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# PERPETUAL COPYRIGHT AND CONSTITUTIONAL PROPERTY

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## I. INTRODUCTION

In recent years, various common law jurisdictions have consulted on the issue of perpetual copyright. In October 2013, in its *Modernising Copyright* Report, the Irish Copyright Review Committee recommended that the government should remove ‘an anomaly in the current legislation, by which certain unpublished works might gain a perpetual copyright’.<sup>2</sup> In December 2015, the Australian government initiated a public consultation on a draft Copyright Bill that, among other initiatives, proposed to do away with perpetual copyright in unpublished works, sounds recordings and films.<sup>3</sup> In August 2016, a consultation document jointly issued by the Ministry of Law and the Intellectual Property Office of Singapore noted that, ‘[t]he grant of a perpetual copyright is inconsistent with the wider underlying copyright bargain’ and as such should be dispensed with.<sup>4</sup> On 13 March 2018, the Irish government tabled a copyright reform bill intended to ‘implement certain recommendations of the 2013 *Modernising Copyright* Report,<sup>5</sup> including an amendment to clarify that ‘perpetual copyright does not exist in certain unpublished works’.<sup>6</sup> At the time of writing, however, only the Australian initiative has resulted in actual legislation: the *Copyright Amendment (Disability Access and Other Measures) Act 2017* received the Royal Assent on 22 June 2017; the provisions concerning duration of copyright take effect on 1 January 2019.

Amidst this activity, in October 2014, the UK Intellectual Property Office issued a consultation on whether to address the so-called 2039 rule: that is, the rule that certain unpublished works remain in copyright until 31 December 2039 regardless of when they were first created. The government noted that removing the complex 2039 rules would ‘simplify copyright law in the UK and encourage and enable the publication of previously unpublished older works, while continuing to protect the authors of unpublished works (and their families) for an appropriate period’.<sup>7</sup> In January 2015, the government published its response to the consultation. Although many respondents were supportive, a number had ‘raised some concerns with the policy and its potential negative impact on owners of copyright works’. As a result, the

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<sup>2</sup> Copyright Review Committee, *Modernising Copyright* (Dublin, 2013), 14.

<sup>3</sup> See Part III.B and following.

<sup>4</sup> Ministry of Law and the Intellectual Property Office Singapore, *Public consultation on proposed changes to Singapore’s copyright regime* (23 August 2016), 18.

<sup>5</sup> *Copyright and Other Intellectual Property Law Provisions Bill 2018* [No 31 of 2018]. See proposed s.7 of the 2018 Bill for the provisions regarding perpetual copyright.

<sup>6</sup> *Copyright and Other Intellectual Property Law Provisions Bill 2018*, Explanatory Memorandum, 3.

<sup>7</sup> Intellectual Property Office, *Consultation on reducing the duration of copyright in unpublished (“2039”) works in accordance with section 170(2) of the Copyright, Designs and Patents Act 1988* (October 2014), 1.

government decided not to take any action at that time, but would instead ‘seek further views from affected parties’.<sup>8</sup> Since then, government activity on this issue appears to have stalled.

The government’s apparent enthusiasm for addressing this issue was likely cowed by arguments that it ‘would amount to a confiscation of property rights,’ or that the removal of copyright granted under the 2039 rule ‘may not be permitted on human rights grounds as it could be deemed a deprivation of property.’<sup>9</sup> It cannot have helped that the government had recently received a bloody nose over its failed attempt to introduce an exception permitting private copying in the UK.<sup>10</sup> No doubt, the prospect of litigation on the part of affected copyright owners alleging breach of their rights under Article 1 Protocol 1 of the European Convention on Human Rights (A1P1) proved too worrisome. And yet, Griffiths has cautioned against the ‘overstated or positively misleading’ claims that are often made by vested interests about the sacrosanct nature of intellectual property rights within the context of European human rights discourse.<sup>11</sup> We endorse that sentiment and present an argument in favour of term reduction consistent with A1P1 norms.

We consider the background to the legislation abolishing perpetual copyright in Australia, and how this legislation sits with Australian jurisprudence concerning constitutional property rights. In many respects, the story underpinning the abolition of perpetual copyright is a non-story, but a non-story that offers insight into how and why contentious legislative reform is possible at all in a policy landscape that is more typically characterised by polarised opinion and an uncertain, often disputed evidence base. Then, we consider the relevance of this Australian experience for reform of the 2039 rules before offering a suggested blueprint for tailored legislative activity on this issue. Next, we interrogate our proposed model according to the prevailing norms and logic of the European Court of Human Rights as applied to the right to property, while also considering the relevance of the publication right for our model. We conclude that the British government should not be dissuaded from addressing the 2039 phenomenon by arguments concerning the confiscation of property and human rights violations. These arguments have some merit but are not persuasive. A suitably nuanced approach to this issue might readily accommodate and preserve the interests of the very small minority of copyright owners that are fearful of losing valuable economic rights in their long unpublished materials. At the same time, it might release tens of millions of unpublished historic records and documents into the public domain without objection, controversy or concern.

We discuss the potential advantages to legislating on this issue later in the article. For now, suffice it to say that one of the principal impediments to enabling online access to our shared cultural heritage within the UK lies in the fact that these historic unpublished materials remain in copyright beyond the standard term of life plus 70 years. Consider the recent centennial commemorations marking the start of the First World War. If the standard copyright term

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<sup>8</sup> Intellectual Property Office, *Government response to the consultation on reducing the duration of copyright in certain unpublished works* (January 2015), 1.

<sup>9</sup> *Ibid.*, 4.

<sup>10</sup> The exception for private copying was introduced in October 2014 but, following a judicial review, on 17 July 2015 the High Court quashed the regulations relating to the exception. At present, the government is not intending to take steps to reintroduce the exception. See: [www.gov.uk/government/news/quashing-of-private-copying-exception](http://www.gov.uk/government/news/quashing-of-private-copying-exception) (accessed: 14 March 2018).

<sup>11</sup> J. Griffiths, “‘On the back of a cigarette packet’: standardised packaging legislation and the tobacco industry’s fundamental right to (intellectual) property’, *Intellectual Property Quarterly* (2015) 343-69, 369.

applied, the letters, poems, and war diaries of those who fought and died in the trenches would be out of copyright. However, because they fall under the 2039 rule, these works remain in copyright. And this, in turn, imposes an unnecessary, complex and time-consuming administrative burden on institutions such as the Imperial War Museum wishing to digitise and make them available online, enabling these soldiers to speak to their experiences in their own voice. Having to clear rights in these historic unpublished materials is a burden not shared by other institutions throughout (most of) Europe, the US, or indeed in most other countries across the world. Moreover, it drives many UK-based memory institutions to knowingly infringe copyright in the interests of pursuing their public interest mission. That is, to manage this burden, they choose to infringe copyright in 2039 works rather than engage in diligent search or clear rights, accepting the risk of litigation instead of denying online access to these materials where there is clear demand. Without doubt, in addressing the 2039 problem, the aggregate benefit to the cultural heritage sector within the UK and to the wider public would be transformative.

## II. COPYRIGHT DURATION AND THE 2017 ACT

The Australian *Copyright Amendment (Disability Access and Other Measures) Act 2017* addresses four discrete issues in digital copyright policy. Within this section, we are concerned only with the impact of the Act on copyright duration. In Part III we consider briefly the other three.

The 2017 Act establishes new terms of copyright protection for unpublished literary, dramatic, musical and artistic works, sound recordings and cinematographic films, all of which currently enjoy protection in perpetuity. Duration of protection in broadcasts and published editions is not affected by the Act.

For unpublished literary, dramatic, musical and artistic works, the term of the life of the author plus 70 years post mortem will apply. However, this is subject to a ‘use it or lose it’ provision: that is, if the copyright owner of the unpublished material makes the work public before the commencement of the Act on 1 January 2019, the work will remain in copyright for 70 years from end of the year in which the work is first made public.<sup>12</sup> For unpublished sound recordings and films, the new term of protection is 70 years from the year in which the work was created, unless the work is made public within 50 years of its making, in which case duration will run for 70 years from the end of the year in which the work was first made public.<sup>13</sup> The Act also provides a new consolidated term of protection for works, sound recordings and films owned by the Crown,<sup>14</sup> and establishes a new standard term of protection for works created or published by international organizations.<sup>15</sup> For reference, we include a summary of the duration provisions that will apply to copyright works from 1 January 2019 in Appendix A.<sup>16</sup>

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<sup>12</sup> Copyright Act 1968, s.33 (as amended by the 2017 Act).

<sup>13</sup> Copyright Act 1968, s.93 (as amended).

<sup>14</sup> The new rules on duration provide that work will be protected for 50 years from the end of the year in which the material is made, whether it is made public or not; Copyright Act 1968, s.180 (as amended).

<sup>15</sup> Copyright Act 1968, s.188A (as amended).

<sup>16</sup> This summary is reproduced from the Explanatory Memorandum accompanying the 2017 Act.

In addition, the 2017 Act defines ‘when a work is made public’ (s.29A). Section 29A(1) states that a literary, dramatic, musical or artistic work is made public when the work (or an adaptation of the work) is published, performed in public, broadcast or otherwise communicated to the public,<sup>17</sup> or when ‘records of the work, or of an adaptation of the work, are offered to the public (whether for sale or not), or are exposed for sale to the public.<sup>18</sup> If an artistic work has been exhibited in public, or has been included in a film that has been seen in public, it has also been made public.<sup>19</sup>

Section 29A(2) addresses the concept of made public in relation to ‘subject-matter other than works,’ that is, sound recordings, films, broadcasts and published editions. Material is made public when it is published or when copies of the material are offered to the public (whether for sale or otherwise) or exposed for sale to the public. In addition, a sound recording is made public if it is heard in public or communicated to the public, and a film is made public if it is seen (to the extent that it consists of visual images) or heard (to the extent that it consists of sounds) in public or communicated to the public.

These definitions are non-exhaustive. The legislation anticipates that work might be made public in other ways, although this cannot happen without the consent of the copyright owner.<sup>20</sup> So, the owner of the copyright in an historic manuscript need not *publish* the work (in an ordinary commercial sense) to trigger the use it or lose it proviso of the 2017 Act: so long as the work has been published, performed in public, broadcast, communicated to the public, or otherwise made public in some relevant way before 1 January 2019, the additional 70-year term will be secured. That said, the act of making the work public must be more than a ‘merely colourable’ one.<sup>21</sup>

And so, perpetual copyright in Australia has been abolished. There will be some copyright owners who act within the 18-month window to avail of the use it or lose it clause. But for the most part, on 1 January 2019 millions of unpublished copyright works will enter the public domain.

### **III. ABOLISHING PERPETUAL COPYRIGHT: THE AUSTRALIAN EXPERIENCE**

#### **A. BEFORE THE 2017 ACT: COPYRIGHT AND THE DIGITAL ECONOMY (2014)**

Various issues have dominated copyright policy in Australia in recent times, but the abolition of perpetual copyright is not one of them. Fair use, on the other hand, has often taken centre stage. Over the last 20 years, there have been eight government inquiries addressing the issue,<sup>22</sup> beginning in 1998 when the Copyright Law Review Committee recommended that the existing fair dealing exceptions should be consolidated in a single provision ‘akin to but more

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<sup>17</sup> Section 29A(1)(a).

<sup>18</sup> Section 29A(1)(d).

<sup>19</sup> Section 29A(1)(a)(b). A building that has been constructed has also been made public; s.29A(1)(c).

<sup>20</sup> Section 29A(3) states that subsections 29(4) to (7) apply, for the purposes of this section, in relation to making public in the same way as those sections apply in relation to publication. See s.29(6)(7) regarding unauthorised publication.

<sup>21</sup> Sections 29A(3) and 29(4).

