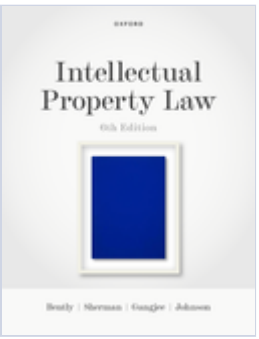

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7. Duration of Copyright

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Abstract

This chapter examines the debate over the question of the appropriate period of protection that ought to be granted to copyright works, with emphasis on literary, dramatic, musical, and artistic works as well as films and entrepreneurial works (sound recordings, broadcasts, and typographical arrangements of published editions). It begins by considering the provisions of the EU Term Directive with regards to the duration of protection for such works and then discusses a number of exceptions to the general rule that the duration of copyright works is life plus 70 years. It also analyses the so-called publication right provided to those who first publish works in which copyright has lapsed. The chapter concludes with an assessment of the optimal term of copyright protection.

Keywords: copyright, duration of copyright, term of protection, EU Term Directive, publication right, optimal term

1 Introduction

The question of the appropriate period of protection that ought to be granted to copyright works has long captured the attention of policymakers, legislatures, judges, and commentators. For example, the central question of the literary property debate of the eighteenth century was whether common law literary property protection should be perpetual.[1] Similar debates have arisen at many other times during the history of copyright law. While these debates have always been shaped by the particular circumstances under discussion, they are similar in that they have attempted to mediate between the private interests of owners and the interests of the public in ensuring access to creative works[2]—that is, they have attempted to coordinate and balance the various interests that coexist in copyright law. Another common feature of these debates is that, whenever the question of duration has arisen, the length of protection has typically increased rather than decreased.[3] For example, under the 1710 Statute of Anne, books were protected for 14 years from publication and for a further 14 years if the author was alive when the first term lapsed. This was increased in 1814 to 28 years, or the life of the author. After great debate, the Literary Copyright Act 1842 extended the term of copyright in books to 42 years, or the author's life plus seven years.[4] In 1911, this was increased once again to life plus a 50-year term. As a result of the EU Term Directive, in 1996 the term of protection for 'authorial works' (including cinematographic works) was extended to the life of the author plus 70 years,[5] while in 2011 the term of protection for sound recordings rose from 50 to 70 years.

Before looking at duration in more detail, it is important to note a number of things. The first is that the
p. 199 period of protection changes depending on the type of work in question. ↵ This is a reflection of the fact that different interests and policy issues arise with different categories of work. The way in which the term of protection is calculated also differs depending on the type of work in question. In relation to most literary, dramatic, musical, and artistic works, copyright subsists throughout the life of the author and for a fixed term (currently 70 years) calculated from when the author dies (*post mortem*). In the case of entrepreneurial works and certain types of authorial work (such as those of unknown authorship), the protection is a fixed term that is calculated from when the work is either *made, published, or communicated to the public*. The term is calculated from the end of the year in which a particular event occurs.[6]

Second, while the United Kingdom remained a member state of the EU, the question of term of copyright was almost completely harmonized. As a result of the EU Term Directive, the length of protection for literary, dramatic, musical, and artistic works in the United Kingdom was set at the life of the author plus 70 years.[7] The term of protection offered to films also changed as a result of the Directive. Under the Copyright, Designs and Patents Act 1988 (CDPA 1988), as enacted, where films were treated as entrepreneurial works, films were given a fixed term of protection. As a result of harmonization, protection is required both for 'cinematographic works' both as authorial works and 'fixations' on film as 'related rights'.[8] The UK legislature appears not to have fully comprehended the logic underlying the Directive. It has amended the 1988 Act to make the term of 'films' under section 5 (that is, fixations) depend on the life of the principal director, author of the screenplay, author of the dialogue, and the composer of music specifically created for use in the work. No changes needed to be made to the term for broadcasts,[9] and there has been no harmonization at all in relation to rights in typographical arrangements.

In implementing the Term Directive, member states were required to apply the new terms to all works and subject matter that were protected in at least one member state on 1 July 1995.[10] As it turned out, this meant not only that the copyright in many works was extended, but also that the copyright in some works that had previously expired had to be revived.[11] For example, the UK copyright in a work by a British author who died in 1944 and which had first been published in the United Kingdom would have lapsed on 1 January 1995, but would have been revived from 1 January 1996, since the work would have been protected in Germany (which already operated a life-plus-70 term) on 1 July 1995.[12] The Directive also obliged member states when implementing the reforms 'to adopt the necessary provisions to protect in particular acquired rights of third parties'.[13] Acts done pursuant to arrangements made before 1 July 1995 at a time when copyright did not subsist in the work are treated as not infringing any revived copyright in a work.[14] Initially, the revived
p. 200 copyrights were treated as 'licensed by the copyright owner, subject ↵ only to the payment of such reasonable royalty or other remuneration as was to be agreed or determined in default of agreement by the Copyright Tribunal'.[15]

Where a work originates outside the United Kingdom,[16] the period of protection is to be no greater than that which the work would receive in its country of origin.[17] That is, the UK law is based on a notion of 'comparison of terms' rather than national treatment.[18] This means that, where a work is first published in Canada or New Zealand,[19] and the author is not a national of the United Kingdom, the work is protected in the United Kingdom for only 50 years after the death of the author (because that is currently the duration of Canadian copyright law and New Zealand).[20] A work of Indian origin would be protected for 60 years after the author's death, because that is the term operative in India.[21] But a Mexican author would only be protected for life plus 70 years, despite the fact that Mexico now offers an extraordinary term of 100 years *post mortem auctoris*.

