lack of available data. Evidence will be gathered at consultation stage to try and provide further information on the scale of potential costs.

Other non-monetised costs by 'main affected groups'

Copyright owners whose works fall out of copyright may lose the ability to commercially exploit their copyright works and control the exploitation by others. They may also be subject to the indirect cost of re-imposing control over the physical work after copyright has expired, such as where the work has been deposited in an archive on the basis that copyright would prevent its wider publication.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	NA	NA	NA
High	NA	NA	NA
Best Estimate	NA	NA	NA

Description and scale of key monetised benefits by 'main affected groups'

It has not been possible to monetise the benefits due to lack of available data. Evidence will be gathered at consultation stage to try and provide further information on the scale of potential benefits.

Other key non-monetised benefits by 'main affected groups'

To cultural institutions and others, a reduced administrative burden and reduced litigation risk surrounding the use of unpublished works; to copyright owners and others seeking to publish previously unpublished works, who may be able to commercialise previously unexploited works and in whom the publication right will vest; to society from improved access to information held in unpublished copyright material.

Key assumptions/sensitivities/risks

Discount rate (%)

3.5

Where an organisation refers to 'archival items' in its collection, this may refer to single copyright works, or it may refer to groups of several, such as a number of letters comprising a single course of correspondence. Where it has been possible to use estimate figures therefore, these are likely to be conservative estimates.

BUSINESS ASSESSMENT (Option 2a)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs: NA	Benefits: NA	Net: NA	Yes	OUT - Zero Net Cost

Summary: Analysis & Evidence

Policy Option 2b

Description: Reduce the duration of copyright in 2039 works (other than photographs and films), to bring the term of protection for these works within the relevant general rule at some future time.

FULL ECONOMIC ASSESSMENT

Price Base Year 2014	PV Base Year 2014	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: NA	High: NA	Best Estimate: NA

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	NA	NA	NA
High	NA	1	NA
Best Estimate	NA	NA	NA

Description and scale of key monetised costs by 'main affected groups'

It has not been possible to monetise the costs due to lack of available data. Evidence will be gathered at consultation stage to try and provide further information on the scale of potential costs.

Other non-monetised costs by 'main affected groups'

Copyright owners whose works fall out of copyright may lose the ability to commercially exploit their copyright works and control the exploitation by others. They may also be subject to the indirect cost of re-imposing control over the physical work after copyright has expired, such as where the work has been deposited in an archive on the basis that copyright would prevent its wider publication. These costs would not come about until such a time as was specified by the Regulations.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	NA	NA	NA
High	NA	1	NA
Best Estimate	NA	NA	NA

Description and scale of key monetised benefits by 'main affected groups'

It has not been possible to monetise the benefits due to lack of available data. Evidence will be gathered at consultation stage to try and provide further information on the scale of potential benefits.

Other key non-monetised benefits by 'main affected groups'

To cultural institutions and others, a reduced administrative burden and reduced litigation risk surrounding the use of unpublished works; to copyright owners and others seeking to publish previously unpublished works, who may be able to commercialise previously unexploited works and in whom the publication right will vest; to society from improved access to information held in unpublished copyright material. These benefits could not be realised until such a time as was specified by the Regulations.

Key assumptions/sensitivities/risks	Discount rate (%)	3.5
Where an organisation refers to 'archival items' in its collection, this may refer to single copyright works, or it may refer to groups of several, such as a number of letters comprising a single course of correspondence. Where it has been possible to use estimate figures therefore, these are likely to be conservative estimates.		

BUSINESS ASSESSMENT (Option 2b)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs: NA	Benefits: NA	Net: NA	Yes	OUT - Zero Net Cost

Summary: Analysis & Evidence

Policy Option 3a

Description: Reduce the duration of copyright in 2039 works (other than photographs, films and sound recordings), to bring the term of protection for these works within the relevant general rule from the date of commencement.

FULL ECONOMIC ASSESSMENT

Price Base Year 2014	PV Base Year 2014	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: NA	High: NA	Best Estimate: NA

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	NA	NA	NA
High	NA	1	NA
Best Estimate	NA	NA	NA

Description and scale of key monetised costs by 'main affected groups'

It has not been possible to monetise the costs due to lack of available data. Evidence will be gathered at consultation stage to try and provide further information on the scale of potential costs.

Other non-monetised costs by 'main affected groups'

Copyright owners whose works fall out of copyright may lose the ability to commercially exploit their copyright works and control the exploitation by others. They may also be subject to the indirect cost of re-imposing control over the physical work after copyright has expired, such as where the work has been deposited in an archive on the basis that copyright would prevent its wider publication.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	NA	NA	NA
High	NA	1	NA
Best Estimate	NA	NA	NA

Description and scale of key monetised benefits by 'main affected groups'

It has not been possible to monetise the benefits due to lack of available data. Evidence will be gathered at consultation stage to try and provide further information on the scale of potential benefits.

Other key non-monetised benefits by 'main affected groups'

To cultural institutions and others, a reduced administrative burden and reduced litigation risk surrounding the use of unpublished works; to copyright owners and others seeking to publish previously unpublished works, who may be able to commercialise previously unexploited works and in whom the publication right will vest; to society from improved access to information held in unpublished copyright material.

Key assumptions/sensitivities/risks

Discount rate (%) 3.5

Where an organisation refers to 'archival items' in its collection, this may refer to single copyright works, or it may refer to groups of several, such as a number of letters comprising a single course of correspondence. Where it has been possible to use estimate figures therefore, these are likely to be conservative estimates.

BUSINESS ASSESSMENT (Option 2a)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs: NA	Benefits: NA	Net: NA		

Summary: Analysis & Evidence

Policy Option 3b

Description: Reduce the duration of copyright in 2039 works (other than photographs, films and sound recordings), to bring the term of protection for these works within the relevant general rule at some future time.

FULL ECONOMIC ASSESSMENT

Price Base Year 2014	PV Base Year 2014	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: NA	High: NA	Best Estimate: NA

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	NA	NA	NA
High	NA	NA	NA
Best Estimate	NA	NA	NA

Description and scale of key monetised costs by 'main affected groups'

It has not been possible to monetise the costs due to lack of available data. Evidence will be gathered at consultation stage to try and provide further information on the scale of potential costs.

