

12 December 2014

Consultation on reducing the copyright in unpublished (“2039”) works in accordance with section 170(2) of the Copyright, Designs and Patents Act 1988

The British Copyright Council represents those who create, hold interests or manage rights in literary, dramatic, musical and artistic works, performances, films, sound recordings, broadcasts and other material in which there are rights of copyright and related rights.

Our members include professional associations, industry bodies and trade unions which together represent hundreds of thousands of authors, creators, performers, publishers and producers. These right holders include many individual freelancers, sole traders and SMEs as well as larger corporations within the creative and cultural industries. Our members also include collecting societies which represent right holders and which enable access to works of creativity.

BCC Member organisations

Artists’ Collecting Society . Association of Authors’ Agents . Association of Illustrators . Association of Learned & Professional Society Publishers . Association of Photographers . Authors’ Licensing & Collecting Society . BPI . British Academy of Songwriters, Composers and Authors . British Association of Picture Libraries & Agencies . British Equity Collecting Society . British Institute of Professional Photography . Broadcast Entertainment Cinematograph & Theatre Union . Chartered Institute of Journalists . Copyright Licensing Agency . Design & Artists Copyright Society . Directors UK . Educational Recording Agency . Equity . Music Managers’ Forum . Music Publishers Association . Musicians’ Union . National Union of Journalists . Professional Publishers Association . PPL . PRS for Music (MCPS and PRS) . Publishers Association . Publishers Licensing Society . Royal Photographic Society . Society of Authors . Writers’ Guild of Great Britain

General comments on this consultation

1. The British Copyright Council does not support the change to the 2039 Rule and takes the view that the present rule (expiration in 2039 of copyright in certain unpublished works) should remain.
2. This policy proposal and its accompanying Impact Assessment present insufficient economic evidence to support the proposed change. We note the evidence showing the potential for real economic harm to rights holders provided in at least two of the submissions made to IPO by BCC members. Notably that of the Society of Authors but also in the case study prepared by the Music Publishers Association.

Furthermore, at several points in the Impact Assessment, contradictory views are expressed on the economic impact and value of the policy change:-

- Page 11 of the Impact Assessment states that “...*the cost [to copyright owners] is unquantifiable.....the lack of commercial exploitation would indicate that there will be very little or no economic harm to rights holders...*”. The BCC finds this statement to be contradictory.
- Page 9 of the Impact Assessment states that “*many 2039 works are likely to be of little commercial value to the copyright owner....*” but that “*they may be of commercial interest to third parties*”. Surely, if a work is protected by copyright and a third party has a commercial interest in publishing it, then the licence fee they would pay to the copyright owner must be of commercial value to that copyright owner.
- On page 11 it is stated that “*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*”. The fact that a copyright owner has not previously exploited their work does not remove its commercial value to that copyright owner should someone decide to publish it, nor does it remove the economic harm to the copyright owner should they not receive a licence fee for use of their work.

3. The BCC asks whether it can be right to grant a 25 year publication right, in effect a new property right, to the first publisher of a previously unpublished works, while reducing or removing the property rights of the original rights holder under the 2039 Rule.
4. Granting a 25 year publication right to the first publisher which in many cases will be the museums, libraries, archives and other public bodies which hold previously unpublished works in their collections, risks presenting them with a commercial advantage over other potential publishers, particularly when it is combined with their right to benefit from certain specific exceptions and the exception for orphan works.
5. Having acquired this new property right, how will museums, libraries and archives exercise it and how will they ensure that the original author also benefits from publication, or is able to exercise their moral rights? This needs further very careful consideration.
6. The Government has recently introduced an UK Orphan Works Licensing Scheme to permit lawful publication of works where the copyright owner cannot be identified (Page 1 of the Impact Assessment states that such works cannot be lawfully published) and Regulations introducing the potential for Extended Collective Licensing (not considered in the Impact Assessment). Surely, time should be allowed to assess and review the impact of these new legislative solutions, before Government makes any change to the 2039 Rule.
7. Revoking the 2039 Rule will not meet the Government's objective of simplifying rights clearance as it will still be necessary to ask and obtain answers to questions relating to the original author or performer e.g. when did the author die? Has the work been published? Was the work performed posthumously? When was the work published/performed? The change may be counterproductive resulting in a reduction in the number of publications of previously unpublished works. If the law does not simplify the process, or encourage publication, then revoking the 2039 Rule has the effect of removing property rights from authors without the justification of achieving any of its desired policy objectives.
8. The BCC also has concerns about how responses to the consultation will be interpreted and quantified. A number of questions are directed solely at those organisations and institutions which will be the beneficiaries of the proposed change - by becoming rights holders themselves. It is difficult for rights holders to refute these responses or to respond to those questions. The BCC asks how this will impact on a balanced assessment of responses.