Although the United Kingdom introduced the 'comparison of terms' rule originally to implement the Term Directive, that implementation seems to go further.[22] This is because section 12(6), like sections 13A(4), 13B(7), and 14(3), refers to the duration of copyright as being 'that to which the work is entitled' in the country of origin. A literal interpretation requires reference therefore not only to duration in the country of origin, but also to whether copyright subsists at all in that country: after all, if there is no copyright in the work in its country of origin, it is difficult to say that the work is 'entitled' to copyright for any length of time. The impact would be to deny copyright to works that were unprotected in the country of origin, for example, because they fell outside any list of subject matter or failed to reach that country's originality threshold. The Directive, in contrast, states that copyright 'shall expire on the date of expiry of the protection granted in the country of origin'.[23] The use of the term 'expiry' suggests that the rule is not directed at conditions of subsistence. The preferable view is that section 12(6) should be read as dealing only with expiry of term; in cases in which works are not protected in the country of origin, but would meet British requirements for subsistence, the section should be understood as requiring British law to give such works protection until such time as protection of a work *of that sort* would expire in the country of origin. This interpretation should still apply, despite the United Kingdom leaving the EU, because section 5(2) of the EU(W)A maintains the application of 'the principle of the supremacy of EU law' to legislation passed before 31 December 2020.

The Term Directive was amended by the Information Society Directive, codified in 2006[24] and again amended
p. 201 in 2011.[25] The latter amendments followed a period of ↵ sustained lobbying by the record industry and allied interests, particularly performers, which were concerned about the imminent lapse of sound recording

copyright in material from the late 1950s and early 1960s, the heyday of rock 'n' roll and the early years of pop. It was argued that it would be unfair if performers, such as Sir Cliff Richard (or the French performer Johnny Halliday), were no longer able to gain income from their recordings during their lifetime. Despite arguments against such extension from the Gowers Committee[26] and academics,[27] all of which emphasized how increasing copyright term imposed costs on consumers (and welfare generally by increasing so-called 'deadweight loss'),[28] the European legislature decided that an increase in the term of protection for sound recordings and performers from 50 to 70 years was appropriate.

2 Literary, Dramatic, Musical, and Artistic Works

Subject to the exceptions listed later in this chapter, copyright in a literary, dramatic, musical, or artistic work expires 70 years from the year in which the author of the work dies.[29] Thus, if an author of a book were to have died in 1990, the copyright in the book would expire at the end of 2060. In general, if a literary, dramatic, musical, or artistic work is jointly authored, the 70-year *post-mortem* term of copyright is calculated from the year in which the longest surviving author dies.[30] However, in the case of 'songs', a special rule applies (following from the 2011 Directive). Where, as a result of collaboration, both a literary work and a musical work were 'created in order to be used together',[31] the works are treated as a work of 'co-authorship' (a statutory designation distinct from joint authorship). For the purposes of duration of copyright, co-authored songs are treated in the same way as jointly authored works—that is, copyright continues to subsist until 70 years from the death of the last of the co-authors to die.[32] Thus the Hammerstein lyrics of Rodgers and Hammerstein songs, such as those in the songs in *South Pacific*, continue ↵ to be protected beyond 2030 (70 years from Oscar Hammerstein II's death) to the end of 2049—that is, 70 years from the death of the musical composer Richard Rodgers.[33] But the provision does not apply where words are written for pre-existing music (as might be the case with a parody of an existing song), or where a literary work, such as a poem, is later used as the lyrics of a song; in both of these situations, where the music and lyrics were not 'specifically created for the … musical composition with words', the normal rules apply.

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2.1 Exceptions to the Term of Life Plus 70 Years

The general rule that the duration of literary, dramatic, musical, and artistic works is life plus 70 years is subject to a number of exceptions.[34]

2.1.1 Computer-generated works

Where a literary, dramatic, musical, or artistic work is computer-generated, the duration of protection lasts for 50 years from the end of the year in which the work was made.[35] This provision is under review by the government in the context of developing artificial intelligence. One option being considered is a right with a shorter term, perhaps only five years, reflecting the ease with which AI systems can generate works.[36]

2.1.2 Crown copyright

Crown copyright in a literary, dramatic, musical, or artistic work lasts for 125 years from the year in which the work was made. If the work is published commercially within 75 years from the year in which it was made, then copyright lasts for 50 years from the date on which it was commercially published.[37]

2.1.3 Parliamentary copyright and international organizations

Parliamentary copyright lasts for 50 years from the year in which the work was made.[38] Where an international organization is the first owner, copyright also lasts for 50 years from when the work was made.