Other non-monetised costs by 'main affected groups'

Copyright owners whose works fall out of copyright may lose the ability to commercially exploit their copyright works and control the exploitation by others. They may also be subject to the indirect cost of re-imposing control over the physical work after copyright has expired, such as where the work has been deposited in an archive on the basis that copyright would prevent its wider publication. These costs would not come about until such a time as was specified by the Regulations.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	NA	NA	NA
High	NA	NA	NA
Best Estimate	NA	NA	NA

Description and scale of key monetised benefits by 'main affected groups'

It has not been possible to monetise the benefits due to lack of available data. Evidence will be gathered at consultation stage to try and provide further information on the scale of potential benefits.

Other key non-monetised benefits by 'main affected groups'

To cultural institutions and others, a reduced administrative burden and reduced litigation risk surrounding the use of unpublished works; to copyright owners and others seeking to publish previously unpublished works, who may be able to commercialise previously unexploited works and in whom the publication right will vest; to society from improved access to information held in unpublished copyright material. These benefits could not be realised until such a time as was specified by the Regulations.

Key assumptions/sensitivities/risks

Discount rate (%) 3.5

Where an organisation refers to 'archival items' in its collection, this may refer to single copyright works, or it may refer to groups of several, such as a number of letters comprising a single course of correspondence. Where it has been possible to use estimate figures therefore, these are likely to be conservative estimates.

BUSINESS ASSESSMENT (Option 2b)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs: NA	Benefits: NA	Net: NA	Yes	OUT - Zero Net Cost

Evidence Base (for summary sheets)

Background

Prior to commencement of the Copyright, Designs and Patents Act 1988 (CDPA) (on 1 August 1989), most unpublished works enjoyed perpetual copyright protection. The transitional provisions of the CDPA abolished this perpetual copyright. Instead they provided that the duration of copyright in these works would be reduced to a fixed term of 50 years from the end of the calendar year in which the relevant part of the Act came into force, i.e. from 31 December 1989. This means that copyright in affected works subsists until 31 December 2039. This rule on copyright duration is referred to in this impact assessment as **the 2039 rule**.

On the other hand, all works created following commencement of the CDPA, and published works created before it, fall under the general rule for copyright duration. Original literary, dramatic, musical and artistic works are protected from the date of creation until 70 years following the end of the year of the creator's death. Other works, including sound recordings and broadcasts, are protected for different periods, as set out in Chapter I of the CDPA. This rule on copyright duration is referred to in this impact assessment as **the general rule**.

Problem under consideration

The 2039 rule creates an imbalance of protection between published and unpublished works created prior to the commencement of the CDPA, with a result that many unpublished works receive longer protection than published works. This creates complexity in the law, and means people wishing to use copyright materials face additional administrative burdens in relation to unpublished works compared to published works.

A person wishing to publish a work must establish the date of creation of the work (i.e. before or after 1 August 1989) and the publication status of the work in 1989, in order to determine whether the general rule or the 2039 rule applies. If the work is in copyright they must identify the copyright owner, and obtain their permission, in order to publish the work. Many works falling within the 2039 rule will be very old, and it may be very difficult, time consuming, and often impossible, to identify the copyright owner or obtain the relevant permissions.

As an example, a literary work created by an author who died in the year 1960 would be subject to the general rule that copyright lasts for 70 years after the end of the year of the death of the author – or until the year 2030 – if that work was published before 1989. However, if the same copyright work was unpublished in 1989, its copyright lasts until the year 2039.

In some cases it is possible for works subject to the 2039 rule to be protected for hundreds of years longer than if the work fell within the general rule. For example, the published works of William Shakespeare (d. 1616) have long been out of copyright, and can be reproduced without copyright permission. However, an unpublished manuscript by William Shakespeare will fall within the 2039 rule so, under copyright law, cannot be published without permission from the copyright owner (whom it may be impossible to identify).

In practice, there appears to be little public awareness of the 2039 rule, and most people are likely to expect very old works to be out of copyright. Therefore, many will already reproduce such materials without seeking permission to do, in breach of the law.

Affected works

The transitional provisions in Schedule 1 to the CDPA apply the 2039 rule to a variety of different types of works. The Government's proposals for reform relate to six categories of unpublished works made before 1 August 1989.

The following descriptions refer to the status of the work as of 1 August 1989, and 'unpublished' must be interpreted as unpublished at that time. Subsequent publication of a work in category 1 will not affect its status as a 2039 work. Subsequent publication of a work in category 2 will bring it within the relevant general rule. Subsequent publication or the identification of the author of a work in category 3 will bring it within the relevant general rule. For many works in category 4, subsequent publication will bring a work within the general rule. Subsequent publication does not affect the status of works in categories 5 or 6.

1. Literary, dramatic and musical works of which the author has died and which have not been published, performed in public, offered for sale to the public or broadcast, and unpublished engravings of which the author has died.
2. Unpublished sound recordings made on or after 1 June 1957
3. Unpublished anonymous and pseudonymous literary, dramatic, musical and artistic works (other than photographs)
4. Unpublished literary, dramatic or musical works and sound recordings subject to crown copyright
5. Works previously subject to perpetual rights conferred on certain universities and colleges by the Copyright Act 1775 (“1775 works”)
6. Unpublished works whose copyright vests in certain international organisations

These different categories of work are described below.

1) Literary, dramatic and musical works of which the author has died and which have not been published, performed in public, offered for sale to the public or broadcast, and unpublished engravings of which the author has died

The majority of works in this category will be text-based works such as letters, diaries, scripts, sheet music and manuscripts.

In some cases it is possible to trace the current copyright owner of an unpublished work whose author has died, though the cost of doing so may be disproportionately high. This may be the case when there is a contract for exploitation of the work assigning copyright to a third party, (e.g. a publishing contract), or when copyright has passed to the author’s estate, and the relevant heir can be identified. However, the process of tracing copyright owners and clearing rights is a lengthy and complicated one, which becomes more difficult the older the work is, and in many cases it will not be possible to identify the owner. Where it is possible to identify the owner, the age of the work may mean the owner is not aware that they are the copyright owner, and may have no more interest in the work than a member of the general public.