<sup>22</sup> ‘History of fair use proposals in Australia’, Wikipedia, available: [http://en.wikipedia.org/wiki/History\\_of\\_fair\\_use\\_proposals\\_in\\_Australia](http://en.wikipedia.org/wiki/History_of_fair_use_proposals_in_Australia) (accessed: 9 April 2018).

precise than the open-ended US 'fair use' provision'.<sup>23</sup> Two reports produced in the wake of the Australian-United States Free Trade Agreement (AUSFTA) similarly recommended introducing fair use.<sup>24</sup> The Attorney-General's department revisited the arguments for fair use in 2005; a final report was never issued, although that review did give rise to the introduction of new exceptions, for example, for parody and satire, and time and format shifting.

More recently, in 2012, the Australian Law Reform Commission (the ALRC) was tasked with conducting a review concerning copyright and the digital economy. Specifically, the Commission was asked to consider 'whether the exceptions and statutory licences in the Copyright Act 1968, are adequate and appropriate in the digital environment'. The ALRC's final report, *Copyright and the Digital Economy*, was published in February 2014; it made 30 recommendations, including the introduction of an exception for fair use.<sup>25</sup> The Liberal Coalition government has not formally responded to the report, although the ALRC's recommendation on fair use was later endorsed by the Productivity Commission's 2016 Report on the intellectual property regime (discussed further in the next section).<sup>26</sup> The government has however responded to the Productivity Commission's recommendation, proposing yet further consultation on the issue of more flexible exceptions in early 2018.<sup>27</sup> Whether an Australian government ever chooses to grasp the nettle of fair use reform remains to be seen.

While the ALRC's consultation rekindled the debate about fair use in Australia, it made no recommendation on perpetual copyright. Given the inquiry's terms of reference, this is not a surprise. But, the consultation did provide the cultural heritage sector with a platform, an opportunity to bring the issue of perpetual rights into the copyright policy space. The ALRC's initial Issues Paper had set out eight guiding principles for reform to help in evaluating the review process;<sup>28</sup> the National Library of Australia suggested the need for a ninth: 'Recognising the concept of duration of copyright.' Specifically, the National Library invoked that the 1968 Act, as reformed, 'should not support any measure which has the effect of

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<sup>23</sup> Copyright Law Review Committee, *Simplification of the Copyright Act: Part 1 - Exceptions to the Exclusive Rights of Copyright Owners* (1998) 13, 6.10, available: [www.austlii.edu.au/au/other/lawreform/CLRC/1998/](http://www.austlii.edu.au/au/other/lawreform/CLRC/1998/) (accessed: 9 April 2018).

<sup>24</sup> Joint Standing Committee on Treaties, *The Australia-United States Free Trade Agreement*, (2004), Ch.16, 16.50, Recommendation 17; Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, *Final Report* (2004), Ch.3 (Intellectual Property), 3.117.

<sup>25</sup> Australian Law Reform Commission, *Copyright and the Digital Economy: Final Report* (November 2013), Recommendation 4-1, P122.

<sup>26</sup> Productivity Commission, *Intellectual Property Arrangements: Productivity Commission Inquiry Report No.78* (September 2016), Recommendation 6.1.

<sup>27</sup> Department of Industry, Innovation and Science, *Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements* (August 2017), 7: 'The Government **notes** this recommendation and will further consult ... The Government will publicly consult on more flexible copyright exceptions. Consultation will occur in early 2018 following the finalisation of other copyright reform priorities.'

<sup>28</sup> These were: Promoting the digital economy; Encouraging innovation and competition; Recognising rights holders and international obligations; Promoting fair access to and wide dissemination of content; Responding to technological change; Acknowledging new ways of using copyright material; Reduce the complexity of copyright law; Promoting an adaptive, efficient and flexible framework. Australian Law Reform Commission, *Copyright and the Digital Economy: Issues Paper 42* (August 2012), 18-22.

restricting a work in perpetuity,<sup>29</sup> and asked for an expiry term for unpublished material.<sup>30</sup> In this they were joined by the National and State Libraries Australasia,<sup>31</sup> the Australian Digital Alliance/Australian Libraries Copyright Committee,<sup>32</sup> the State Records of South Australia,<sup>33</sup> the National Archives of Australia,<sup>34</sup> and the Australian War Memorial.<sup>35</sup>

## **B. BEFORE THE 2017 ACT: INTELLECTUAL PROPERTY ARRANGEMENTS (2016) and IMPLEMENTING THE MARRAKESH TREATY**

Eighteen months after the ALRC's Report, in August 2015, the Coalition government under Tony Abbott appointed the Productivity Commission to examine the effect of the scope and duration afforded by Australia's intellectual property system on research and innovation, access to and the cost of goods and services, and competition, trade and investment.<sup>36</sup> The Commission were invited to 'recommend changes to the current system that would improve the overall wellbeing of Australian society', taking account of Australia's international trade obligations.<sup>37</sup> The Productivity Commission published their final report, *Intellectual Property Arrangements*, on 23 September 2016.

With respect to copyright, the Commission invited responses on a broad range of issues expressed at a high level of generality: Does the current law remain 'fit for purpose'? Are the protections afforded under copyright proportional to the efforts of creators? Are moral rights necessary? To be efficient and effective in the modern era, what changes should be made to Australia's copyright regime (if any)?<sup>38</sup> The Commission's Draft Report was released in April 2016. As noted above, it endorsed the introduction of a fair use provision. Regarding perpetual copyright, the Draft Report stated '[t]here is no case for unlimited copyright protection for unpublished works,' and recommended that the Copyright Act 1968 be

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<sup>29</sup> National Library of Australia, Submission 218, 4.

<sup>30</sup> *Ibid.*, 22.

<sup>31</sup> National and State Libraries Australasia, Submission 204, 2 ('[Perpetual copyright] is out of step with other countries. For libraries with extensive collections dating back hundreds of years, perpetual copyright restricts and encumbers access and use. / The act of lodging a public collection could be used as a trigger point for initiating a 70-year copyright period in line with international agreements, unless further provisions are stipulated at the time of lodging with libraries.')

<sup>32</sup> Australian Digital Alliance / Australian Libraries Copyright Committee, Submission 213, 39 ('[W]ithout a copyright term duration for unpublished works, a wealth of unpublished works are locked up in cultural collections in perpetuity.').

<sup>33</sup> State Records of South Australia, Submission 255, 3.

<sup>34</sup> National Archives of Australia, Submission 155, 8. The National Archives of Australia called expressly for an amendment 'abolishing the perpetuity of copyright in unpublished works and establishing a limit to the length of time during which unpublished works remain in copyright from the date of creation.' The submission continued: Such a limit would allow digitisation and online communication of archival material, in which it could be determined, by their age, that all non-Crown copyright had expired, instead of the current s 51 which allows copies to be communicated to individuals and requires knowledge of the date of death of the creator'. *Ibid.* See also the response of the Grey Literature Strategies Research Project, Submission 250, 4.

<sup>35</sup> Australian War Memorial, Submission 188, 3.

<sup>36</sup> Productivity Commission, *Intellectual Property Arrangements*, iv.

<sup>37</sup> *Ibid.*, iv-v.

<sup>38</sup> Productivity Commission, *Intellectual Property Arrangements: Productivity Commission Issues Paper* (October 2015), 20-21.

amended so that the current terms of protection apply to unpublished works.<sup>39</sup> By this time, however, the government had already launched and concluded its own consultation on draft legislation, first published on 23 December 2015: the *Exposure Draft: Copyright Amendment (Disability Access and Other Measures) Bill 2016*.<sup>40</sup>

On the face of it, the timing of this draft legislation seems curious, coming four months into the Productivity Commission's general review. However, both the domestic and international context had changed. On 15 September 2015, Malcolm Turnbull replaced Tony Abbott as Prime Minister following an internal leadership ballot. Previously, Turnbull had served under Abbott for two years as Minister for Communications. Within a week of taking office, Turnbull moved copyright policy out of the Attorney-General's portfolio, and into the hands of the Department of Communications,<sup>41</sup> a move that for many industry commentators signalled new thinking and a new direction in the government's copyright agenda. Then, on 10 December 2015, the Australian government ratified the Marrakesh Treaty,<sup>42</sup> one of the first developed countries in the world to do so.<sup>43</sup>

Australia, through the work of its NGO representatives at the World Intellectual Property Organisation (WIPO), had played a key role in negotiating the Marrakesh Treaty. The work of Maryanne Diamond was particularly influential. Head of Advocacy and Engagement at Vision Australia between 2009 and 2015, and President of the World Blind Union (the WBU) between 2008 and 2012, Diamond led the WBU delegation at WIPO in the years leading up to the conclusion of the Treaty. Invited to give the opening remarks to the 2013 Diplomatic Conference at which the Treaty was adopted, she urged the assembled delegates to conclude 'a treaty that is simple, usable and meaningful', and to 'create history' by doing 'some good in the world' for the 285 million people who are blind or have low vision.<sup>44</sup>

Undoubtedly, the implementation of Marrakesh provided the principal catalyst for the introduction of the Exposure Draft. Less than two weeks following ratification of the Treaty, the Draft Bill was put out for consultation. But, the new Turnbull government offered no meaningful public explanation about how or why it chose to include four additional policy objectives as part of the Bill. These were: a new preservation exception for libraries and archives; updating the educational statutory licence provisions; expanding the existing safe harbour provisions to include search engines, universities and libraries; and, of course, harmonising the term of copyright protection for published and unpublished works. The background paper to the Exposure Draft sheds very little light on the matter. It simply notes that: 'It is appropriate to proceed with the amendments contained in the Bill before the

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<sup>39</sup> *Intellectual Property Arrangements: Draft Report*, 119; see also, the final report at 133.

<sup>40</sup> The consultation concluded on 12 February 2016.

<sup>41</sup> Administrative Arrangements Order, 21 September 2015, available here: [www.pmc.gov.au/resource-centre/government/administrative-arrangements-order-made-21-september-2015](http://www.pmc.gov.au/resource-centre/government/administrative-arrangements-order-made-21-september-2015) (accessed: 18 March 2018).

<sup>42</sup> The Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or otherwise Print Disabled 2013.

<sup>43</sup> For these purposes, we have been guided by the List of Developing Countries as declared by the Australian Minister for Foreign Affairs, updated on February 2015.

<sup>44</sup> M. Diamond, Opening Remarks, WIPO DIP Com 18 June 2013, available: [www.worldblindunion.org/English/news/Pages/WIPO-Opening-Remarks-by-Maryanne-Diamond.aspx](http://www.worldblindunion.org/English/news/Pages/WIPO-Opening-Remarks-by-Maryanne-Diamond.aspx) (accessed: 4 March 2018).

[Productivity] Commission reports as those amendments simplify the operation of the Act and are likely to be consistent with the recommendations (if any) made by the Commission.<sup>45</sup>

### C. DEBATING PERPETUAL COPYRIGHT: THE 2016 EXPOSURE DRAFT

The 2016 Bill proved controversial in one respect only: the proposed new safe harbour scheme. The existing scheme was first introduced in 2004, following AUSFTA, and provides ‘carriage service providers’ (companies providing telecommunication services such as broadband connectivity) with limitations against liability for certain forms of copyright infringement.<sup>46</sup> It is more restricted in scope than comparable schemes in many other jurisdictions, including the US. And, like fair use, it has been the subject of ongoing government inquiry and public debate. Reviews were conducted in 2005,<sup>47</sup> and in 2009.<sup>48</sup> Then, in October 2011, the Attorney-General’s department launched a consultation on *Revising the Scope of the Copyright ‘Safe Harbour Scheme’*; for this reason, this issue was expressly exempted from the scope of the ALRC’s review.<sup>49</sup> The Attorney-General’s office never delivered a formal report, although it is generally accepted that the proposal in the 2016 Bill to widen the scope of the safe harbour scheme – extending it to service providers more broadly defined, such as universities, search engines, and online cloud providers – flowed from the work of the Attorney-General’s department before it lost the copyright brief.<sup>50</sup>

The proposed new scheme was always going to be contentious. And, as with fair use, the copyright industries objected in strong terms.<sup>51</sup> The government was accused of embarking on an unexpected, contentious and ill-conceived shift in policy direction without seeking or necessarily wanting meaningful stakeholder engagement. It was claimed that the proposal was poorly timed and procedurally problematic; it lacked transparency, accountability, and a compelling evidence base; it was out of line with the recommendations from previous Australian reviews and reports, and it pre-empted two ongoing consultations on this issue in both Europe and the US; moreover, not surprisingly, it was argued that implementation would likely have a detrimental impact on the digital content market and revenue streams for authors and artists.<sup>52</sup> In short, the government was pursuing an anomalous and undesirable

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<sup>45</sup> Department of Communications and the Arts, *Stakeholder consultation: proposed reform of the Copyright Act 1968, Guiding questions* (December 2015), 1.

