

NMDC response to the consultation on reducing the duration of copyright in unpublished (“2039”) works in accordance with section 170(2) of the Copyright, Designs and Patents Act 1988

This response to the Intellectual Property Office's consultation on the proposal to reduce the duration of copyright in unpublished works is on behalf of the members of the National Museum Directors' Council (NMDC). The NMDC represents the leaders of the UK's national collections and major regional museums. For further details of the membership and activities of the NMDC, please see www.nationalmuseums.org.uk. This submission has been developed with the Museums IP Network, chaired by Bernard Horrocks, IP Manager at Tate.

This response is co-signed by the Museums Association (MA) and the Association of Independent Museums (AIM). The Museums Association is the membership body for those working in the museum and heritage profession, and the institutions they work for. The Association of Independent Museums connects, supports and represents independent museums and heritage institutions.

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

It is difficult to estimate the number of works subject to the 2039 rule in museum collections across the UK, however it is likely to be a significant proportion because of the types of works – letters, diaries, personal papers – which are subject to the rule. These are types of works which have been acquired by museums irrespective of their focus. Letters and diaries belonging to local people may have been acquired by a town or district museum; art galleries may have acquired the personal papers of a particular artist represented in their collection; or industrial history museums may hold notes and diagrams created by enthusiasts or experts.

By way of an indication, below are four examples from national collections, which could be replicated across the 1,735 Accredited museums in the UK.

- The National Maritime Museum has approximately 800,000 unpublished items in its archives. About 25% of these will be subject to the 2039 rule.
- Imperial War Museums (IWM) has approximately 1.75 million orphan works in its documents collections and almost all of these are unpublished works. Those which were acquired in the 1970s and 1980s are likely to be subject to the 2039 rule, and it would be particularly difficult to trace the owners of the copyright in these works because the creator is likely to have died and the Museum does not hold details of their next of kin.
- It is impossible to calculate how many works in the V&A's collection would be subject to the 2039 because it is so numerous. Examples include:
 - *The Archive of Art and Design* has 18th and 19th century business records still in copyright. These include the ledgers and day books of cabinet makers Holland & Sons dating from 1824 onwards; the ledgers and client accounts of jewellers Garrard & Sons from 1753 onwards; and the order books of the stained glass maker James Powell & Sons dating from 1860 onwards.

- *The Theatre and Performance Archive* includes substantial numbers of works relating to correspondence, unpublished drafts and scripts, photographs and ledger books. Examples include:
 - The Ellen Terry Collection includes 47 letters from the actress to her daughter Edith Craig, 18 letters to her husband James Carew, and 47 letters received by Ellen Terry. There is significant public interest in this subject and therefore this material – as demonstrated by the current Watts Gallery exhibition about Ellen Terry – but it is subject to the 2039 rule and therefore still in copyright (even though Terry died in 1928. A time-consuming rights clearance exercise would be required to be able to place the material on public display.
 - Tom Taylor was the most popular playwright of the Victorian era and the V&A holds the Tom Taylor Collection of his working drafts, sketchbooks, notebooks and scrapbooks. As Taylor died in 1880, his published work is no longer in copyright, but the unpublished work, showing the process by which he developed the final works, remains in copyright until 2039.
- Tate estimates that there may be as many as 135,000 works in its Archive subject to the 2039 rule. This represents approximately 13.5% of the entire Archive holdings. As with the Tom Taylor example above, although the published works of an artist may no longer remain in copyright, the same does not apply to the unpublished letters, scrapbooks and personal papers. Consequently, it is more challenging to be able to display contextual material, to study and research the lives and influences of the artists, or to fully understand the process by which the final published works were created. There are many examples in the Tate collection where an artist's work is no longer in copyright, but where there are significant collections of personal papers which cannot be made more fully available to the public without a resource-intensive rights clearance exercise, including Walter Sickert (d.1942) – Tate has 337 works by the artist subject to the 2039 rule; Henry Scott Tuke (d. 1929), 206 works; Thomas Cooper Gotch (d. 1931) 303 works; and Felicia Browne (d. 1939), 34 works. In addition, Tate has 19 unpublished works by the artist Henri Gaudier-Brezeska who died fighting in the First World War in 1915. As the centenary of the artist's death approaches, it is unfortunate that the present 2039 rule may prevent this material from being made more widely available to the public.

