

COPYRIGHT IN PHOTOGRAPHS: DURATION

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1. Introduction

Calculating the duration of copyright protection for photographs requires consideration of the copyright regime under which the photograph was created. In this guidance we explain the characteristics of the legislation you will encounter, and consider copyright duration in photographs of unknown authorship.

2. In Practice

For help on calculating the duration of copyright in photographs, see the flow chart at the end of the document. Dates of publication are discussed more fully in sections 3 and 4, and works of unknown authorship are discussed in section 5.

3. Photographs taken on or after 1 June 1957 (but before 1 August 1989)

It is important to determine whether the photograph was *published* before 1 August 1989 as this changes the way in which the term of protection is calculated.

If the photograph was published, copyright will expire either 50 years after the end of the year of publication (in accordance with the 1956 Act) or 70 years after the death of the author (in accordance with s.12(2) of the CDPA) whichever is longer.

If the photograph remained *unpublished* when the CDPA came into force, copyright will expire either on 31 December 2039 (in accordance with the so-called 2039 rule)¹ or 70 years after the death of the author (in accordance with s.12(2)) whichever is longer. This means that 1 January 1969 is the key date for determining which rule should apply: if the author *died* before 1 January 1969 then the 2039 rule will *always* provide the longer term.² However if the author died on or after 1 January 1969, life plus 70 will always provide a term of protection equal to or greater than the 2039 rule.³

¹ The transitional provisions in the CDPA provide that the duration of copyright in many unpublished literary, dramatic, musical and artistic works, films and sound recordings, continues until 50 years from the end of the calendar year in which the 1988 Act came into force (that is, until 31 December 2039). Moreover, these provisions – collectively referred to as the 2039 rule – apply regardless of when the works in question were created or when their authors died. The 2039 rule affects the following categories of unpublished work: (i) anonymous or pseudonymous literary, dramatic, musical or artistic works (other than photographs); literary, dramatic and musical works, engravings and photographs taken on or after 1 June 1957; sound recordings made on or after 1 June 1957, and films which have not been registered under the Cinematograph Films Act 1938 (and subsequent legislation); Crown copyright works. For further details, see CDPA, Schedule 1, paragraphs 12 and 41. See also: Intellectual Property Office, *Government response to the consultation on reducing the duration of copyright in certain unpublished works* (29 January 2015), available here: <https://www.gov.uk/government/consultations/reducing-the-duration-of-copyright-in-certain-unpublished-works>.

² For example, if the author died in December 1968, the 70 year post mortem term would be calculated from 1 January 1969, expiring on 31 December 2038.

³ If the author died in December 1969, the 70 year post mortem term would be calculated from 1 January 1970, expiring on 31 December 2039. If the author died in December 1970, the 70 year post mortem term would be calculated from 1 January 1971, expiring 31 December 2040.

What is meant by ‘publication’? Publication is defined in the CDPA to mean the issue of copies of the work to the public, including making it available to the public by means of an electronic retrieval system (s.175(1)). However, this is subject to a number of conditions relating to artistic works. In relation to photographs, the following *do not* constitute publication (s.175(4)(b)):

- the exhibition of the work
- the issue to the public of copies of a film including the work
- the communication to the public of the work (otherwise than for the purposes of an electronic retrieval system)

4. Photographs taken before 1 June 1957

The 1911 Act drew no distinction between duration for published and unpublished photographs. Copyright expired 50 years after the work was *made*, regardless of whether it was ever made public in any manner. The Act set out that duration of protection for photographs taken before the 1 July 1912 (when the 1911 Act came into force) was to be calculated in accordance with the rules of the 1911 Act.⁴ This meant that, for all photographs taken before 1 June 1957 copyright expired 50 years after the work was made.

When the 1956 Act was passed, the rules on duration for photographs taken before 1 June 1957 remained unchanged: the term set out in the 1911 Act continued to apply and remained in force under the CDPA. While the CDPA introduced a standard term of protection for photographs that was equivalent to other artistic works (at that time, life of the author plus 50 years), this term *did not apply* to photographs created before 1 June 1957. However, implementation of the Term Directive has meant that photographs taken before 1 June 1957 have benefited by way of both extended copyright and revived copyright. We explore each in turn.

4.1. Photographs taken on or after 1 January 1945 but before 1 June 1957

Consider two photographs taken one year apart, the first on 1 January 1944, the second on 1 January 1945. Prior to the changes made under the Term Directive, copyright would have expired in the first photograph on 31 December 1994 (50 years from the end of the year in which the photograph was taken), and copyright in the second photograph would expire at midnight on 31 December 1995.

The Duration Regulations 1995, which implemented the Term Directive within the UK, set out that any work still in copyright on 31 December 1995 benefits from an extended copyright under the Directive.⁵ Therefore, while the first photograph might benefit from a revived copyright, the second photograph benefits from an extended copyright. For that reason, following the implementation of the Directive, the duration of protection for *any* photographs taken on or after 1 January 1945 but before 1 June 1957 will be the life of the author plus 70 years.

