Recommendations

A Reply to the Consultation paper on how to implement an extended general term of copyright protection in Canada of February 11, 2021

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1. Registration at Life-Plus-Fifty

For the record, I do not think Canada should extend its copyright term from fifty to seventy years after the author's death (see Appendix B); but if we do, I think it's imperative that we adopt the recommendation of the nonpartisan Standing Committee on Industry, Science, and Technology, who after comprehensive consultation and review concluded in their report that the best way to mitigate the negative effects of term extension would be to require rights holders to opt-in and register their works for the additional twenty years.

This simple requirement would elegantly serve as a filter, permitting that vanishingly small proportion of perennially profitable copyrights (for whose owners a registration fee would pose no hardship or disincentive) to claim another two decades of protection, while automatically and unequivocally releasing the vast remainder of copyrights into the public domain, where they could begin their fertile second life as part of our shared creative heritage.

The establishment of a public database listing which works have been registered and until what date will add further clarity and help prevent inadvertent infringement. Also, a portion of the registration fees collected should go to the support of living artists and towards the creation of new works.

This recommendation is in a category of its own. It is a deft, effective, and painless antidote to what would otherwise be a generalized affliction. The recommendations that follow are more like band-aids—which can and should be applied in conjunction with this one, but should (and can, I trust) be applied in any case, to alleviate some of the stings and abrasions that are caused by even our present life-plus-fifty term.

2. Reversion of Rights Twenty-Five Years After Assignment

Article 14 (1) of the Copyright Act should be revised to allow authors (or their estates) to receive, on request, a reversion of any rights they have assigned or licensed:

A) after at least twenty-five years have elapsed since that assignment or licensing. This would allow creators to regain control of their work, whether to re-release it, renegotiate contract terms, or dedicate it to the public domain. This provision would go a long way towards redressing the imbalance of power that can exist between large, established publishing or production companies and the (especially young or inexperienced) individual artist whose rights they contractually acquire, on sometimes extortionate terms. For that very reason, of course, this right of reversion must be neither waivable nor overridable.

B) after at least ten years have elapsed since that assignment or licensing *and* the work is commercially unavailable or out-of-commerce. (For example, if the work has sold less than fifty copies in any format in the last five years.) This may be a common contractual provision in some artistic industries, but it should be guaranteed under the Copyright Act.

3. Exemption For Orphan and Out-Of-Commerce Works

Libraries, archives, museums, schools, community centers, non-profit organizations, heritage foundations, and any other institution or private individual pursuing non-commercial objectives of benefit to the public (e.g., restoration, preservation, or providing educational or cultural access) should—if, after having undertaken a reasonably diligent search, they've found the work to be orphan (i.e., its copyright owner is unknown or unlocatable) or out-of-commerce (i.e., for example, it has sold less than fifty copies in five years)—be permitted to copy or otherwise make use of the work in pursuance of their objectives. The copyright owner would be entitled to come forward later and either claim equitable remuneration at a rate the parties agree to (or, in the absence of an agreement, at a rate determined by the Copyright Board) or withdraw the work from use, in which case the user would not be liable for the past use, i.e., no remuneration would be required for use that had already occurred. —This recommendation corresponds to the Consultation paper's Option 3.

We should also institute a free online resource center that would enable users to find information about best practices for diligent searches, transparently record past searches for the benefit of others, and offer public notice of current or intended use.

4. Investments For the Creation and Promotion of Public Domain Works

We should implement a centralized portal or hub through which artists and copyright owners can legally and openly release their artworks to the public domain. Such donations should be eligible for a tax deduction.

To acknowledge the benefit to our society of free, accessible, and transformable works, we should fund arts grants for the creation of works that will be released directly into the public domain. We should also provide funding, in the form of grants, subsidies, or tax incentives, to publishers and producers of new public-domain artworks.

We should establish a free, public, permanent online repository and archive of Canadian public-domain artworks, old and new. We should also establish an at-cost (or, for libraries, no-cost) print-on-demand service for the publication of materials from within this collection. Finally, we should establish a glossy monthly periodical featuring works from this collection, whose guest editors will be paid a distinguished honorarium and chosen by lottery. Such projects, by being not-for-profit, would be able to take advantage of the freedoms afforded “Non-commercial user-generated content” under article 29.21 of the Copyright Act, thus giving makers of new public-domain artworks greater creative latitude while not depriving them of a wider audience.

Appendix A: Disclaimer of Authority

I have, for force, repeatedly used the word “should”; you may, of course, mentally substitute the word “could.”

Likewise, I have, for legibility, expunged from this document many of such moderating words and qualifying phrases as “perhaps,” “possibly,” “I imagine,” “could it be that ...?,” “as far as I can see,” “I could be wrong, but it seems to me that,” “apparently,” “arguably,” “I think,” “I believe,” “I think I believe,” etc. You may, of course, if you like, reinsert these, or others like them, *passim*.

Appendix B: Why I Think I Believe Term Extension Is a Bad Idea

In our virtual classroom recently, some classmates of mine were chatting about Sonny and Cher. I, perhaps because of my youthful aura, was asked if I even knew who they were. I admitted that about all I knew was that Sonny had once had a copyright law named after him: “In 1998, I think it was, the U.S. extended the length of copyright protection from fifty years after the death of the author to seventy years after the death of the author. And it looks like it’s about to happen in Canada, too.” After a brief, perhaps boredom-induced pause, one of my classmates asked, “And who does that benefit?”

It’s a good question, and one that I’ve been puzzling my head over the past few weeks.

To many, apparently, the answer is obvious: It will benefit the artists themselves. At least, several august bodies, speaking presumably on behalf of their artist members—including the Songwriters Association of Canada; the Canadian Music Publishers Association; l’Association des professionnels de l’édition musicale; the Canadian Independent Music Association; the Society of Composers; the Authors and Music Publishers of Canada; the Professional Writers Association of Canada; la Société des Auteurs et Compositeurs Dramatiques; la Société Civile des Auteurs Multimédia; the Society for Reproduction Rights of Authors, Composers and Publishers in Canada; Music Canada; la Société des auteurs de radio, télévision et cinéma—have advocated for term extension. Oh, and TicketMaster.

To try to understand their rationale, I read through swaths of transcribed testimony and briefs submitted to the Standing Committee on Industry, Science and Technology and the Standing Committee on Canadian Heritage in 2018. Here’s what I found out.

The most common reason there adduced, given almost verbatim by several witnesses, was that extending copyright would bring our laggard nation “in line” with our trading partners. I must admit that this argument (“But everybody else is doing it!”) left me unmoved. Often, too, the language in which it was couched begged the question, taking for granted that more copyright is better, that the march of progress leads to longer and longer terms, and that we therefore need to catch up. Indeed, rather troublingly, the very first question asked by an honorable member during the very first question period of

the very first of the Heritage committee's meetings explicitly betrayed this bias: "The impression I have been given from those in the industry is that Canada is behind other countries. I think that Mexico has a protection for songs for 100 years; most countries have moved to 70, and we're behind at 50 years. I want to know whether that is factually true, and if so, why it is so." At times, this attitude was even tinged with a disturbing undertone of bigotry—as, for example, when one witness asked rhetorically, "[D]oes Canada want to remain in the same category as North Korea and Afghanistan in this area?," or when others boggled that "even Mexico" and "even Russia" are "ahead" of us. On the flip side of the same token, of course, it would be offensive to attempt to reduce this attitude to absurdity by asking rhetorically whether Mexico, Cote D'Ivoire, Jamaica, Colombia, and Equatorial Guinea, then, with respectively one hundred, ninety-nine, ninety-five, ninety, and eighty years of copyright protection after their authors' deaths, constitute the very vanguard of intellectual property law. Obviously, a mere enumeration of which, or tally of how many, countries have extended their terms is meaningless. (For what it's worth—i.e., nothing—by my count seventy-one countries have a life-plus-seventy term, and 111 have a life-plus-fifty.)