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2.1.4 Artistic works used in designs

Until recently, copyright in artistic works that have been used in designs of industrially produced articles lasted in effect for 25 years from the year in which such articles were first legitimately marketed. This limitation on term, which took the form of a defence (CDPA 1988, section 52), was removed by the Enterprise and Regulatory Reform Act 2013 (ERR 2013) with effect from 28 July 2016.[39] The practical effect of repeal of the defence is to restore the full term to all works protected in the United Kingdom or any member state of the EEA on 1 July 1995. Complex transitional provisions allowed for copies created before 28 October 2015 to be sold off before 28 January 2017.[40]

2.1.5 Works of unknown authorship

As we saw earlier, in certain situations it may not be possible to identify the author of a particular work. Given that, with works of unknown authorship, there is no identifiable author whose death can help to set the duration of protection, copyright law is forced to use other trigger points to calculate duration. In these circumstances, the 1988 Act provides that copyright in a literary, dramatic, musical, or artistic work of unknown authorship lasts for 70 years calculated either from the year of creation, or if, during that period, the work is made available to the public, from the year in which it was made available.[41] If the author's name is disclosed before the 70-year term lapses and before the author's death, this disclosure will have the effect of extending the term of copyright to the author's life plus 70 years.[42]

2.1.6 Unpublished works not in the public domain

Section 17 of the Copyright Act 1911 conferred protection on unpublished literary, dramatic, and musical works, and engravings, for 50 years from the date of publication. This meant that, so long as the works remained unpublished, the copyright term was unlimited. The 1988 Act removed this possibility by specifying that copyright in works that were unpublished at the author's death and remained so until 1 August 1989 was to last for a fixed period of 50 years from 1 January 1990—that is, until 31 December 2039.[43] The Minister now has power to reduce the period of copyright in unpublished works.[44]

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3 Films

Under the Copyright Act 1956 and CDPA 1988 (as enacted), where 'films' were treated as types of entrepreneurial work, protection was limited to 50 years, normally calculated from the year of release.[45] The Term Directive required recognition of copyright in both the first fixation of a film, for 50 years, and the 'cinematographic or audiovisual work', for which the term was to be 70 years from the year of the latest death among four categories of person: the principal director, the author of the screenplay, the author of the dialogue, or the composer of music specially created for and used in the cinematographic or audiovisual work.[46] Subsequent British attempts at implementation rather unwisely ignored the distinction, preferring to extend the copyright in 'film'—the section 5B copyright—to 70 years from the death of these four persons.[47] Where the identity of these four people is unknown, the term of protection is 70 years from the year in which the film was made.[48] Alternatively, if, during that period, the film is made available to the public, copyright expires 70 years from the end of the year in which the film was first made available.[49] Foreseeing potential problems in identifying when such copyright expires, the Duration of Copyright and Rights in Performances Regulations 1995[50] also introduced a new exception into the 1988 Act to allow a film to be copied at a time when it is reasonable to assume that copyright has expired.[51]

Not long after this attempted implementation, the Court of Appeal recognized that cinematographic works benefit from copyright not merely through fixation as films, but also as dramatic works.[52] While this decision moved British law some way towards compliance with international and regional obligations, it also exposed further the oddness of the British attempt to give effect to the Term Directive. This is because the term of copyright in the cinematographic work as a dramatic work is left to be determined by reference to the life of the 'author'. In British law, this might well include the director and authors of scripts for the film (as long as they do not exist before the film-making process) and possibly the editors or director of cinematography, but it is highly unlikely to include the composer of music. If normal principles were to be applied, the term of protection would be unlikely to be that required by Article 2(2). If the legislation is not amended, it is not unlikely that a court will be faced with the choice of applying these normal principles and acknowledging failed implementation, or reading the term 'author' in this context as being open-textured enough to take its meaning from the Directive. Moreover, once a *post-mortem* term is acknowledged to exist in relation to the cinematographic work as a dramatic work, the wrong-headedness of extending the term of the section 5B film copyright is apparent. If the section 5B copyright is to reflect the Directive's demands in relation to related rights in the first fixation of a film, the period should be confined to 50 years from the making of the fixation.[53]

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4 Entrepreneurial Works

Because entrepreneurial works need not necessarily have human authors, the period of protection is calculated using different trigger points.

4.1 Sound Recordings

For sound recordings, copyright expires 50 years from the end of the year in which the recording was made.[54] If, during that period, the sound recording was published, copyright expires 70 years from the year of such publication. If, during the 70 years from making, the work is not published, but is made available to the public by being played in public or communicated to the public, copyright expires 70 years from the year of communication or playing in public.[55] Thus, if a sound recording was made in 1964 (e.g. unreleased Beatles recordings), but first published in 2013, then copyright might last until the end of 2083—giving a total period of 119 years.