<sup>46</sup> For an outline of the statutory scheme, see S. Ricketson and C. Cresswell, *Law of Intellectual Property: Copyright, Design and Confidential Information* (2001-2017), s.9.607.

<sup>47</sup> Attorney-General’s Department, *Review of the Scope of Part V Division 2AA of the Copyright Act* (2005).

<sup>48</sup> The *Digital Economy: Future Directions* report produced in 2009 by the Department of Broadband, Communications and the Digital Economy (now, the Department of Communications and the Arts).

<sup>49</sup> ALRC, *Final Report*, 29-30. The ALRC was charged ‘not to duplicate’ work on the scope of a safe harbour scheme, and exceptions in relation to technological protection measures; the Report notes that this referred to ‘work being undertaken by the Australian Government Attorney-General’s Department’.

<sup>50</sup> Ricketson and Cresswell, s.9.606.

<sup>51</sup> The formal submissions to the consultation that have been made public are available at: [www.communications.gov.au/have-your-say/updating-australias-copyright-laws](http://www.communications.gov.au/have-your-say/updating-australias-copyright-laws) (accessed: 14 April 2018).

<sup>52</sup> In general, see the submissions by: the Australian Copyright Council; the Copyright Agency; Thomson Reuters; John Wiley; the Australian Publishers Association; the Australian Writers’ Guild and the AWG Authorship Collecting Society; the Australian Directors Guild; the Australian Film/TV Bodies; Screenrights; Foxtel; Free TV Australia; the Phonographic Performance Company of Australia; APRA AMCOS; the Australian Recording

agenda cloaked in the skirts of legislation primarily concerned with access for disabled persons to copyright material.<sup>53</sup> The government capitulated, the safe harbour provisions were removed. And again, as with the fair use question, it was announced that further consultation would be undertaken before implementing any new legislation.

By contrast, the debate about the abolition of perpetual copyright generated much less heat, almost none in fact. The response to the consultation on the Exposure Draft was either very positive, on the part of the cultural heritage sector,<sup>54</sup> or one of general indifference. Indeed, over half of the consultation respondents made no reference to the issue at all (38 from 71 responses). This included responses from the Australia Screen Directors Authorship Collecting Society, the Australian Writers' Guild, the Australian Authorship Collecting Society, the International Confederation of Music Publishers, Music Rights Australia, and a joint submission from a coalition of film and television bodies.<sup>55</sup> APRA AMCOS, the Australian music collecting society, did refer to the duration provisions but only to express 'no concern about the section of the Exposure Draft that aligns the terms of protection for unpublished works with those of published works'.<sup>56</sup> Given that the Bill was proposing to end perpetual copyright in unpublished films, sound recordings and authorial works, the lack of any objection among this broad sweep of industry stakeholders seems remarkable – at least, when viewed through the prism of the rhetoric and debate generated by the UK government's 2014 consultation on reform of the 2039 rule.

Six respondents did express some apprehension about the proposed change, led by the Australian Copyright Council (the ACC),<sup>57</sup> an organisation first established in 1968 with a membership drawn from across the copyright industries.<sup>58</sup> The ACC signalled support for the policy objective being pursued but raised concern about the fact that 'sometimes copyright is exercised to prevent material from being published ... for example, when an author wants to suppress the publication of work that is incomplete or of inferior quality'.<sup>59</sup> The Australian

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Industry Association; Music Rights Australia; the Australasian Music Publishers Association; the International Confederation of Publishers; and, News Corp Australia.

<sup>53</sup> See the submission of the Phonographic Performance Company of Australia, 4 ('The current proposal as set out in the Exposure Draft appears to have been inserted into a bill that focuses on access for disabled persons to copyright material which on the face of it is unrelated to the [safe harbour scheme].')

<sup>54</sup> Of the responses that specifically referred to the duration provisions, the majority favoured bringing perpetual copyright to an end (27 from 33). These respondents typically represented the interests of librarians, archivists and other heritage professionals, however, express support was also forthcoming from the Australia Broadcasting Corporation.

<sup>55</sup> Collectively referred to as the Australian Film/TV Bodies, these included: the Australian Screen Association, the Australian Home Entertainment Distributors Association, the Motion Picture Distributors Association of Australia, the National Association of Film Operators, the Australian Independent Distributors Association and the Independent Cinemas Association of Australia.

<sup>56</sup> 'APRA AMCOS has no concerns about the section of the Exposure Draft that aligns the terms of protection for unpublished works with those of published works'; APRA AMCOS submission, 3.

<sup>57</sup> The ACC's submission was endorsed by each of the other five respondents: the Australian Publishers Association, the Australian Recording Industry Association, the Phonographic Performance Company of Australia, Screenrights Australia, and the Australian Society of Authors.

<sup>58</sup> For further details, see the ACC website: [www.copyright.org.au/acc\\_prod/ACC/Home/ACC/Home.aspx](http://www.copyright.org.au/acc_prod/ACC/Home/ACC/Home.aspx) (accessed: 12 April 2018).

<sup>59</sup> ACC submission, 8.

Society of Authors (the ASA) expressed the same concern in similar terms.<sup>60</sup> In other words, the principal objection addressed questions of propriety and reputation rather than property or money.<sup>61</sup> None of the submissions flagged any possible negative economic consequences for rightsholders. Moreover, only the ACC expressly addressed the question of constitutional property protection, simply noting that it ‘has been dealt with in Schedule 3, clause 15 of the Bill.’ Clause 15 would become s.31 of the 2017 Act, guaranteeing compensation for the acquisition of property.<sup>62</sup> And yet, as we shall see, when located within the broader jurisprudence of Australian constitutional property, s.31 is entirely redundant.

#### **D. COMPENSATION FOR ACQUISITION OF PROPERTY AND PLAIN PACKAGING**

Section 31 of the 2017 Act states that if the operation of the legislation ‘would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) from a person otherwise than on just terms ... the Commonwealth is liable to pay a reasonable amount of compensation to the person’.<sup>63</sup> Where agreement on compensation cannot be reached, the person may take proceedings in the Federal Court of Australia or the Supreme Court of a State or Territory for the recovery of ‘such reasonable amount of compensation as the court determines’.<sup>64</sup> This was the provision to which the ACC referred when it noted that the question of acquisition of property ‘has been dealt with’.<sup>65</sup> And yet, given the recent experience of plain packaging litigation in Australia, the likelihood that anyone will either try or succeed to make a claim for compensation under this provision is diminishingly small. In other words, the offer to provide compensation is no more than a fig leaf.

To understand the tokenistic nature of s.31, one must locate it within the broader jurisprudence of Australian constitutional property, and specifically within the context of the recent litigation concerning plain packaging on cigarettes.

Paragraph 51(xxxi) of the Commonwealth Constitution provides that Parliament has the power to make laws for peace, order and good government with respect to ‘[t]he acquisition of property on just terms, from any State or person for any purpose in respect of which the Parliament has power to make laws’. This enables parliament to legislate for the compulsory purchase of property, while imposing a restraint on that power by prohibiting acquisition on any terms that are not just.

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<sup>60</sup> Australian Society of Authors, 1 (‘There are nonetheless occasions, when copyright allows an author to prevent publication of their work, including, but not limited to, early drafts of subsequently published work, manuscripts written much earlier in their career and therefore of an inferior standard, personal letters or journals that were never intended to be made publicly available. / On behalf of our members I would therefore like to record our concern about the unintended consequences of limiting the term of copyright for unpublished works, thereby removing the author’s or their family’s or estate’s control over that material.’)

<sup>61</sup> As an alternative, the ACC suggested creating a bespoke exception regarding ‘old, unpublished works and other subject matter’; see ACC submission, 8. Similarly, see the Australian Publishers Association submission stating a preference for a solution based on ‘appropriate exceptions for suitable institutions rather than removing the right of control from creators and their estates’, 3.

<sup>62</sup> ACC submission, 8.

<sup>63</sup> s.32(1).

<sup>64</sup> s.31(2).

<sup>65</sup> Australian Copyright Council, Comments on Exposure Draft of Copyright Amendment (Disability and Other Measures) Bill, 8.

The provision is not restricted to acquisition by any specific method, to the acquisition of any specific type of interests, or of any specific type of property.<sup>66</sup> As Rich J observed in *Minister of State for the Army v. Dalziel* (1944) '[i]t extends to any acquisition of any interest in any property',<sup>67</sup> including claims in contract and tort which are considered choses in action and so property for the purposes of s.51(xxxi).<sup>68</sup> Intellectual property interests also fall within the scope of provision, as confirmed by the Australian High Court in *JT International SA v. Commonwealth* (2012) 250 CLR 1.

The *Tobacco Plain Packaging Act* 2011 was the subject of challenge in *JT International*. The Act was the first of its kind in the world, imposing significant restrictions on how tobacco companies could package and market cigarettes for sale to the consumer. Limitations are placed on the shape, colour and appearance of packaging. Cigarette packs and cartons must be rectangular, constructed to specified dimensions, made of cardboard, and of a drab dark brown colour in a matt finish.<sup>69</sup> No trade mark may appear anywhere on the retail packaging of the product, apart from the name of the brand or as otherwise permitted by the TPPA.<sup>70</sup> When a brand name is used on the pack or carton, it must also comply with various requirements regarding positioning, font, size and colour.<sup>71</sup> Packs and cartons must also carry written health warnings and graphic images of smoking-related diseases in line with related, pre-existing regulations such as the *Competition and Consumer (Tobacco) Information Standard* 2011. In short, under these provisions, the sole distinguishing characteristic of every cigarette pack or carton lies with the name of the brand, and even that can only be used in small type and on an inconspicuous background.

The plaintiffs argued that the TPPA amounted to an acquisition of property, in the form of their registered and unregistered trade marks, copyright, registered designs, patents and goodwill. They sought a declaration that the TPPA should not apply to their products and packaging, or, in the alternative, that the TPPA was invalid.<sup>72</sup>

In setting out their reasoning, the judiciary addressed numerous issues: whether intellectual property rights are more appropriately characterised as negative or positive rights; the nature and extent to which the TPPA interfered with the intellectual property rights under consideration; whether a more generalisable proportionality test might take the TPPA outside the scope of s.51(xxxi) entirely; and, the relevance (or not) of jurisprudence on the 'takings' clause of the Fifth Amendment to the US Constitution. All of this was obiter. Ultimately, the resolution of the case was straightforward. The relevant touchstone – described by Bell and Hayne JJ as the 'bedrock principle' in this domain – was the dictum of Mason J in the

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<sup>66</sup> *Minister of State for the Army v. Dalziel* (1944) 68 CLR 261, 285 per Rich J.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Georgiadis v. Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.

<sup>69</sup> In general, see TPPA 2011, ss.18 and 19.

<sup>70</sup> TPPA 2011, s.20(1)(2)(3).

<sup>71</sup> TPPA s.21, and associated regulations.

<sup>72</sup> For relevant academic commentary, see: M Davison and P. Emerton, 'Rights, Privileges, Legitimate Interests, and Justifiability: Article 20 of TRIPS and Plan Packaging of Tobacco' (2014) *Am. U. Int'l L. Rev.* 505-80; O.H. Dean, 'Deprivation of trade marks through state interference in their usage' (2013) *European Intellectual Property Review* 576-89; D. Fletcher, 'JT International SA v Commonwealth: Tobacco Plain Packaging' (2013) *Sydney Law Review* 827-43; J. Liberman, 'Plainly Constitutional: The upholding of Plan Tobacco Packaging by the High Court of Australia' (2013) *American Journal of Law and Medicine* 361-81; and Griffiths, "On the back of a cigarette packet".