A second reason offered was that term extension will benefit the artist's descendants. This sounds very noble and unobjectionable, particularly when it is milked for its full pathos, as by this witness: "As for the degradation of intellectual property as an asset, I liken it to buying a house. What if you passed that house down to your children; then, 50 years after your death, your children are kicked out of the house that they grew up in?" How terrible! The poor wee ones! However, a little reflection reveals that, if the artist and her children were born an average generation's width apart, let's say thirty years, and if both the artist and her children live an average lifespan, then the poor wee ones, when their childhood home is so cruelly taken from them, will have been in the grave for twenty years already themselves. But perhaps I'm being captious; perhaps one should silently correct the quotation (and increase the pathos) by changing "children" to "grandchildren"? Well, in that case, a proponent of term extension would be in the position of claiming that somehow it is better, more humane, to kick the sexagenarian great-grandchildren of an artist out of their ancestral home than it is to kick out, twenty years earlier, her septuagenarian grandchildren. To determine which of these scenarios is the less tragic would indeed tax the perspicacity of the astutest ethicist. But even if you do believe (as I, who will never have grandchildren, do not) that these outcomes are tragic, it is clear that

nothing is gained by postponing the day of reckoning. Your only recourse would be to make ownership in copyright, like ownership in houses, perpetual. But no one seemed to be suggesting that. Why not, if more is better?

A variation on the second reason was borrowed from the European Union's term extension directive of 2006, which states, "The minimum term of protection laid down by the Berne Convention, namely the life of the author and 50 years after his death, was intended to provide protection for the author and the first two generations of his descendants. The average lifespan in the Community has grown longer, to the point where this term is no longer sufficient to cover two generations." For starters, no evidence for this claim is cited; none of the Berne Convention texts themselves offer any justification for or explanation of the length of term; and at least a couple of researchers, in an authoritative work on the Berne Convention, have argued that the drafters never clearly justified why and how the term of protection provisions came to be adopted. Never mind; for the sake of argument, let's accept that that's what the drafters intended. One might well ask why we should accept that the spirit of their law has, over the 135 years that have elapsed since the first draft, aged any better than the letter. (Do we today expect *any* breadwinner to provide for her children and her children's children to their dying day?) Furthermore, the average lifespan is irrelevant. Here, in a brief submitted to the Industry committee, the argument is dressed up in some statistics: "Around the time that Canada joined the Berne Convention in 1928, the average life expectancy was about 60 years. It rose to about 81 years between 2007 and 2009. As a result, the current term of protection afforded under the Canadian Copyright Act is insufficient to cover two generations of descendants of a songwriter ..." But an increased average life expectancy does not perforce increase the space between generations. An artist and her grandchild could each live to a thousand, and still only die sixty years apart. The pertinent statistic is the average age of the mother at childbirth, and in 1928 in Canada it was about thirty, and in 2009 it was ... about thirty. So, to cover two generations after the author's death, we should at most implement a life-plus-sixty term. But, again, why is it any better to deprive the great-grandchildren of their heritage (just when they're losing their parents)? The whole argument begins to look rather trumped-up—all the more so when we consider the obvious fact that it's not descendants we should be talking about at all but *heirs*. Copyright (like a house) can be sold or bequeathed to anyone, and is no more likely to end up in the possession of one's grandchildren than in that of an investor, a corporation, or the state. The poor wee

ones!

A third reason offered for a longer term of protection was that it "will better allow music publishers to reinvest the revenues they derive from the exploitation of copyright protected works in the discovery, support, and development of songwriters ... [and] new and emerging talent." Or, to quote another witness, who apparently views the extra twenty years' protection as their right, indeed as a possession they've been deprived of (a childhood home they've been kicked out of): "The loss of this income for Canadian publishers means less money spent developing new writers, which means fewer artists, fewer musicians, fewer studios, fewer touring crews, and fewer jobs all around." I must admit that this plaint, too, leaves me unharrowed. For one thing, copyrights are no more guaranteed to end up in the possession of music publishers than in that of songwriters' grandchildren. And even when they do, there is obviously no guarantee that those revenues will trickle down to artists and creators. In any case, this argument does at least provide a kind of answer to the question I started out asking. Q: Who does term extension benefit? A: The current owners of a handful of perennially profitable old copyrights, some of whom are publishers and producers and promoters, surely, of whom, surely, some will spend some of the extra income on artists.

A fourth argument for term extension offered by a couple of witnesses was that it really does benefit the artist, tangibly, today.

> [Witness:] You have to think of a copyright as an income stream that stretches out into the future. You can value—like there's a business—the income stream that a given set of copyrights would throw off. If I were to extend the term of my rights in that copyright by 20 years, the net present value of that copyright increases.
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> [Honorable member:] You could borrow against that during your lifetime—
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> [Witness:] Correct, or when you sell it, suddenly it's like I'm not selling you life plus 50 anymore, I'm selling you life plus 70, and that has a greater value. There's an immediate tangible impact on the value of catalogues.

A Canadian economist, I understand, tasked in 2005 with quantifying this impact, concluded that adding twenty years to a fifty-year term would increase the present value of a sound recording copyright by 2.3% (and that's assuming the royalties don't taper off over seventy years!). Other economists in other countries have come up with other numbers,

ranging from fractions of one percent up to perhaps six. No matter; let's assume for the sake of argument that it's a hundred percent; let's pretend that a twenty-year copyright term extension will double the value of everyone's catalogue today. The problem remains that even doubling a negligible amount leaves you with a negligible amount. And, lamentably but inescapably, most artists' catalogues—today, tomorrow, at their death, and fifty and seventy years thereafter—are, in terms of the royalties they earn their owner, worthless. A profitable, because widely and lastingly popular, work of art is as rare as a winning lottery ticket. Of course, in the world of artistic creations, no lottery ticket is ever finally, demonstrably a loser: your song might catch on someday. An artist, then, as the owner of her copyright, is in the position of someone who keeps trying to hawk the same lottery ticket—and who is now told to cheer up, because the jackpot has just gone up by 2.3% (or 6 or 100%, or whatever). It may technically increase the value, relative to the odds, of that lottery ticket, but I'd be surprised if the price potential buyers are willing to pay for the same one chance in a million will increase commensurately—especially with a million other ticket-sellers competing desperately to make a sale.

A final reason for term extension that is sometimes put forward (though not explicitly in any of the briefs or testimony that I read) is that it will further incentivize artists, and so supply to society more of a commodity without which all our lives would be tragically poorer, etc. This is, in effect, an argument for copyright, tout court—*the* reason that copyright exists, some say—coupled with the assumption, again, that more of it is better.

In its narrower application, as a justification for term extension, it seems patently absurd. As one witness before the Industry committee, disrecommending extension, put it, "Nobody woke up this morning thinking about writing the great Canadian novel and decided to instead sleep in, because their heirs get 50 years' worth of protection right now rather than 70 years." Or, as Thomas Babington Macaulay, 180 years ago, argued before the English House of Commons, who were then considering whether or not to extend their term of copyright:

> I will take an example. Dr Johnson died fifty-six years ago. If the law were what my honourable and learned friend wishes to make it, somebody would now have the monopoly of Dr Johnson's works. Who that somebody would be it is impossible to say; but we may venture to guess. I guess, then, that it would have been some bookseller, who was the assign of another bookseller, who was the grand-

> son of a third bookseller, who had bought the copyright from Black Frank, the doctor's servant and residuary legatee, in 1785 or 1786. Now, would the knowledge that this copyright would exist in 1841 have been a source of gratification to Johnson? Would it have stimulated his exertions? Would it have once drawn him out of his bed before noon? Would it have once cheered him under a fit of the spleen? Would it have induced him to give us one more allegory, one more life of a poet, one more imitation of Juvenal? I firmly believe not. I firmly believe that ... he would very much rather have had twopence to buy a plate of shin of beef at a cook's shop underground. Considered as a reward to him, the difference between a twenty years' and sixty years' term of posthumous copyright would have been nothing or next to nothing.

And the absurdity is only compounded when we consider the fact that term extension is not going to be, and to my knowledge never has been in any country that adopted it, limited to artworks created *after* the law is passed—which are obviously the only artworks subject to its incentivization, time's passage being what it is, i.e., infamously unidirectional. We can't foster finished works, and we can't entice the dead. Perhaps no one today makes much use of this argument for term extension, then, because it all too clearly highlights just who stands to benefit, tangibly, today: those who happen to be clutching a life-plus-fifty-year-old winning lottery ticket.