The term of protection for sound recordings is, however, subject to one important—and conceptually quite innovative—qualification. Once 50 years has run from publication (or if there has not been publication, communication to the public),[56] the copyright in the sound recording might be determined by a performer whose performance is embodied on the sound recording if the sound recording is not being exploited.[57] This has been referred to as the 'use it or lose it' provision.[58] The effect of such action is that rights in the phonogram as such expire, leaving the performers with rights in the fixation of the performance embodied therein.[59] However interesting the device may be, its practical effects are likely to be minimal. This is because the conditions in which a performer can terminate the assignment are strictly defined.[60] In particular the right to terminate does not exist if the recording is accessible over the Internet.[61]

4.2 Broadcasts

The duration of broadcasts is 50 years from when the broadcast was first made.[62] Where the author of a broadcast is not a national of the United Kingdom, the duration of copyright is that to which the broadcast is entitled in the country of which the author is a national (provided that the period of protection does not exceed 50 years).[63]

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4.3 Typographical Arrangements

For typographical arrangements of published editions, copyright expires 25 years from the year of first publication.[64] This right should be distinguished from the publication right conferred on the publisher of a previously unpublished work in which copyright has expired, which also lasts for 25 years from publication.[65]

5 Moral Rights

In the United Kingdom, moral rights of integrity and attribution subsist as long as copyright subsists.[66] The right to object to false attribution is less extensive, lasting for only 20 years after the author's death. In some other countries, moral rights are capable of operating in perpetuity. The Term Directive made no attempt to harmonize the duration of moral rights and was expressed to be without prejudice to them.[67]

6 Publication Right in Works in which Copyright Has Lapsed

In order to give effect to Article 4 of the Term Directive, a new property right equivalent to copyright, called a 'publication right', was introduced in the United Kingdom.[68] The right is granted without formality to any person who, after the expiry of copyright protection, publishes for the first time a previously unpublished literary, dramatic, musical, or artistic work, or film. This new right lasts for 25 years from the end of the year in which the work was first published.

In order to have the right, a publisher must publish a 'public domain' literary, dramatic, musical, or artistic work, or a film for the first time.[69] The right is acquired only where the work is previously unpublished. It should be noted that 'publication' in this context has a special meaning.[70] When determining whether the work is previously unpublished, no account is to be taken of any unauthorized act done at a time when there is no copyright in the work. An 'unauthorized act' means an act done without the consent of the owner of the physical medium in which the work is embodied or on which it is recorded.

The publication right that vests in the publisher is available only 'after the expiry' of copyright protection.[71] This means that the publication right is unlikely to be of great significance in the United Kingdom for some time. This is because of the dual effect of the changes made as regards unpublished works in the 1988 Act and the other changes made to the copyright term introduced to give effect to the Term Directive. The effect of these ↵ transitional provisions is that the publication right is currently restricted to unpublished artistic works other than engravings.[72]

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Another consequence of limiting the availability of the publication right to cases in which copyright has expired is that it may exclude works in which copyright has never subsisted. Since the majority of existing unpublished works received statutory copyright protection in 1911, it will normally be possible to resolve the question of whether a work ever enjoyed copyright protection without too much difficulty (although problems exist in relation to artistic works). It seems that no statutory copyright existed in unpublished paintings, drawings, and photographs created before 1862 by an artist who died before 1855, nor in unpublished sculptures created prior to 1 July 1862.

While the publication right may supplement existing rights given to publishers in their typographical arrangement of published editions, it differs from these rights in three regards. First, the publication right is available only for the first publication of a previously unpublished work. Second, while the new publication right may apply where the publication relates to an artistic work, the typographical arrangement right is not relevant in such circumstances. This is because the right in typographical arrangement is confined to 'a published edition of the whole or any part of one or more literary, dramatic or musical works'.[73] Third, the publication right is much more extensive than the right to prevent facsimile copying of a typographical arrangement.

A work qualifies for a publication right[74] only if the first publication occurs in the United Kingdom or the EEA and the publisher of the work at the time of first publication is a national of the United Kingdom or an EEA state.[75] Publication has a more extended meaning than that discussed in relation to copyright. Where two or

more people jointly publish a work, it is sufficient if any of them is a national of an EEA state. No provision is made for the extension of the publication right so as to recognize equivalent rights for foreign publishers, where the country of publication provides reciprocal rights to publishers in the EEA.[76]

7 Optimal Term

Although the existing provisions on copyright term are, in large measure, a result of EU harmonization, any legislative flexibility that might have been anticipated to become available as a result of Brexit has already been sacrificed in trade agreements. For example, the UK-EU Trade and Cooperation Agreement requires the United Kingdom to maintain the established terms of life-plus-70 years for authorial works.[77] The FTA with the Ukraine even requires the United Kingdom to confer a 50-year term on producers of film fixations (which, as noted elsewhere, the United Kingdom had, as a member of the EU, failed to protect adequately).[78]
p. 208 The only freedom that has been preserved in these agreements is to ↵ lengthen copyright terms and/or modify the rule on comparison of terms (e.g. to grant full national treatment).[79] Nevertheless, we think it still valuable for readers to be offered some guidance as to the literature on the 'optimal' term of protection.

