

Copyright in Millions of Unpublished Works, Films and Sound Recordings to be Snuffed Out on 1 January 2019

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- New rules regarding copyright duration come into effect on 1 January 2019
- The new rules are retrospective – there are no transitional provisions other than in the rules themselves
- The new rules eliminate ‘perpetual’ copyright in respect of unpublished copyright material
- After 1 January 2019, the duration of copyright will be affected by a new expression, ‘making public’, which may affect the duration all copyright in all copyright material made public before that date (other than artistic works and computer programs) and films and sound recording after that date
- The effect of the new rules will be to snuff out copyright in literary works (other than computer programs), dramatic and musical works made before 1948 that have not been made public
- The effect of the new rules will be to foreshorten copyright in sound recordings made before 1955 that have not been made public as at 1 January 2019 and may have an effect on the duration of copyright in films not made public before 1 January 2019
- Steps can be taken before 1 January 2019 to ensure that copyright lasts longer after the new rules come into effect

From 1 January 2019, a new way of calculating the term of copyright comes into force, as a result of which the indefinite period of copyright in respect of unpublished works and other subject matter is abolished and the duration of copyright in works *made public* after the death of the author and in films and sound recordings *made public* more than 50 years after being made is foreshortened. One effect of the *Copyright Amendment (Disability Access and Other Measures) Act 2017* (Cth) Schedule 2 (**Disability Act**) will be that the copyright in millions of unpublished works, sound recordings and films subsisting as at the effective date will be snuffed out or foreshortened overnight unless something is done before that date to protect them.¹

1. The general rule in respect of material the author or maker of which is generally known – ss 33 and 93

Works

In respect of works ‘made public’ after 1 January 2019, the author of which is ‘generally known’, the term of copyright will be 70 years from the end of the year in which the author dies, regardless of the date of being made public. The effect of this is to eliminate the extended period of copyright in respect of literary works (other than computer programs), dramatic and musical works and engravings published after the death of their respective authors, as well as indefinite copyright in respect of

unpublished works. No distinction is made between the different types of works.²

After the Disability Act takes effect, works made public before 1 January 2019 have substantially the same copyright duration as under the law as before this amendment takes effect, except that the term of protection in respect of literary works (other than computer programs), dramatic and musical works not made public until after the author’s death is measured from the date the work is made public, instead of by reference to when the work or an adaptation of the work was published, first performed in public, broadcast or records of the work or an adaptation are offered or exposed for sale to the public.³

A discussion of what the newly defined expressions “made public” and “generally known” mean follows below.

Films and sound recordings

In respect of films and sound recordings made public after 1 January 2019, provided that the film or sound recording is first made public within 50 years after the end of the year in which it was made, the term of copyright will be 70 years from the end of the year in which the film or sound recording is first made public or, if not made public within 50 years from the date made, then 70 years after the date made.⁴

Again, after the Disability Act takes effect, films and sound recordings made public before 1 January 2019

¹ The commencement date of the new rules is prescribed by the Disability Act, s 2(1) item 3.

² Disability Act Schedule 2 s 4, which will repeal the existing ss 33 and 34 and introduces a new s 33; see the new s 33(3).

³ Disability Act Schedule 2 s 4, which will repeal the existing ss 33 and 34 and introduces a new s 33; see the new s 33(2).

⁴ Disability Act Schedule 2 s 9, which will repeal the existing ss 93 and 94 and introduces a new s 93; see the new s 93(3).

have the substantially the same copyright duration as under the law before this amendment takes effect, except that the term of protection is measured from the date the film or sound recording was 'made public', instead of by reference to when the work or an adaptation of the work was published.⁵

Works, films and sound recordings not made public before 1 January 2019

The effect of these new provisions is that, if any work has not been made public before 1 January 2019, and the author died before 1 January 1948, copyright will lapse on 1 January 2019. In the case of authors of such works who died in 1949, 1950, 1951 and so on, the copyright lapses one year, two years, three years and so on after 1 January 2019, whether made public or not.⁶

So, those wishing to publish hitherto unpublished works in this category, would be well advised to do so before 1 January 2019, or create some other 'making public' event, in order to gain the protection of copyright after that date. For example, those with a parent's war diaries or sound recordings created during the First War or Second World War might wish to arrange a reading or a playing in the local scout hall before 1 January 2019 in order to give them more time to exploit the work fully.

In respect of sound recordings made between 1955 and 1958,⁷ but not made public before 1 January 2019, copyright will lapse in 2025, 2026 and 2027 and 2028, respectively, that is, 70 years after the year in

which made, because they were not made public within 50 years of the year made. For those made after 1 January 1959, there will be a small window of opportunity to have the copyright extended to 70 years from the date made public.

