



December 2014

Consultation on reducing the duration of copyright in unpublished (“2039”) works in accordance with section 170(2) of the Copyright, Designs and Patents Act 1988

About UK Music

1. UK Music is the umbrella body representing the collective interests of the UK’s commercial music industry, from songwriters and composers to artists and musicians, studio producers, music managers, music publishers, major and independent record labels, music licensing companies and the live music sector.
2. UK Music exists to represent the UK’s commercial music sector, to drive economic growth and promote the benefits of music to British society. The members of UK Music are listed in annex 1.

General

3. We see no justification to change the 2039 Rule to the extent that it impacts music, whether it is for sound recordings or musical works. The rule constitutes a compromise achieved in 1988 in order to bring the calculation of term for unpublished works in line with the one for published works in 2039.

We note that Government has not provided any evidence in the Impact Assessment which would justify their preferred Option 2a with regards to sound recordings and is otherwise very limited for other forms of works.

4. There are some important general points about the Impact Assessment that we would wish to note:
 - a) On page 1 it is stated that the works cannot be lawfully published if copyright owners cannot be identified. The Government has recently introduced an orphan works licensing scheme to permit lawful publication of such works. In addition the Impact Assessment does not consider whether works subject to the 2039 Rule could be cleared via an extended collective licence. Both of these systems have only just been introduced following a lengthy process:

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this would be a good opportunity to assess whether they can help to solve any problems relating to unpublished works to the satisfaction of both rightholders and users.

- b) On page 9 it is stated 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”. This is a contradiction – if a work is in copyright and a third party has a commercial interest in publishing it, then the licence fee they would pay the copyright owner must be of commercial value to the 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”. That does not follow: even if the copyright owner had not been planning publication, if an archive were to decide to publish a work and seek a licence from the copyright owner, then the copyright owner would receive a payment. The fact that an initiative to publish comes from a licensee, not the copyright owner, does not indicate that the removal of rights would not constitute an economic loss to the copyright owner.

5. We are responding to specific questions raised in the consultation on the basis of our knowledge and experience. We also refer to our members who have provided individual submissions.

Questions

6.

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

The members of UK Music include record labels, music publishers and collecting societies that are copyright owners of works that are subject to the 2039 Rule.

Some examples of works in the PRS repertoire are listed in Annex 2. Revocation of the 2039 Rule would be a direct cost to these copyright owners. For example, the Edward Elgar estate has received more than £20k in royalties for Elgar’s posthumously published Third Symphony from *PRS for Music*. Of this £13,650 was since 2005, the year that the work would have come out of copyright if the 2039 Rule had not applied.

UK Music disagrees with the proposed change in particular due to the absence of any economic evidence to justify the renegeing of the CDPA 1988 compromise the 2039 Rule.

The policy appears to be predicated on the basis that it will ensure material will be more accessible but, particularly in the case of music, this will not prove to be the case for several reasons, below.

General reason

The primary stated policy objective is to reduce the administrative burden for entities wishing to publish previously unpublished works. In our view, the policy will not achieve the stated objective.

It is acknowledged on p. 11 of the consultation document that it is not the current Government's intention to undermine existing markets (this point is made in both the section on works published after 1989 and that on sound recordings). Certainly it would be particularly unacceptable if copyright term were cut short for a work that is already under exploitation. Publication of a work entails cost and that cost is necessarily front-loaded. For example, it entails preparing the work for publication (e.g. editing, digitizing, packaging), sales and marketing. Cutting short copyright term for a work that has been published is likely to undermine that investment. Avoiding such an outcome is a fundamental principle set out by the then Conservative Government during the debate on Schedule 1 of the Copyright, Designs and Patents Act:

“The general principles underlying the schedule are that existing copyright should not be lost; that existing works not in copyright should not suddenly acquire it; that existing copyright owners should not suddenly find themselves with a right substantially less valuable than they enjoy at present and that others already exploiting or dealing with existing works should not suddenly find themselves unable to continue.”
HL Deb 14 December 1987, vol 491, cols 573-89

To avoid undermining existing exploitation, it would be necessary to restrict the revocation of the 2039 Rule to works that have not yet been published. There are works subject to the Rule that are in term that have been published both after 1989 and *before* 1989 (Schedule 1, paragraph 12(2) covers works published before 1989). If existing exploitation is permitted to continue, any party wishing to clear rights would still need to ask the very same questions set out on page 4 of the consultation document that the policy is designed to obviate. Therefore, revoking the 2039 Rule would not simplify rights clearance, so would fail to achieve its main objective of reducing any administrative burden. It would also fail to achieve the third objective of providing greater legal certainty.