There is now an extensive literature debating the optimal term of copyright protection.[80] The arguments divide, in the first place, over understandings of the very nature and purpose of copyright. An initial distinction can be drawn between the 'natural rights' thinkers and those who regard copyright as an 'instrument' by which to achieve specific policy aims.

Natural rights approaches can be divided into two types: 'personality'-based thinking; and 'labour'-based thinking. For those who see copyright as the legal reflection of the 'natural right' of an author to protect their 'personality', a term equivalent at the very least to the lifetime of the author seems appropriate.[81] This, after all, is the period for which the law of defamation protects the reputation of individuals. For those who see copyright as a natural right in the product of one's labour, it is common to claim that the term of copyright should be indefinite.[82] Others counter that this may fail to recognize that works are rarely, if ever, the products of a single author and that there are important competing natural rights (e.g. to education).[83] Thus some who accept the argument that copyright law is justified as reflecting natural rights in the products of one's labour nevertheless take the view that such protection is justified for only a limited period in time.

For those who view copyright as a legal device that gives effect to public policy, the optimal term depends on a number of matters. First is the starting point: is copyright an incentive to create (or to invest in creation) that is to be accepted only insofar as it is necessary to achieve those ends? Such a view might suggest a very short term, similar to that conferred by patent law, and certainly much shorter than those recognized at present by copyright. Or, alternatively, is private ownership of intellectual goods generally desirable as securing the optimal use of those goods, and the 'public domain' necessary only where the value of such goods is so low that the cost of transacting itself prevents the optimal use of such goods? Such a view might support a system of perpetual copyright, subject perhaps to requirements of registration[84] or compulsory licensing to ensure that transaction costs are kept to a minimum.

Second is the question of empirical evidence: what evidence is there that increasing term in fact increases the quantity of creative activity?[85] What evidence is there as to the social costs associated with longer terms? Is the idea that intellectual goods will not be optimally exploited unless they are privately owned borne out by evidence as to the exploitation of public domain materials?

p. 209 ↵ The arguments as to the effect of increasing term were extensively ventilated in the US literature surrounding the Supreme Court case of *Eldred v. Ashcroft*.[86] One important point that was made was that no incentive to create is conferred by extending copyright protection for works that are already in existence.[87] Thus, some alternative justification needs to be offered for any such legislative changes. Another important insight offered by economists was that increasing term will not necessarily increase incentives. This is because increasing term leads to potential payments in the distant future, and when a present value is calculated for such returns, it is likely to be much reduced. A sum of £10,000 received in 100 years' time is not worth £10,000 today: depending on how one does the calculation (in particular the 'discount rate'), it might be worth very little indeed. In fact, if the discount rate is 7 per cent, the present-day value of £10,000 in 100 years' time is a mere £12.[88] While present-day incentives might thus be minimal, considerable debate surrounds the social costs of increasing copyright terms. Those campaigning for increased terms have often argued that the price of 'public domain' works does not differ from the price of copyright-protected works and thus that there are no real 'social costs'. In a remarkable study, however, Paul Heald showed that copyright protection often simply means that protected works are unavailable.[89] Heald randomly sampled fiction works on Amazon, identifying the publication dates and from that determining their copyright status (in the United States). The evidence shows that copyright works tend to be unavailable from a short time after publication and that they only really become available again once copyright lapses. For example, he found that more than twice as many new books originally published in the 1890s are for sale by Amazon than books from the 1950s, even though, in quantitative terms, far fewer books were published in the 1890s. This suggests that copyright protection has a considerable social cost, in that it impedes exploitation without offering returns to anyone.

Heald also studied the counterclaims that, in the absence of private ownership, intellectual goods will not be used 'optimally', but will also either be underexploited or overused. In one study, he compared works published between 1913 and 1922 (which fell into the public domain in the United States from 1988 to 1998—essentially meaning that they had a 75-year term) with those published between 1923 and 1932 (which were in copyright until at least 2018).[90] The study shows that a higher proportion of the works in the public domain were in print and that, while the average prices of works in and out of the public domain were the same, for a sample of the most popular works, the price of the public domain editions was substantially lower. In a further study, Heald analysed the use of popular songs from the same period, 1913–32, in films.[91] This study confirmed the finding of the previous study that a work's status as a public domain work did not in fact lead to its 'underexploitation'; public domain songs were no less likely to be in a film than those that were still in copyright. These studies thus flatly contradict the empirical premise of the neoliberal arguments that perpetual copyright is desirable to avoid underexploitation of works.

Notes

[1] That is, the debates surrounding *Millar v. Taylor* (1769) 4 *Burr* 2303, 98 *ER* 201, and *Donaldson v. Beckett* (1774) 2 *Brown's Parl Cases* 129, 1 *ER* 837; *Cobbett's Parliamentary History of England for the Years 1771–1774, Vol. XVII* (1813), 953. See M. Rose, *Authors and Owners* (1993); R. Deazley, *On the Origin of the Right to Copy* (2004); Sherman and Bently, ch. 1.