*Tasmanian Dam Case* (1983): '[t]o bring [s.51(xxxi)] into play ... there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be'.<sup>73</sup> A six to one majority decided the Commonwealth had not *acquired* any property; as such s.51(xxxi) was not engaged.<sup>74</sup> Heydon J dissented.<sup>75</sup>

The significance of *JT International* in the current context will be immediately apparent. Property rights might be restricted or even extinguished by an Australian government without being acquired.<sup>76</sup> In bringing perpetual copyright in unpublished works to an end, millions of existing property rights are effectively being extinguished. However, the government has not acquired any property. Nor has anyone else. On 1 January 2019, these unpublished works will simply enter the public domain as copyright ceases to exist. Given the very clear jurisprudence on constitutional property and the scope of s.51(xxxi), reaffirmed in *JT International*, a claim for compensation for acquisition of property under the 2017 Act will not bite.

## **E. CONSTITUTIONAL PROPERTY RIGHTS AND THE 2017 ACT**

The 2017 Copyright Amendment Bill was introduced on 22 March. Without the proposed safe harbour provisions, it proved non-controversial, attracting bipartisan support through the House of Representatives. Both Liberal and Labor parliamentarians expressed their support for the initiative and it passed the House of Representatives and the Senate in just over three weeks without amendment.<sup>77</sup> Also, on 28 March, the Parliamentary Joint Committee on Human Rights reported that the Bill did not give rise to any human rights concerns (although, in truth, that means very little, given the general paucity of Australian human rights jurisprudence).

Still, when considering the constitutional property question, what is so remarkable about the 2017 Bill is that its passage was so unremarkable. From a constitutional property perspective, it is a non-story. The support that Tim Wilson expressed for the Bill provides a useful point of entry. Wilson is the Liberal Party MP for Goldstein since 2016, having been appointed to the Australian Human Rights Commission from 2014-16, and previously having worked for the Institute of Public Affairs (IPA) for seven years. The IPA is a public policy think tank advocating a free market and libertarian agenda, including the deregulation of state-owned enterprises, trade liberalisation, and climate change scepticism. At the IPA, Wilson served as the Director of Policy both for Climate Change and for Intellectual Property and Free Trade.

On 29 April 2010, while Wilson was Director of Policy for IP and Free Trade, the Labor government, under Kevin Rudd, first announced their plans to introduce plain packaging legislation for the branding and sale of tobacco. Wilson and the IPA denounced the proposal,<sup>78</sup>

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<sup>73</sup> Mason J in the *Tasmanian Dam Case* (1983) 158 CLR 1, 145.

<sup>74</sup> See paragraphs 42 (French CJ), 147 (Gummow J), 189 (Bell and Hayne JJ), 296 (Creenan J) and 372 (Kiefel J).

<sup>75</sup> 'The impugned legislation compels the presence on the packets of the Commonwealth's and Quitline's messages ... That control is a measurable and identifiable advantage relating to the ownership or use of property. It enlivens the s.51(xxxi) guarantee'; 225-26.

<sup>76</sup> *R v. Ludeke, Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 636 at 653, cited by Gummow J at 33.

<sup>77</sup> The Bill was introduced and read a first time on 22 March 2017. It was introduced in Senate and read a first time on 29 March. It passed both Houses on 15 June 2017.

<sup>78</sup> Incidentally, in the early 2000s the IPA had admitted that it received financial support from tobacco companies, however at the time of the plain packaging debates, it consistently refused to reveal information

warning the government that ‘under its constitution obligations ... property rights must be compensated for, and that includes trademarks’; he estimated that ‘taxpayers may be required to fatten the profits of tobacco companies by up to £3 billion a year’ by way of compensation,<sup>79</sup> a figure roughly equivalent to the current Australian government’s annual expenditure on Recreation and Culture or Agriculture, Forestry and Fishing. This was a claim that Wilson reiterated in numerous press and media interviews.

As the 2017 Bill was read for a second time, Wilson was one of a small handful of MPs to contribute to the debate. Describing himself as a ‘strong advocate’ of copyright law,<sup>80</sup> he reminded that House that ‘[n]obody should ever be under any illusion about the important role that it plays in helping support our artists and the avenues that they need’. Nevertheless, he continued: ‘[O]f equal importance is ensuring that our copyright laws are flexible and contemporary and reflect the needs and demands of the modern age, particularly in the digital world ... Copyright is, has been and always will be a vehicle and a mechanism to distribute content, not an inhibitor or a barrier’. Every aspect of the Bill was to be welcomed, including setting ‘new standard terms of protection for published and unpublished materials’.<sup>81</sup>

Wilson is a backbench member of the party in government, as well as an MP still navigating a nascent career in party politics. Even if he were minded to criticise the Bill, expediency would likely prevail. And yet, the distance between his rhetoric on plain packaging and the abolition of perpetual copyright is striking. He raised no objection. Indeed, no-one questioned or objected to the fact that millions of property rights were being severely truncated in terms of duration of protection. To provide some context: in August 2015, the Australian Libraries Copyright Committee conducted an informal survey of 14 Australian universities to establish the prevalence of unpublished works in their collections. The reported figures relate to 20 collections covering roughly one-third of the university sector. The survey reported that the collection included over 12.9km of unpublished works, assuming 100 files per linear metre. Each file was assumed to contain one or more documents totalling approximately 80 pages.<sup>82</sup> This was an informal survey intended to provide a snapshot of the scale of the works and rights at play: it incorporated over 100M pages of unpublished material; and this represented less than half of the archive collections held in the University sector alone, not to mention the collections held by the federal and state government, and by community, corporate, scholarly, religious, private, and other archives across Australia.

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about donors and subscribers. It was later revealed, by the Sydney Morning Herald, that at least one major tobacco company was contributing to the IPA at the time of their campaign against the TPPA. For further details, see: [www.abc.net.au/mediawatch/transcripts/1420\\_smhipa.pdf](http://www.abc.net.au/mediawatch/transcripts/1420_smhipa.pdf) (accessed: 12 March 2018).

<sup>79</sup> T. Wilson, ‘Plain packaging ploy likely to go up in smoke’, *The Australian*, 30 April 2010, available: [www.theaustralian.com.au/opinion/plain-packaging-ploy-likely-to-go-up-in-smoke/news-story/d435ddb79355a3891913b7788833d4e2](http://www.theaustralian.com.au/opinion/plain-packaging-ploy-likely-to-go-up-in-smoke/news-story/d435ddb79355a3891913b7788833d4e2) (accessed: 10 March 2018).

<sup>80</sup> House of Representatives, 28 March 2017, 3469.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Intellectual Property Arrangements*, 132, citing work carried out by the Australian Library Copyright Committee and discussed in the submission of the Australian Digital Alliance to the Productivity Commission Inquiry in December 2015, Submission 108, at 8.

Given the established jurisprudence regarding s.51(xxxi) of the Constitution, how is it that the Australian government could terminate so many property rights without any meaningful criticism or debate?

#### IV. ABOLISHING PERPETUAL COPYRIGHT: LESSONS FOR THE UK

In many respects, the lessons for the UK from this Australian experience have less to do with constitutional property jurisprudence than with the political economy of copyright policy and law-making, although the two are related in this context.

The Australian jurisprudence on constitutional property is quite particular, quite different from analogous regimes in the US and Europe. Because the Australian constitution only safeguards against the ‘acquisition of property,’ it is not engaged by other forms of interference with property that might trigger claims under A1P1. This is neatly demonstrated by the recent Court of Appeal decision in *R v. BAT* [2016] EWCA Civ 1182 which also concerned plain packaging legislation.<sup>83</sup>

In *R v. BAT* [2016] the UK government was challenged over the *Standardised Packaging of Tobacco Products Regulations 2015* which implement – but go further than – the *Tobacco Products Directive 2014*. The rights in question had not been acquired by the government. Under the Australian Constitution, the matter would end there. However, as we discuss in Part VI, A1P1 enables a court to consider state action that might amount to a deprivation of use, a control of use, or a more general interference with the peaceful enjoyment of possessions. One of the principal grounds for appeal in *BAT* concerned the deprivation or control of the use of property without compensation. Lewison LJ gave the main opinion.

While the appellant’s intellectual property rights (primarily trade marks) had been circumscribed within the UK, Lewison LJ considered that they remained free to use their rights throughout the EU (except in those Member States which have introduced similar legislation about plain packaging).<sup>84</sup> Moreover, even within the UK, the marks retained some residual utility: they could, for example, be used within a wholesale context or in trade magazines.<sup>85</sup> In short, the regulations did not constitute a deprivation of use.<sup>86</sup> The court accepted, however, that the regulations might amount to a control of use rather than a deprivation. As such, A1P1 was engaged. But on balance, noting that ‘a requirement for compensation is rare in a case of control of use,’<sup>87</sup> the court concluded the trial judge was entitled to decide that the regulations strike a fair balance for the purposes of A1P1.<sup>88</sup> No compensation was necessary.

In substance, the outcome in *R v. BAT* mirrors that of *JT International*: both uphold the implementation of plain packaging laws without need for compensation to be paid to

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<sup>83</sup> *R v. BAT* [2016] EWCA Civ 1182.

<sup>84</sup> *Ibid.*, 102.

<sup>85</sup> *Ibid.*, 104. The Secretary of State also pointed out that the TMs could be used to prevent the use of identical or similar but confusing signs on e-cigarettes, they could be used against counterfeiters, and they could be used against unauthorised parallel importers from outside the EEA; *ibid.*, 103.

<sup>86</sup> *Ibid.*, 106.

<sup>87</sup> *Ibid.*, 113.

<sup>88</sup> *Ibid.*, 115.

influential commercial interests. Clearly, however, implementation of the legislation in the UK was subject to stricter scrutiny from a constitutional property perspective. The same higher standard would apply to any reform of the 2039 rule.

Arguably, the more important lesson is a very simple one: the Australian experience evidences that legislative activity in this area is possible at all, and with the support – or at least, without the opposition – of traditionally sceptical vested interests.

In recent years, copyright reform has typically been characterised by debates that are hotly contested and highly polarised. This is as true for the UK as it is for Australia and elsewhere. Historically, trade and industry associations have been able to influence, frame and capture policy agendas, often without compelling evidence or meaningful public scrutiny.<sup>89</sup> In 2011, Ian Hargreaves called for an end to policy-making based on lobbyconomics, in his *Review of Intellectual Property and Growth*,<sup>90</sup> but little has changed. When the UK government did introduce new exceptions to copyright in 2014 – for example, for private use, parody or quotation – the objections and arguments of the copyright industries were predictably negative and alarmist. And the same was true for the proposed 2039 reforms. The government noted that, while respondents from the education and cultural heritage sectors were ‘unanimously supportive of the proposed changes,’ many respondents, ‘especially those representing rightsholders, were opposed to the policy, and instead argued that the 2039 rule should remain in force until it has expired.’<sup>91</sup>

But, the experience of abolishing perpetual copyright in Australia is markedly different. When the government dropped the safe harbour provisions from the 2017 Bill before introducing it to parliament, this was welcomed by the copyright industries who had lobbied for its removal. Music Rights Australia, representing over 70,000 songwriters and artists, and more than 125 record labels, applauded the government on its decision, commenting: ‘This means the other uncontroversial aspects of the Bill can progress as we have always believed they should’.<sup>92</sup> UK Music and Music Rights Australia share the same core values, aims and objectives: protecting and promoting the interests of those who work within the music industry, while lobbying and guiding policy makers toward decisions that are in the best interests of the sector. How is it that Music Rights Australia deems it ‘uncontroversial’ to bring perpetual copyright to an end, whereas UK Music and other similar organisations are moved to warn government against the potentially deleterious effects of legislating on the 2039 issue?<sup>93</sup>

One answer might lie in the broader policy landscape outlined above: the copyright industries in Australia were already fighting on two major fronts, the safe harbour scheme and fair use. For example, the Copyright Agency, a collecting society that licenses content for use in the education sector, literally established a ‘fighting fund’ for the purpose of campaigning against

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<sup>89</sup> In general, see B. Farrand, ‘Lobbying and Lawmaking in the European Union: The Development of Copyright Law and the Rejection of the Anti-Counterfeiting Trade Agreement’ (2015) *Oxford Journal of Legal Studies* 487-514.