As copyright is the right of the copyright owner to authorise or prohibit the reproduction, communication to the public etc. of a copyright work, on discovering that they own copyright in a work, these individuals are faced with three main options: They can grant free access to the work, offer to receive a fee by licensing the work, or they can refuse access to the work altogether. The result is that these copyright owners are the gatekeepers to a wealth of historical and culturally significant information.

The 2039 rule applies to works in this category which were unpublished at 1 August 1989, and whose author died before 1969. Where the author of a work died after this date, their works will fall within the general rule. Some of these works may have been published subsequent to 1989 on the assumption that copyright would run until 2039. This publication will have rendered those works ineligible for protection under the publication right, and transitional provision may be required in respect of these works.

2) Unpublished sound recordings made on or after 1 June 1957

Under the Copyright Act 1956, publication in relation to a sound recording means ‘the issue to the public of records embodying the recording’. Therefore, sound recordings made between the commencement of the Copyright Act 1956 (1 June 1957) and the commencement of the Copyright, Designs and Patents Act 1988 (1 August 1989), which have not been issued to the public in some recorded form (e.g. on cassette tape or CD) fall within the 2039 rule.

On publication of a previously unpublished sound recording, the 2039 rule is replaced with a term of protection of 70 years from the end of the calendar year in which the work was published. For example an unpublished sound recording made in 1960 would remain protected by copyright until the year 2039, however if the recording was published in 2039 it would be protected until the year 2109.

The policy to replace the 2039 rule with the general rule will mean sound recordings made between 1957 and 1964, and which have never been published, will fall out of copyright. The new term for other work must

be calculated on an individual basis according to the general rule. For example, a sound recording made in 1980 and which has never been published will be protected by copyright until 2030, instead of until 2039.

It should be noted that for sound recordings there will likely be underlying literary and musical works which may have a longer term of protection than the sound recording itself. This may serve to prevent the benefits of the policy from being realised in respect of sound recordings.

3) Unpublished anonymous and pseudonymous literary, dramatic, musical and artistic works (other than photographs)

Anonymous works are those whose author is unknown because of a lack of attribution. A work might also be held to be anonymous if its authorship is not sufficiently clear as to be capable of identification, such as those written by authors with commonplace names, e.g. John Smith. Pseudonymous works are those whose author is unknown because they chose to write under a false name, such as legal texts written under the name of 'A Barrister'. Unpublished works of this type are subject to the 2039 rule.

Under a specific provision in the CDPA (Section 57), works under this category can currently be used without risk of copyright infringement where it is reasonable to assume either that the copyright has expired, or that the author died 70 years or more before the beginning of the calendar year in which the act is done. It is rarely reasonable to assume that copyright in a work has expired without having reference to the likely date of death of the author, therefore an investigation into the likely date of death of the author will be necessary in most cases.

Some institutions hold that for a work which can be proved to have been written before circa 1880, there is an acceptable level of risk to the assumption that the author has been dead for over 70 years. However, this still requires a complex factual and legal analysis of a work before such a use can be deemed to fall within the permitted act in section 57 of the CDPA. Such an investigation will be necessary in relation to both 2039 works and works falling within the general rule, so in practice this policy is expected to have little or no impact on this category of works.

4) Unpublished literary, dramatic or musical works and sound recordings subject to crown copyright

Crown copyright works are affected in the same way as privately owned copyright works, and it is proposed to reduce the term of protection for these also. However as literary, dramatic and musical crown copyright works are protected under s163 for 125 years after making, rather than 70 years after the death of the author, and the 2039 only applies to these works if the 2039 rule provides for a longer term of protection than that of the general rule, the changes will only be relevant to such works made before 1914. Most crown copyright material is freely available under the Open Government Licence in any case, and any reduction in the term of copyright protection is in practice likely to have little impact on these works.

5) 1775 works

In its 1977 Report, the Whitford Committee wrote:

Under section 46(1) of the Copyright Act 1956 there are preserved to certain universities and colleges those perpetual copyrights covered by the copyright act 1775. It was possible for new perpetual copyrights to be created up to 1911. In fact the only examples we were given of titles still in print and believed to have a valid claim to protection under Section 46(1) are (selections of) two works published by Oxford University Press, namely Clarendon's *History of the Rebellion and Life*, both registered in 1775. Whether or not these are the only works still protected, clearly the works covered are by now of some antiquity and the copyrights of little commercial interest. It has been submitted that these rights should nevertheless be brought to an end as a matter of principle.

Accepting for the purpose of argument that there may have been some justification for the creation of these rights in 1775, it has been urged upon us that their continuation is in conflict with the right which it is today generally accepted society should have to a free and unrestricted use of all works after a stipulated period of protection. The ten universities and colleges known at some time to have enjoyed these rights have all been consulted. None pressed for the rights to

be retained. Unless it be thought that a case can be made out for retaining anomalies which are probably harmless and undoubtedly quaint, there seems no reason why these old rights should not be brought to an end, and we recommend that they should be.

A list of the 1775 works can be found in the register book of the Company of Stationers. Under the general rule, Clarendon's copyright in the works identified by the Whitford Committee would have expired in the year 1744, but are instead protected until 2039. It appears that the Whitford Committee's recommendation was overlooked, and it is proposed to implement it at last via these regulations. As both works can now be accessed online for free, any reduction in the term of copyright protection is in practice likely to have little impact on these works.

6) Unpublished works whose copyright vests in certain international organisations

The CDPA provides copyright protection for some works which otherwise wouldn't be protected in the UK because they were made by employees of international organisations. Such works which were unpublished as of 1 August 1989 are subject to either the 2039 rule or the term it would have received under the 1956 Act, whichever is the earlier.

The focus of this impact assessment

For the reasons given above, the main impacts of any amendments to the 2039 rule are expected to relate to categories 1 (unpublished literary, dramatic, and musical works) and 2 (unpublished sound recordings). Therefore the analysis which follows focuses on these categories of work.

For the purpose of calculating relevant dates in this Impact Assessment, it is assumed that the new regulations come into force in 2014.

