

March 12, 2021

**Delivered via email: [copyright-consultation-droitdauteur@canada.ca](mailto:copyright-consultation-droitdauteur@canada.ca)**

Departments of Canadian Heritage  
and Innovation, Science and Economic Development Canada

**RE: Submission from the Canadian Media Producers Association in response to the Federal Government's consultation on how to implement an extended general term of copyright protection in Canada**

## Introduction

The Canadian Media Producers Association (CMPA) welcomes the opportunity to comment on the Federal Government's paper *A consultation on how to implement an extended general term of copyright protection in Canada* (the "Consultation Paper").<sup>1</sup>

The CMPA is the national trade association for English-language independent producers. We represent more than 500 companies engaged in the development, production, and distribution of content made for television, film, and digital platforms. The CMPA works to promote the continued success of the Canadian production sector and to ensure a future for the diverse content made by Canadians for both domestic and international audiences.

Canada's independent producers play a critical role in strengthening Canadian identity in the digital age and in establishing a vibrant content marketplace. In addition, the film and television production sector is a key contributor to Canada's creative economy, creating more than \$3.22 billion in Canadian content production activity and 62,700 full-time equivalent jobs last year.<sup>2</sup>

Canada's copyright framework is critical to the success of our industry. For these reasons, we are pleased to provide the following comments on the Consultation Paper.

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<sup>1</sup> Government of Canada, *A consultation on how to implement an extended general term of copyright protection in Canada, 2021*, <http://www.ic.gc.ca/eic/site/693.nsf/eng/00188.html> ("Consultation Paper").

<sup>2</sup> *Profile 2019: An Economic Report on the Canadian Film and Television Production Industry*, produced by the CMPA and the Association des producteurs de films et de télévision du Québec (APFTQ), in conjunction with the Department of Canadian Heritage, [CMPA 2019 E FINAL.pdf](#) ("Profile 2019"), p. 4. The Canadian content production sector does not include in-house broadcaster production (\$1.23 billion in production volume) or foreign location and service production (\$4.86 billion in production volume).

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## **Copyright term extension should be implemented without accompanying measures**

The CMPA agrees that the Government ought to implement its treaty obligations to extend the general term of copyright protection in literary, musical, dramatic, and artistic works to the life of the author plus 70 years without accompanying measures.

There are no barriers to implementing term extension immediately. Doing so will bring Canada in line with international norms and align Canada with its key trading partners. As noted in the Consultation Paper, “[a]pproximately 80 countries have moved to a term of life-plus 70 years or longer, including key trading partners such as the United States (U.S.), Mexico, the European Union (EU), the United Kingdom, Australia, Japan, and South Korea.”<sup>3</sup>

The CMPA agrees with the assessment in the Consultation Paper that adding a registration requirement for the additional period of protection provided under the Canada-United States-Mexico Agreement (CUSMA) would conflict with Canada’s international treaty obligations and increase costs for copyright owners. In particular, we agree that, “[n]umerous international treaties to which Canada is a party (i.e., Berne) prohibit the imposition of any ‘formalities’ that would need to be satisfied for foreign works to benefit from copyright protection in Canada.”<sup>4</sup> A registration requirement is not a viable or desirable option.

For all of these reasons, term extension should be implemented without any accompanying measures.

## **The scope and magnitude of the orphan works problem is unclear**

The Consultation Paper raises some legitimate questions about orphan and out-of-commerce works. However, these are complex issues that require much more research, data, and examination before new or expanded regimes can be put in place. Implementing term extension is not dependent on, and should not be blended with, a discussion about orphan or out-of-commerce works. These are independent issues that should not be conflated.

The CMPA welcomes further study and consultations on the issues surrounding orphan works and out-of-commerce works raised in the Consultation Paper. There are a number of outstanding questions that deserve further study and analysis, but in the interim, we offer the following general observations about the options identified in the Consultation Paper.

The CMPA agrees that orphan works lead to undesirable outcomes because they cannot provide compensation to their owners, and they cannot be reproduced or communicated to the public because there is no one to authorize their uses.<sup>5</sup> What remains unclear, however, is how many and how often users (a) wish to make copyright-protected uses of orphaned works; and (b) how often works are truly “orphaned.”