⁴ That is, 50 years from the end of the year in which the work was made; Copyright Act 1911, s.24 and Schedule 1 (rights in existing works were to last ‘for the term for which it would have subsisted if this Act had been in force at the date when the work was made’).

⁵ Duration Regulations 1995, regulation 14.

4.2. Photographs taken before 1 January 1945

Any photograph taken before 1 January 1945 will *only* be in copyright today if copyright has been *revived* following the implementation of the Term Directive. If copyright protection has been revived, duration is calculated according to the standard term of life of the author plus 70 years.

As discussed above, for works to benefit from the revived term, it must be established that they were still protected in at least one other member state on 1 July 1995. Because German copyright law provided a life plus 70 term of protection for authorial works before the Term Directive came into force, Germany is typically the jurisdiction most often relied upon to establish that a work was still in copyright in a relevant member state on the relevant date.

In relation to photographs, however, we need to sound a note of caution. In part, this is because the Berne Convention, the foundational instrument of international copyright, only requires that photographs be protected for a minimum of 25 years from the making of the work (A.7(4)),⁶ unlike other literary and artistic works which are to be afforded a minimum term of protection of life plus 50 years (A.7(1)). Moreover, a number of European jurisdictions, including Germany, Italy and others, distinguish between the duration of protection afforded to artistic or creative photographs (life plus 70 years) and the duration of protection afforded to more prosaic ‘non-original’ photographs (typically 25 or 50 years only).

In short, determining whether copyright is revived in a photograph taken before 1 January 1945 will not always be straightforward. In *The Law of Photography and Digital Images*, Christina Michalos offers this advice: ‘When considering whether a photograph taken before January 1, 1945, can claim revived copyright it will usually be prudent to take advice from lawyers specialising in copyright law of the relevant EEA state in respect of which it is sought to establish that [the work] was protected, in order to ensure that copyright survives any transitional provisions or requirements for registration or otherwise’.⁷

Michalos is right to suggest caution when dealing with photographs taken before 1 January 1945. However, it seems unlikely that many cultural institutions will have the available funds to secure specialist legal advice on this issue. With that in mind, the prudent course of action might simply be to assume that copyright has been revived in the photographs in question, unless it can easily be established that copyright has not been revived.

5. Photographs of Unknown Authorship

Many photographs held in archives and other collections are of unknown authorship which will impact how duration of copyright is calculated.

When is a work of unknown authorship? The CDPA states that a work is of unknown authorship if the identity of the author is unknown or, in the case of joint authorship, if

⁶ A.7(4) provides that ‘[i]t shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works and that of works of applied art in so far as they are protected as artistic works; however, this term shall last at least until the end of a period of twenty-five years from the making of such a work’.

⁷ C. Michalos, *The Law of Photography and Digital Images* (London, Sweet & Maxwell, 2004), 58.

the identity of none of the authors is known (s.9(4)). It continues that ‘an author shall be regarded as unknown if it is not possible for a person to ascertain his identity by reasonable inquiry’ (s.9(5)), although the Act does not define what constitutes a ‘reasonable inquiry’.

For photographs that appear in newspapers and magazines without a named author, a reasonable inquiry must surely involve approaching the relevant (or parent) publication to see if they can provide details of authorship. It might also include approaching relevant photographers or photography associations, such as the Association of Photographers, the British Press Photographers Association of the National Union of Journalists. If no identifying information is discovered after making a reasonable inquiry, the work can be considered a work of unknown authorship.

Under the CDPA, the copyright for a work of unknown authorship expires 70 years after the end of the year in which the work was created (s.12(3)(a)), unless the work is made available to the public during that 70 year period in which case the copyright expires 70 years from the end of the calendar year in which the work was first made available (s.12(3)(b)).

So, in the case of a photograph of unknown authorship appearing in a newspaper or magazine, copyright will expire 70 years from the end of the year in which the work was first published.

However an enormous number of photographs held in archives throughout the UK are likely to have been unpublished at the time of accession to the institution, whether they concern private, family, corporate or government collections. The majority of these works will not have been created for commercial purposes, but rather to document or record a particular moment in time. Where these works are of unknown authorship, copyright expires (or will have expired) 70 years from the end of the year in which the work was first created.

This, in turn, has important consequences regarding photographs taken before 1 January 1945. In the previous section we considered the challenges in determining whether photographs from this period are in copyright. What we *can* say, however, is that *if the photographs are works of unknown authorship* (presuming an appropriate reasonable inquiry has been undertaken) then the work *will be out of copyright*, unless it was published or made available to the public within 70 years after the end of the year of creation. For most photographs, the context and nature of the collection in which they sit will help in determining whether they are likely to have been published or made available to the public. If not published or made available in the 70 years following creation, then copyright has expired.