Rationale for intervention

The current situation imposes a disproportionate administrative burden on cultural institutions and others whose collections contain 2039 works. When a user seeks access to a 2039 work with a view to publication, either they or the institution must take steps to locate the copyright owner, which may be a long and costly process for works whose authors died more than 70 years previously. If the rights holder can be identified, they may refuse to grant permission to use the work. They may also seek to monetise the work by issuing a licence or claiming royalties. If the rights holder cannot be identified, which will often be the case given the age of many of these works, the user and the institution must undertake a risk based assessment as to whether the rights holder is likely to turn up and claim damages for the infringement.

When a work is to be used for commercial purposes, this can even give rise to criminal liability.

Many 2039 works are likely to be of little commercial value to the copyright owner. If this were not the case, they would be exploited as such and would have been published prior to 1989. They may be of commercial interest to third parties, but due to their age and other factors it is impossible to identify the copyright owner in order to obtain a licence. In many cases 2039 works will be of particular historic or cultural significance due to their age and unpublished status, and it is in the public interest for these works to be available for publication. It is not in the public interest for these categories of works to be afforded a different term of protection to all others, granting a longer monopoly to owners of copyright in the works, merely because of their publication status prior to 1989.

The UK is the only EU Member State where such material remains protected by copyright and is not freely available in the public domain, which puts our cultural institutions and those who would make use of their collections at a significant disadvantage when compared to European counterparts.

Policy objective

Government policy is to remove the 2039 rule for unpublished works existing prior to commencement of the relevant part of the CDPA, thereby reducing their term of protection to that of the appropriate general rule (i.e. the lifetime of the author plus 70 years for literary, dramatic, musical and artistic works, 70 years from publication for sound recordings, and 125 years from creation for Crown copyright works).

Power to make these changes is set out in the Enterprise and Regulatory Reform Act 2013 (ERR Act), section 76, amending section 170 of the CDPA. This power, and therefore the policy objective, does not extend to reducing copyright duration for photographs or films.

Description of options considered

Option 1: Do nothing.

Option 2a: (Preferred) Reduce the duration of copyright in 2039 works (other than photographs and films), to bring the term of protection for these works within the relevant general rule from the date of commencement.

Option 2b: Reduce the duration of copyright in 2039 works (other than photographs and films), to bring the term of protection for these works within the relevant general rule at some future time.

Options 3a and 3b: As per 2a and 2b but excluding sound recordings from the policy.

Costs and benefits

Box A: Copyright and publication right

This impact assessment deals with two types of intellectual property protection - copyright and publication right – which apply to the same types of material, under different circumstances. It is useful to have a basic understanding of the differences between these types of protection before reading the assessment of options, below, as their interaction is often complex.

Copyright is an economic right allowing a copyright owner to benefit from his creative endeavour or investment by selling or licensing the right to deal with the work in a variety of ways. These include reproduction, distribution, rental or lending, public performance, communication to the public, and adaptation. Copyright benefits copyright owners in the form of the potential revenues which can be generated by the sale or license of these rights, which will usually result in the publication of the work. The copyright owner has these rights for the duration of copyright, in accordance with the relevant general rule, or the 2039 rule (see above) depending on its publication status.

Publication right is an economic right which comes into being when an unpublished work that has fallen out of copyright is published for the first time. It belongs to the person who first publishes the work, and gives that person equivalent rights to an owner of copyright. 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, and is based on a right that previously existed in German law to encourage the publication of previously unpublished works.

Owing to the 2039 rule, which means that the copyright in most unpublished works has not yet expired, regardless of their age, it is not possible for the vast majority of works to currently benefit from the publication right in the UK. However, termination of the copyright in 2039 works as a result of the options under consideration below would mean that many hitherto unpublished works would benefit from protection under the publication right when published for the first time.

Option 1: Do nothing

The 2039 rule would persist, and affected works would remain protected by copyright for a further 25 years, only falling into the public domain on 1st January 2040. This would perpetuate the administrative cost, the burden of risk, and the cultural disadvantages posed by the 2039 rule.

Following the introduction of changes to copyright exceptions, it is possible to use 2039 works in more ways than presently, which may justify taking no action. However, exceptions such as that for non-commercial text and data mining for research purposes cannot be fully utilised unless the work is first in a digital format, and the 2039 rule can act as a barrier to digitisation. The existence of exceptions is not sufficient to justify maintaining a different term of protection for these types of works merely because of their publication status and date of creation.

(Preferred) Option 2a : Reduce the duration of copyright in 2039 works (other than photographs and films), to bring the term of protection for these works within the relevant general rule from the date of commencement.

Proposed change

- 1) Literary, dramatic and musical works of which the author died before 1969 and which have not been published, performed in public, offered for sale to the public or broadcast as of 1 August 1989

For the above categories of 2039 works, this option would provide for copyright to terminate on commencement where the author of the work died before 1944. Copyright in these types of 2039 works whose author died between 1944 and 1969 will expire 70 years after the end of the calendar year in which the author died as per the general rule in the CDPA Section 12(2).

- 2) Unpublished sound recordings made on or after 1 June 1957

For this category of 2039 works, this option would provide for copyright to terminate on commencement for works made between 1 June 1957 and 31 December 1964. Copyright in works made between 31 December 1964 and 1 August 1989 will expire 50 years after the end of the calendar year in which the sound recording was made, as per the general rule for sound recordings.

Costs

There would be some costs to copyright owners from Option 2a.

Copyright is an economic right allowing a copyright owner to benefit from his creative endeavour or investment by selling or licensing the right to deal with the work in a variety of ways. These include reproduction, distribution, rental or lending, public performance, communication to the public, and adaptation. Copyright is a benefit to copyright owners in the form of the potential revenues which can be generated by the sale or license of these rights, which will usually result in the publication of the work.

The National Archives have estimated 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. See **Annex A and B** for details of the analysis behind these estimates. This is a conservative estimate, as a single archival item may comprise many individual works.

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, until the year 2039. The Government's proposals would reduce this period of protection to the same period of protection the work would benefit from under the relevant general rule. This is a cost to copyright owners – as it removes their rights altogether. This cost 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. For those 2039 works which have been subsequently published after 1989 on the assumption that protection would last until 2039, transitional provision may be necessary to minimise costs to business. This will be explored via consultation.