And to be honest, though as an artist myself I recoil from saying something so treasonous publicly, I'm not sure I find the incentive argument all that persuasive in its wider (prehumous or ante-mortem) application, either. Do artists need incentives to create? It is clear, from an abundance of evidence online today, that many of them are only too happy to give their works away for free. They'd be pleased, of course, if, liking what you've read or seen or heard, you were to donate a little something, if you can afford to; but if you can't, they're just glad you came, just grateful you dedicated an hour or two of your attention to their art. The fact is, artists crave an audience to entertain, or uplift, or enlighten, as much as an audience craves to be enlightened, uplifted, entertained. A book that remains unread is but half written; a play performed to an empty house is a rehearsal; most screenwriters, I daresay, would, if they had to choose, rather have a script produced than a script sold. Art is communication, and the possibility of being heard, being understood, being appreciated provides countless artists with all the incentive they need.

We should also acknowledge the fact that making art is inherently rewarding. For

some it is relaxation; for some, therapy; for some, an interesting technical puzzle; for some, a distraction from the fact of their mortal insignificance; for some, a spiritual experience, the means by which they open their innermost floodgates to the ebullient wellspring of the cosmos; for some, a justification for their flawed existence; for some, a path to self-actualization, a way, the only possibly way, of fulfilling, of completing themselves. For some it is wholesome, mischievous fun.

So, I can't altogether subscribe to the dire prognostications of several of the committees' witnesses, such as, for example, that "the [writing] profession will wind up disappearing if [writers] don't receive fees and that will mean the end of works and Canadian content," or that "A fair and equitable remuneration is essential to the survival of creativity." Ninety-nine percent of of all creators in all eras have not had fair and equitable remuneration, and yet they still created. Let us not doomsay. Homo artifex is not endangered.

But hold on. I'm not suggesting that we should be complacent about the plight of the artist, or blithely let them freeze in garrets. My point is only that, while copyright does a good job of preventing certain abuses—none of us want to live in a society where, for example, heartrendingly gorgeous songs can be appropriated at will and without compensation to their starving creators in order to sell more ecosystem-ravaging luxury sedans at half-time—it is a pretty stupid way to pay artists for their work: a handful of superstars with megahits live in godlike opulence, while everyone else scrapes by on thrift, gifts, and day jobs. The problem is vividly stated in one Heritage committee witness's cri de coeur:

> History is filled with famous classic authors who died in poverty, despised and abandoned by their societies, but later recognized and adulated for their genius, creativity and artistic merit. Why do we want to perpetuate these human tragedies?

Of course we do not want to. But will any amount of tinkering with the Copyright Act help the despised, abandoned author today, whose copyrights are, and for some years to come will be, by definition as it were, valueless? As-yet-unrecognized geniuses don't move much product. (Which is, of course, another reason we can't leave this problem to the publishers, producers, and promoters to solve: they do not as a rule invest their inherited revenues in the discovery, support, and development of oddball avant-garde out-

siders, but prefer to put their money on the safest of bets—those artists believed, and indeed often groomed, to have the broadest mainstream appeal. —Conversely, too, artists who depend on copyright royalties, on popularity, for their livelihood will hardly be inclined to take chances or innovate.)

What, then, should we do? Well, it may be beyond the ability of any society to recognize, celebrate, and reward every one of its geniuses when it matters most to them, i.e., while they're still alive; but we can perhaps ensure that they at least have enough to eat, and don't have to—God forbid—take up teaching jobs. That is, I believe, the purpose of that relatively recent invention, arts grants. These—eked out with other forms of (often publicly funded) assistance, such as residencies, prizes, jury work, and, for writers, public lending right payments—constitute for many artists a kind of patchwork universal basic income. Though far from ideal, and though necessarily imperfectly administered (there is only so much funding to go around, and a jury of the despised, abandoned author's peers may be no better equipped to detect her genius than a commercial publisher, or the lay public), this system does at least go some way towards rendering copyright revenues irrelevant: one study of Canadian poets, for instance, revealed that royalties represent only 4.2% of their income as writers (which itself, alas, represented only 18% of their household income). We should do whatever we can to bolster and expand these resources, and so ensure that, though many of our Miltons may remain inglorious, they at least shall not be mute.

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To sum up, I couldn't find many reasons for extending the term of copyright in Canada, and the few I found seemed to me dubious. But perhaps it doesn't much matter either way, as this law professor before the Industry committee suggested?:

> I'm indifferent to whether it's 50 years or 70 years ... I just finished a book last month that was about literary social life in France in the 19th century. They had salons where people would go, and artists and politicians would mix. In that book there were lists of the artists and the writers who showed up there, and three-quarters of them were names we don't know. In terms of copyright term protection, I think very few works manage to be relevant 50 years—or even less so—70 years after the death of the author. I don't know why we should be having so

> much difficulty over an issue that is important for only a minority of authors ... I would never walk outside or march for that one way or another.

To put it differently, by inverting the question posed by my classmate that I started out considering, we might ask, “Well, who does term extension hurt?”

The answer to that strikes me as obvious: It hurts all of us. By curtailing and stymieing the public domain, it deprives the public of a priceless resource. (It kicks us out of our house for another twenty years!)

I’ll confess that to some extent this is, for me, an unreflective and emotional stance. (But see Appendix C.) While the thought of copyright infringement, even of my own works, gives me scarcely a frisson of indignation or dread, the thought of the public domain, of the creative commons, of free and open-source software, of such community-built world wonders as Wiktionary, Ubuntu, StackExchange, Project Gutenberg, and LibriVox, literally brings tears of agape to my eyes. I’ll confess that, having grown up on libraries, and still subsisting on them, I have a deep-seated and overpowering ... I won’t say sense of entitlement, or expectation that everything should be free, but ... *yearning* to be able to borrow any book ever written. And the strength of this yearning is no doubt in part due to the fact that I am myself a maker of books. As the authors of a citizen’s guide to Canadian copyright point out, “People learn to create by seeing, imitating, experimenting, listening, practising, and watching—creators are the most ardent consumers of the arts. They need ample and affordable access to the works of others.” Or, as Northrop Frye once said, “Poetry can only be made out of other poems; novels out of other novels.” Me, I make stories out of other stories. A hoary adage of the writer’s workshop is “Write what you know”; but without books, I wouldn’t know anything. I read others’ stories, true and made-up, for inspiration, for facts, for details I couldn’t have imagined, for atmosphere, for cautionary counterexamples. In writing one book, I might, for research (to use that word loosely), read fifty, or eighty, or a hundred. Many of those will be out of print, rare, hard to find. And though I am the beneficiary of a wonderful, well-stocked local public library network, with interlibrary-loan access to dozens of other library networks; and of the bristling stacks of two world-class university libraries, each an hour’s bike ride away; and of the biggest library of digital material the world has ever seen, all only a few keystrokes away—despite all this unprecedented access, for which I am, when I remember to be, heartily grateful, I still, of course, sometimes can’t get my hands on books. There are

still, of course, thousands and thousands of books out there that are, to me, as good as nonextant, as good as extinct. And that makes me sad. (Like the sultan at a resplendent feast perversely sighing at the absence of dodo eggs, I suppose.) And, though I can't prove it (I can't get my hands on the proof!), I feel that this impoverishes my own work, a little, maybe, sometimes.

This problem—the inaccessibility of old artworks; of orphan works and out-of-commerce works—is one that copyright exacerbates, even as it alleviates others. A fence, after all, is a blunt instrument. Currently, to protect a very few artworks from unauthorized use for the generally very few years that they are commercially viable, we put a forbidding fence around *all* artworks, for a period that ranges from fifty to more than a hundred years. Now we are proposing to extend that period to at least seventy years and perhaps as much as—for works produced early in a longevous artist's life (and the fact of a rising average life expectancy is actually pertinent here!)—150 years. As far as I can see, this will only further exacerbate the one problem without doing anything to further alleviate the others.

Whether or not we, to benefit a few lottery winners, or to placate our trading partners (and their lottery winners), insist on doing this foolish thing, let us at least have the wisdom and the public-spirited generosity to take down the barbed wire and the no-trespassing signs and install in our fence some wide and welcoming gates.

Appendix C: Thirty-Eight Epigraphs

1.
“Copyright, intended to be the servant of creativity, a means of promoting access to information, is becoming an obstacle to both.”

2.
“[P]erhaps the law could shift the burden of the last twenty years from the user to the copyright owner, so that ... copyright owners would have to assert their continued interest in exploiting the work by registering with the Copyright Office in a timely manner. And if they did not, the works would enter the public domain. (This should not, as far as I can see, present insurmountable problems under international law. The Berne Convention requires a minimum term of life plus fifty years, defers to member states as to the treatment of their own citizens, and provides the term of protection of the country of origin for the works of foreign nationals ... At the same time, copyright owners who choose to assert their continued interests would have the full benefit of the additional twenty years, subject to the requirement of additional registration.)”

