



CONSULTATION SUBMISSION

ISED General Term of Copyright Consultation

Introduction

The Canadian Alliance of Student Associations (CASA) is a non-partisan organization that represents 265,000 students at universities, colleges and polytechnics across the country. CASA advocates for a post-secondary education system that is accessible, affordable, innovative and of the highest quality. A key aspect of achieving this system is upholding the right for students to have access to the information they need to learn. With regard to the ongoing public consultation on the extension of the general term of copyright, CASA's recommendations seek to ensure that any impacts produced by the impending general term extension do not affect the accessibility or affordability of educational materials for post-secondary students.

General Comments

As a national voice of post-secondary students across Canada, CASA believes in a balanced approach to copyright that respects the rights of copyright holders while allowing for fair access to content for non-commercial uses. As an instrument of public policy, Canadian copyright legislation has two main objectives: to further the creation and dissemination of intellectual and creative materials, and to facilitate access to knowledge and information for the benefit of Canadian society as a whole.¹ CASA also believes that post-secondary students should have access to the widest array of information, ideas, and knowledge possible, and that enabling this knowledge capture is a core component of any high quality and innovative post-secondary education sector.

In its current form, CASA takes issue with several elements of the *Copyright Act* that favour copyright holders at the expense of users. With an eye to restoring balance, CASA's primary goals surrounding copyright in Canada centre around creating a system that is accessible, affordable, innovative, and of the highest quality by reducing copyright protection terms, infringement penalties and levies, as well as increasing the scope of educational fair dealing, to better reflect the needs of content users. As such, CASA generally opposes any measure that will increase the general term of copyright, as this would generally limit access to materials and raise costs for post-secondary students looking to access educational information.

Outside of copyright protection terms, CASA sees the right of students to access information as key to achieving a post-secondary education system that is accessible, affordable, innovative, and of the highest quality. CASA strongly believes that "education" should be preserved as a qualifying exception to copyright under the principle of fair dealing. During the *Copyright Act* review of 2012, "education" was added to the list of exceptions unbound by copyright under the principle of fair dealing. Since then, post-secondary institutions across the country have started to implement policies permitting the copying and sharing of up to 10% of a work, or a chapter from a book, for educational purposes. This has

¹ Canadian Library Association (CLA), "Unlocking the Public Interest," September 2008, accessed online: <http://cla.ca/wp-content/uploads/Unlocking-the-public-interest-Final.pdf>



subsequently led to wider access and reduced costs for post-secondary students looking to access information and materials for study and research. Students benefit from fair dealing because it allows them to access more information than they could before, as instructors are no longer limited to course materials that must be purchased. Fair dealing also allows for the reduction of costs faced by post-secondary students, as the use of educational fair dealing by course pack producers has significantly reduced the price of mandatory reading materials. Indeed, following the 2012 change to the *Copyright Act*, the average price of a course pack at the University of British Columbia dropped by 33%.² Additionally, a pilot project at the University of Toronto that looked to reduce coursepack prices by implementing fair dealing policies saw total savings amongst 877 students reach as much as \$406,038 by Fall 2016.³ Educational fair dealing is a crucial element of the *Copyright Act* for post-secondary education in Canada, and CASA's main advocacy priority on the copyright file is preserving and expanding these exceptions for educational use.

Given the benefit of less restrictive copyright protection terms and rules on post-secondary education, CASA was disappointed to see that the new Canada-United States-Mexico Agreement (CUSMA) brings Canada's general term of copyright protection in-line with that of the United States and Mexico, rather than aligning their general term of protection with Canada's. Prior to the ratification of CUSMA, Canada's general term of copyright protection was 50 years after the life of the author, whereas the United States and Mexico operate with general terms of 70 years after the life of the author. Meaning, Canada's ratification of CUSMA will significantly reduce Canadian's access to works for an additional 20 years. While fair dealing exceptions continue to exist despite this impending extension to the general term of protection, these exceptions must be considered on a case-by-case basis and are often still subject to uncertainty and unfounded threats of litigation. Thus, any extension to the general term of copyright protection in Canada would restrict user access for an additional 20 years and would prompt greater use of fair dealing provisions many remain hesitant to utilize. Because of this, CASA strongly opposes any extension to Canada's general term of copyright protection. However, we also recognize that CUSMA has been negotiated over a period of several years and has been agreed to by the governments of Canada, the United States, and Mexico, making any amendment to copyright sections very improbable. Therefore, while CASA disagrees with the government's decision to extend the general term of protection, we accept that the decision is inevitable and have sought to provide recommendations that will do the least harm to students and the post-secondary education system at large.

Stance on Presented Options

Post-secondary students echo many of the concerns raised by stakeholders, both at the Industry, Science and Technology (INDU) Committee's during the group's recent *Copyright Act* review⁴ and in recent

² "Course Pack prices significantly reduced in Fall 2013, Copyright at UBC," University of British Columbia, accessed online: <http://copyright.ubc.ca/course-pack-prices-significantly-reduced/>

³ Nancy Cancilla, Bobby Glushko, Stephanie Orfano and Graeme Slaght, "Engaging Faculty and Reducing Costs by Leveraging Collections: A Pilot Project to Reduce Course Pack Use," *Journal of Librarianship and Scholarly Communication* 4 (2017): pp. 2.