Data from The National Archives supports the view that there will be very little cost to copyright holders from this reduction in copyright term. 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 ('Moving Here'¹) 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 orphan² (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

¹ <http://webarchive.nationalarchives.gov.uk/+/http://www.movinghere.org.uk/about/default.htm>

² A copyright work for which one or more of the rights holders cannot be located

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 works, and have every incentive to do so given the approach of the 2039 expiry limit.

In addition to the cost to copyright owners in the form of lost rights, costs could also arise indirectly where copyright owners whose works are held in archives and museums and who lose control of the work through the loss of copyright in the work, seek to re-impose control of the work by placing restrictions on the use of the physical work beyond the expiry of copyright, e.g. via privately negotiated contracts. We expect these instances to be rare, but will seek to gather more evidence via consultation.

Benefits

There are three main expected streams of benefits from the implementation of Option 2:

- a) A reduction in administrative burden and risk of infringement currently shouldered by cultural institutions and others.
- b) Benefits to society from the publication of previously unpublished works.
- c) Benefit transfer from copyright owners of unpublished works, to publication right holders of published works.

The main benefits of this policy will be the reduction in administrative burden and risk of infringement currently shouldered by cultural institutions, and the benefits to society from the publication of previously unpublished works.

a) Reduced administrative burden and risk of infringement

Currently when a cultural institution wishes to do any of the acts restricted by copyright with a work which they think may be subject to the 2039 rule, they are faced with three choices:

- 1) they can decline to do the act, essentially keeping the work locked away for 25 years until the 2039 rule brings copyright in the work to an end;
- 2) they can undertake a clearance process in order to copy it legally if the copyright owner can be found. For 2039 works, which are often very old and whose authors are often long dead this can be disproportionately expensive; or
- 3) they can do the act without permission, potentially infringing copyright. Where the proposed act involves commercial publication this can be a criminal act.

Option 2 will deliver benefits in respect of each of the three choices listed above. Choice 1) will no longer be a consideration as the public will be able to gain access to the work as it will no longer be protected by copyright. Cultural institutions will benefit financially in respect of choice 2) as they will be able to proceed to deal with the 2039 work without permission of the copyright owners, and they will benefit legally in respect of choice 3) as they will no longer be at risk of civil or criminal proceedings for copyright infringement. It is expected that the social benefits from the removal of choice 1) and the financial benefits from the removal of choice 2) will be the most important features, as in practice cultural institutions undertake either 1) or 2) in order to mitigate the risks posed by choice 3).

It has not been possible to quantify these benefits as it is unknown exactly how many 2039 works exist and what proportion of these would undergo a rights clearance process. There are also other uncertainties around how long and costly the rights clearance process is, and the scale of benefits to society from publication. These will vary significantly between archives and archival items.

Evidence provided by The National Archives and information collected during consultation of the passage of the Enterprise and Regulatory Reform Act 2013³ does, however, provide some indication of what the scale of these benefits could be. More evidence is also expected to be collected via the present consultation.

National Records of Scotland describes a collection of 28,000 wills written by soldiers before they departed for the First World War, which cannot be published because of the 2039 rule⁴.

The Manchester Archives estimate that 70% of their holdings are subject to the 2039 rule, so cannot be digitised⁵.

As discussed previously under analysis of costs (see page 11) the National Archives estimate that there are 103.5 million unpublished archival items subject to the 2039 rule in the UK. If it takes a member of staff at one institution earning X salary 12 months to clear rights in Y number of 2039 works, the total **potential** annual cost to business of the 2039 rule can be estimated as X (uplifted 30% for non-wage costs⁶) divided by Y, multiplied by the estimated number of 2039 works in the country.

For example, assuming a salary of £24,132⁷, uplifting this by 30% to give a labour cost to business of £32,176, and taking an estimate from one study conducted by the University of Cambridge involving 6000 works⁸, this equates to approximately £5 spent on rights clearance per 2039 work per annum. Multiplying this by the National Archives' estimate of 103.5 million pre-1945 unpublished works gives a **potential** annual cost to business of approximately £518million.

Of course this value is not a true reflection of the annual cost to business because it is not known what proportion of these works would undergo a rights clearance process in a given year. For the works which are intended to be used in a given year, it is unknown what proportion will fall within choices 1 to 3 above. The length and cost of rights clearance will vary significantly between different archive works, depending on who the rights holder is and how easy they are to trace. Whether archives have dedicated rights clearance staff and staff salaries will also vary between different archives. It has, therefore, not been possible to monetise expected benefits from the reduced administrative burden. What is clear is that this is an unnecessary expenditure when the same works, had they been published before 1989, would not require rights clearance at all. Bringing an end to the 2039 rule which keeps these works in copyright would therefore save cultural institutions a great deal of time and money in mitigating the risk of infringement.

It is undesirable that the current law carries the potential for cultural institutions and others to inadvertently infringe copyright in the pursuance of their mandate to provide access to material for the benefit of historical, cultural and scientific research. The removal of the 2039 anomaly will reduce the legal risks and costs associated with operating as cultural institutions, and encourage and facilitate the publication of works to which access has previously been restricted by this anomaly in copyright law.

b) Benefits to society from the publication of previously unpublished works

As discussed previously there will be benefits to society as a whole from the publication of unpublished works both in terms of greater access to cultural heritage and availability of material for research and education. Unpublished works may contain previously unknown information, and enabling their publication and dissemination carries the potential for new discoveries about the past. Additionally, both publishers and cultural institutions may see increased revenues through an increased demand for 'rediscovered' works which become eligible for publication.

c) Benefit transfer from copyright owners to publication right holders:

³ In submissions to the Enterprise and Regulatory Reform Act 2013 consultation the Government received anecdotal accounts of the rights clearance burden, and expects to collect more data via the present consultation.

⁴ <http://www.ipo.gov.uk/response-2011-copyright-natrecscot.pdf>

⁵ <http://www.ipo.gov.uk/response-2011-copyright-ma.pdf>

⁶ 30% uplift taken from HMT Green Book (2011) plausible estimates (page 59, footnote 6).