3.
“I want to start with a famous quote sometimes apparently misattributed to Einstein: the definition of insanity is doing the same thing over and over again but expecting different results ... As an American I feel like telling you, our favorite people, in Canada to please don’t make the same mistakes that we’ve made, because twenty-three years afterwards we know it wasn’t just a mistake, it was a big mistake ... Why was it a big mistake? The benefits, on the one hand, and we have economic modeling on this, we have five Nobel-laureate economists telling us this, the incentives from adding an extra twenty years to the copyright term are minuscule ... What are the harms? The harms are to culture. The harms are to access. The harms are to education. We’re locking away millions of older works, we’re talking about a hundred to 120 years in the future for authors that are gonna live another fifty years, most of those works by that time are no longer generating any revenue for the copyright holders ... The commercial lifespan of

most works does not last that long ... So nobody's making any money, but what's happening? Historians find the historical record incomplete, because that additional swath of twenty years is unavailable to them to freely build upon ... Artists find their cultural heritage off-limits. Documentarians find themselves unable to use works from the past. So we're locking away an additional twenty years of culture for no good reason ... So really it's all harm and little, little plausible benefit."

4.
"This law, the Sonny Bono Copyright Term Extension Act, also extended existing copyrights over works which had already been created. This is particularly remarkable if the idea is to give an incentive to create. Obviously the authors of existing works were given sufficient incentive to create; we know that because they did. Why do we need to give the people who now hold their copyrights another twenty years of monopoly? This is all cost and no benefit."

5.
"Many international studies show that the public costs of long copyright terms outweigh their private benefits. Long copyright terms have been criticized by intellectual property law experts as effective monopolies in perpetuity for the typically corporate rights holders that profit most from them (e.g., Disney, which has repeatedly succeeded in lobbying the US government to lengthen copyright term). Other critics point out that for the vast majority of rights holders, there is no economic incentive in such long copyright terms; and that for the public, there is demonstrable harm to the public good and education in how long copyright terms impoverish the public domain. Keeping works under restrictive copyright licences for so long after their economic benefits have been exhausted results in them ceasing to be of value to new creation, education and innovation."

6.
"The public domain has been a grand experiment, one that should not be allowed to die. The ability to draw freely on the entire creative output of humanity is one of the reasons we live in a time of such fruitful creative ferment."

7.
"... the idea of providing grants according to the licence. In order to stimulate the adoption and use of Creative Commons licences by creators and producers, we could think about providing creation grants and production support subsidies, depending on the licence issued for making the cultural product available ... A permissive licence, such as a Creative Commons licence that allows, during the creator's or producer's lifetime, the work to be adapted, remixed or shared for commercial or non-commercial purposes, would allow the work to receive greater financial support, as authors would contribute more during their lifetime to the vitality of culture and the health of the public domain."

8.
"We need to mitigate the damage done by copyright term extension ... These concessions could cost Canada hundreds of millions a year ... One small but useful mitigation measure might be the imposition of renewal requirements and fees for those extra years of protection that are NOT required by the Berne Convention."

9.
"As several courts have pointed out, there is a powerful element of circularity here. You claim you have a right to stop me from doing *x*—quoting two lines of your three-verse song in an academic book, say. I say you have no such right and it is a fair use. You say it is not a fair use because it interferes with your market—the market for selling licenses for two-sentence fragments. But when do you have such a market? When you have a right to stop me quoting the two-sentence fragment unless I pay you."

10.
"[W]here you have many, many artists who want to earn a living, and only a few companies who act as gatekeeper to the audiences that will supply that living, the companies can negotiate deals that allow them to move nearly all the income generated by artists to their side of the balance sheets."

11.
"Apart from doing away with the need to indicate that you want your works to be copyrighted, we have lengthened the copyright term. We did this without any credible evidence that it was necessary to encourage innovation. We have ex-

tended the terms of living and even of dead authors over works that have already been created. (It is hard to argue that this was a necessary incentive, what with the works already existing and the authors often being dead.) We have done away with the need to renew the right. Everyone gets the term of life plus seventy years, or ninety-five years for corporate "works for hire." All protected by a "strict liability" system with scary penalties. And, as I said before, we have made all those choices just when the Internet makes their costs particularly tragic."

12.
"[Honorable member:] Could you tell us how documentary filmmakers and documentary films are being affected by copyright?

[Witness:] That's a good question. Again, we are users and rights holders in that scenario, so fair dealing in particular affects our work. In terms of fair dealing, documentary filmmakers are able to take content from copyrighted material and use it within their work. What happens, practically speaking, is that once they go to the insurance companies and speak to their lawyers, they still have to pay a number of fees to purchase the copyrighted material, because the exemption isn't necessarily well understood by the landscape. That affects, obviously, our bottom line. In both of those scenarios, our filmmakers want to be able to use that exemption to create truthful and meaningful stories and not have to pay the fees that they are often charged even today, despite the exemption existing. It could be 20% to 30% of their entire project budget, which can range from $20,000 to $1 million for a documentary."

13.
"[T]here may be motivations for creation that do not depend on the market mechanism. People sometimes create because they seek fame, or out of altruism, or because an inherent creative force will not let them do otherwise. Where those motivations operate, we may not need a financial incentive to create. Thus the "problem" of cheap copying in fact becomes a virtue."

14.
"It is valuable copyrights that are responsible for terms being extended. Mickey Mouse and "Rhapsody in Blue." These works are too valuable for copyright owners to ignore. But the real harm to our society from copyright extensions is not that Mickey Mouse remains Disney's. Forget Mickey Mouse. Forget Robert

Frost. Forget all the works from the 1920s and 1930s that have continuing commercial value. The real harm of term extension comes not from these famous works. The real harm is to the works that are not famous, not commercially exploited, and no longer available as a result."

15.
"Extending the duration of copyright essentially enriches large firms of intermediaries. It does nothing to put money in the pockets of most creators. Economists argue that copyright already lasts too long."

16.
"The Copyright Act as it exists today provides some shelter to our next generations for their intellectual development. It protects individual study and research as it unfolds during schooling through to post-secondary studies and continuing research, and allows for the necessary imitation and invocation that is the praecursor to original creation. Despite this, our next generations are not well supported in terms of maximizing their own potential.

A few of the problems that have been brought to my attention:

1. A parent informed me that her twelve-year-old had come home "scared to death," all because of a strident lecture at school. A teacher had forbidden the students from engaging with content found via the Internet, a prohibition expounded in the name of copyright. Fair dealing would amply protect students' efforts. Moreover, the Copyright Act includes a specific exception for use of Internet materials towards meeting educational tasks.

2. A parent informed me that her daughter's creative efforts, posted to YouTube, had resulted in a takedown. This budding filmmaker said to her mother: "I didn't know it was wrong." To be clear, she did nothing wrong. YouTube's overzealous content-identification system had resulted in the takedown of her creation, which included approximately 17 seconds of audible music from a popular song. It is questionable as to whether 17 seconds would even breach the threshold of substantiality necessary to a claim of copyright, but if it did, exceptions beckon.

3. A group of worried students showed me a notice from a copyright-owner, threatening them with serious consequences if they had the temerity to quote from his father's work, without first seeking his permission and making payment. The right of quotation was enshrined in the Berne Convention, a con-

vention hailed as the first international treaty of authors' rights.

4. A parent sent me a Use of Technology agreement required at the local high-school. Parents were asked to give consent such that the school may search a student's smartphone if the school "feels" that a rule has been broken. Among the rules listed: "honour copyright." This may be due to the misplaced fear that schools could be liable for the activity of students; it speaks to the reality that administrations prefer to play it safe and discourage young people from lawful uses of copyright-protected materials.

Attitudes like these will not place Canada in a position of strength in a world governed by knowledge economies. If we train generations of Canadians into believing that creative effort, scientific inquiry, technology advancement, or a free press, are all predicated on a system of permission-then-payment, Canada's creative future looks bleak."

17.