[2] See further C. Seville, 'Copyright's Bargain: Defining Our Terms' [2003] *IPQ* 312. In recent years, it has become common to articulate the object of the public interest as 'the public domain'.

[3] L. Bently, 'R v. The Author: From the Death Penalty to Community Service' (2008) 32 *Colum JL & Arts* 1.

[4] C. Seville, *Literary Copyright Reform in Early Victorian England* (1999).

[5] Term Dir. On this, see N. Dawson, 'Copyright in the European Union: Plundering the Public Domain' (1994) 45 *NILQ* 193.

[6] CDPA 1988, s. 12(2); Term Dir., Art. 8.

[7] Duration of Copyright and Rights in Performances Regulations 1995 (SI 1995/3297). The length of protection is greater than that which is required in WCT, Art. 1(4), and TRIPS, Art. 9.

[8] Duration Dir., Art. 3(3) (the rights of the producer of first fixation of a film are to last 50 years after fixation or after the fixation was lawfully published). These are distinct from the rights of the owner of copyright in a cinematographic or audiovisual work.

[9] Term Dir., Art. 3(4).

[10] *Montis Design BV v. Goossens Meubelen* BV, Case C-169/15, EU:C:2016:790, [34]–[35] (new terms did not apply where work had fallen into the public domain in a member state before 1 July 1995, and the work was not protected in the territory of any another member state, even though the work had fallen into the public domain because the right holder had failed to comply with a formality).

[11] Duration Regs, especially reg. 17.

[12] *Land Hessen v. G. Ricordi & Co.*, Case C-360/00 [2002] *ECR* I–5089.

[13] Term Dir., Art. 10. See also Recitals 26 and 27.

[14] Duration Regs; *Sweeney v. Macmillan Publishers* [2002] *RPC* (35) 651.

[15] Duration Regs, regs 23, 24. Regulation 24 was repealed (with effect from 6 April 2017) by the Copyright (Amendment) Regulations 2016 (SI 2016/2010) as it was incompatible with the ECJ rulings in *Butterfly Music Srl v. Carosello Edizioni Musicali e Discografiche Srl*, Case C-60/98 [1999] *ECR* I–3939 and *Flos SpA v. Semeraro Casa e Famiglia*, Case C-168/09 [2011] *ECR* I–181, [53]–[56], in particular that transitional provisions must not generally prevent 'new rules from applying to the future consequences of situations which arose under the earlier rules'; and must be temporary and 'not have the effect of deferring for a substantial period the application of the new rules'. As observed in previous editions, a rule that all revived copyrights are subject to compulsory licensing appeared to breach these rules.

[16] CDPA s 12(6) (as amended by SI 2019/605, reg. 4).

[17] On what is a country of origin, see CDPA 1988, s. 15A.

[18] Term Dir., Recital 22, Art. 7.

[19] CDPA 1988, s. 15A(2).

[20] CDPA 1988, s. 12(6); Canadian Copyright Act, s. 6; New Zealand Copyright Act 1994, s. 22. The term of protection applicable in Canada is to be increased to life plus 70 years under the United States, Mexico and Canada Trade Agreement (USMCA), Art. 20.62.

[21] Indian Copyright Act 1957, s. 22, as amended by Act 13 of 1992.

[22] As observed by Mustafa Safiyuddin, of Legasis Partners, Mumbai.

[23] Term Dir., Art. 7.

[24] Directive 2006/116/EC.

[25] Directive 2011/77/EU.

[26] *Gowers Review of Intellectual Property* (Dec. 2006), Recommendation 3, [4.20]–[4.47], 48–57.

[27] Centre for Intellectual Property and Information Law, *Review of the Economic Evidence Relating to the Extension of the Term of Copyright in Sound Recordings* (2006); IViR, *Recasting Copyright for the Knowledge Economy* (2006), ch. 3. See also N. Helberger, N. Dufft, S. van Gompel, and B. Hugenholtz, 'Never Forever: Why Extending the Term of Protection for Sound Recordings is a Bad Idea' [2008] *EIPR* 174; M. Kretschmer et al., 'Creativity Stifled? A Joint Academic Statement on the Proposed Copyright Term Extension for Sound Recordings' [2008] 30 *EIPR* 341; C. Geiger, 'The Extension of the Term of Copyright and Certain Neighbouring Rights: A Never Ending Story?' (2009) 40 *IIC* 78.

[28] The 'deadweight loss' is the loss caused to those who would have bought a record at the price for which it would sell in a competitive market (without copyright), but who are not willing to pay the price established by the copyright owner and thus do not make the relevant purchase.

[29] CDPA 1988, s. 12(2).

[30] CDPA 1988, ss 3(1), 12(4).

[31] CDPA 1988, s. 10A (introduced with effect from 1 November 2013) by the Copyright and Duration of Rights in Performances Regulations 2013 (SI 2013/1782), reg. 4, to implement Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011, Art. 1(1), amending Directive 2006/116/EC on the term of protection of copyright and related rights by adding Art. 1(7).