⁷ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/220541/green_book_complete.pdf

⁸ £24,132 is the gross median annual wage of archivists and curators (SOC code 2452) estimated by the most recent published ONS (provisional 2013) Annual Survey of Hourly Earnings. <http://www.ons.gov.uk/ons/rel/ashe/annual-survey-of-hours-and-earnings/2013-provisional-results/index.html>

⁸ <http://www.ipo.gov.uk/response-2011-copyright-cul.pdf>

On expiry of copyright, works become eligible for publication by persons other than the copyright owner. If those works are previously unpublished, then upon first publication these persons acquire a 25 year “publication right” (described in Box A above).

The ‘Publication Right’ in the 1996 Regulations is ‘equivalent to copyright’, meaning it allows the right holder to authorise or prohibit the reproduction, distribution, rental or lending, public performance, communication to the public, and adaptation of the work. 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.

The result may be a benefit transfer from a copyright owner who is not making commercial use of their work, to a publication right holder who is. This converts a non-monetised right owned by one party (who may not know they own the copyright, or may not be in a position to exploit it) into a monetised right owned by another party (who, by definition, will be exploiting the work). This will be a small contributor to growth. It also encourages the publication of previously unpublished works, which is a benefit to society as a whole as mentioned above.

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. However, private owners of items protected by copyright – such as letters and manuscripts – can also benefit from the publication right. These private owners may be individuals or businesses.

In some cases the owner of the physical item and the owner of the copyright in that item will be the same person. This may be the case for example where the owner of an item is a private individual who is related to the creator of the work, such as someone who owns their grandfather’s war diaries. In such a case, the person will be in a similar position as under the current law, as they will be able either to prevent publication of the work (by controlling the physical item) or to publish it and benefit from a period of protection under the publication right.

The protection given under the publication right will usually be longer than protection under the 2039 rule, as it will run for 25 years from whenever the work is first published. For example, if the copyright owner of a work falling under the 2039 rule were to publish that work in 2019, they will benefit from 20 years’ protection in which they could commercially exploit the work. If the same work were instead to benefit from the publication right, the publisher would benefit from 25 years’ protection.

The regulations provide that no publication right can arise in works previously protected by Crown Copyright, so there is no question of third parties acquiring rights over public sector information.

Option 2b: Reduce the duration of copyright in 2039 works (other than photographs and films), to bring the term of protection for these works within the relevant general rule at some future time.

Proposed change

So as to allow copyright owners to prepare for these changes it would be within the Secretary of State’s power to delay the reduction of copyright for 2039 works to some future date post-commencement. This could be a fixed date following commencement of the legislation, or it could be a fixed period following publication of a work.

This would have the same costs and benefits of Option 2a, except for the period between the date of commencement and the date on which the Regulations provided for copyright to expire. During this period the 2039 rule would remain in place and no costs or benefits would be realised.

This option would delay the introduction of the benefits identified under Option 2a, while also delaying its costs. As the benefits of Option 2a are expected to outweigh its costs, this option would appear to be less favourable than Option 2a. However, transitional measures may be desirable in order to reduce costs to certain groups – such as copyright owners who have already begun to commercially exploit their 2039 works on the assumption that they will have that period of protection. Whether, and the extent to which, transitional arrangements should be put in place in such circumstances will be examined at consultation stage.

Options 3a and 3b: As per Options 2a and 2b but excluding sound recordings from the policy.

During the passage of the enabling powers in the Enterprise and Regulatory Reform Act 2013 it became apparent that by virtue of the definition of ‘publication’ for the purposes of the 2039 rule, certain films and photographs which are currently under commercial exploitation via film and picture libraries may be considered ‘unpublished works’ falling within the policy.

As a result, the decision was taken to exclude these works from the policy. It may be that similar arguments apply to sound recordings. Currently, the nature of the market for pre-1989 sound recordings, and the extent to which commercially-exploited sound recordings would be considered to be “published” under the relevant definition, is unclear, as is the impact of this policy on owners of sound recordings. This is something that will be explored via the consultation. It should be noted in this context that sound recordings do not benefit from the publication right (described in Box A above).

As one of the Government’s aims with this policy is to provide greater clarity and consistency to copyright law, both in the UK and the EU, the Government would prefer to apply the policy to sound recordings as well as other works unless there were a clear case not to do so.

On the other hand, most sound recordings falling within the 2039 rule (ie. those made between 1957 and 1989, and unpublished when the CDPA came into force) will contain works which will remain protected by copyright in the literary and musical works under the general rule (this will be true of all works created post-1969, and most created between 1957 and 1969). Therefore the practical benefits to third parties of reducing this protection will be limited, as they will still need to seek clearance of other rights. Moreover, libraries, archives and museums, would appear to have a greater interest in publishing older works of cultural and historical significance.

In view of the above, while the Government would prefer to retain sound recordings within the policy, it recognises that the impacts of doing so are complex and have not yet been fully explored. The Government will seek evidence on impacts, particularly from the recorded music industry, during consultation.

Summary and preferred options with description of implementation plan

The Government’s preferred option is Option 2a, reducing the duration of copyright in 2039 works (other than photographs and films), to bring the term of protection for these works within the relevant general rule from the date of commencement.

Option 2a is preferred to Option 2b because the benefits of removing the 2039 rule are expected to outweigh the costs and Option 2b would delay the time before which these expected net benefits can be realised.

Option 2a is preferred to Options 3a and 3b because sound recordings are excluded from the policy under Options 3a and 3b and for clarity and consistency to copyright law, the Government would prefer to apply the policy to sound recordings as other works unless there was a clear case not to do so. The Government does not currently have clear evidence suggesting that sound recordings should be excluded from this policy, but will seek evidence on this in consultation.

Power for the Government to remove the 2039 rule for unpublished works existing prior to commencement of the relevant part of the CDPA is set out in the Enterprise and Regulatory Reform Act 2013 (ERR Act), section 76, amending section 170 of the CDPA. Once the 2039 rule has been removed the term of protection for works currently covered by the 2039 rule will be reduced to that of the appropriate general rule.