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

Not applicable.

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

Not applicable.

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

Not applicable.

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?

The BCC does not agree with the policy as outlined in this consultation document.

The BCC represents organisations which represent right holders, whether individuals or companies (see above). That includes the estates of authors and those of other creators of copyright works, some of which are likely to be subject to the 2039 Rule. As such, the BCC takes the view that the present rule (expiration in 2039 of copyright in certain unpublished works) should remain. The BCC cannot see any advantage for authors and other rights holders in revoking the present rule. The effect of revoking the rule is to remove property rights and there is no acceptable basis on human rights grounds for an intervention with property rights. The BCC does not believe that the stated policy objective will be achieved

by revoking the rule.

Furthermore, the BCC is concerned that the principle of non-retrospective effect of legislative change (ex post facto laws) may be breached by the proposed policy change. We note that in Recommendation 4 of the Gowers Report it is stated that “*policy makers should adopt the principle that term and scope of protection for IP rights should not be altered retrospectively*”¹ and later in the same report the point was made that the scope of rights should not change retrospectively “*in order to ensure trust in the system*”². More recently, the principle that no retrospective changes should be made was reiterated in the Hargreaves Report (p.23) which says: “*this is doubly clear for retrospective extension to copyright term, given the impossibility of incentivising the creation of already existing works, or work from artists already dead.*”

As far as EU law is concerned, this same principle was upheld by the European Court of Justice in case C-362/12 (a tax case) where a piece of UK legislation was found to be in breach of EU law because the retrospective application of UK legislation deprived tax payers of a benefit. Similarly UK rights holders should not be retroactively deprived of their exclusive rights in their copyright works.

The economic evidence presented for the proposed policy change does not support its introduction (see General Comments above).

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

We do not agree with the Government’s preferred option to implement clause 76 of the Enterprise and Regulatory Reform Act 2013.

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?

No the BCC believes the 2039 Rule should remain unchanged. See our response to Q4.

The BCC draws IPO’s attention to the possibility of a more, not less, complex process arising, particularly for works that have already been published if there is a policy change (see the answer to Q6 given in the response of our member the Society of Authors).

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

No. See our response to Q4.

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

This policy is unlikely to encourage the publication of previously unpublished works. Decisions to publish (or not) are based on personal wishes (where a work remains unpublished or publication is delayed due to issues of privacy, confidentiality or libel – see our response to Q11) and commercial considerations. Such decisions may have been made on the basis of the existence of the 2039 Rule, including the original decision to deposit an unpublished work, for safekeeping and posterity, with a museum, library or archive.

Other works covered by the transitional term provisions will already have been published or performed, either before or after 1989. The consultation document itself (see the section on Sound Recordings and also on Photographs and Films) indicates that it could be unfair to cut short a term for a work that is under exploitation.

As far as facilitating publication is concerned, it will still be necessary to carry out the sort of rights clearance procedures that the Government’s policy approach is trying to simplify. This is particularly true for moral rights - right to be identified as the author; right to prevent derogatory treatment; right to privacy of certain (photographs and) films and right to prevent false attribution. (Also see our note at Q6 on the risk of introducing a more complex

¹ Page 6, Gowers Review, December 2006.

² Page 45 Gowers Review, December 2006.

process.) The policy will, therefore, fail to achieve one of its key objectives of facilitating rights clearance and will only succeed in removing property rights from unpublished authors for no good reason.

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

Not applicable.

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?

We leave it to our members to provide examples. However, it is likely that those who deposited works with a third party probably did not anticipate Government changing its policy or the rules protecting such work from publication. We are concerned about the impact on privacy and on confidentiality, see our response to Q8 above and Q11.

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

Yes, we consider there are important issues of privacy and confidentiality affecting these works. The right to publish is protected by international law. Given the limitations of the UK moral rights regime, adoption of this policy should be subject to a requirement to evaluate the impact on the author's reputation, prior to publication. Unpublished works are sometimes unpublished for a good reason, they include private letters and personal diaries and the author's decision on the publication of these should not be overridden by this policy.

We also note concerns expressed about the effect of a publication on living persons (which may be one reason for private diaries, etc., not to be published until after someone has died). This may also be because there are possible libel concerns. Revoking the 2039 Rule could lead to libel issues that copyright owner had deliberately been avoiding by not publishing the work.

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

As we think that the 2039 Rule should be retained, it follows that all the **existing** transitional provisions under the 2039 Rule should be retained.