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

The rights clearance process varies between museums and is dependent on both the type of material and the available staff resource. However, there will be an agreed due diligence process in place to explore what information the museum already has about the rights holder, deploy a series of appropriate searches (such as a Google or external database search), find out more about the rights holder or their next of kin, and share information with museums that have similar collections. As rights clearance can be a labour-intensive activity, the level of research conducted is usually commensurate with the end use.

Although some national museums and very large regional collections (such as Glasgow Museums) employ a full or part-time Intellectual Property Manager, Rights Clearance Officer or equivalent, it is simply not feasible for smaller museums to do this. Rights clearance may therefore be done by curators or collections managers, often in response to a request to use the material.

As an example, IWM's rights clearance process is set out below.

Phase	When staff should follow this procedure:	
	Curatorial and Exhibitions staff	Non-curatorial Staff
Phase 1: Establishing rights status, seeking permission to use, and recording rights status		
<ol style="list-style-type: none"> 1. Identify object and check rights information in Adlib. 2. Ascertain the copyright status and the rights holder if applicable. 3. Contact the rights holder if necessary using the IWM Copyright Agreement form and seeking rights to all IWM collections works. 4. Update the rights data in Adlib. 	When following the Acquisition & Accessioning or Loans In procedures, exhibitions planning or when wanting to use the object.	When wanting to use an IWM collections object. The IP Administrator will provide support when searching Adlib and understanding the rights information. Collections staff will contact the rights holder and update the Adlib record.
Phase 2: Rights research and orphan work designation		
<ol style="list-style-type: none"> 1. Conduct due diligence research into the rights holder and record evidence of the research. 	The IP Consultant can provide support as needed.	Liaise with IP Administrator and/ or Collections staff about due diligence research where required.
Phase 3: Update rights status on Adlib in response to a change		
<ol style="list-style-type: none"> 1. Record the change or challenge on Adlib. 2. If necessary, ensure the object and any digital assets are removed from commercial and/ or non-commercial use. 	In response to new information about an object (including recording due diligent searches), or response to a copyright claim.	N/A

It can be difficult to determine cost, but these two examples of a rights clearance exercise at the V&A provide an illustration:

- The V&A has acquired a collection of over 2,000 twentieth century posters. A curator has spent 35 days clearing rights. The curator requested permission to use over 850 works although there were multiple rights holders within each work, so 1,150 enquiries were made to organisations and individuals in a bid to identify rights holders and secure their permission to use the works. In five months, rights had been cleared for 250 objects. A curator at the V&A is typically in receipt of a salary of £25,763 - £30,965.
- The time taken to secure permission to use 270 images in the catalogue for the exhibition *British Design: 1948 – 2012 Innovation in the Modern Age* was 120 working days. Therefore staff costs were approximately £4,800.

It is important to remember that if a work remains in copyright, museums cannot seek a commercial return on the investment they make in the care and preservation of that work.

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

The 2039 rule means that certain extremely old unpublished items, where no living family members are likely to be easy to discover, are almost impossible to clear. As this makes the task extremely onerous it is not the best use of staff time, and other works are therefore prioritised.

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?

This question is not applicable to museums as the works in their collections subject to the 2039 rule have third party copyright.

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

NMDC agrees with the Government's proposed approach. NMDC also feels that there should not be a transitional period, as this would add unnecessary complexity and confusion. The Government's proposed approach will bring UK copyright legislation with regard to unpublished works in line with other EU Member States. It will also make the operation of the EU Orphan Works Directive more straightforward and allow museums to utilise that legislation.