Risks and assumptions

There is no centrally available data directly giving the number of unpublished 'literary' works held by UK public archive services. Analysis has, therefore, had to rely on using estimates to illustrate the possible scale of costs and benefits.

Where an organisation refers to 'archival items' in its collection, this may refer to single copyright works, or it may refer to groups of several, such as a number of letters comprising a single course of correspondence. Where it has been possible to use estimate figures therefore, these are likely to be conservative estimates. There is a lot of uncertainty over how many individual items exist.

There may be data protection or confidentiality issues where a 2039 work makes reference to a living person, however this is likely to be minimal and the same situation would have arisen by normal effluxion of time if the work had been subject to the general rule, and still would arise in 2039 anyway. If there are issues in this area, the only effect of the policy is to bring them forward in time; the policy will not have created the issues.

Direct costs and benefits to business calculations (following OITO methodology)

It has not been possible to accurately monetise the costs and benefits of this measure, but it has been possible to show that the benefits will outweigh the costs.

The transitional provisions of the 1988 act represented a derogation from the previous position of unlimited copyright protection for unpublished works in the UK. This reform imposed the costs to business described herein as they resulted in a small number of hard-to-identify works having a different term of protection to all others depending on the date they were created. The Government intends to complete the abrogation of perpetual copyright after half of the previous term has expired, ending the costs associated with the previous reform. The measures therefore qualify as OUT - Zero Net Cost.

Wider impacts

Impact on Micro Enterprises

The proposals are not expected to impose costs on micro enterprises. Such costs as there may be are expected to fall on individual copyright owners whose works fall out of copyright.

Education

The proposals are likely to have a positive impact on education as previously unpublished material is brought out of copyright and disseminated more widely.

Evaluation

The evaluation strategy will be developed as part of the present consultation.

Annex A: Duration of Copyright in Unpublished Written Works: Impact on Archives – National Archives Analysis

Archives consist of those records created or received for the transaction of day to day business which are permanently preserved for 'historical' reference.

Few are created with the intention of communication or sale to the public, and they rarely carry the kind of embedded metadata on IPR that most published works have, nor have they been managed by their owners or creators with copyright in mind.

The bulk have been in existence for many decades or centuries, and the original author is therefore often long dead, and current rights ownership may be difficult to trace, given that there is no commercial incentive to document it.

Even in cases where the ownership of the material itself normally equates to ownership of the associated rights, there will usually be at least some material (for example, incoming correspondence) which will have different copyright status.

While most commercial copyright material consists of a coherent physical item (a published book, a DVD) items like incoming correspondence files may well contain multiple copyright 'works', whereas whole filing systems may in fact constitute a single logical entity.

The figures below relate almost entirely to archives held by public archive services (which includes a minority of institutions describing themselves as libraries, museums, heritage centres etc) i.e. those which are publicly funded to preserve archives and make them accessible to the public in various ways.

Most such services hold at least some material created by themselves, their parent organisation or associated official bodies. However:

- some official archives have been received rather than created by the organisation, and are therefore in different public and private copyrights
- most services also have custody of large quantities of material which has been donated or deposited by a wide variety of other private bodies
- While services normally attempt to secure a transfer of rights in such material, or at least licensing arrangements, this is not always possible, and again, the depositor may in any case not own the rights in all material deposited.

There are also significant privately-held archives in the UK, usually in the hands of their creators (for example, most major banks, oil companies or landed estates have distinct archive units), but public information on most of these is limited and they are not further discussed here.

There is no centrally available data directly giving the number of unpublished 'literary' works in held by UK public archive services.

Many services have publicly-accessible online catalogues, but these are designed to facilitate public access, and generally do not include detailed information on copyright status.

They relate to physical items or groups of items, which may not equate to individual copyright works on a one for one basis (for example, an incoming correspondence file could easily contain 100 separate copyright works).

Nevertheless, some information on numbers can be estimated from these and published statistics from various parts of the sector, notably those produced by CIPFA (for local authority services) or SCONUL (for university archives and libraries). These two sectors hold the majority of publicly-accessible archives in the UK, with most of the remainder being held by a small number of national institutions.

The National Archives of the UK (TNA) is by far the largest (over 190 linear km of shelving). However, its statutory remit to hold the archives of government, the majority (estimated 85%) of which will be in Crown Copyright, makes it untypical.

The other main national archival institutions (National Records of Scotland, Public Record Office of Northern Ireland), have a remit to hold private or non-governmental material of national importance as well as government records, and therefore will hold a lower proportion of Crown copyright material.

The British Library, National Library of Wales and National Library of Scotland and some national museums also hold substantial quantities of mostly private deposited archives, although, some of the latter hold mostly material of recent date (e.g. the Imperial War Museum) and/or mostly non-literary works (eg English Heritage maps, plans and photographs)

According to catalogue data (nationals) and estimates from national statistics (university and local authority services), physical items held are as follows:

Estimated number of physical archival items held in the UK, by institution type

Institution (or category of institution)	Items to 1800	1800-80	1880-1945
The National Archives of the UK	3.55	2.95	10.80
National Records of Scotland	0.60	0.65	6.85
Public Record Office of NI	0.20	0.50	0.85
British Library	0.40	1.15	2.60*
National Library of Wales	0.30	0.25	0.90***
National Library of Scotland	0.10	0.10	0.60***
Science Museum	0.10	0.10	0.20***
Local Authority Services	17.80	20.90	23.10**
Universities	3.10	3.65	4.05**
Total	35.15m	30.25m	49.95m

* the 1880-1945 figure for the BL has been estimated from sample years, as range searches are not possible on the BL catalogue

** local authority and university numbers estimated from overall volumes of material reported in annual CIPFA/SCONUL returns, multiplied by 750 (estimated number of items per cubic metre, based on sample from TNA and W Yorks Archive Service). The age distribution is based on the dates of items catalogued on the national A2A union catalogue, which is believed to cover about 30% of catalogued material in UK public archives.