So those wishing to commercialise sound recordings made in that period from 1955 to 1958 would be well advised to make them public in some manner before 1 January 2019 in order to gain the longer period of protection out to 2088, 70 years from the date of making public.

These provisions have the effect of forfeiting a property right belonging to many copyright owners in respect of unpublished material and foreshortening the copyright of others. As a consequence of the possibility of invalidity of these amendments on the grounds of breach of s 52 of the *Commonwealth of Australia Constitution Act 1900* (UK) s 51(xxxi), the Disability Act Schedule 2 s 31 provides that, if the operation of these amendments would result in an acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person which, if it cannot be agreed, can be determined by the Federal Court of Australia or the Supreme Court of a State or Territory.

2. What does "made public" mean?

The new expression "made public" will be used to determine the duration of copyright, defined in respect of works, films and sound

recordings by a new s 29A(1) of the *Copyright Act 1968* (Cth) (Act), introduced by the amending legislation.⁸ This provides that, without limiting when a work is made public, it is made public when:

- (1) in the case of a literary, dramatic or musical work, when the work, or an adaptation of the work, is published, performed in public, broadcast or otherwise communicated to the public or records of the work or adaptation are offered to the public (whether or not for sale) or exposed for sale to the public;⁹
- (2) in the case of an artistic work, when the work is published, performed in public, broadcast or otherwise communicated to the public, exhibited in public or, if the work is included in a cinematograph film, when the film is seen in public, or records of the work are offered to the public (whether or not for sale) or exposed for sale to the public.¹⁰ If the work is a building, the work is deemed to have been made public when the building has been constructed;¹¹
- (3) in the case of all subject matter other than works, when it is published or copies of the material are offered to the public (whether or not for sale) or exposed for sale to the public,¹² and specifically in the case of a sound recording, if it is heard in public or communicated to the public¹³ or,

5 Disability Act Schedule 2 s 4, which will repeal the existing ss 93 and 94 and introduces a new s 93; see the new s 93(2).

6 The new provisions do not operate to backdate the lapsing of copyright in respect of works made in or before 1949 that remain unpublished as at 1 January 2019; see Disability Act Schedule 2 s 30.

7 Copyright in sound recordings made before 1955 had a duration of 50 years from the date made, slightly lengthened by the Act to 50 years after the year made. So the copyright in such sound recordings lapsed before the extension of copyright which came into effect on 1 January 2015 as a result of the *US Free Trade Agreement Implementation Act 2004* (Cth).

8 Disability Act Schedule 2 s 3.

9 see the new s 29A(1)(a)(i) and 29(d).

10 see the new s 29A(1)(a)(ii) and 29(b).

11 see the new s 29A(1)(c).

12 see the new s 29A(2)(a) and 29(d).

13 see the new s 29A(2)(b).

14 see the new s 29A(2)(c).

in the case of a film, it is seen in public (to the extent it consists of visual images), heard in public (to the extent it consists of sounds) or communicated to the public.¹⁴

These changes are notable in that:

- 1 In respect of literary works (other than computer programs), dramatic and musical works, films and sound recordings, the range of events other than publication by reference to which the duration of copyright could be measured is no longer exhaustively listed, so that the commencement of copyright could be determined by reference to a range of lesser events, including events not specified in the legislation.
- 2 “Publication” still remains relevant to every other aspect of copyright, including subsistence of Australian copyright in foreign works, where no other connecting factor is present, under the *Copyright (International Protection) Regulations 1969* (Cth). “Making public” can be an event less than publication. The only interesting aspect of this is that, in relation to films and sound recordings, if Australian copyright subsists by reason of first publication in Australia or in a convention country alone, its duration may be measured from an earlier date, when it was first made public in Australia, if this occurred without publication. This is the case already with literary works (other than computer programs), dramatic and musical works but under the new rules the possible earlier event is not exclusively defined.¹⁵
- 3 Section 14 of the Act is not excluded from the operation of the new s 29A, as it is in respect

of publication under s 29, so the making public of a work could take place if only a substantial portion of the work or other subject matter is made public.

- 4 There could be a dispute as to whether an event less than ‘publication’ but sufficient to be ‘making public’ took place within the life of an author (or, in the case of works made public before 1 January 2019, after the death of the author), if those defending an alleged infringement were arguing that some minor disclosure during the life of the author had the effect of the work being ‘made public’ during the life of the author resulting in copyright having expired. The new provisions are very vague - there has been no judicial interpretation of the existing expressions, so it is not clear why there was felt to be a need for change.
- 5 Perversely, however, for those works whose authors died before 1949, it may be the copyright owner who will argue that the work, whilst not published, was ‘made public’ by disclosure of some kind, in order to have copyright survive a little longer after 1 January 2019. There may be a similar effect in respect of sound recordings made in or after 1959 not made public before the death of the maker and in respect of films (after 1969, except insofar as copyright subsists in respect of photographs and/or screenplay).