<sup>90</sup> I. Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (May 2011), 18.

<sup>91</sup> *Government response to the consultation on reducing the duration of copyright*, 3-4.

<sup>92</sup> MRA Statement issued to The Industry Observer, cited in L. Brandle, ‘We’re years away from seeing copyright reforms in Australia’, *The Industry Observer*, 24 March 2017.

<sup>93</sup> *Government response to the consultation on reducing the duration of copyright*, 4.

fair use, committing over \$15M to the cause between 2013 and 2016.<sup>94</sup> To be sure, scuttling these proposals for reform was of preeminent concern.<sup>95</sup> Perhaps taking on another battle was considered politically inexpedient, or potentially distracting or counterproductive. Perhaps abolishing perpetual copyright was deemed an acceptable quid pro quo, in part exchange for removing the safe harbour provisions from the 2017 Bill. Perhaps the copyright industries were genuinely persuaded that the policy was in the public interest, that it would enable socially and culturally beneficial uses of historically significant material. Or, given the jurisprudence on constitutional property, perhaps it was thought pointless to object (although this is hard to square with the ACC's assessment that the issue had been 'dealt with' by the proposed legislation).

Or, perhaps the explanation is more mundane. Perhaps the copyright industries were simply indifferent to the proposed reform. In turn, this suggests that they considered there was very little at stake, financially. If the abolition of perpetual copyright was genuinely thought to compromise meaningful future revenue streams, objections would have been raised.

This explanation is certainly consistent with the commercial reality of the unpublished material typically held in archives and other memory institutions consists of documents and records produced by public and private organisations, families and individuals in their day-to-day activities or business: financial records; logbooks, agenda and minutes; personal correspondence. These are unique records that have been selected for permanent preservation because of their enduring evidential, cultural and political value. But rarely do they have any intrinsic commercial value, nor were they originally created for the purposes of commercial exploitation. And, while it is difficult to gauge with any precision the volume of works impacted by the 2039 rule, The National Archives has estimated there are at least 100 million unpublished works that remain in copyright beyond the standard term.<sup>96</sup> Only a very small proportion of these unpublished works will have any literary or artistic value or merit, and fewer still will have any genuine economic potential. For this reason, we think it would be misguided to determine general policy in this area with reference to the economic interests of the descendants, estates and beneficiaries, of an elite few. That is to fundamentally misunderstand the type, nature and scale of works principally affected by the 2039 rule.

We accept that there may be some potential economic disadvantage to a very small number of rightsholders. The government noted three examples presented to them during their consultation on the 2039 issue. First, the Society of Authors noted that 'the estate of one author has been in receipt of £100,000 over the last 25 years through licensing extracts of

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<sup>94</sup> It transpired in early 2017 that the Copyright Agency was diverting funds collected in relation to the licensing of orphan works in schools and universities. Before 2013, this orphan work revenue was held for four years before being distributed to the organisation's members. The change in policy about how these orphan work revenues would be used was not disclosed to members. The Copyright Agency has since confirmed that it plans to cap the fund at \$15M and begin redistributing money collected for orphan works to its members once again. See P. Martin, 'Copyright Agency diverts funds meant for authors to \$15m fighting fund', 24 April 2017, available: [www.smh.com.au/federal-politics/political-news/copyright-agency-diverts-funds-meant-for-authors-to-15m-fighting-fund-20170420-gvol0w.html](http://www.smh.com.au/federal-politics/political-news/copyright-agency-diverts-funds-meant-for-authors-to-15m-fighting-fund-20170420-gvol0w.html) (accessed: 14 April 2018).

<sup>95</sup> Indeed, several industry respondents to the consultation on the Exposure Draft addressed only this issue; these included: Music Rights Australia; the Australasian Music Publishers Association; the International Confederation of Publishers; and, News Corp Australia.

<sup>96</sup> *Consultation on reducing the duration of copyright in unpublished ("2039") works*, Annex A.

unpublished materials held by archives'.<sup>97</sup> Second, UK Music provided an example of one composer's estate 'which has received more than £20,000 in royalties for posthumously published work' a substantial fraction of which (we are not told how much) has been received post 2005.<sup>98</sup> Third, was the Ralph Vaughn Williams Charitable Trust, which manages the copyright in works created by Williams. It was argued that removal of the 2039 rule would result in many of Williams' works entering the public domain earlier than anticipated, which would in turn impact upon revenues for the trust. We agree these are examples that give rise to genuine individual concern; but we believe they are exceptional rather than typical cases.

Moreover, the financial savings enjoyed by the heritage sector could be extraordinary. It is well known that the burden imposed on memory institutions in searching for rightsholders and clearing rights can be prohibitive, deterring digitisation initiatives and impeding access to collections. And this is true whether rightsholders are identifiable and locatable, or whether the works in question are orphans.

The results of the first major study addressing the costs of diligent search activity in compliance with the UK orphan works regime were recently reported. The authors estimated the cost of diligent search in relation to 26,770 orphan works to be £187,241, taking one appropriately qualified researcher 8.2 years to complete, working 52 weeks a year.<sup>99</sup> Estimates of the total number of orphans in any particular UK-based collection can vary from 5% to 95% depending on the nature of the collection, with many institutions reporting a typical figure of between 20% and 40%.<sup>100</sup> Let's assume that just 30% of The National Archives estimate of 100M 2039 works are orphans.<sup>101</sup> If we apply the same reported costs to a corpus of 30M orphan works, it would likely take a team of 100 researchers, working 52 weeks a year, over nine years to conduct and report the necessary diligent search activity, at a cost of more than £200M.<sup>102</sup>

And what of the remaining 70M works? Again, let's assume that only half of these remaining items require rights clearance to make available online (the institutions themselves may hold the rights in a substantial number of these works). That still implicates 35M works. As part of the 2039 consultation, the government received variable estimates of the time taken to clear rights in an individual work, ranging from '15 minutes to half a day, with cost estimates of between £4.88 and £46 per work'.<sup>103</sup> A review of published empirical studies concerning rights clearance in the heritage sector indicates a typical per item cost of between £40-50;<sup>104</sup>

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<sup>97</sup> *Government response to the consultation on reducing the duration of copyright*, 4.

<sup>98</sup> *Ibid.* But for the 2039 rule, Williams' works would have come out of copyright on 1 January 2005.

<sup>99</sup> K. Patterson, R. Deazley and V. Stobo, 'Diligent Search in Context and Practice', Section 13 ('Clearing the Scrapbooks'), in R. Deazley et al, *Digitising the Edwin Morgan Scrapbooks* (2017), available: [www.digitisingmorgan.org](http://www.digitisingmorgan.org) (accessed: 14 April 2018).

<sup>100</sup> Intellectual Property Office, *Orphan Works, Impact Assessment No: BIS1063*, 10.

<sup>101</sup> Given the age of much of this material we think this is likely to underestimate the actual number of orphan works, but it serves for our current purposes.

<sup>102</sup> This figure relates to salary costs only, as well as application and licence fees (where relevant); it does not include any other related estates and indirect costs.

<sup>103</sup> *Government response to the consultation on reducing the duration of copyright*, 2.

<sup>104</sup> See, for example: B. Stratton, *Seeking New Landscapes: A rights clearance study in the context of mass digitisation of 140 books published between 1870 and 2010*, Project Report for British Library/ARROW (2011), available at: [www.arrow-net.eu/sites/default/files/Seeking%20New%20Landscapes.pdf](http://www.arrow-net.eu/sites/default/files/Seeking%20New%20Landscapes.pdf) (accessed: 14 April 2018); V. Stobo, R. Deazley and I.G. Anderson, 'Copyright and Risk: Scoping the Wellcome Digital Library' (2013)

adopting an even more modest baseline of £30 per work, a likely cost projection for our purposes would still exceed £1BN.<sup>105</sup>

In short, while term reduction might impact financially on a very small number of rightsholders, we think the countervailing benefits to memory institutions promise to be extraordinary. But in any event, we believe it is possible to implement a scheme that would release most 2039 works into the public domain without controversy, while at the same time providing interested rightsholders with a reliable mechanism for securing their existing rights. With that in mind, in Part V we present a possible blueprint for legislative activity in this domain; in Part VI we subject that blueprint to scrutiny in accordance with the prevailing norms and logic of the European Court of Human Rights as applied to the right to property.

## **V. REFORMING 2039: A LEGISLATIVE BLUEPRINT**

### **A. A POSSIBLE MODEL FOR REFORM**

In this section, we present one potential model for enabling term reduction, with two distinct limbs. The first is a ‘use it or lose it’ proviso which is contingent on making affected works available to the public; we define the concept of making available within this context in a very capacious way. The second limb is a statutory compensation scheme. As we discuss in Part VI, we think a ‘use it or lose it’ proviso by itself would be sufficient to address any constitutional property concerns raised by A1P1 of the European Convention. However, we think it prudent to allow for a statutory compensation scheme as a backstop to ensure the very small minority of rightsholders who may be financially disadvantaged by term reduction have a means of claiming economic redress. We note, however, that a compensation scheme need not require paying compensation to all, or indeed very many, affected owners.

Let’s assume that all 2039 copyright interests will come to an end on 31 December 2019, that is, 20 years before they were originally intended to expire. Let’s also assume that the enabling legislation is in place by 1 January 2019, allowing a 12-month window of ‘use it or lose it’ activity.<sup>106</sup> Under our model, those who take steps to make their work available to the public before 31 December 2019, will continue to enjoy copyright protection until 31 December 2039. For those who take no steps to make the unpublished work available to the public, copyright comes to an end on 31 December 2019; in other words, instead of 21 years of protection, their copyright term expires after 12 months.

What does making the work available to the public mean in this context? The CDPA defines the concept of ‘making available’ differently in different contexts. When articulating the

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CREATE Working Paper 2013/10, available at: [zenodo.org/record/8380/files/CREATE-Working-Paper-2013-10.pdf](http://zenodo.org/record/8380/files/CREATE-Working-Paper-2013-10.pdf) (accessed: 14 April 2018); R. Peters and L. Kalshoven, Europeana Factsheet: what rights clearance looks like for Cultural Heritage Organisations – 10 Case Studies (2016), available at: [pro.europeana.eu/files/Europeana\\_Professional/Advocacy/rights-clearance-case-study-report-jun-2016-english.pdf](http://pro.europeana.eu/files/Europeana_Professional/Advocacy/rights-clearance-case-study-report-jun-2016-english.pdf) (accessed: 14 April 2018); Hargreaves, *Digital Opportunity*; and, V. Stobo, K. Patterson, K. Erickson and R. Deazley, “‘I should like to see them sometime’: an empirical study of copyright clearance costs in the digitisation of Edwin Morgan’s Scrapbooks’ (2018) *Journal of Documentation* (forthcoming).

<sup>105</sup> Even assuming the lowest reported threshold of £4.88 per work, this would still suggest an aggregate cost of more than £170M for 35M works.

<sup>106</sup> In truth, the ‘use it or lose it’ period might just as well be 18 months, in line with the Australian experience, or indeed longer. However, for the sake of simplicity of argument, we adopt a period of 12 months.

economic rights of copyright owners, it is a more narrowly defined construct; when setting out the scope of certain exceptions to copyright, a more expansive definition has been adopted. In relation to quotation, for example, work has been made available to the public ‘if it has been made available *by any means*’, including: issuing copies to the public; making it available by means of an electronic retrieval system; renting or lending copies of the work to the public; performing, exhibiting, playing or showing it in public; communicating the work to the public. This definition is open-ended and non-exhaustive, although it remains a matter of dispute whether a work that has been accessioned to and catalogued by a public archive or other memory institution has been made available to the public.<sup>107</sup>

In the interests of safeguarding the assets of those who might be disadvantaged by 2039 reform, we propose a very broad definition of making available. Specifically, in relation to 2039 works, making available would be defined to include deposit in a publicly accessible archive or other memory institution. This would apply to rightsholders that have already deposited material with an archive, and well as rightsholders who do so to take advantage of the use it or lose it proviso.