Inappropriate to revoke the rule in relation to music

It is particularly inappropriate to revoke the rule in relation to music (i.e. musical works, associated lyrics and sound recordings) for these reasons:

Firstly, the type of large-scale rights clearance exercise that the policy is intended to simplify is far more likely to be carried out by libraries and archives in relation to text items, not to musical works, for which such large archives are much less common. This is illustrated by the fact that the consultation document refers to publication of war diaries, poems, letters and wills. The evidence in Annex B specifically only relates to literary works. Furthermore, the volume of ancient sheet music that is subject to the 2039 Rule is likely to be much less than the volume of text.

Secondly, music rights for large-scale rights clearances are typically managed by collecting societies, which can offer blanket licences. This means that, for example, *PRS for Music* can – and does routinely – license all of the works in its repertoire that

are subject to the 2039 Rule as part of its normal licensing arrangements. There is no additional administrative work required on the part of the licensee.

Thirdly, film and photographs have been excluded from the policy on the grounds that they may be under commercial exploitation via film and picture libraries but have not been “published” for the purposes of this 2039 Rule. As noted in the consultation document, the same issue applies for sound recordings. It also applies to musical works and associated lyrics that are incorporated into films.

Sound recordings

The second stated objective of the policy is “an increase in the publication and dissemination of these works”. So far from making unpublished content more accessible, an imminent cessation of the 2039 Rule is likely to have precisely the opposite effect: limiting the opportunities for some previously unheard music to be released to the public and could result in an unnecessary burden on music companies.

The existence of the 2039 Rule means that music companies currently have certainty that they can match consumer desire for previously unreleased versions of sound recordings. The issuing of such material is an added incentive for music fans to buy music and for music companies to remaster material that is in their archives using the superior technology available today. The existence of popular services such as iTunes means fans can buy individual tracks if they do not want to buy new versions of an album.

Music companies own the contents of their vaults. The end of the 2039 Rule is not going to allow access to their property. To deny the commercial incentive that copyright provides will mean any unreleased recordings will simply gather dust. It would also be burdensome in that music companies would have to quickly reconsider release strategies that could have otherwise been developed over the next 25 years.

As noted in the impact assessment, the 25 year publication right does not apply to sound recordings and so the impact of the removal of the 2039 Rule will act as a particular disincentive for record companies.

As it stands the Government’s proposal would mean any music previously unreleased between the period Andy Williams “Butterfly” and the Beatles “I Feel Fine” was at number one in the UK charts would fall out of copyright on commencement of the regulations. This is music from a period of great cultural significance to the UK and its soundtrack continues to define us as a nation.

Summary

Revoking the 2039 Rule would constitute a significant removal of property rights. Given that the policy objective generally and particularly in relation to music would not be achieved, it would be an unlawful intrusion upon the rightholders’ property rights, as protected by Article 17.1 and 17.2 of the Charter of Fundamental Rights of the European Union. Article 17 – like the equivalent provisions in Article 1 Protocol 1 ECHR – requires any interference with protected property rights to be ‘in the public interest’.

7.

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?

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

8.

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

No. In the field of music the proposed changes will have no impact to our knowledge given that the 2039 Rule is not an impediment to the publication of previously unpublished works. The decision to publish is based on personal and commercial considerations. As acknowledged in answer to question 4, the policy may act as a disincentive and restrict the publication of previously unpublished works for music.

9.

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

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?

The publication of musical works and sound recordings not only constitutes a business decision as to when publishing a sound recording is economically appropriate, it is also often based on the wishes of the composers and musicians who for personal reason might have decided not to publish, or to publish at a later point. The 2039 Rule provides for all parts in the music industry the transitional provision to adjust their activities concerning the publication of their work. It is inappropriate to remove from musicians, composers, record producers and music publishers this option post facto. The 2039

compromise was agreed to give all parties the time to adjust their personal and commercial behaviour.