"From a policy perspective, the longstanding Canadian decision to maintain the international standard of life plus 50 years was consistent with the evidence that term extension creates harms by leaving Canadians with an additional 20 years during which no new works will enter the public domain, with virtually no gains in terms of new creativity. Within Canadian classrooms, dozens of books scheduled to enter the public domain will be shut out for decades. The prospect of using those books in new and innovative ways without the need for further licensing or royalties—as well as increasing access in open electronic form—will be lost for a generation. The agreement represents a major windfall that could run into the hundreds of millions for rights holders and that should be accounted for with any proposed reforms."

18.

"There is a vast amount of creative work spread across the Internet. But as the law is currently crafted, this work is presumptively illegal. That presumption will increasingly chill creativity, as the examples of extreme penalties for vague infringements continue to proliferate. It is impossible to get a clear sense of what's allowed and what's not, and at the same time, the penalties for crossing the line are astonishingly harsh ... The consequence of this massive threat of liability tied to the murky boundaries of copyright law is that innovators who want to innovate in this space can safely innovate only if they have the sign-off from last genera-

tion's dominant industries ... The consequence of this legal uncertainty, tied to these extremely high penalties, is that an extraordinary amount of creativity will either never be exercised, or never be exercised in the open. We drive this creative process underground by branding the modern-day Walt Disneys "pirates." We make it impossible for businesses to rely upon a public domain, because the boundaries of the public domain are designed to be unclear. It never pays to do anything except pay for the right to create, and hence only those who can pay are allowed to create ...

Judges and lawyers can tell themselves that fair use provides adequate "breathing room" between regulation by the law and the access the law should allow. But it is a measure of how out of touch our legal system has become that anyone actually believes this. The rules that publishers impose upon writers, the rules that film distributors impose upon filmmakers, the rules that newspapers impose upon journalists—these are the real laws governing creativity. And these rules have little relationship to the "law" with which judges comfort themselves."

19.
"The rights that were supposed to be limited in time and scope to the minimum monopoly necessary to ensure production become instead a kind of perpetual corporate welfare—restraining the next generation of creators instead of encouraging them. The system that was supposed to harness the genius of both the market and democracy sometimes subverts both. Worse, it does so inefficiently, locking up vast swaths of culture in order to confer a benefit on a tiny minority of works."

20.
"Term extensions do not hold up to scrutiny in cultural economic theory. Most of the commercial value of a sound recording is extracted in the first 10 years, so 70 years after death provides no real additional incentive. Furthermore, it prevents a more vital public sphere to the benefit of major record labels, who get to further exploit an artist's work after their death."

21.
"Would it truly be a violation of copyright for me to quote the middle stanza in a nonfiction book on copyright policy? Not at all. It is a classic "fair use." In a moment I will do so. But it is something that the publisher may well fuss over, be-

cause copyright holders are extremely aggressive in asking for payments for the slightest little segment. Copyright holders in music and song lyrics are among the most aggressive of the lot. Year after year academics, critics, and historians pay fairly substantial fees (by our standards) to license tiny fragments of songs even though their incorporation is almost certainly fair use. Many of them do not know the law. Others do, but want to avoid the hassle, the threats, the nasty letters. It is simpler just to pay."

22.
"[A]s a body of law, copyright is over three hundred years old and its scope was continually expanded in both depth and breadth, all in the name of the starving author, artist or musician. Yet creative individuals are still disadvantaged. New rights might only become more articles signed over to publishers and distributors ... To the extent that we have successful authors, artists, musicians and publishers, those gains came despite our system of copyright, not because of it."

23.
"The term should be as long as necessary to give incentives to create, but no longer. If it were tied to very strong protections for authors (so authors were able to reclaim rights from publishers), rights to the same work (not derivative works) might be extended further ... The value of short terms is that there is little need to build exceptions into copyright when the term itself is kept short. A clear and active "lawyer-free zone" makes the complexities of "fair use" and "idea/expression" less necessary to navigate ...

Copyright should have to be renewed. Especially if the maximum term is long, the copyright owner should be required to signal periodically that he wants the protection continued. This need not be an onerous burden, but there is no reason this monopoly protection has to be granted for free. On average, it takes ninety minutes for a veteran to apply for a pension. If we make veterans suffer that burden, I don't see why we couldn't require authors to spend ten minutes every fifty years to file a single form."

24.
"*All Else is Folly* is one of the most famous Canadian novels about the First World War, describing the experiences of a young soldier, Alexander Falcon, who finds himself transported from a ranch in southern Alberta to the battlefields of

France. It was published in 1929, and received a rapturous reception ... But, then as now, books come and go: it went permanently out of print shortly after publication, and only reappeared in 2014, when it entered the public domain. It is a pleasure and a privilege to offer it, free of charge, to the Canadian public ...

I offer this as a single example of the usual situation: a book that is well and truly unavailable, but which can be made available once more—because copyright is not eternal. If Life+70 were in place today, the book would presumably still be completely unavailable until 2033—by which point too much time might have passed, and the book would never reappear.

This is how excessive copyrights, quite literally, destroy heritage and are, quite literally, cultural vandalism.

You don't have to be near a bookstore or library to download a public domain ebook, you don't have to pay anything, and you don't have to register. In an era of huge income disparities, free ebooks make a difference. It's easy to make the case that universal access to heritage is a basic human right: the public domain supports this right ...

Our ebooks are freely available for reuse, modification, and redistribution. Consequently, they are available through a wide network of Canada's public libraries. And, I have to point out, our ebooks are produced with no government financial aid whatsoever. We don't need financial support, but we do need a supportive legal environment, particularly in the area of copyright durations."

25.

"More property rights, even though they supposedly offer greater incentives, do not necessarily make for more and better production and innovation—sometimes just the opposite is true. It may be that intellectual property rights slow down innovation, by putting multiple roadblocks in the way of subsequent innovation ... Heller and Eisenberg referred to these effects—the transaction costs caused by myriad property rights over the necessary components of some subsequent innovation—as "the tragedy of the anticommons." "

26.

"One thing we always need to keep straight when listening to the publishers' argument is that they're right, copyright extension benefits them. They get twenty years extra royalties for whatever movies or music or books that they're publishing. But hopefully when the legislature is trying to decide whether a law is good

or not, the question isn't whether there's some private party out there that's going to make a profit at the public's expense, but rather whether there's an overall public benefit from the law that's being considered. And it's impossible, at least given my research, to see any sort of public benefit from term extension at all. All you see is this diminishment of availability of book titles and an associated price increase that's associated with copyright—not surprisingly, copyrighted works are more expensive than works in the public domain. So the public pays a price in terms of dollars, the public pays a price in terms of lost availability, and the only winner is the private profit of the publishing company ... It's basically a tax. I mean, all the copyright term extension is, it's a tax on consumers and the tax goes to publishers, and the way these laws are written, there's no obligation on the part of copyright owners to provide any sort of benefit for the public from this tax."

27.
"There is no incentive up front to artists to extend term to 70 years after death. It really doesn't work that way, because they're often not the rights holders of their music. A rights reversion offers a real incentive to artists, especially when we're talking about musical acts from 1993. You don't know the future value of that music. You can't predict that. There's a value gap in our time. We don't think in terms of 70 years after our death most of the time."

28.
"Most of the material available online comes from so long ago that the copyright could not possibly still be in force. But since copyright lasts for seventy years after the death of the author (or ninety-five years if it was a corporate "work for hire"), that could be a very, very long time indeed. Long enough, in fact, to keep off limits almost the whole history of moving pictures and the entire history of recorded music. Long enough to lock up almost all of twentieth-century culture.

But is that not what copyright is supposed to do? To grant the right to restrict access, so as to allow authors to charge for the privilege of obtaining it? Yes, indeed. And this is a very good idea. But as I argue in this book, the goal of the system ought to be to give the monopoly only for as long as necessary to provide an incentive. After that, we should let the work fall into the public domain where all of us can use it, transform it, adapt it, build on it, republish it as we wish. For most works, the owners expect to make all the money they are going to

recoup from the work with five or ten years of exclusive rights. The rest of the copyright term is of little use to them except as a kind of lottery ticket in case the work proves to be a one-in-a-million perennial favorite. The one-in-a-million lottery winner will benefit, of course, if his ticket comes up. And if the ticket is "free," who would not take it? But the ticket is not free to the public. They pay higher prices for the works still being commercially exploited and, frequently, the price of complete unavailability for the works that are not.