To facilitate this process, and to ensure that reliable and trustworthy information about the operation of the ‘use it or lose it’ mechanism is publicly available and accessible, we recommend establishing a Register of Interests in 2039 works. The Register could be administered by the IPO as an adjunct to their responsibility for managing the UK orphan works regime. Rightsholders seeking to claim the benefit of the proviso need only lodge a good faith declaration with the IPO that their unpublished 2039 works have been made available to the public in a qualifying manner. This might involve no more than sending an email (accompanied by appropriate supporting documentation such as evidence of an unbroken chain of title). Where making available has happened by way of deposit with an archive or other institution (whether before or after 2039 reform), this declaration should also be accompanied by confirmation from the institution that the work(s) has been deposited and is publicly accessible. In turn, this would mean that every archive holding 2039 material belonging to donors and other third party rightsholders would know with certainty what 2039 material in its collection remains in copyright on 1 January 2020 and what has entered the public domain.

It is worth noting, that introducing a ‘use it or lose it’ proviso presents no problem regarding compliance with the Berne Convention, specifically A.5(2) which concerns formalities.<sup>108</sup> For one thing, the scope of application of A.5(2) is limited to the minimum set of rights guaranteed under the Convention: in this case, 2039 works have already benefitted from the standard term, and without subject to formality. But in addition, requiring rightsholders to invoke a ‘use it or lose it’ mechanism to retain rights that exceed the standard term is not, properly understood, a prohibited formality; rather, it is a matter of substantive law regulating the

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<sup>107</sup> For a discussion, see R. Deazley, *Copyright and Digital Cultural Heritage: The Permitted Acts – Exceptions to Copyright*, 5.3.2 (‘Has the work been made available to the public?’), available: [copyrightcortex.org/copyright-101/chapter-7](http://copyrightcortex.org/copyright-101/chapter-7) (accessed: 14 March 2018).

<sup>108</sup> The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

extent of protection provided beyond the Berne minimum requirements.<sup>109</sup> In short, there is no inconsistency with Berne.

For those who do not take steps to secure their copyright under the ‘use it or lose it’ proviso, or who might miss the relevant deadline for some reason, there remains the opportunity of applying for compensation. As we noted earlier, a compensation scheme need not require paying compensation to all affected owners, but it would require those owners to make a positive claim against the state demonstrating clear economic detriment flowing from the term reduction (and, as we shall see, any compensation could be less than the full market value of the work, assuming the market value of the work can be objectively determined). Relevant factors to consider when deciding whether to grant an award might include:

- Proof of ownership: has the claimant demonstrated clear and unambiguous title to the work(s) in question, and are all co-owners (if relevant) joined in the claim?
- The age of the unpublished work: if the claimant and previous owners have not sought to exploit the work commercially before this time, why not?
- What was the market value of the work when the term reduction scheme was announced, and how has that value been determined?
- What is the nature of the claimant’s economic loss flowing from the reduction of term to 12 months?

Any process for determining compensation should also be mindful of the fact that this is not the first time the state has reduced term of protection in these works: indeed, when the CDPA was first passed, the implementation of the 2039 rules involved a reduction in term for unpublished works from perpetual protection to 50 years. At that time, no compensation was paid to any affected rightsholder. With that in mind, we think it important also to ask:

- What was the nature of the claimant’s economic loss flowing from the previous reduction in term in 1989 (when perpetual protection was reduced to 50 years), and how does it compare with the estimated loss flowing from reduction from 21 years to 12 months?

## **B. THE RELEVANCE OF THE PUBLICATION RIGHT**

One additional factor to consider when assessing the proportionality of any term reduction measure – as well as the likelihood of an affected owner successfully claiming compensation – is the publication right. Introduced by the 1993 European term directive,<sup>110</sup> the publication right provides a 25-year term of protection for anyone who first publishes previously unpublished work in which copyright has expired.<sup>111</sup> The right applies to literary, dramatic, musical and artistic works, and films,<sup>112</sup> and is a property right ‘equivalent to copyright’

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<sup>109</sup> Stef van Gompel, *Formalities in Copyright Law: An analysis of the history, rationales and possible future* (Kluwer Law International, 2011), 194-200.

<sup>110</sup> For details, see the *Copyright and Related Rights Regulations 1996/2697*, regs 16 and 17.

<sup>111</sup> Publication, in this context, is defined to include ‘any communication to the public, in particular – (a) the issue of copies to the public; (b) making the work available by means of an electronic retrieval system; (c) the rental or lending of copies of the work to the public; (d) the performance, exhibition or showing of the work in public; or (e) broadcasting the work or including it in a cable programme service’; reg. 16(2).

<sup>112</sup> Reg. 16(7).

meaning that almost all the relevant provisions in the CDPA that relate to copyright works also apply to the publication right (including exceptions to copyright). One notable difference is that moral rights are not granted to works protected by the publication right,<sup>113</sup> but, otherwise, copyright and the publication right are substantively identical.<sup>114</sup>

To date, however, this *sui generis* right has enjoyed little relevance or traction in Britain precisely because of the 2039 rule. That is, *because* this historic material has remained in copyright beyond the standard term, opportunities to avail of the publication right have been foreclosed.

But in turn, this means that should the government take steps to address the 2039 problem, owners who would be divested of their rights could still first publish or communicate their work to the public and secure for 25 years a right analogous to copyright. Moreover, the promise of a reinvigorated publication right is likely to prove a more attractive option than the ‘use it or lose it’ proviso. That is, copyright owners will likely choose *not to make work available* before 1 January 2020 (and so forfeit the opportunity of an additional 20 years of copyright protection) in preference to *first publishing* at some point after 1 January 2020, securing the 25-year publication right. Indeed, there is a compelling economic logic in waiting to avail of the publication right rather than retain copyright under the 2039 provisions. From this perspective, many owners of 2039 works may welcome a reduction in term sooner rather than later.

In addition, once copyright has expired, the risk of losing the publication right to a third party is mitigated. Regarding claims to the publication right, the relevant regulations state that no account shall be taken ‘of any unauthorised act,’ and continue that ‘[i]n relation to a time when there is no copyright in the work, an unauthorised 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.’<sup>115</sup> In other words, no one can trigger a claim to the publication right without dealing with the owner of the physical work itself. For those copyright owners who have retained physical ownership of the material in question, this provides an obvious safeguard regarding the future exploitation of existing unpublished material.

However, there will be copyright owners who have transferred their unpublished works to an archive or another repository for the purposes of long term preservation. They may be placed in a more vulnerable position. The terms and conditions of the relevant deposit agreement (if one exists) will be crucial. If the archive has simply taken possession but not ownership of the physical material then, as above, the potential benefit of the publication right remains with the copyright owner. But, if ownership of the physical material has been transferred to the archive, the opportunity for others – including the archive itself – to first avail of the publication right arises. This scenario does not *preclude* the owner from benefitting from the publication right; it simply means they are not *guaranteed* the benefit of the right. But in any event, as we have already discussed, under our proposed scheme, rightsholders who have transferred physical ownership of their works to an archive might easily trigger the ‘use it or lose it’ proviso by way of notification to the IPO and so retain rights under 2039.

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<sup>113</sup> Reg. 17(1).

<sup>114</sup> See reg. 17 for details of which copyright provisions do and do not apply to works protected by the publication right.

<sup>115</sup> Reg. 16(3).

For obvious reasons, as a mechanism for off-setting any negative economic impact of a reduction of term, the publication right is likely to be instrumental in establishing the proportionality of any state action on this issue. For disadvantaged copyright owners who own the physical medium on which the work is embodied, the publication right is in effect guaranteed. But even when the ownership of that physical medium has been transferred to a third party, such as an archive, the publication right may still present an economic opportunity. Much would depend on the actions and commercial appetite of the owner, as well as their relationship with the current custodian of the physical work. Either way, the publication right will likely play a key role in the administration of any statutory compensation scheme. For example, in addition to the factors outlined in the previous section, one might also consider:

- What steps did the claimant take between the announcement of the term reduction scheme and 31 December 2019 to make use of or exploit the work, if any?
- What steps is the claimant planning to take to exploit the work in accordance with the publication right?
- To what extent does the availability of the publication right fail to offset the nature of the claimant’s loss flowing from the reduction of term?

## VI. REFORMING 2039: THE CONSTITUTIONAL PROPERTY CHALLENGE

In this section, we analyse the compatibility of our legislative blueprint for term reduction with constitutional property protection as it applies in the UK. The key provision is A1P1, entrenched in UK law through the Human Rights Act 1988. Our proposed legislation may also fall within the ambit of article 17 of the Charter of Fundamental Rights of the European Union, but we leave examination of that protection to one side for two reasons. First, it is not clear that article 17 will apply. Member states must comply with rights under the Charter when acting ‘within the scope of EU law’,<sup>116</sup> which can be understood broadly to mean when a state takes action in pursuance of, or dependent on, underlying EU regulation.<sup>117</sup> Although the legislation we propose might be considered to fall within the general scope of the Term Directive, the proposal is chiefly motivated by domestic copyright policy concerns and does not impinge on rights at a European level. Secondly, the protection provided by article 17 has been explicitly linked to A1P1, with the Explanatory Note to article 17 providing that the right’s meaning and scope are the same as A1P1,<sup>118</sup> and the CJEU regularly referencing Strasbourg decisions on the property right when dealing with article 17 cases.<sup>119</sup> Although the precise reasoning of the CJEU may differ from that of the Strasbourg court, the ultimate outcome in respect of the legislation at issue here is almost certain to be the same.<sup>120</sup> For that reason, it is unlikely that an article 17 analysis will provide any illumination of our central question not already found in the A1P1 analysis below.

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<sup>116</sup> EU Charter, art.5(1).

<sup>117</sup> *Aklagraen v. Hans Akerberg Fransson* (C-617/10) EU:C:2013:105, [2013] 2 CMLR 46.

<sup>118</sup> *Explanations Relating to the Charter of Fundamental Rights* (2007/C303/02).

<sup>119</sup> See, for example, *Kadi* (2008) E.C.R.-I 6351, [2008] 3 CMLR 41 at [354]-[372].

<sup>120</sup> For a side-by-side analysis of article 17 and A1P1 in relation to protection of trademark rights in the context of tobacco plain packaging legislation, see Griffiths, ““On the back of a cigarette packet””.

## A: THE LEGAL FRAMEWORK OF CONSTITUTIONAL PROPERTY PROTECTION

Article 1 of the First Protocol provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Through its jurisprudence over the past few decades, the European Court of Human Rights at Strasbourg has developed an analytical framework within which applications under A1P1 will be decided. First, the court will ask whether the applicant holds a 'possession'. This term has an autonomous meaning for the purposes of the Convention:<sup>121</sup> the position of the domestic law on whether the interest in question is a property right will be relevant, but not determinative. In broad terms, the court will consider any transmissible interest with a financial value to be a possession,<sup>122</sup> and will also protect the legitimate expectation of acquisition of such an interest.<sup>123</sup>

Secondly, the court will consider whether the state action complained of by the applicant amounts to an interference with the peaceful enjoyment of that possession. An interference can fall within one of 'three rules': a deprivation of possessions (whether de jure or de facto); a control of the use of possessions; or a more general interference with the peaceful enjoyment of possessions.<sup>124</sup> The relationship between these three categories is not easy to pin down,<sup>125</sup> although there is some weight in the argument that a deprivation is a subset of control of use, which is in turn a subset of the more general interference with peaceful enjoyment of possessions.<sup>126</sup> The court invariably references the three rules in its jurisprudence, and the categorisation can have some relevance to the question of proportionality, dealt with at a later stage within the court's analytical framework.<sup>127</sup> Despite this, the court has been satisfied in some cases that it is possible to determine whether an A1P1 violation has occurred without categorising the interference,<sup>128</sup> suggesting that this step has instrumental rather than substantive significance in the decision-making process.