As noted in the Consultation Paper, Canada already has a unique regime for dealing with unlocatable (or orphaned) copyright owners.

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<sup>3</sup> Consultation Paper, s. 1.2.

<sup>4</sup> Consultation Paper, s. 1.4.

<sup>5</sup> Consultation Paper, s. 2.1.



According to its website, the Copyright Board of Canada (the “Board”) received only ten applications for unlocatable licences in 2020 and eleven applications in 2019.<sup>6</sup>

While there may be various reasons why so few users apply to the Board for unlocatable licences, it is difficult to reconcile the alleged magnitude of the orphan works problem with the practice before the Board.

The true scope of the orphan works problem is also unclear to us. Without further data, it is unclear whether some of the concerns around orphan works might be the result of a lack of knowledge of available search and rights management information and as such, a failure to conduct a diligent search. In other words, it would be helpful to know how many of the works in issue are truly orphaned. As highlighted in the Consultation Paper, collective societies, such as the Producers Audiovisual Collective of Canada (PACC) and the Canadian Retransmission Collective (CRC) maintain extensive databases of rights information for audiovisual works, and often assist users and the Board by searching for and locating rightsholders. It is unclear to us whether those who are calling for more robust orphan works solutions are either aware of, or in contact with, collective societies or trade associations that can assist with their searches for the copyright owners.

These questions need further study and explanation before a new regime for orphan works is implemented.

### **Orphan works and out-of-commerce works are two discrete issues, and should not be commingled**

The CMPA does not agree that Canada’s orphan works licensing regime should be expanded to out-of-commerce works. From a policy perspective, truly orphaned works have no knowable copyright owner attached to them and it is thus impossible to seek a licence for use. In contrast, copyright owners of out-of-commerce works have made the choice to take their works out of circulation for commercial use as of a certain time, but the owners are still knowable and available to grant licences.

The Consultation Paper highlights a comment made in the 2009 study of Canada’s orphan works regime by Jeremy de Beer and Mario Bouchard that the current orphan works regime does not apply, “where a copyright owner [...] insists on terms that are unacceptable to a licensee.”<sup>7</sup> Any suggestion that an orphan works or out-of-commerce works regime ought to apply where a copyright owner exercises its right to licence under its own terms is misguided. In no circumstance should a new regime be extended this far.

Similarly, allowing use of an out-of-commerce work without seeking the authorization of the copyright owner raises a number of potential issues. As an example, there may be a revival of commercial interest such that the copyright owner wishes to make the work commercially available again. Expanding an orphan works solution to out-of-commerce works might prohibit

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<sup>6</sup> [https://decisions.cb-cda.gc.ca/cb-cda/refusees-other-autre/en/2020/nav\\_date.do](https://decisions.cb-cda.gc.ca/cb-cda/refusees-other-autre/en/2020/nav_date.do)

<sup>7</sup> Consultation Paper, s. 2.1, footnote 31.



that revival. While there is much to discuss and consider, out-of-commerce works must be treated differently than orphan works.

**The goal of any orphan works or out-of-commerce works solutions must be to bring copyright owners and users together**

Finally, as an overriding principle, the goal of any orphan works or out-of-commerce works regime should be to bring copyright owners and users together so that they can negotiate the terms of use. While we are confident that most users would prefer to obtain authorization to use from the copyright owner, exceptions—particularly those without remuneration—would tend to incentivize *not* locating a copyright owner. As such, the CMPA is of the view that options 3, 4, and 5 are not viable solutions to the orphan works and out-of-commerce works issues raised in the Consultation Paper.

We have illustrated only a few of the complexities associated with implementing a new or expanded regime for the use of orphan works and out-of-commerce works. These issues are incredibly complex, have been studied extensively in other jurisdictions for many years, and require much further study, careful consideration, and consultation in Canada before implementation.

**Conclusion**

The CMPA asks that the Federal Government extend the general term of copyright protection to the life of the author plus 70 years, without accompanying measures, and without delay. Any discussion of orphan works or out-of-commerce works require further study and should not be blended with the Government’s obligation to implement term extension.

Thank you for this opportunity to provide our comments on the Consultation Paper.

Sincerely,

*[Original signed by]*

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