Think of a one-in-a-million perennial favorite—*Harry Potter*, say. Long after J. K. Rowling is dust, we will all be forbidden from making derivative works, or publishing cheap editions or large-type versions, or simply reproducing it for pleasure. I am a great admirer of Ms. Rowling's work, but my guess is that little extra incentive was provided by the thought that her copyright will endure seventy rather than merely fifty years after her death. Some large costs are being imposed here, for a small benefit. And the costs fall even more heavily on all the other works, which are available nowhere but in some moldering library stacks. To put it another way, if copyright owners had to purchase each additional five years of term separately, the same way we buy warranties on our appliances, the economically rational ones would mainly settle for a fairly short period."

29.

"In general, having more works in the public domain better serves the broader public interest, therefore any undue extension to the term of copyright causes harm by limiting access to works and reducing the scope and breadth of the public domain. Despite the USMCA, we therefore recommend that there be no extension to the term of copyright protection ...

[W]e recommend a new provision be added to the Act to make clear how rights-holders might opt to place copyright-protected works into the public domain before the end of the term of copyright protection. A simple, clear and binding mechanism for doing so, perhaps similar to the Creative Commons CC0 designation, would be a significant step toward further augmenting the public domain."

30.

"One of the most stunning pieces of evidence to our aversion to openness is that, for the last fifty years, whenever there has been a change in the law, it has almost always been to expand intellectual property rights. (Remember, this implies that

every significant change in technology, society, or economy required more rights, never less, nor even the same amount.) We have done all this almost entirely in the absence of empirical evidence, and without empirical reconsideration to see if our policies were working."

31.

"We have, then, only one resource left. We must betake ourselves to copyright, be the inconveniences of copyright what they may. Those inconveniences, in truth, are neither few nor small. Copyright is monopoly, and produces all the effects which the general voice of mankind attributes to monopoly ... I believe, Sir, that I may with safety take it for granted that the effect of monopoly generally is to make articles scarce, to make them dear, and to make them bad ... Thus, then, stands the case. It is good that authors should be remunerated; and the least exceptionable way of remunerating them is by a monopoly. Yet monopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good."

32.

"Think of the copyright system as offering a deal to artists and record companies. "We will enlist the force of the state to give you fifty years of monopoly over your recordings. During that time, you will have the exclusive right to distribute and reproduce your recording. After that time, it is available to all, just as you benefited from the availability of public domain works from your predecessors. Will you make records under these terms?"

Obviously, fifty years of legalized exclusivity was enough of an incentive to get them to make the music in the first place. We have the unimpeachable evidence that they actually did. Now they want to change the terms of the deal retrospectively. They say this will "harmonize" the law internationally, give recordings the same treatment as compositions, help struggling musicians, and give the recording industry some extra money that it might spend on developing new talent. (Or on Porsches, shareholder dividends, and plastic ducks. If you give me another forty-five years of monopoly rent, I can spend it as I wish.)

Change the context and think about how you would react to this if the deal was presented to you personally. You hired an artist to paint a portrait. You offered $500. He agreed. You had a deal. He painted the painting. You liked it. You gave him the money. A few years later he returned. "You owe me another

$450," he said.

You both looked at the contract. "But you agreed to paint it for $500 and I paid you that amount." He admitted this was true, but pointed out that painters in other countries sometimes received higher amounts, as did sculptors in our own country. In fact, he told you, all painters in our country planned to demand another $450 for each picture they had already painted as well as for future pictures. This would "harmonize" our prices with other countries, put painting on the same footing as sculpture, and enable painters to hire more apprentices. His other argument was that painters often lost money. Only changing the terms of their deals long after they were struck could keep them in business. Paying the money was your duty. If you did not pay, it meant that you did not respect art and private property.

You would find these arguments absurd. Yet they are the same ones the record industry used ... Is the record companies' idea as outrageous as the demands of my imaginary painter? It is actually worse.

The majority of sound recordings made more than forty years ago are commercially unavailable. After fifty years, only a tiny percentage are still being sold. It is extremely hard to find the copyright holders of the remainder. They might have died, gone out of business, or simply stopped caring. Even if the composer can be found, or paid through a collection society, without the consent of the holder of the copyright over the musical recording, the work must stay in the library. These are "orphan works"—a category that probably comprises the majority of twentieth-century cultural artifacts.

Yet as I pointed out earlier, without the copyright holder's permission, it is illegal to copy or redistribute or perform these works, even if it is done on a nonprofit basis. The goal of copyright is to encourage the production of, and public access to, cultural works. It has done its job in encouraging production. Now it operates as a fence to discourage access. As the years go by, we continue to lock up 100 percent of our recorded culture from a particular year in order to benefit an ever-dwindling percentage—the lottery winners—in a grotesquely inefficient cultural policy."

33.

"The model of used book stores suggests that the law could simply deem out-of-print music fair game. If the publisher does not make copies of the music available for sale, then commercial and noncommercial providers would be free, un-

der this rule, to “share” that content, even though the sharing involved making a copy. The copy here would be incidental to the trade; in a context where commercial publishing has ended, trading music should be as free as trading books.”

34.
“The term length set by the first modern copyright law, Britain’s Statute of Anne, in 1710, was for fourteen years after the publication date, renewable once if the author outlived its expiry. The term-lengthening trend that has continued since roughly the mid-19th century is based on effective lobbying, not on economic evidence. Australian government studies in 2000 and in 2010 consistently argue against copyright extension as a cost to any jurisdiction that imports more IP than it exports. A 2006 report for the UK government concludes that Britain’s copyright term of life-plus-seventy-years “far exceeds the incentives required to invest in new works”. A 2011 report for the UK government cited economic evidence and the government’s own 2010 study to conclude that copyright term extensions are “economically detrimental”. A 2011 study by the Canadian government concludes that “extending the term simply does not create an additional incentive for new creativity”. By way of contrast, a US Report on the fair use economy reveals the substantial positive impact that fair use has on the economy.”

35.
“I believe copyrights over literary works should be shorter, and that one should have to renew them after twenty-eight years—something that about 85 percent of authors and publishers will not do, if prior history is anything to go by. I think that would give ample incentives to write and distribute books, and give us a richer, more accessible culture and educational system to boot, a Library of Congress where you truly can “click to get the book” as my son asked me to do years ago now.”

36.
“Ever since I first read and fell in love with it in 1960, I have made a practice of re-reading J. D. Salinger’s masterpiece *The Catcher in the Rye* every ten years. Each go-round, I have feared that this time, finally, I would find it too adolescent, too simplistic, too dated, too corny—too this, too that, too something-or-other—but each time, glad to say, to my joy and relief, I have found it to be not too young or too trite, but too touching for words, to be frank, and as funny and fresh

as the first time, to boot. Now it happened that on a transoceanic leap to England in 1990, I found myself with a fair patch of spare time, and so when I happened to run across a copy of the novel in a small bookstore in Brighton, I purchased it, figuring it was just about time for my decadely encounter with gangly sixteen-year-old Holden Caulfield, his adorable little sister Phoebe, his crude macho roommate Stradlater, his teachers and peers at Pencey Prep, old Maurice, the nasty New York elevator boy, phony Sally Hayes, who Holden used to neck so damn much with that he thought she was intelligent, smart Jane Gallagher, the muckle-mouthed girl who Holden used to play checkers with and once *almost* necked with, the two nuns at the breakfast counter at Grand Central Station—and then, lurking at the shadowy core of it all, the tragic ghost of Allie, Holden's dead brother ...

And so, quite on schedule, I opened up this novel so treasured in memory, and plunged in with high hopes. But after only a few sentences I started to feel ill at ease. And what was the matter? This will sound silly to you, but the *em*-dashes were too short. Instead of saying (about his parents), 'They're *nice* and all —I'm not saying that—but they're also touchy as hell", Holden said, 'They're *nice* and all – I'm not saying that – but they're also touchy as hell'. The *em*-dashes had been micro-miniaturized into *en*-dashes!

The ratio of the size of my reaction to the size of the stimulus may remind you of the fable "The Princess and the Pea", but bear with me for a moment. Quite soon I came across a "week-end visit" (why the hyphen?), and "haemorrhages" (how come "ae"?), as well as Pencey Prep's claim to be "moulding"—not "molding"—boys into young men. And then I read about "Mr and Mrs Spencer" (no periods?!), and Selma Thurmer's "phoney slob" of a father. Phoney??? This key word in Salinger's book, appearing eighteen times if it appears once, sported a superfluous "e" each and every time it was printed. And so it went. On nearly every page, something somewhere looked British. The quote marks used in dialogues were single, not double; people travelled with two "l"'s in the hyphenated summer-time and sat in their living-rooms in the ditto winter-time; room-mates put on their favourite grey-coloured pyjamas; women hailed taxi-cabs in front of theatres and phone-booths and twelve-storey buildings; carousels went round and round (but not around and around); *and*, it was all marvellously humourous.