Finally, if the court is satisfied that the state action does engage A1P1 by amounting to some category of interference with the peaceful enjoyment of possessions, it will consider whether that interference can be justified. Here, three sub-questions come into play. Is the state action

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<sup>121</sup> *Beyeler v. Italy* (2001) 33 EHRR 52.

<sup>122</sup> *Bramelid and Malmström v. Sweden* (1982) 5 EHRR 249 (Commission Decision).

<sup>123</sup> *Batelaan and Huiges v. Netherlands* (1984) 41 DR 170; *Van Marle v. Netherlands* (1986) 8 EHRR 483; *Pudas v. Sweden* (1988) 10 EHRR 380; *Tre Traktörer Aktiebolag v. Sweden* (1991) 13 EHRR 309. For a more detailed discussion of the meaning of "possessions", see F. McCarthy, "Protection of Property and the European Convention on Human Rights" (2017) 6 *Brigham Kanner Property Rights Conference Journal* 299, 318-323.

<sup>124</sup> *Sporrong and Lönnroth v. Sweden* (1983) 5 EHRR 35, para 61.

<sup>125</sup> *James v. United Kingdom* (1986) 8 EHRR 123, para 37.

<sup>126</sup> *Allgemeine Gold-und Silberscheideanstalt v. United Kingdom* (1987) 9 EHRR 1.

<sup>127</sup> Briefly, a deprivation of possessions cannot usually be justified without payment of compensation: *Lithgow v. United Kingdom* (1986) 8 EHRR 329, para 120. The proportionality requirement is discussed further below.

<sup>128</sup> For example, *Stretch v. United Kingdom* (2004) 38 EHRR 12.

lawful? Does it pursue a legitimate aim in the public or general interest? Is the interference proportionate, in that it strikes a fair balance between the needs of the state and the rights of the applicant without imposing an individual and excessive burden on her?<sup>129</sup> If these three questions are answered in the affirmative, the interference is justified and no breach of A1P1 has occurred.

The 1998 Act entrenches A1P1 into domestic law using several mechanisms. Of most relevance here is section 3, which provides that legislation must, if possible, be given effect in a way which is compatible with Convention rights.<sup>130</sup> If no such interpretation of UK-wide legislation is possible, the Supreme Court is empowered to make a declaration of incompatibility,<sup>131</sup> opening the door to a fast-track Parliamentary amendment procedure.<sup>132</sup> In other words, if legislation is not Convention compliant, it must be amended.<sup>133</sup>

A challenge to the Convention compliance of legislation will be brought by way of judicial review proceedings. When faced with a Convention question, a domestic court must take into account the jurisprudence of the Strasbourg court wherever relevant.<sup>134</sup> Notwithstanding the discretion implied in a mere obligation to 'take account of', domestic jurisprudence indicates that a Strasbourg decision should be followed unless there is a strong reason to deviate from it.<sup>135</sup> This approach has the effect of preventing the UK courts interpreting Convention rights in such a way as to provide either a greater or lesser protection than might develop from the Strasbourg jurisprudence.<sup>136</sup>

In dealing with A1P1 cases, the approach of the domestic courts is broadly in line with the analytical framework described above. A clear divergence can be noted only in respect of the question of proportionality, where the domestic approach is more structured than in Strasbourg. Four issues are considered in the proportionality review process:<sup>137</sup>

- (i) Whether there is a legitimate aim which could justify a restriction of the relevant protected right;
- (ii) Whether the measure adopted is rationally connected to that aim;
- (iii) Whether the aim could have been achieved by a less intrusive measure;
- (iv) Whether, on a fair balance, the benefits of achieving the aim by the measure outweigh the disbenefits resulting from the restriction of the relevant protected right.

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<sup>129</sup> *James v. UK*, para 50.

<sup>130</sup> Human Rights Act 1988, s.3(1).

<sup>131</sup> 1988 Act, s.4(2) and (4).

<sup>132</sup> 1988 Act, s.10 and schedule 2.

<sup>133</sup> The effect is more dramatic for legislation made by the devolved legislatures in Scotland, Wales and Northern Ireland, in relation to which a finding of incompatibility with the Convention renders it invalid: Scotland Act 1998, s.29; Government of Wales Act 2006, s.81; Northern Ireland Act 1998, s.24.

<sup>134</sup> 1988 Act, s.2(1).

<sup>135</sup> *R (Anderson) v. Secretary of State for the Home Department* [2003] 1 AC 837.

<sup>136</sup> *R. (on the application of Ullah) v. Special Adjudicator* [2004] 2 AC 323 HL.

<sup>137</sup> *Bank Mellat v. H M Treasury (No 2)* [2014] AC 700, paras 68-76; *R (Nicklinson) v. Ministry of Justice (CNK Alliance Ltd Intervening)* [2015] AC 657, para 80; *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales* [2015] UKSC 3, para 45.

The court will accept the legislature's judgment as to the existence of a legitimate aim at stage (i) review, unless that judgment is manifestly without reasonable foundation. However, this latitude does not extend to stage (iv), where the level of scrutiny required by the Court is higher. The question at stage (iv) is whether the measure achieves a fair and proportionate balance between the public interest pursued and the private interests affected. Although the views of the legislature may still carry significant weight in the balancing exercise, private interests must be given similar consideration, and the court may be particularly well placed to evaluate those in the context of a particular case.<sup>138</sup>

## **B: APPLICATION OF A1P1 TO THE PROPOSED LEGISLATION**

If we employ the analytical framework outlined above in relation to the model legislation proposed in Part V, do we find that legislation to violate A1P1? Although it is impossible to predict the outcome of any court action with absolute certainty, we make a robust argument that no breach of the article would result.

First, Strasbourg jurisprudence indicates that intellectual property in general,<sup>139</sup> and copyright in particular, are possessions within the meaning of A1P1.<sup>140</sup> There is no reason to think a different outcome would obtain in this context.

However, the question of whether the legislation interferes with the peaceful enjoyment of that possession is more complex. The possession held by copyright holders prior to the introduction of the proposed model legislation is a right limited in time: unlike ownership of a plot of land, which is liable to endure indefinitely, or a motor vehicle, which will last until the asset itself is exhausted, the copyright interests we are concerned with have a legislative expiry date in 2039. Is changing the term an interference with a possession, or a redefinition of that possession?

An analogy can perhaps be drawn here between copyright and state-provided licences, for example to sell alcohol or act in a professional capacity as an accountant or lawyer. The analogy is not exact, since copyright is a possession in itself, whereas licences are treated as ancillary to the underlying possessions they regulate (land in the case of planning permission, for example, or goodwill in a business in the case of a professional licence). However, both are privileges provided by the state for financial exploitation, and both are provided subject to state-defined conditions, including as to duration.

In several Strasbourg cases, claimants have alleged a violation of A1P1 following on withdrawal of a licence. In an early case, the Commission indicated that the question to be addressed is whether the licensee has a 'reasonable and legitimate expectation' of continuing to benefit from the licensed activity.<sup>141</sup> Accordingly, where a GP was issued a licence to dispense medications based on the absence of a chemist in the neighbourhood, then lost that licence when a chemist later opened, no interference occurred.<sup>142</sup> He could have had no

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<sup>138</sup> *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill*, *ibid.*, para 52.

<sup>139</sup> *Anheuser-Busch Inc. v. Portugal* (2007) 45 EHRR 36.

<sup>140</sup> *Melnychuk v. Ukraine* App No 28743/03 (ECtHR, 5 July 2003); *Neij v. Sweden* (2013) 56 EHRR SE19.

<sup>141</sup> *Batelaan and Huiges*, 173. The term 'legitimate expectation' in the Strasbourg jurisprudence does not share the technical meaning of the term within UK public law doctrine.

<sup>142</sup> *Batelaan and Huiges*.

legitimate expectation of continuing to dispense following the change in circumstances. The court will also consider the extent to which the applicant's expectation that the licence would continue was backed up by financial or other investment, with investment-backed expectation more likely to fall within the ambit of A1P1.<sup>143</sup>

An argument can be made that rightsholders can have no reasonable and legitimate expectation of continuing to benefit from copyright beyond the standard terms stipulated under European and international copyright law. The expectations of rightsholders in this respect must be informed by the earlier reduction in the term of UK protection, from perpetuity to 50 years. The ongoing series of consultations around appropriate copyright term should have put them on notice that further changes might occur. In these circumstances, any expectation that the term of copyright is incapable of further revision is arguably unreasonable. Additionally, there is little or no evidence of investment by rightsholders based on reliance on the existing term. On the contrary, a failure to exploit the potential of these rights is one of the problems our proposal seeks to address. If these arguments are correct, reduction in the term of copyright will not engage A1P1 at all.

If this argument is not correct, and the reduction in term interferes with a possession rather than redefining a possession, it seems likely that the interference would be categorised a control of use. The effect of the legislation would not be to transfer the property from the hands of the rightsholders to another, or to transfer it at all. This is a right which always had an expiration date. Again, by analogy with the licence cases, a change to that best before date cannot be held to remove that possession from the rightsholders in its entirety, but merely to change the terms on which it is held.

Assuming, then, that the legislation will control the use of the rightsholders' possessions, can this interference be justified? The interference will certainly be lawful. The legislation gives it a clear basis in domestic law and adheres to the basic rule of law principles of clarity, accessibility and non-retrospectivity.<sup>144</sup> There is also no doubt that the legislation will be considered to pursue a legitimate aim in the public or general interest. The margin of discretion afforded to the state by both Strasbourg and domestic courts in this respect is notoriously wide. Short of a situation in which a state fails to assert any public interest for its actions,<sup>145</sup> the Strasbourg court has never found a violation of A1P1 in this respect, and as outlined above, the domestic courts will also assume good faith on the part of the legislature in this context. In any event, the desire here to simplify the law whilst enriching the public domain and reducing the administrative and financial burden on memory institutions seems clearly to serve important UK policy ambitions. The extensive consultation leading to the enactment of any legislation would serve to bolster this assertion.<sup>146</sup>

Attention then turns to the issue of proportionality, which will be analysed here using the more structured approach to review employed in the domestic courts. It is difficult to imagine the Strasbourg court would find the legislation to be disproportionate if domestic review had concluded otherwise. Addressing the four criteria around which domestic review is structured, and accepting that the aims pursued by the legislation are legitimate, we think

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<sup>143</sup> *Pine Valley v. Ireland* (1992) 14 EHRR 319, para [51].

<sup>144</sup> *James v. UK*.

<sup>145</sup> *Zwierzynski v. Poland* (2004) 38 EHRR 6.

<sup>146</sup> *R (on the application of Countryside Alliance) v. Attorney General* [2008] 1 AC 719.

few would dispute that reducing the term would make a substantial contribution to the objectives outlined above: enabling online access to our shared cultural heritage and reducing an existing burden on memory institutions. Even if one disagrees with the policy, it would be hard to sustain an argument that the proposed measure is not rationally connected to the proposed aims. Moreover, it is difficult to see how a less intrusive measure could be employed to achieve the same results. Finally, we must consider the overall balance between the impact on rightsholders and the benefits to society resulting from the legislation have been fairly struck.

In terms of the overall balance of the exercise, it is worth noting that recent research on digitisation initiatives undertaken by memory institutions indicates that, when asked for permission to make archive material available online, the overwhelming majority of rightsholders – when they can be identified and when they respond to requests – grant permission, and without requesting a fee of any kind. That is, around 95% of those who own the copyright in this unpublished historic material do not appear to be motivated by financial concerns when approached for permission to use. Indeed, many are surprised to discover that they hold these rights at all.<sup>147</sup>

It is also necessary to observe that the impact of the legislation on rightsholders is not easy to ascertain. As discussed in Part IV, the evidence presented by rightsholders to government during the 2039 consultation seems to have been limited to three specific cases, and it does not appear that a systematic quantification of likely losses has been – or could be – carried out. Any such quantification would have to take account of the potential for losses to be mitigated through the publication right, and set against the considerable financial savings to memory institutions, again discussed in Part IV.