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

The term of copyright should be the same as in the equivalent published works: 70 years after the death of the creator. To have different periods of copyright for published and unpublished works by the same creator – an artist or a playwright for example – is confusing and should not be perpetuated.

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

NMDC has no objection to abolishing these rights.

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

NMDC feels that these works will be much more widely used. This is particularly important for publicly funded museums who wish to ensure the greatest possible public engagement in their collections. Whilst unpublished works may not presently be being utilised because of the cost and complexity of rights clearance, they are still being stored and conserved by the institutions at some financial cost. There is undoubted public value in ensuring that the collections in public ownership, cared for using public funding, are made available to the public to view and research.

If this change in the term of copyright in unpublished works could be made within this Parliament then it would allow museums to more easily display and publish works relevant to upcoming anniversaries. As the consultation document makes clear, the present 2039 rule has meant that some material pertinent to the centenary of the start of the First World War could not be displayed or published by museums without infringing copyright legislation. If this rule remains in place it will similarly affect material relating to upcoming anniversaries of other major historical events, for example: other key dates associated with the First World War; Votes for Women (1918); Easter Uprising (1916); Partition of Ireland (1922); Battle of Britain (1940); VE Day (1945); Second Reform Bill (1867); Emergence of the Impressionist Art Movement (1868); opening of Ellis Island Immigration station, New York (1892); formation of the Independent Labour Party (1893); opening of the Manchester Ship Canal (1894).

The example of public use of an artist's works where the term of copyright in that artist's work may have recently expired provides a good illustration of how ease of availability encourages greater use. For example, copyright in works by the photographer Herbert Ponting expired in 2005, allowing those public institutions which hold collections of his work such as the Royal Geographic Society, the Royal Collection and Royal Museums Greenwich

to allow greater public access to them. Evidence suggests that the appetite for the works to either be viewed by the public, used by academics or utilised for more commercial uses has not been diminished because of the extra volume of works available. The availability of Ponting's work enabled the Natural History Museum, Scott Polar Institute, the Royal Collection and the Royal Geographic Society to all publicly display material created by him during commemorations of the centenary of Scott's Polar Expedition. These exhibitions were all popular (and occurred simultaneously), added to the sum of public knowledge about the expedition and allowed each institution to use selected works for commercial purposes.

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?

NMDC members are not aware of a situation such as this, and instead feel that those who deposited such works are unlikely to be aware of the 2039 rule.

Q11 Do you consider there to be 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?

Museums already carefully consider the sensitivities of using some of the material in their collections, whether it is in or out of copyright. It is important to remember that this is material already deposited in a public collection.

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

Transitional arrangements are not required as this would add unnecessary confusion and complication.

Q13 Should these regulations apply to unpublished sound recordings?

NMDC feels that these regulations should apply to unpublished sound recordings. To apply it to all types of works reduces the opportunity for confusion. It would seem odd that an unpublished letter by an artist, whose work is already out of copyright, could be released from the 2039 rule, but a sound recording of their voice could not. It is important to remember that sound recordings in museum, library and archive collections are not just recordings of musical or artistic performance. For example, the Science Museum Group holds sound recordings relating to the railways; museums across the country hold recordings of the first-hand testimony of local people relating to regional or national events; and many natural history collections include sound recordings of the natural world.

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?

It is difficult to answer this question because of the breadth of types of sound recordings in museum collections. There will be very different markets for musical recordings to that of birdsong, for example.

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, this largely depends on the type of sound recording. For example, it may be of great public benefit to the Theatre and Performance Archive at the V&A, where copyright has not been cleared in some sound recordings because of the prohibitive cost. Although the museum would have to invest in format shifting and updating collections management records, the V&A feels that this could have invaluable public benefit.

For more information about any of the points raised in this submission, please contact Katie Childs, Policy and Projects Manager at the National Museum Directors' Council: katie.childs@nationalmuseums.org.uk or 0207 091 3175.