Well, these anglicisms were harmless enough, I suppose, but then, in the space of one single page, after first running into a "coloured girl singer" and a

"pearl-grey hat", I banged straight into the kerb. A kerb in New York City? Blimey! That was too much. But the worst came when I read this:

> Note to the reader: I've left this passage in small type (size 10, in point of fact), so that it looks just like the extract that was originally right here, taken from the British *Catcher in the Rye* (two paragraphs about James Castle's pathetic death, in which "gaol" is used for "jail", and "Maths" for "math"). However, as you may have guessed, what you are reading is not that extract. No, this is in fact your author, improvising at his Macintosh keyboard. Why on earth is that? Simple—here it is, an eye-blink from press time, and guess what? Old J. D. won't give me permission to quote a measly 26 lines from his book! No, he won't! Don't ask me why. He's a funny guy, I guess. I could plead till the cows came home, and he wouldn't budge.
>
> Unfortunately, that leaves me up a creek. Why? Well, as I told you in my Introduction, I've calculated every line of every page in this whole book down to the last comma. Page-breaks can't just fall willy-nilly; they have to come at certain precise points, so as to leave poems and major displays unbroken. With my 26-line gaol-and-Maths extract, I had it all worked out great for Chapter 10. But with it jerked out from under me, especially at the last moment, I was in a mess! For instance, flip to p. 302. Do you honestly think, reader, that that giant paragraph with its six-line coda filled out the page merely by accident? Give me a break!
>
> Something had to be done to make up for the missing 26 lines. Something—but what? Yes, what?? And as I pondered my dilemma, I kept on asking myself, "Suppose old Holden had grown up and become a university professor and written a book on translation. Would Salinger have denied even him the permission to quote from *The Catcher in the Rye*? If so, I pitied the old guv. Poor, poor Salinger.

"Gaol"? "Maths"?! Which side of the Atlantic are we on, for God's sake? I persevered and plowed my way through to the end ..."

37.

"I'm a poet. Anyway, sometimes, at parties, or filling out forms, I say that I'm a poet. Several years ago I first started trying my hand at translating some poems by Ü, one of my favorite writers. I suppose this was audacious, since my German

is so lousy; but it occurred to me that if I was able, with however much difficulty, and with dictionaries at hand, to read and understand a poem, then I could also write down what I'd read and understood—and what else was translating? I told myself it was good German practice, and it was: you never look so closely at a foreign sentence as when you have to fashion one of your own out of it. But it was also good English practice—practice, that is, at writing English poems.

I started out with a few poems that had already been translated into English, so that I could check my work and see where or how badly I'd bungled. I was surprised by what I discovered. I had, of course, made a few small errors of reading, but I'd instinctively smoothed them over: my version was not detectably marred by them. But the other translator, H, had made a few small errors of reading, too; and what was more, he'd made more than just a few of what I considered to be large errors of writing: ungrammaticisms, solecisms, misused words, mangled idioms. His presumably superior knowledge of German had not helped him so very much, while my superior knowledge of writing English poetry had, to my surprise, resulted in what I felt was and still feel is an objectively superior poem. H may have been a professional translator of poetry, but he was no poet. My confidence as an amateur translator was boosted. And it wasn't long before I started thinking about maybe sending some of my translations out into the world.

Justin O'Brien lists four reasons for translating. The first is a "desire to exercise one's faculties while perfecting one's knowledge of a foreign language." The second is to penetrate more deeply into an alien civilization. The third reason, "which is also an excuse for beating in the doors of publishers with one's manuscript, is the laudable desire to communicate, to share one's enthusiasm for an unjustly neglected writer or work." And "the fourth reason for translating—let's be frank—is that it offers a way of enjoying, with but little creative effort and less creative power, a position on the fringe of Beautiful Letters. Translation is, after all, a legitimate form of plagiarism, ever offering the hope of rising to fame on borrowed wings."

As I contemplated trying to publish my translations, no doubt my motivations partook to some degree of the fourth reason; but, bearing in mind the limits of introspection, I'm pretty sure that the third reason predominated. As far as I could tell, Ü was indeed unjustly neglected—at least in English, at least today. Though much of her oeuvre had been (competently) translated and published on both sides of the Atlantic during her lifetime, all those books had now been out of print and unavailable for almost sixty years. (My vast local library system held

exactly two of them—one for children.) Hardly anyone I talked literature to had heard of her; certainly I'd never met another fan of her work. And though H's translations, put out by a small UK press within the last decade, had no doubt been intended to help rectify this situation, I was of the opinion that they would do little to improve Ü's repute.

In short, I thought that I could do her at least as much good as she could do me.

So, I reached out to her original publishing house—whom (because I can already see the initials becoming unmanageable) I will call Sturm, Sturm, und Strapaze—with some beginner's questions. I was told that I could translate anything I liked, but that in order to publish a translation of any work under copyright, contracts and royalties were compulsory; thus, any prospective publisher of my Ü poems would have to purchase non-exclusive English-language publication rights. I asked if this fee was a flat rate; I was told that it was a negotiable, symbolical lump sum. I asked whether, in the event that I found a willing periodical, I should put the editor in touch with SS&S; I was told yes.

Six months passed. I found a periodical (I'll call it P1) willing to print, in four or eight months' time, my translation of Ü's poem "A." The managing editor (I'll call him Ed) was understandably curious to know what that negotiable, symbolical sum might be; he said that, since they, like all literary publications, ran on a very tight budget, he hoped that the fee might be covered by (that is, taken out of) the usual contributor's honorarium—about $225 probably, in this instance. I, putting him in touch with my helpful contact at SS&S, passed this information along, and said that I'd be happy to share the payment with them in whatever proportion they thought was fair.

Twenty-seven days passed.

I asked Ed if he'd heard anything.

Three days passed.

He said he hadn't, but would follow up shortly.

Fifteen days passed.

He followed up, cc'ing me.

Eight days passed.

I gave Ed the public foreign-rights email address that I had originally used to contact SS&S.

He followed up again, cc'ing me and that email address.

Fifteen days passed.

He followed up again, for the third time, in the same words, but adding an all-caps plea to respond.

Seven days passed.

“Tina,” the person filling in for my helpful contact at SS&S, who was away on parental leave, replied. She apologized for the delay. She told Ed that the lump sum, once negotiated, would be payable directly to SS&S; whatever separate agreement he might come to with me had nothing to do with them. She requested some information to help her determine what that lump sum should be: What would the print-run of the issue in question be? What other texts and authors would appear alongside Ü? What was the issue’s theme? Could Ed provide a table of contents? How many pages would be in the issue? What would its selling price be? Would it be distributed outside of Canada? Would there be an online as well as a print version? Once in possession of this information, she could begin to negotiate a price for the non-exclusive English-language publication rights for the poem “A”—subject to the Ü Estate’s final approval, of course.

Five days passed.

Ed replied, answering Tina’s questions in detail, cc’ing me.

The next day, Tina replied (not cc’ing me; I wouldn’t hear anything for fifty-six days), thanking Ed for the information, which would give the Ü estate a more accurate idea of the project; then she asked how much P1 could offer for the rights.

The next day, Ed replied, explaining that P1 really wouldn’t want to pay much more than the aforementioned regular publication rate of $225 for the poem, since, frankly, they had a lot of other accepted material they could publish instead. And they would want to pay me, the translator, some of that amount. He acknowledged that they might be able to kick in a bit more for me if the SS&S amount was high, but reminded her that they ran on a tight budget and normally didn’t publish translations. They just thought it would be a good chance to expose their readership to Ü’s work.

Twenty-nine days passed.

Ed followed up.

Twenty-five days passed.

Ed followed up, pleading for a reply, and cc’ing me.

Six days passed.

Tina replied, offering sincere apologies for the delay, and asking Ed if P1 could offer SS&S $125 for the rights.

Ed asked me if I was willing to take the $100 that was left over.