⁴ "Statutory Review of the Copyright Act," Report of the Standing Committee on Industry, Science and Technology, June 2019, pp. 32-38.



public commentary⁵, regarding the adverse effects of a general term extension. In addition, CASA has serious concerns about the impending term extension's impact on already persistent issues surrounding orphan and out-of-commerce works. Both orphan and out-of-commerce works represent significant barriers to access for post-secondary students under Canada's current term of copyright, and extending that term will only exacerbate existing issues of access surrounding these works. Specifically, CASA is troubled by the fact that a general term extension to 70 years after the life of the author will create a 20-year period where no new works are released from copyright into the public domain. It is for this reason that CASA is opposed to a longer general copyright term in principle. While CASA stands firmly against this general term extension, we are optimistic about the potential of utilizing various mitigation measures outlined in the Government of Canada's recent copyright consultation document that may increase access to works for non-profit libraries, archives, and museums (LAMs) during a work's general term, specifically with regard to orphan and out-of-commerce works.

Upon assessing the measures outlined in the government's consultation document, CASA sought to identify mitigation measures that maximize access to materials and do not impose any unnecessary administrative hurdles on content users. In doing so, CASA is aligned with the INDU Committee in calling for the amendment of the *Copyright Act* "to ensure that copyright in a work cannot be enforced beyond the current term unless the alleged infringement occurred after the registration of the work."⁶ This change, as noted in the INDU Committee's review, would have multiple positive impacts on copyright in Canada. Firstly, it would allow copyrighted materials to continue to enter the public realm after 50 years following the life of the author, unless the author proactively reaches out to register their work for the remaining 20 years. This would increase access for post-secondary students and other content users while also promoting copyright registration, therefore increasing registrations and increasing transparency in the system.⁷ In addition, this change may also reduce the amount of orphan works subject to copyright in Canada, as more content creators will be incentivized to register with the Canadian Intellectual Property Office to avoid termination of their work's exclusive protection, thus reducing the amount of works with no known or locatable author. Indeed, this legislative change would greatly increase the accessibility of works past the 50 year existing general term, and would help rebalance the copyright landscape in North America. As Professor Jeremy de Beer noted to the INDU Committee in 2018, "[w]ithout counterbalancing measures to align Canadian and American copyright flexibilities, Canadian innovators would be at a huge disadvantage."⁸ INDU's recommendation is sound, and does not, as inferred in the government's consultation document, contravene the 1886 Berne Convention.⁹ As such, CASA

⁵ Howard Knopf, "Online discussion about CDN Government Consultation paper on how to implement an extended general term of copyright protection in Canada," Excess Copyright (blog), February 25, 2021, accessed online: <http://excesscopyright.blogspot.com/2021/02/february-25-20201-online-discussion.html>.

⁶ "Statutory Review of the Copyright Act," Report of the Standing Committee on Industry, Science and Technology, June 2019, pp. 38.

⁷ Ibid.

⁸ Jeremy De Beer, testimony to the House of Commons Industry, Science and Technology Committee, November 28, 2018.

⁹ Howard Knopf, "Let's Listen to the Former American Register of Copyrights about How to Deal with the Last 20 Years of the Extended Life + 70 Copyright Term," Excess Copyright (blog), March 2, 2021, accessed online: <http://excesscopyright.blogspot.com/2021/03/lets-listen-to-former-american-register.html>; quoting Maria A. Pallante, "The Next Great Copyright Act," *The Columbia Journal of Law & Arts* 36, no. 3 (2013).



recommends that the Government of Canada move forward to implement Recommendation 6 from the INDU Committee's 2019 statutory review of the *Copyright Act* to mitigate some of the negative impacts of CUSMA's general term extension.

That being said, the government has requested opinions on the various options outlined in its February 2021 consultation document. While our primary recommendation is to follow the INDU Committee's advice on this question, of the choices presented in the consultation document, CASA would prefer a mixture of options three and five, subject to additional considerations. Specifically, CASA welcomes the creation of a new exemption for the use of works by non-profit LAMs 100 years after their creation, in order to achieve their public interest and education missions, subject to multiple considerations below. Taking into account the average life expectancy of an individual, this exception would allow non-profit LAMs access to copyrighted material roughly fifty years earlier than under the proposed general term extension.¹⁰ This would greatly increase access to information for post-secondary students, making it a potential game-changer for post-secondary accessibility, affordability, and quality in Canada.