*** NLW and NLS catalogues do not permit relevant searches: these figures estimated from figures on volume given on their websites, at 750 items per cm

Note: In all cases, 5% has been deducted from raw catalogue numbers for the period to 1800, and 10% thereafter. This is to allow for catalogue descriptions relating to groups of items (about 1%) and non-text items (eg maps, plans, photographs 4-9%), based on a sample from WYAS and the national institutions.

Few archive services maintain searchable records of publication of material in their holdings. However, it is possible to produce an estimate by comparing the figures in the table above with available catalogues of publications.

The estimate of at least 35m archival items to 1800 compares with the total 0.48 million publications in the English Short Title Catalogue maintained by the BL for the same period, and an estimated further 0.75m 1800-1880. A search of the ESTC by relevant terms, suggests that for the period to 1800, there were in fact no more than about 10-15,000 publications containing transcripts, calendars or reproductions of archival documents. Even assuming an average of 200 archival documents per publication, would suggest that less than 10% of such material was published.

A search of the COPAC union catalogue for similar terms in sample years between 1880 and 1945 suggests that hard copy publication of historic documents peaked around 1900 at less than 500 publications per year, and probably amounted to about 20,000 publications between those dates. Assuming 200 'items' per publication, that would amount to 4m items published, again, less than 10% of the total in UK archives over the period .

While the digitisation of archives for access online is recognised as a major opportunity to widen public access, this is only just becoming widespread outside The National Archives. So far, the latter has

digitised between 5 and 10% of its total current holdings, virtually all of which is material in Crown Copyright.

It is therefore likely that at least 58.5 million unpublished items archival items exist for the period to 1880, and a further 45 million exist for the period between 1880 and 1945.

Rights Ownership

In some cases, the archive service will be the rights holder. The 2003 Logjam survey of archives in the North-West found that in local authority archives, approximately 55% of material held was of non-official origin. However, official archives will include material from bodies other than the parent authority: for example, county council services also hold the archives of numerous current and defunct district and parish councils, poor law unions, school and drainage boards, and local NHS organisations.

Transfer of property orders following past reorganisations of statutory functions often do not specifically refer to IPR, or residual property generally, leaving the identity of the current rights owner uncertain even in relation to this material. This has been raised as an issue in the digitisation project for school records currently being undertaken by a national consortium of local authority services, where in some cases it remains unclear whether rights passed to the authority, or remained with relevant church and other voluntary bodies historically responsible for school provision, adding some complexity to the project.

The proportion of material of the parent body held by university services and the other national bodies is generally lower still. A survey of university and local authority services in the East Midlands carried out by the East Midlands Regional Archives Council in 2006 found that 89% of archive holdings were not owned by the services holding them.⁹ Ownership of the associated IPR will presumably be even less frequent than that, although services may have licensing arrangements with depositors (in so far as the latter own the rights).

⁹ <http://webarchive.nationalarchives.gov.uk/20111013135435/http://research.mla.gov.uk/evidence/view-publication.php?pubid=81>

Annex B Comment on the proposed reduction on the duration of copyright in certain transitional cases – Ronan Deazley and Tim Padfield; (excerpt)

4. THE SCALE OF THE PROBLEM

4.1. Relevant presumptions

It is impossible to determine with any certitude the precise number of works affected by the 2039 provisions. However, to provide some sense as to the scale of the impact of those provisions, we present indicative data on **unpublished literary works created in 1880 or before** currently housed in British archive collections.

We have also chosen to focus on documents and records with a creation date of no later than 1880 for the simple reason that we presume unpublished material dated 1880 or before will have been created by an author who died more than 70 years ago (that is: before 1944). That is, we think it is reasonable to presume that most material created up to and during 1880 would, but for the 2039 provisions, now fall within the public domain. We recognise also that much material of a later date would also, but for the 2039 provisions, already fall into the public domain but it would not be practicable for us to seek to identify it.

To explain that proposition: we presume that (i) the material under consideration was created by authors of no less than eighteen years of age (the current age of majority),¹⁰ and that, as a consequence (ii) all relevant authors under consideration will have been born no later than 1862. With that in mind, in presenting figures based on a document creation date of no later than 1880, we adopt a presumptive lifespan for all relevant authors of more than 80 years (whether male or female). This presumptive lifespan is far in excess of the average life expectancy for individuals born in 1862. For example, drawing on data available in the Human Mortality Database, the average life expectancy in England and Wales for men born in 1862 was 41 years; the average life expectancy for women born in England Wales in 1862 was 44 years.¹¹ So: for material that was created by an eighteen-year old male in 1880 one might reasonably expect that individual to have died sometime in 1903; for material created by an eighteen-year old female in 1880 one might reasonably expect her to have died in 1906.

As for our focus on literary works, while the scope of the 2039 provisions also extends to dramatic and musical works as well as unpublished engravings, films, sound recordings and anonymous works, the vast majority of the historic material (dated 1880 or before) held in archive collections throughout the UK is in fact literary in nature (roughly speaking, between 90-95%). For this reason, we have chosen to limit our enquiry to unpublished literary works only.

4.2. Indicative data

There is, unfortunately, no publicly available data that captures the full extent of historic unpublished literary works created in 1880 or before that remain in copyright today as a result of the existing transitional provisions. However, TNA have provided the authors with some **minimum estimates** drawing on data on numbers of catalogued items held within national libraries and archives, as well as local authorities and university services.

TNA estimate that there are a minimum of 35 million unpublished literary works created in 1880 or before that are currently held in archive collections throughout the UK. Some of this catalogued material will have been published (whether in analogue or digital form) since the time of deposit with the archive, although TNA further estimate that, at most, perhaps 10% of this historic material has in fact been published.¹² On that basis, the total number of literary works in archives that remain in copyright as a result of the 2039 provisions would appear to be **no fewer than 31.5 million unpublished documents and records**.

¹⁰ In reality, we recognise that the majority of historic records and documents under consideration will have been created by authors over the age of 18.

¹¹ These figures are taken from the Human Mortality Database (www.mortality.org).

¹² In many respects, we consider the figure of 10% to overestimate the true extent of publication of these archival documents and records. For example, in 2009, it was estimated that less than 2% of works held in archive collections in England and Wales had been digitised and made available online. However, for the purposes of the current exercise we adopt the estimate of 10% as a reasonable guide.

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