Take the example of a photograph taken on New Year’s Eve in 1945. The work has never been made available and was taken by an unknown author. If the author cannot be identified, then the term of protection set out in s.12(3) applies: copyright expires 70 years after the end of the year in which the work was created, i.e. 31 December 2016.

6. Legislative Context

When the CDPA came into force on 1 August 1989, the standard term of protection for authorial works, including photographs, was the life of the author plus 50 years after the author’s death. In 1993, however, the *Directive on the Duration of Copyright* (the European Term Directive) was introduced to harmonise the term of protection for

certain authorial works at 70 years post mortem. Within the UK, adopting the life plus 70 term of protection required by the Directive involved two things:

- extending the duration of protection for works that were still in copyright (*extended copyright*)
- reviving the duration of protection for certain works in which copyright, under UK law, had already expired (*revived copyright*)

In relation to the extension of existing copyright terms, the change was relatively unproblematic. Works that were already in copyright simply enjoyed an additional 20 years of protection.

However, *reviving* copyright in works that were out of copyright posed a number of challenges. The most fundamental question concerned determining which works should benefit from the revived copyright. The Directive stipulated that any work that was still protected in at least one member state on 1 July 1995 should benefit from the new harmonised term, and that copyright in such works would be revived as of 1 January 1996; of particular importance was the fact that Germany already offered a life plus 70 years term of protection for authorial works at that time.⁸

So, for example, consider the literary estate of D.H. Lawrence who died in 1930; in the UK all copyright in his published work had expired as of 1 January 1980. However, as his work was protected in another member state on 1 July 1995 (Germany), the copyright in Lawrence's published work was revived in the UK and throughout the EU, until 2000, in accordance with the Term Directive.

For those works that enjoyed a term of life plus fifty years under the CDPA when first enacted, the implications of revived copyright under the Directive has now run its course. That is, as more than 20 years have passed since the commencement of the Directive (1 January 1996), any additional revived period of protection will now have expired. However, for one class of work revived copyright still remains of particular significance: photographs taken before 1 January 1945. We consider this in further detail below.

7. The relationship between the CDPA and earlier legislation

Photographs taken before 1 August 1989 pose particular problems when calculating duration of protection, for a number of reasons. For one thing, the term of protection for photographs has changed quite dramatically under different legislative regimes. For example, under the Fine Art Copyright Act 1862, duration was calculated in accordance with the life of the author plus seven years post mortem. Thereafter, duration of protection has varied as follows:

- 50 years from the making of the original negative (1911 Copyright Act)
- 50 years from the end of the year in which the photograph was first published (1956 Copyright Act)
- 50 years from the end of the calendar year in which the author dies (CDPA)
- 70 years from the end of the calendar year in which the author dies (CDPA, as amended in 1995 to implement the Term Directive)

⁸ German Copyright Act 1965, A.64.

Today, the standard term of copyright set out in the CDPA (life plus 70 years) applies to photographs created both before and after the Act came into force. However, it is still important to be aware of the terms of protection that applied under previous Acts, specifically the 1956 Act. This is because the CDPA *also* contains various transitional provisions addressing the CDPA's relationship with previous legislation. One of the basic principles of these provisions is that a change in the copyright legislation should not lead to a reduced term of protection for existing works. In other words, if a work would have enjoyed a longer period of protection under a previous legislative regime that longer term will apply.

To illustrate the relevance of these transitional provisions, consider the following example:

A photographer X takes a series of photographs in 1958 and dies the following year; the photographs remain unpublished until they feature in a book, published in 1984, on the life and work of X. According to the CDPA, copyright in the photographs will expire 70 years from the end of the calendar year in which the author dies; that is: 70 years commencing 1 January 1960. In other words, on 1 January 2030 the photographs would be out of copyright. However, applying the term of protection initially granted to photographic works under the 1956 Act, the copyright will only expire 50 years after the end of the year in which they are *first published*. This means the photographs remain in copyright until 1 January 2035, five years longer than the protection provided under the CDPA. That is, because of the transitional provisions, the CDPA defers to the term of protection provided under the previous law (the 1956 Act).

8. Legal References

Copyright Designs and Patents Act 1988 c.48 (www.legislation.gov.uk/ukpga/1988/48/)

Copyright Act 1956 c.74 (www.legislation.gov.uk/ukpga/1956/74/contents/enacted)

Copyright Act 1911 c.46

(www.legislation.gov.uk/ukpga/1911/46/pdfs/ukpga_19110046_en.pdf)

Duration of Copyright and Rights in Performances Regulations 1995 No.3297

(legislation.data.gov.uk/uksi/1995/3297/made/data.htm?wrap=true)

Directive 93/98/EEC of October 1993 harmonizing the term of protection of copyright and certain related rights [1993] OJ L290/9 (the *Term Directive*)

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