I said of course. (In the end, P1 didn't deduct the rights fee, but gallantly paid me the full $225.) And so, nearly five months after it was first accepted, we were able to close the deal, and in due course my translation of Ü's beautiful poem, "A," appeared in print.

A few years went by before I mustered up the fortitude to send out another of my Ü poems. This time, the willing periodical (I'll call it P2) was located in the UK—which was a bit of a problem, as I soon found out from my third helpful contact at SS&S (I'll call him Max), because this poem, "B," was one of those that had been translated a few years earlier by H, whose publisher, of course, had the UK rights tied up. Max informed me that I'd therefore require prior permission, against a fee, from that publishing house; and he provided me the email address of its director (whom I'll call Shelly).

So I blithely contacted Shelly, expecting her to be pleasantly surprised and glad to accept the "nominal" fee that P2 had originally intimated they might be able to offer SS&S. The tone of her reply, however, was one of bewildered, aggrieved defensiveness: Why had I done this? What made me think it was important that readers read my translation and not just theirs? Guessing that very little good would come of my making a case for the superiority of my translation to the jumble of translatorese her house had foisted on the world, I instead genially withdrew my request—and so, with it, my submission of "B" to P2. Any poet, knowing how rarely acceptances come along, will guess with what heaviness of heart, and what fawning contrition, I annulled this one. I apologized for having made an amateur's mistake.

To try to avoid making another in the future, I asked Max whether any other collections of Ü's poems were under exclusive English-language contract in any other jurisdictions. Max replied that, unless he was mistaken, only those works that H had translated were under exclusivity. I asked if that meant, then, that I could (get permission to) publish any poem of Ü's outside the UK, and any except the poems H had translated inside the UK? To which Max, perhaps believing he'd been adequately elucidating, did not reply.

Eight months passed. One day I received a kind of provisional acceptance letter from an American periodical (P3), who said that they loved my translation of "B" and wanted to publish it on their website. They said, however, that they only accepted and published pieces for which the rights had already been obtained. If I could obtain the rights and send those along, they'd be more than

happy to move forward with the process and publish the piece.

I replied, saying that, as far as I understood, with a dead author, it wasn't quite so straightforward as simply getting permission in advance. SS&S, in any case, would only issue a permission letter to a specific publication upon specific terms; so I ended up in a catch-22, where periodicals asked for permission in advance and SS&S asked for details (and a fee) from the periodicals before providing permission. I said (as I'd said in my cover letter) that probably SS&S would accept even a token fee if P3's budget was not large, and, though I wasn't sure if P3 offered payment to its contributors, I was willing to donate mine to the cause, if so.

They replied, saying that, at this moment, they did not offer payment to contributors, and asking me to please update them on the status of obtaining the rights.

Meanwhile I'd contacted Max to tell him the news, that P3 wanted to publish my translation of "B" on their website. I asked him to remind me what information SS&S needed to proceed.

His thirst for data was significantly less sharp than his colleague's had been. He said that he needed to know whether it was a print issue, a digital issue, or both, and, since SS&S did not grant free permissions, how much P3 would be ready to pay for the rights.

I repeated that it would be a digital issue, and said that, though I'd learned they didn't pay their contributors, I'd inquire about a rights fee. Then, somewhat disingenuously, I said that if P3 couldn't or wouldn't offer a token sum, perhaps I might. I guess I was hoping to elicit a chivalrous "Perish the thought!," and an offer to waive the fee.

I wrote to P3 again, asking more explicitly whether the payment of a fee to the rights holder was out of the question. If so, I said (to them, too), though it rather went against my self-respecting writer's principles, I might consider pitching in the symbolical sum myself.

P3 replied tersely, telling me again that they did not pay contributors, that rights must be obtained before publication, that they would only move forward with the process after.

Meanwhile Max had replied, "US $60 = 50 Euros?"

At this point I wanted to tell them both to go to hell. Why was I in the middle of these petty, sordid negotiations at all? I felt a long way away from that "laudable desire to communicate, to share one's enthusiasm for an unjustly ne-

glected writer or work" that had originally inspired this undertaking.

But instead of burning both bridges, I slept on it. In the morning, I wrote back to Max with humble apologies for having wasted his time: P3 couldn't or wouldn't pay the fee, and fifty euros was more than I could afford; besides, it rather went against my principles to pay to have my work published; I said I was sure Ü would agree.

Max replied, saying that it was my translation, but it was not my work; it was Ü's work. And it was against *his* principles that a translator should pay a US journal [*sic*] to see an SS&S author published in her translation. As it should have been against P3's principles to wish to publish a prestigious SS&S author without paying a symbolical fee! They wouldn't like an SS&S journal to publish, in German translation, one of P3's authors without paying, would they? Maybe I could discuss this with them. He hoped we could come to an arrangement.

I said that I was afraid there wouldn't be much point in discussing it with them. Besides, I could guess what their reply would be. They no doubt believed that it would be a good chance to expose their readership to Ü's work. In other words, I told Max, P3, and countless others who paid their contributors nothing, expected us to be grateful for the exposure they were giving us. Publication *was* payment, in their minds. It was, I said, ach! really quite disheartening.

(Well, and who does do the other more good—the literary journals that publish poets, or the poets whose poetry makes up literary journals?)

Max replied that this kind of attitude didn't make him happy. That these journals could think that publishing a prestigious German author like Ü was actually a good advertisement for SS&S, and not the contrary, seemed to him incredible! Nevertheless, he could, perhaps, as a one-time exception, as a favor to me, send me a permission, free of charge ... However, he said, wasn't "B" under exclusivity in the UK? And wasn't P3's website accessible worldwide?—including from within the UK? Wouldn't that make this just as problematic as P2 had been? Perhaps, he suggested, it would be better to find a print-only journal in the US.

Ah, I said. Right, I said. Good idea, I said.

And so I withdrew my submission of "B" to P3.

I'm not sure what the moral of this story is, or whether there is one. All I know is that I, who would never wish harm to anyone, have at times keenly yearned for the copyright of one of my favorite writers in the world to hurry up and die of old age already."

38.

“It is painful to me to take a course which may possibly be misunderstood or misrepresented as unfriendly to the interests of literature and literary men ... But as I am, on full consideration, satisfied that the measure before us will, if adopted, inflict grievous injury on the public, without conferring any compensating advantage on men of letters, I think it my duty to avow that opinion and to defend it.”

Appendix D: About the Author

What's relevant? I have never taken so much as a single law course, but I have been eating and dreaming copyright these past few weeks. Sometimes, at parties, or filling out forms, I say that I'm a writer. I've had four books of fiction published. I once won a national award for a short story, once sat on a jury for a national fiction prize. I've never received a royalty check: none of my books have sold enough copies to earn out the modest advance on royalties I received on publication from my publishers. The largest part by a considerable margin of my income as a writer has come in the form of Canada Council grants, of which I've received perhaps five in my life, out of perhaps seven or eight applied for. I haven't had to apply lately, since for the last four years I've lived rent-free as a building caretaker, a job that leaves me a lot of time to write. What's relevant? I love my publisher, who is apparently indefatigably willing to lose money publishing my work. I probably wouldn't mind teaching. At the age of eighteen or so, I decided that American spelling was more aesthetically pleasing, somehow cleaner, less pompous; I continue to use it from habit. I can be reached by electronic mail at cpboyko at gmail dot com. I've never written a brief to the government before. I hope it's going well. Almost done now. Thanks for reading. I don't own a car and don't want to. I like the idea though not always the reality of paying taxes. I'm shy, but I hide it. I, from the sidewalk, mutely rebuke bad driving. I've been lucky, and I'm grateful. I'm forty-two.

Appendix E: Copyright

Whatever here may be original I release to the public domain.

Appendix F: Sources

Appendix B: Why I Think I Believe Term Extension Is a Bad Idea

"The impression I have been given ...": Standing Committee on Canadian Heritage, May 22, 2018. https://www.ourcommons.ca/DocumentViewer/en/42-1/CHPC/meeting-109/evidence

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one study of Canadian poets ...: Eli MacLaren,"Copyright and Poetry in Twenty-First-Century Canada: Poets' Incomes and Fair Dealing," in *Canadian Literature*, Summer, 2017, Issue 233, 10-27.

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Appendix C: Thirty-Eight Epigraphs

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30. James Boyle, ibid., 236.

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38. Thomas Babington Macaulay, ibid.

Appendix G: Valediction

Let’s build a world wonder.