[32] CDPA 1988, s. 12(8) (as amended). The new mechanism for calculating term applies to existing songs where either the musical or literary work was protected on 1 November 2013 in the United Kingdom or any member state of the EEA: Copyright and Duration Regs, reg. 14(d), (e). The Regulations contain specific provisions dealing with the effects of extension to existing copyrights and revival.

[33] Copyright and Duration Regs, reg. 14 (detailing application to existing works). For background, see IViR, *Recasting Copyright*, ch. 4.

[34] Prior, perpetual copyrights under past law end in 2040. Contrast, however, the curious exception for J. M. Barrie's *Peter Pan*: CDPA 1988, Sch. 1, para. 13, and Sch. 6, respectively. The Peter Pan provision entitles the trustees of the Hospital for Sick Children to a royalty (to be used for the purposes of the hospital) in respect of any public performance, commercial publication, or communication to the public of the whole or any substantial part of the work or an adaptation of the play *Peter Pan* by Sir James Matthew Barrie. Barrie died in 1937, so copyright was about

to lapse when the Bill that led to the CDPA 1988 was going through Parliament. Lord Callaghan of Cardiff introduced the provision into the House of Lords as an amendment to the Bill: see 494 Hansard (HL) 494, 10 March 1988, cols 836–47. For an extensive treatment, see C. Seville, 'Peter Pan's rights: "To Die Will Be An Awfully Big Adventure"' (2003) 51 *J Copyright Soc'y USA* 1.

[35] CDPA 1988, s. 12(7). Were this regarded as an 'authorial right', doubts might exist as to compatibility with various requirements of European law. These concerns diminish if the protection is conceived as a 'related right', which has not been the subject of harmonization.

[36] IPO, *Artificial Intelligence and Intellectual Property: Copyright and Patents* (29 Oct. 2021).

[37] CDPA 1988, ss 163(3), 164, 165(3), 166(5). International organizations initially acquiring copyright in a work may enjoy it for 50 years from the making or longer if specified by order: CDPA 1988, s. 168(3).

[38] CDPA 1988, s. 165(3).

[39] ERR 2013, s. 74. See B. Lauriat, 'Copyright for Art's Sake' [2014] *EIPR* 275.

[40] Enterprise and Regulatory Reform Act 2013 (Commencement No. 10 and Savings Provisions) Order 2016 (SI 2016/593); CDPA 1988, Sch. 1, para. 6A, introduced by Copyright (Amendment) Regulations 2016 (2016/1210), reg. 2(3) (qualifying CDPA 1988, Sch. 1, para. 6, which had preserved the public domain status of artistic works excluded from copyright under Copyright Act 1911, s. 22, where such works were capable of registration and designs).

[41] CDPA 1988, s. 12(3). For the definition of 'making available', see CDPA 1988, s. 12(5).

[42] CDPA 1988, s. 12(4).

[43] CDPA 1988, Sch. 1, para. 12(4). A work published after the author's death, but before 1 August 1989, obtained a term of 50 years from publication: CDPA 1988, Sch. 1, para. 12(2). Under the 1956 Act, a work unpublished at the author's death continued in copyright until 50 years after first publication: CA 1956, ss 2(3), 3(4). In some cases, certain acts, such as performance in public, had the same effect as publication. For some works unpublished on 1 August 1989, the relevant copyright will have been extended by the increase in the term of copyright. For example, if an author died in 1988 leaving unpublished manuscripts (which remained unpublished in 1990), the effect of the changes made in 1988 was that copyright lasted until 31 December 2039. However, as a result of the increase in the duration of copyright to life plus 70 years, copyright was extended to 31 December 2058. See P. Masiyakurima, *Copyright Protection of Unpublished Works in the Common Law World* (2020), ch. 6.

[44] ERR 2013, s. 76. However, following consultation, a decision was taken not to use this power in the immediate future. See IPO, *Government Response to the Consultation on Reducing the Duration of Copyright in Certain Unpublished Works* (2015).

[45] CDPA 1988, s. 13 (as enacted).

[46] Term Dir., Art. 2(2).

[47] CDPA 1988, s. 13B(2). Each category may include more than one member, but unidentified members do not count: CDPA 1988, s. 13B(3), (10).

[48] CDPA 1988, s. 13B (4)(a), (10).

[49] CDPA 1988, s. 13B(4)(b), (10). The requisite 'making available to the public' includes showing in public or communicating to the public, if authorized: CDPA 1988, s. 13B(6).

[50] SI 1995/3297.

[51] CDPA 1988, s. 66A.

[52] *Norowzian v. Arks (No. 2)* [2000] *FSR* 363.

[53] Term Dir., Art. 3(3). See Kamina, 134.

[54] CDPA 1988, s. 13(b) and (c) (introduced with effect from 1 November 2013) by the Copyright and Duration Regs, reg. 6, to implement Directive 2011/77/EU.