3. Anonymous and pseudonymous works

The Disability Act introduces with effect on 1 January 2019 a new method of calculation of the duration of copyright in respect of works where the identity of the author is “not generally known”.

The expression “generally known” is defined by an insertion in section 10 of the Act that provides that “without limiting when the identity of the author of a work is generally known, the identity is generally known if it can be ascertained by reasonable enquiry.”¹⁶ This definition appears similar to the repealed provisions of the Act which referred to an author whose identity was not generally known or could not be ascertained by reasonable enquiry, but is now non-exclusive. Again, there has been no judicial interpretation of the existing expressions, so it is not clear why there was felt to be a need for change in this regard, but one must wonder what sort of knowledge of an author’s identity is required; who should one ask; if the identity is well known to friends and family, or work colleagues, or friends, is that insufficient to be generally known?

In respect of works made public after 1 January 2019, provided such a work has been made public within 50 years after the calendar year in which the work was made, and the authorship of the work remains not generally known throughout the period of 70 years after the year in which work was made, then the copyright in it will expire 70 years after the year of first being made. If, however, the work is first made public within that period of 50 years following the year it was made, then the work enjoys a bonus period of copyright extending to 70 years after being first made public.¹⁷

Such works made public before 1 January 2019 have the same copyright duration as under the law before this amendment takes effect, except that the term of protection in respect of such works is measured from the date “first made public”, instead of by reference to when the work was “first published”.¹⁸

These changes have the effect that, in respect of such works whose

¹⁵ , this only being relevant to works made public before 1 January 2019 (thereafter, it is year of death plus 70 regardless)

¹⁶ Disability Act Schedule 2 s 1

¹⁷ see new s. 33(3) item 2

authors are not generally known made in or before 1948 but not made public before 1 January 2019, copyright will lapse on that date. So, those wishing to publish hitherto unpublished works in this category would be well advised to do so before 1 January 2019, in order to gain the protection of copyright after 1 January 2019, and/or to disclose the identity of the author, to gain the benefit of a duration of copyright until 70 years after the year of death of the author.

4. Conclusion

The Disability Act also amends the duration of copyright in works and other subject matter belonging to the Crown (whether by creation of assignment), as well as such copyright material which would belong to the Crown except for

the terms of an agreement under which it was created. Following the amendment, the duration will be 50 years after the year in which the copyright material is made, whether made public or not.¹⁹ Similarly, there will be a new set of rules for the duration of copyright in copyright material belonging to a small list of international organisations.²⁰

In his second reading speech to the Bill on 22 March 2017,²¹ the Minister for Urban Infrastructure, the Hon Paul Fletcher MP, stated that the amendments “are aimed at aligning the terms of protection for unpublished materials with published materials ... Libraries, archives and other cultural institutions hold large volumes of unpublished materials which are

an important part of Australia’s cultural heritage. Setting a term of protection for unpublished materials will give these institutions greater opportunities to deal with unpublished materials. It will also improve access to important Australian historical and cultural materials that were not previously available to the public.”

The Minister also noted that this amendment brings Australia into line with jurisdictions such as the United Kingdom, United States, Canada, New Zealand, Singapore and the European Union, where all works have a copyright term, whether they are published or not.²²

¹⁸ see new s. 33(2) item 3

¹⁹ Disability Act Schedule 2 s 12, which will repeal the existing s 180 and introduces a new s 180.

²⁰ Disability Act Schedule 2 s 4, which introduces a new s 188A, which alone governs duration. The organisations are prescribed by *Copyright Regulations 1969* (Cth), reg 26, Sch 12, which might be regarded as a surprisingly small list until it is realized that many works, films and sound recordings created or published by international organisations may be subject to Australian copyright without the application of s 187 or s 188 of the Act by virtue of their author(s) or maker(s) having a relevant connection to Australia or to a relevant member of an international copyright convention or by virtue of being first published in Australia or in a relevant member of an international copyright convention.

²¹ Hansard p 2753 <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F7c24ae06-5284-45fo-9coc-3e66799c0523%2F0045%22> accessed 22 August 2017

²² See also Explanatory Memorandum p 48ff (http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5832_ems_6286f247-9092-48bd-aac1-d771a2c7ee30/upload_pdf/625196.pdf;fileType=application%2Fpdf accessed 22 August 2017).

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