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By Email

Re: A consultation on how to implement an extended general term of protection in Canada.

Introduction and Summary

These comments are submitted on behalf of the following members of the Business Coalition for Balanced Copyright (BCBC) in response to the Government consultation on an extended term of copyright protection: Bell Canada, Canadian Communications System Alliance, Cogeco Communications, Google Canada, Rogers Communications, and Spotify.

The BCBC understands that by extending the term of copyright protection under the *Copyright Act*, the Government will be bringing Canada's regime more in line with other developed economies. However, the BCBC shares the concerns of stakeholders about the potential impact on users if an extremely large and unknowable number of works that have been in the public domain are suddenly brought back under copyright protection for up to 20 additional years.

The BCBC agrees that a registration requirement might address some of the concerns related to liability from the use of works in which copyright has been revived. However, we acknowledge the Government's concern that mandatory registration could be a breach of Canada's obligations under the *Berne Convention* not to require formalities as a condition of copyright protection.

As will be explained below, the BCBC believes that limiting remedies to injunctive relief in certain circumstances could address at least some of the concerns of users.

Term Extension Creates Risk for Users

Adding 20 years to the term of copyright presents risks to users, who may face substantial statutory damages claims arising from the use of works that have been in the public domain for many years. Even where a user is able to identify works for which protection is being revived, it may not be feasible for the user to accurately identify the owner of copyright in a work that has been in the public domain for many years. This is particularly true for users that provide the public with access to a large catalogue of works from many diverse genres and countries of origin. Online music and video-on-demand platforms are examples of such potentially affected services.



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The BCBC notes that many of the potential measures outlined in the Consultation Document are intended to specifically assist not-for-profit libraries, museums, and archives. The BCBC agrees that these public institutions play an important and indispensable role in preserving Canadians' cultural heritage and providing the public with access to the works that reflect this cultural heritage.

However, other stakeholders, including broadcasting undertakings, and online platforms and services also play an important and indispensable role in the creation, curation, and dissemination of copyright-protected works. Therefore, the BCBC recommends that the Government adopt additional measures to mitigate potentially negative consequences from term extension, particularly as it relates to orphan and out-of-commerce works.

Injunctive Relief Only for Revived Copyright

The BCBC recommends that Parliament limit the remedies available to owners of works for which copyright has expired prior to term extension and for which copyright is revived once term extension is implemented. We believe two limits are required.

First, the *Copyright Act* should make it clear that the owner of copyright in a work for which copyright has been revived is barred from commencing claims arising from any use of that work while it was still in the public domain. It would be manifestly unfair for a person to make lawful use of a work in the public domain and then, up to three years later, to face a claim for statutory damages if copyright in the work is revived.

Second, where copyright in a work has expired and been revived by term extension, the owner should be limited to injunctive relief for the balance of the term of copyright in the work. This would be similar to the limitation to the relief available against information location tools established in subsection 41.27(1) of the Act.

Limited relief in this manner will give owners the ability to control the use of their works and enter into licensing arrangements with users who wish to avoid being subjected to an injunction. It will also ensure that users are not subject to substantial claims for statutory damages in circumstances where they will not have had adequate notice that their use of the work is potentially infringing, or any other reasonable means to mitigate their risk.

Conclusion

Canada has already made the commitment to implement term extension, therefore it should fulfill that commitment in a manner that provides the benefit of copyright protection to owners but also mitigates any unreasonable risk users might face, in particular arising from the use of orphan and out-of-commerce works.

The BCBC submits that its proposal to limit remedies in certain circumstances strike the appropriate balance of interests and represents a “made in Canada” solution.

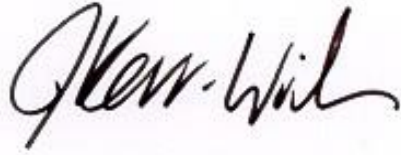
We would be happy to discuss our response further.



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Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

A handwritten signature in black ink, appearing to read "Jay Kerr-Wilson". The signature is written in a cursive, flowing style.

Jay Kerr-Wilson

JKW/ss