For those who are concerned about potential economic loss, the model legislation includes several safeguards designed to reduce, or remove entirely, deleterious effects. Most importantly, the scheme includes the opportunity for rights to be preserved in their entirety, though deposit with a memory institution accompanied by notification to the IPO, or otherwise by making the material available to the public, as described in Part V(A). These procedures need not be time consuming, and, in part at least, mirror the requirements in the Australian legislation. Where the right is not preserved, compensation for loss may still be available. It is important to recognise that payment of compensation is not essential in this context. The Strasbourg jurisprudence mandates payment of compensation only in respect of deprivations of possessions, where ‘fair’ (rather than ‘market value’) compensation is usually required for the proportionality test to be satisfied.<sup>148</sup> We are not dealing here with a deprivation, however, but a control of use. With a control of use, there is no blanket requirement that compensation be provided. The proportionality test can be satisfied without it. The provision of a compensation scheme might therefore be considered to tip the scales even further towards a finding of proportionality. In addition, the public consultation carried out prior to the introduction of the legislation we suggest should have put rightsholders on notice that a change in term was possible, and perhaps likely. The predictability of this change

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<sup>147</sup> V. Stobo, ‘Copyright, Digitisation and Risk: Taking risks with archive collections’, 26-38, in R. Deazley and A. Wallace, eds, *Copyright and Cultural Memory: Digital Conference Proceedings*, CREATE Working Paper 2017/03 (March 2017), available: [www.create.ac.uk/publications/copyright-and-cultural-memory-digital-conference-proceedings/](http://www.create.ac.uk/publications/copyright-and-cultural-memory-digital-conference-proceedings/) (accessed: 13 April 2018).

<sup>148</sup> *Lithgow*, para 120. The court has also found that even a deprivation might be proportionate without payment of compensation in exceptional circumstances: *Jahn v. Germany* (2006) 42 EHRR 49.

is again a point in favour of a finding that a fair balance has been struck.<sup>149</sup> In addition, the transitional period provided for in the model, together with the opportunities for rightsholders to mitigate loss (through preservation of duration to 2039 or exploitation of the publication right), also operate to lessen the burden that rightsholders must bear.

Taken together, we think there is a compelling argument for saying that, even if a reduction in copyright term engages A1P1 as control of use of possessions, the interference could be justified as lawful, in the public interest and carried out in such a way as to avoid an individual and excessive burden being placed on any individual rightsholder.

## VII. A CAUTIONARY NOTE: CONTRACTUALLY PROTECTING THE PUBLIC DOMAIN

We believe the government should take steps to standardise the term of copyright protection in all published and unpublished works, following the lead of the Australian legislature. And, we argue that part of the rationale for addressing this issue concerns the nature and volume of the type of work typically held in archives and other memory institutions: it is unpublished and has little intrinsic commercial value; moreover, it is unique, often the only record or document of its kind in existence, and it is this that gives it such enduring evidential, cultural and political value. The unique quality of these documents and records also raises one final thorny issue to consider.

When the CDPA was revised in 2014, the government introduced a contract override provision into many – but not all – of the exceptions to copyright. These exceptions concern uses that are considered so fundamentally important, they cannot be contracted around.<sup>150</sup> For example, the exception for non-commercial research and private study states: ‘To the extent that a term of any contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable’.<sup>151</sup> In this way, the legislature has marked out a space of privileged activity in relation to works protected by copyright. The copyright owner cannot prevent another making use of the work for non-commercial research, or for any of the other relevant activities. The same is true for those archives and other memory institutions tasked with the long-term preservation of these materials, whether they own the copyright in those materials or not: they cannot, as a condition of granting access to the work, require someone to bargain away their right to make use of the work in those privileged ways. Any attempt to do so will be null and void. Moreover, any material benefitting from the publication right would be bound by the same contractual override provisions.<sup>152</sup>

Once commercially published material enters the public domain there is little need to safeguard opportunities for third parties to make use of that material: the distribution of the material during its commercial exploitation typically ensures that multiple copies of the

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<sup>149</sup> *Ian Edgar (Liverpool) Ltd v. United Kingdom* App no 37683/97 (ECtHR, 25 January) (admissibility).

<sup>150</sup> The exceptions that include a contract override provisions are as follows; non-commercial research and private study (s.29(4B)); text and data analysis for non-commercial research (s.29A(5)); quotation (s.30(4)); caricature, parody and pastiche (s.30A(2)); enabling access for use for disabled persons (s.31F(8)); illustration for instruction (s.32(3)); copying by librarians (ss.41(5), 42(7), 42A(6)); and, recording a broadcast for archival purposes (s.75(2)).

<sup>151</sup> CDPA, s.29(4B).

<sup>152</sup> See the discussion in Part V.B above.

material will be accessible to the public in various ways. But the same cannot be said for archive records. Their unique nature raises the very real possibility of the person or institution in possession of the physical work contractually regulating its use as part of a quid pro quo for enabling access. While the material remains in copyright under the 2039 rule, this problem is mitigated by the contract override provisions. It would be both counterintuitive and counterproductive if, by foreclosing early on the 2039 term, opportunities for interested third parties to make use of this material were diminished.

The Europeana Foundation is tasked by the European Commission with developing a digital cultural heritage platform for Europe. Europeana's Public Domain Charter addresses the digitisation of analogue material that is out of copyright. In brief, the Charter states that works in the public domain in analogue form continue to be in the public domain once they have been digitised.<sup>153</sup> We endorse this initiative and would extend the same logic to (at least) those uses of a work that currently enjoy privileged status while it remains in copyright. When any work enters the public domain, those privileged spaces should remain. In practice, when dealing with work that is held in a public archive or other memory institution, this would mean the institution concerned cannot require users to contract away their ability to make use of any work for research and private study, for text and data analysis, for quotation, for caricature, parody and pastiche, for illustration for instruction, or for enabling access for use for disabled persons. To the extent that they attempt to do so, those contractual provisions should be unenforceable.<sup>154</sup>

## VIII. CONCLUSION

Copyright reform is often hard fought and hard won. Rarely are the copyright industries willing to tolerate or concede any incursion into what they regard as their rightful and necessary domain. For example, it took eight years, and numerous rounds of consultation, to introduce to the UK an exception for parody, a common feature of most other European copyright regimes. At the same time, provision was made for a private copying exception which was subsequently removed from the statute book following litigation on the part of a group of music industry stakeholders.<sup>155</sup> In 2014, when presented with a proposal for reforming the 2039 rule by way of term reduction, industry objections were predictably strident. And, yoking the spectre of A1P1 to the argument against reform had a powerful symbolic and rhetorical appeal. And yet, as a trump card, it proves to be more illusory than real. As we have set out in this article, term reduction – appropriately managed – is entirely consistent with A1P1 norms and jurisprudence. As such, the UK government should not be dissuaded from addressing the 2039 phenomenon by arguments concerning the confiscation of property and human rights violations.

We encourage the UK government to take note of the Australian experience in this arena. It was a non-story, a non-event characterised by an almost total lack of opposition on the part

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<sup>153</sup> For further details, see: <https://pro.europeana.eu/post/the-europeana-public-domain-charter> (accessed: 18 March 2018).

<sup>154</sup> And of course, one might impose reasonable limitations where the physical integrity of the unique work is threatened by the copying or use. For example, a user could not demand that a photocopy or even a photograph be made of a particularly fragile or damaged document.

<sup>155</sup> See n.10.

of the Australian content industries. That non-story provides an illuminating backdrop against which to evaluate claims made by UK lobbyists on this issue. Moreover, the recent introduction of the Irish *Copyright and other Intellectual Property Law Provisions Bill* offers a further gloss, in that the Bill proposes to 'clarify' that perpetual copyright does not exist in certain unpublished works. The extent to which the Irish government has considered the potential constitutional property implications of this clarification is, at present, unclear. Certainly, the Regulatory Impact Analysis accompanying the proposed Bill makes no reference at all to this specific amendment. It may be the Irish government anticipates no meaningful opposition to the removal of perpetual copyright from the Irish statute book. But, if objections based on an A1P1 claim do emerge, we trust the analysis presented in this article might prove as helpful to the Irish as to the UK government in pursuing their agenda for copyright reform.

From our perspective, the case for reform of the 2039 rule is obvious. Standardising and simplifying the rules on copyright duration in older unpublished materials would deliver extraordinary benefit to society. It would bring greater clarity to UK copyright law, and more closely align our rules on copyright duration with our counterparts in Europe and elsewhere. More importantly, it would reduce the costly administrative burden taken on by heritage institutions, commercial enterprises and interested individuals who wish to reproduce and make public previously unpublished works. Adopting the approach outlined above would accommodate the economic concerns of the very small minority of copyright owners that might be affected by term reduction, without triggering the need for compensation in every case. Moreover, the collective gains are likely to be considerable. The figures that we quoted in Part IV – £200M and £1BN – are estimates only; they are merely indicative, not definitive. But, they are compelling. And, they only tell part of the story. While they hint at what might be saved by removing the administrative burden of dealing with the copyright status of these 2039 works, they do not begin to capture the positive effects, economic and otherwise, of enabling access to and use of this material once in the public domain. When we allow for 100M affected works or more, the total economic benefit likely to flow from term reduction must certainly be measured in billions, rather than millions. Moreover, the historical, political, educational and cultural benefit is likely to be immeasurable.

## APPENDIX A

<b>COPYRIGHT MATERIAL MADE BEFORE 1 JANUARY 2019 (OTHER THAN GOVERNMENT COPYRIGHT MATERIAL)</b>			
<b>TYPE OF MATERIAL</b>	<b>FACTORS AFFECTING DURATION</b>	<b>COPYRIGHT EXPIRED IF</b>	<b>OTHERWISE, DURATION IS</b>
Literary, dramatic, musical work, engraving	Made public before death	Author died before 1 January 1955	Life of the author + 70 years
	Made public after death but before 1 January 2019	Made public before 1 January 1955	First made public + 70 years
	Not made public before 1 January 2019	Author died before 1 January 1948	Life of the author + 70 years
Computer program		Author died before 1 January 1955	Life of the author + 70 years
Artistic works other than photographs or engravings		Author died before 1 January 1955	Life of the author + 70 years
Photograph		Made before 1 January 1955	Life of the author + 70 years
Works of unknown authorship, and works made by an international organisation	Made public before 1 January 2019	Made public before 1 January 1955	First made public + 70 years
	Never made public	Made before 1 January 1948	Date made + 70 years
	Made public on or after 1 January 2019 but not within 50 years of being made	Made before 1 January 1948	Date made + 70 years
	Made public on or after 1 January 2019 and within 50 years of being made	Made before 1 January 1955	First made public + 70 years
Sound recording	Made public before 1 January 2019	Made before 1 January 1955	First made public + 70 years
	Never made public	Made before 1 January 1955	Date made + 70 years
	Made public on or after 1 January 2019 but not within 50 years of being made	Made before 1 January 1955	Date made + 70 years
	Made public on or after 1 January 2019 and within 50 years of being made	Made before 1 January 1955	First made public + 70 years
	Made public before 1 January 2019		First made public + 70 years

Cinematographic film (made on or after 1 May 1969)	Never made public		Date made + 70 years
	Made public on or after 1 January 2019 but not within 50 years of being made		Date made + 70 years
	Made public on or after 1 January 2019 and within 50 years of being made		First made public + 70 years

<b>COPYRIGHT MATERIAL MADE ON OR AFTER 1 JANUARY 2019 (OTHER THAN GOVERNMENT COPYRIGHT MATERIAL)</b>		
<b>TYPE OF MATERIAL</b>	<b>FACTORS AFFECTING DURATION</b>	<b>DURATION IS</b>
Works where the author is known		Life of the author + 70 years
Works where the author is unknown	Not made public within 50 years of being made	Date made + 70 years
	Made public within 50 of being made	First made public + 70 years
Sound recording	Not made public within 50 years of being made	Date made + 70 years
	Made public within 50 of being made	First made public + 70 years
Cinematographic Film	Not made public within 50 years of being made	Date made + 70 years
	Made public within 50 of being made	First made public + 70 years