It is key that such very personal rights for creators are not undermined.

10.

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?

The phrasing of this question implies that this question is directed at libraries. If our members deposited works with libraries it might be on the basis of a later posthumous publication based on an individual agreement. Whatever option Government chooses any such expression of the will of the creator needs to be upheld. We ask for assurance from Government for this.

11.

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

No, the 2039 Rule constitutes the transitional provision agreed in 1988.

12.

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

As previously mentioned, we do not believe there is any evidence to support the regulations applying to unpublished sound recordings. Similarly, we believe it would be of reciprocal benefit to treat unpublished musical works in the same way as sound recordings and exempt them from the regulations too and ensure consistency for music based rights.

We note that a persuasive argument which led to the exemption of photographs and films from the regulations during the Parliamentary debates on the Enterprise and Regulatory Reform Act was that the existing 2039 Rule enables certainty of investment for digitisation archive projects when using such media. We would like to point out that there are similar projects for sound recordings and recommend the Government considers the work of organisations such as the EMI Archive Trust when considering this policy further.

UK Music also points out that the term of protection for sound recordings has recently increased to 70 years and instead of abolishing the 2039 Rule, there is a strong argument to suggest that it is updated to take this new development into account. It is regrettable that the Government is not considering this option as part of the consultation, as well as the possible impact of the policy on the session fund which formed part of the term directive package.

13.

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?

Individual record companies and UK Music members BPI and AIM would be in the strongest position to answer this specific question.

We note however that the question does not refer to the contractual or commercial motivation of a record company to publish a sound recording at a specific time. These are commercial decisions by record companies on how to run their business based on existing laws and should not be interfered with without justification.

14.

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

We do not believe the impact of this policy will be minimal and it will be at a cost to both the industry and the enjoyment of music.

Annex 1

UK Music's membership comprises of:-

- AIM – Association of Independent Music - representing over 850 small and medium sized independent music companies
- BASCA - British Academy of Songwriters, Composers and Authors – BASCA is the professional association for music writers and exists to support and protect the artistic, professional, commercial and copyright interests of songwriters, lyricists and composers of all genres of music and to celebrate and encourage excellence in British music writing
- BPI - the trade body of the recorded music industry representing 3 major record labels and over 300 independent record labels.

- MMF - Music Managers Forum - representing 425 managers throughout the music Industry
- MPG - Music Producers Guild - representing and promoting the interests of all those involved in the production of recorded music – including producers, engineers, mixers, re-mixers, programmers and mastering engineers
- MPA - Music Publishers Association - with 260 major and independent music publishers in membership, representing close to 4,000 catalogues across all genres of music
- Musicians' Union representing 30,000 musicians
- PPL is the music licensing company which works on behalf of over 90,000 record companies and performers to license recorded music played in public (at pubs, nightclubs, restaurants, shops, offices and many other business types) and broadcast (TV and radio) in the UK.
- *PRS for Music* is responsible for the collective licensing of rights in the musical works of 100,000 composers, songwriters and publishers and an international repertoire of 10 million songs
- UK Live Music Group, representing the main trade associations and representative bodies of the live music sector

Annex 2

Examples of works in *PRS for Music* repertoire in copyright by virtue of the CDPA's posthumous works rules and under active exploitation.

Debussy	COQUETTERIE POSTHUME
Debussy	IMAGES OUBLIEES
Debussy / Bourget	ROMANCE, SILENCE INEFFABLE
Debussy	L'ARCHET
Delius	APPALACHIA (AMERICAN RHAPSODY)
Delius	IDYLLE DE PRINTEMPS
Delius	IN GLUECK WIR LACHEND GINGEN
Delius / Fenby	INTERMEZZO FROM FENNIMORE AND GERDA
Delius / Beecham	MARCH CAPRICE
Delius	MARGOT LA ROUGE
Delius	MARGOT LA ROUGE - PRELUDE
Delius / Beecham	SLEIGH RIDE
Delius / Fenby	THE MAGIC MOUNTAIN
Delius	VIOLIN SONATA IN B MAJOR
Elgar	CONCERT ALLEGRO OP 46
Elgar	IMPROMPTU
Elgar	LAURA VALSE
Elgar	MARCH
Elgar	QUEEN ALEXANDRA'S ODE
Elgar / Payne	QUEEN ALEXANDRA'S ODE