In addition, CASA recognizes the fact that issues surrounding orphan and out-of-commerce works would remain if option five is implemented alone. Therefore, CASA recommends the concurrent/complementary adoption of option three within the consultation document, subject to multiple conditions, to help increase access to these persistently inaccessible works. Providing non-profit LAMs with the ability to use orphan and out-of-commerce works without appealing to the Copyright Board, but subject to claims for equitable remuneration, would provide an accessible and streamlined approach for non-profit LAMs to use these works to meet their public interest missions. What is more, this option also provides content creators with an outlet to seek equitable remuneration if they choose to register and uphold their copyright claim over a work. As a result, option three provides an equal middle-ground, allowing for non-profit LAMs to access orphan and out-of-commerce works prior to the expiration of their existing copyright, while also allowing owners to claim just compensation should they choose to reaffirm their copyright on a specific work.

Furthermore, of the choices presented in the document, the fusion of options three and five present the most ideal scenario for post-secondary students. This would allow non-profit LAMs to access materials to further their public interest and educational missions 100 years after their creation, rather than 150 years plus, while also providing an accessible and transparent outlet to access orphan and out-of-commerce works still under the 100-year protection. CASA urges the government to consider the complementary implementation of options three and five, subject to a few considerations below, if the INDU Committee's recommendation is seen as out of bounds.

Other Considerations

Provided the government moves forward with CASA's recommendation to implement a fusion of options three and five as outlined above, various other factors should be considered.

¹⁰ Average life expectancy in Canada is 81.1 years old. 81 plus 70 equals 151, meaning content creators would be eligible for roughly 150 years of copyright protection under the proposed general term extension. Retrieved from: "Life expectancy at birth and at age 65, by province and territory, three-year average," Statistics Canada, accessed online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1310040901>.



First, clarity must be provided on the definition of a non-profit LAM. According to the consultation document, non-profit LAMs encompass non-profit libraries, archives, and museums, but there is no concrete outline on what kind of institution qualifies as a non-profit LAM either in the consultation document, or within the existing *Copyright Act*. CASA's support of the complementary implementation of options three and five relies on the inclusion of post-secondary libraries in the definition of non-profit LAMs. If post-secondary libraries were to be excluded from measures seeking to mitigate the effect of the general term extension, it would pose serious accessibility and affordability risks for post-secondary students. As such, any definition of non-profit LAMs developed to implement the options outlined in the consultation document must be inclusive of post-secondary libraries.

Second, the implementation of option five -- an exception for non-profit LAMs for use of works 100 years after their creation -- should ensure that the 100-year exception applies only to those works protected under the general term of copyright. Specifically, the 100-year term should not be extended to published Crown copyright material, which currently carries a term of 50 years after creation.¹¹ While clarity surrounding unpublished Crown copyright material must be addressed, it should be done outside of this consultation. Until Crown copyright can be considered more fulsomely, priority must be placed on ensuring that any new policies brought forth under this consultation do not impede access or increase copyright terms for Crown materials.

Third, the implementation of option three -- permitting the use of orphan and out-of-commerce works by non-profit LAMs, subject to claims for equitable remuneration -- must include guidelines outlining possible fees to be expected and considered, should the copyright owner put forth a claim. This would provide much-needed predictability and transparency for non-profit LAMs, many of which operate on small budgets and would struggle with large, unexpected, and sudden requests for payment.

Finally, any implementation of option three must also provide clarity on what a "reasonable search in good faith for each work"¹² means. Under option three, onus is placed on content users to undertake a "reasonable search" for each work before they can qualify as an orphan or out-of-commerce material. While the overall aim of this condition is to protect copyright holders, it is vague and does not outline any substantive criteria or test for what a "reasonable search" entails. Therefore, in order to protect content users, the government must define "reasonable search" when implementing their preferred option.

Conclusion

A key aspect of achieving an affordable, innovative, accessible and high quality post-secondary education system is upholding the right for students to access the information they need to learn. In principle, CASA is opposed to any extension of the general term of copyright in Canada, but recognizes the government

¹¹ Copyright Act, S. 12.

¹² "A consultation on how to implement an extended general term of copyright protection in Canada," Department of Industry Canada, pp. 11, accessed online: [https://www.ic.gc.ca/eic/site/693.nsf/vwapj/consultation-implement-extended-term-copyright-protection-Canada-en.pdf](https://www.ic.gc.ca/eic/site/693.nsf/vwapj/consultation-implement-extended-term-copyright-protection-Canada-en.pdf/$file/consultation-implement-extended-term-copyright-protection-Canada-en.pdf).



has committed to just that under that Canada-United States-Mexico Agreement. Recognizing this, CASA remains focused on preserving and expanding fair dealing for educational purposes within Canada's copyright legislation. In addition, we recommend that the government implement measures to mitigate the impact of the general term extension on post-secondary students by implementing the INDU Committee's sixth suggestion presented in its 2019 statutory review of the *Copyright Act*. That being said, we acknowledge that the government has specifically requested feedback on six options presented in its February 2021 consultation document, and CASA recommends that, in lieu of implementing the INDU Committee's recommendation, the government move forward with a fusion of options three and five as presented, subject to various considerations. These considerations include clarity on the definition of a non-profit LAM, an exception for Crown copyright, clarity on expected remuneration, and guidelines expanding on what "reasonable search for works" means within the context of option three. If accepted, these recommendations would help to ensure that any impacts created by the impending general term extension are properly mitigated.