[55] CDPA 1988, s. 13A(2) (as amended by SI 2003/2498, with transitional provisions in regs 30–2, 36–9), implementing Term Dir., Art. 3(2) (as amended by Info. Soc. Dir.); and re-amended by the Copyright and Duration Regs (implementing Directive 2011/77/EC). Note that an original collection of recordings would constitute a database and therefore be protected as a literary work.

[56] The eighth recital explains that these are situations in which, 'but for' the term extension, the phonogram would be in the public domain.

[57] CDPA 1988, s. 191HA(3); Directive 2011/77/EU, Art. 1(2)(c), introducing new Art. 3(2a) into Directive 2006/116. Often, there will be multiple performers. Each is entitled to terminate, but all will need to act collectively to exploit the fixation of the performance.

[58] IPO, *Directive 2011/77/EU: A Users Guide to the Directive* (Aug. 2013), 5.

[59] CDPA 1988, s. 191HA(4); Directive 2011/77/EU, Recital 8.

[60] CDPA 1988, s. 191HA(4) (introduced with effect from 1 November 2013 by the Copyright and Duration Regs, reg. 9).

[61] CDPA 1988, s. 191HA(2)(b).

[62] CDPA 1988, s. 14(2).

[63] CDPA 1988, s. 14(3) (as amended by the Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019 (SI 2019/605), reg. 7).

[64] CDPA 1988, s. 15.

[65] Rel. Rights Regs, reg. 16(6).

[66] See Chapter 10.

[67] Term Dir., Art. 9.

[68] Rel. Rights Regs, reg. 16.

[69] The publication right does not arise from the publication of a work in which Crown copyright or parliamentary copyright subsisted: Rel. Rights Regs, reg. 16(5).

[70] It includes any making available to the public and, in particular, includes the issue of copies to the public; making the work available by means of an electronic retrieval system; the rental or lending of copies of the work to the public; the performance, exhibition, or showing of the work in public; or communicating the work to the public: Rel. Rights Regs, reg. 16 (as amended).

[71] Rel. Rights Regs, reg. 16 (as amended).

[72] For an elaboration of the reasoning that leads to this conclusion, see Copinger (18th edn, 2021), [17–18]–[17–31].

[73] CDPA 1988, s. 8(1).

[74] For general analysis of concepts relevant to protecting foreign claims, see Chapter 4, section 5, pp. 129–33.

[75] Rel. Rights Regs, reg. 16(4) (as amended by the Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019 (SI 2019/605), reg. 27). No explanation has been offered for continuing the application of the right to EEA nationals and first publication in other EEA states.

[76] Rel. Rights Regs, reg. 16(4).

[77] TCA, 230 (term). See Johnson, 101–5.

[78] UK-Ukraine Political, Free Trade and Strategic Partnership Agreement, art. 154(3).

[79] Johnson, 105.

[80] For an overview, see S. Ricketson, 'The Copyright Term' (1992) 23 *IIC* 753.

[81] In some countries, such as France, the moral rights of authors are perpetual, being exercised after the author's death by heirs and by the state.

[82] This was the basis of much of the argument for perpetual copyright at common law.

[83] H. Breakey, 'User's Rights and the Public Domain' (2010) 3 *IPQ* 312; H. Breakey, *Intellectual Liberty* (2012).

[84] See W. Landes and R. Posner, 'Indefinitely Renewable Copyright' (2003) 70 *U Chi L Rev* 471. For a compelling critique, see M. Lemley, '*Ex Ante* versus *Ex Post* Justifications for Intellectual Property' (2004) 71 *U Chi L Rev* 129.

[85] K. Garcia and J. McCrary, 'A Reconsideration of Copyright's Term' (2019) 71(2) *Alabama L Rev* 351–406; K. Garcia, J. Hicks, and J. McCrary, 'Copyright and Economic Viability' (2020) 17(4) *J Emp L Studs* 696–721 (demonstrating short commercial life of sound recordings and considering implications for copyright term).

[86] [2003] 123 *S Ct* 769 (in which the US Supreme Court, Stevens J and Breyer J dissenting, held Congress's extension of copyright for extant works to life plus 70 years to be constitutional).

[87] See especially the amicus brief from Akerlof et al., available online at https://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/economists.pdf *<https://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/economists.pdf>*.

[88] A standard way in which to calculate present value is FV ÷ (1 + DR)*n*.

[89] P. Heald, 'How Copyright Keeps Works Disappeared' (2013) Illinois Public Law Research Paper No. 13–54, available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2290181 *<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2290181>*.

[90] P. Heald, 'Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Bestsellers' (2008) 92 *Minn L Rev* 1031.

[91] P. Heald, 'Testing the Over- and Under-Exploitation Hypotheses: Bestselling Musical Compositions (1913–32) and Their Use in Cinema (1968–2007)' (2009) 60 *Case W Res L Rev* 1. See also P. Heald and C. Buccafusco, 'Do Bad Things Happen When Works Enter the Public Domain? Empirical Tests of Copyright Term Extension' (2012) 28 *BTLJ* 1 (examining the fate of 334 best-selling books from 1913 to 1932 and correlating the public domain status of 171 of these with the availability of professionally recorded audio versions).

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