Elgar	SPIRIT OF ENGLAND OP 80
Elgar / Payne	SYMPHONY NO 3
Elgar / Payne	THE CROWN OF INDIA Op 66
Gershwin	Lullaby
Holst	A WINTER IDYLL
Holst	INDRA OP.13
Holst	NUNC DIMITTIS
Holst	SITA OP.23
Mahler	Totenfeier
Messenger	J'AI DEUX AMANTS from L'Amour Masque
Messenger	L'AMOUR MASQUE
Rachmaninov	PRELUDE IN D MINOR OP.POSTH
Ravel	CHANSON DU ROUET
Ravel	FRONTISPICE (on EMI)
Ravel	MYRRHA
Ravel	SI MORNE
Ravel	SITES AURICULAIRES
Ravel	SITES AURICULAIRES - ENTRE CLOCHES (on EMI)
Ravel	VIOLIN SONATA (1897) (on EMI)
Satie	ALLEGRO
Satie	ALLONS Y CHOCHOTTE
Satie	CHEZ LE DOCTEUR
Satie	DESEPOIR AGREABLE
Satie	DEUX CHOSES
Satie	DOUZE PETITS CHORALS POUR PIANO
Satie	GNOSSIENNES 4-6
Satie	LES PANTINS DANSENT
Satie	MUSIQUES INTIMES ET SECRETES
Satie	NOUVELLES PIECES FROIDES
Satie	OGIVES
Satie	OMNIBUS AUTOMOBILE
Satie	PAGES MYSTIQUES
Satie	PAGES MYSTIQUES - HARMONIES
Satie	PAGES MYSTIQUES - PRIERE
Satie	PAGES MYSTIQUES - VEXATIONS
Satie	PRELUDES FLASQUES
Satie	PREMIERE PENSEE ROSE + CROIX
Satie	REVERIE D'UN PAUVRE
Satie	TROIS MELODIES SANS PAROLES
Satie	TROIS NOUVELLES PIECES ENFANTINES
Satie	TROIS NOUVELLES PIECES ENFANTINES - BERCEUSE
Satie	VERSET LAIQUE ET SOMPTEUX
Satie / Caby	2 REVERIES NOCTURNES
Satie / Caby	CARESSE
Satie / Caby	CARNET D'ESQUISSES ET DE CROQUIS
Satie / Caby	DANSE DE TRAVERS
Satie / Caby	DREAMY FISH
Satie / Caby	PETITE MUSIQUE D'UN CLOWN TRISTE
Satie / Caby	PETITE OUVERTURE A DANSER
Satie / Caby	PRELUDE CANIN
Satie / Caby	SIX PIECES

Satie / Caby	USPUD - BALLET CHRETIEN
Zemlinsky	DIE SEEJUNGFRAU
Zemlinsky	SYMPHONY NO 2 IN B FLAT MAJOR
Zemlinsky	PSALM NO.13 OP.24
Zemlinsky	PSALM 83
Zemlinsky	SERENADE

Examples of Vaughan Williams Works currently in copyright until 2039 by virtue of the 2039 Rule (provided by the Vaughan Williams Society via the Music Publishers Association):

String Quart in C minor: *Composed 1897 / Published: Faber 2000*

Serenade in A minor for small orchestra: *Composed 1898. / Published: OUP 2012.*

Quintet in D major, for cl, hn, vln, vc & pno: *Composed 1898 / Published: Faber*

The Garden of Proserpine, for sop, chorus & orch. (words, Swinburne): *Composed 1897-99/ Published: Stainer & Bell 2011*

Mass for soloists (SATB) mixed double chorus & orch: *Composed 1897-9/Published: Stainer & Bell 2011*

Bucolic Suite for orchestra in 4 movements: *Composed 1900/ Published: OUP*