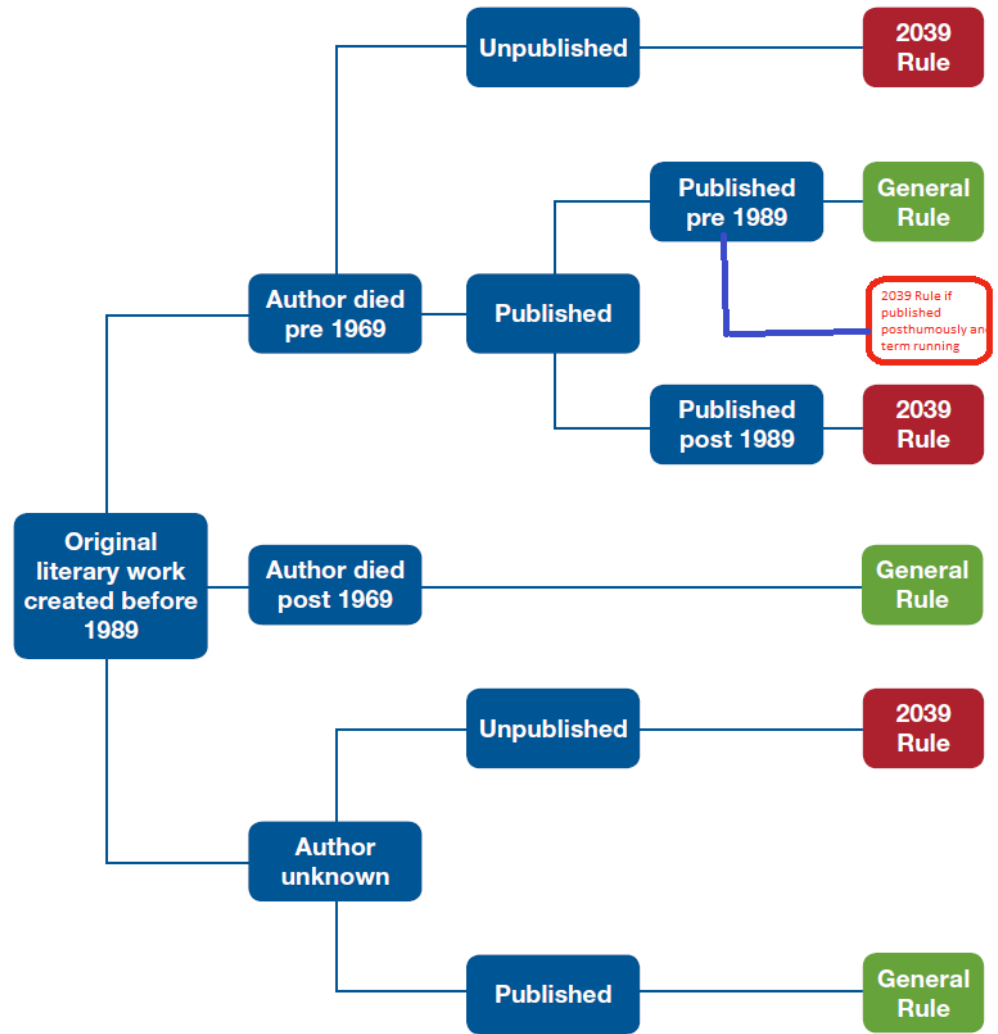
However, the question is asked only in respect of works subject to the 2039 rule but published after 1989 under the proposed policy change.

Not only are there works that are subject to the Rule that have been published after 1989, but there are works that were published pre-1989 that are covered by the Rule (by virtue of CDPA, Schedule 1, paragraph 12(2)) and they should remain so. See Diagram 2 on the following page taken from the IPO consultation paper and amended.

To explain our view further: Schedule 1 identifies 2 categories of work: works that have not been published by 1989, which are protected to 2039, and works which had been published posthumously pre-1989, which are allowed to have whatever remains of their 50 years term.

The consultation document acknowledges that where works have been published post-1989, then it may be unjust to curtail their term (presumably because publication typically involves considerable investment and that investment would be undermined if copyright protection were suddenly suspended). It does not appear to acknowledge that there are also works published posthumously pre-1989 for which the same issue is relevant. For example, If a book is published posthumously in 1987 printing 10,000 copies with the author's estate expecting to be able to benefit from exclusive rights to 2037, the estate would be affected just as if publication had taken place in 1990.

Diagram 2: Duration of copyright for works created before 1989



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

No. We do not support changes to the 2039 rule for sound recordings, or for any other category of work.

There is no evidence to support the regulations applying to sound recordings. If the 2039 Rule is revoked it could lead to a position where near-identical sound recordings are in competition, one in copyright and one not.

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?

No. We leave it to those of our members which represent the owners of copyright and the rights in performances in relevant sound recordings to respond to this question.

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)

Again, we leave it to those of our members which represent the owners of copyright and the rights in performances in relevant sound recordings to respond to this question.