

March 12, 2021

**Submission to the Government of Canada's Copyright consultation
A consultation on how to implement an extended general term of copyright protection in
Canada**

Introduction

The Government of Canada has launched a consultation to seek the views of stakeholders and the public on the extension of the general term of copyright protection and related accompanying measures. This occurs in the context of Canada's implementation of the Canada-United States-Mexico Agreement, which requires Canada to extend general copyright protection from 50 years after the life of the author to 70 years after the life of the author.

The Canadian Museums Association (CMA) is pleased to respond to this important consultation. The association sought the expertise of Alexander Herman of the Quebec Bar, for the research and preparation of this submission. Several museums were consulted and provided input on the issue, as part of the process.

Canada boasts more than 2700 museums, cultural heritage and science centres. These museums, large and small and in all regions, have a clear desire to make their collections more available to the public through online access and other forms of reproduction, and this is especially true during the current pandemic. Museums across the country spent much of 2020 forced to keep their doors closed to the public, with a dramatic fall in revenue as a result. As such, it is necessary and timely for copyright law in Canada to take the essential step to allow museums the ability to digitize their collections more freely (and without prohibitive administrative costs). This is for the benefit of the Canadian public, which has gone so long without access to physical museum spaces.

As stakeholders that use copyright-protected material on a daily basis, museums-need copyright rules applying to them to be clear, uniform and easy to use. Rules that are opaque and convoluted, or that create unnecessary regulation and cost, will never result in the appropriate freeing up of museum assets for the public's benefit.

Also, special considerations need to be given for museums that wish to make Indigenous collections available online. A report on the Copyright Act by the Standing Committee on Industry, Science and Technology of The Canadian Copyright Act published in June 2019, concluded that the Copyright Act has shortcomings when it comes to "the protection, preservation, and dissemination of [Indigenous Peoples'] cultural expressions,". Although special considerations that must be given when assessing the copyright of Indigenous tangible and intangible heritage lies outside the scope of the recommendations given in this report, the CMA wants to highlight this important distinction.

Summary of the CMA's responses and recommendations

- (1) It should be made clear that term extension will **not apply retroactively**;
- (2) **INDU Committee Recommendation:** the recommendation appears too complex and of little practical use for museums;
- (3)
 - **Option 1:** expanding the current orphan works licensing scheme would be of little benefit to museums since the Copyright Board is a labour-intensive and confusing forum to use;
 - **Option 2:** allowing collective societies to facilitate the use of orphan works and/or out-of-commerce works would only add an unwelcome and unreasonable license cost to the current work undertaken by museums;
 - **Option 3:** of the options presented, permitting museums by law to use orphan works and/or out-of-commerce works in pursuance of their public interest mission is by far the best approach (subject to the CMA Recommendation below);
 - **Option 4:** an exception for use in the last 20 years would in principle be acceptable, though it may add an unnecessary layer of confusion for copyright management in museums;
 - **Option 5:** an exception for use 100 years after creation will add an unnecessary layer of confusion for copyright management in museums;
- (4) **CMA Recommendations:** a digitization exception to allow museums to make non-commercial use of collection works in pursuance of their public interest mission, subject to certain qualifications, in order to once again connect their unique collections to the Canadian public; develop specific guidance for copyright issues when dealing with Indigenous collections.

1) Term extension

For the sake of clarity, when the general term of copyright is extended to life of the author plus 70 years, the CMA would *not* want this change to apply retroactively to works that are already in the public domain. If the change were retroactive, it would cause unnecessary confusion and lead to convoluted methods for clearing pre-existing past uses of public domain works. For instance, a published book incorporating a public domain work might have to be removed from circulation and destroyed (a very costly undertaking) if that work now re-enters copyright. It would affect works created by authors who died between 1950 and 1970. Note that three members of the Group of Seven would fall within this category.

It is implied in the government consultation that when Canada extends the general copyright term this will *not* be retroactive, which is positive from our point of view. We note that Article 20.10 of the Trade Agreement ensures that Canada is not required to restore protection to works that have already fallen into the public domain. When Australia entered into a free trade agreement with the United States in 2005 and likewise extended copyright from 50 to 70 years

after the death of the author, the change was not retroactive. We urge Canada to follow the same approach.

2) INDU Committee Recommendation

The INDU Committee Recommendation from 2018 provided that the enforcement of copyright in a work in the period between 50 and 70 years following the death of the author would require prior registration with the Canadian Intellectual Property Office (CIPO). The CMA believes that this recommendation could lead to a complex and unmanageable system, since an enormous number of works of a particular artist may thus need to be registered. For a visual artist this could mean hundreds, possibly thousands, of works. The scheme may also complicate the use of copyright material from a museum's perspective, since it would involve frequent checking (and re-checking) of the registry to ensure the use is free, and remains free going forward.

3) Accompanying measures

Option 1 (p 9 of the Consultation document) – Expanding orphan works licensing

Though the intention is a good one, expanding the current orphan works licensing scheme to encapsulate unpublished works and (for libraries, archives, and museums – or LAMs) out-of-commerce works would be of little practical benefit to museums. As it currently stands, the Copyright Board can be a labour-intensive and somewhat confusing forum for museums to use. If a museum seeks a licence from the Copyright Board, a great amount of effort and resources necessarily goes into each application, the responses take time, and applications can be rejected on technicalities. While there is nothing wrong with expanding coverage to include unpublished and out-of-commerce works, there is little likelihood this system will be used much by museums for the same reasons. A risk-based approach would be preferable for many of these institutions.

Option 2 (p 10 of the Consultation document) – Collective licensing

Expanding the licensing capabilities of collective societies for orphan works and out-of-commerce works would not be of interest to museums, since it would only lead to unwelcome and unreasonable license fees for the use of such works. While the default exception for LAMs acting in pursuance of their public interest mission is fine in principle, having it subject to a tariff set by the Board and the existence or creation of a relevant collective society, would introduce a cumbersome, time-consuming, and uncertain system. With a collective society involved, a fee structure would soon be enforced, which would inevitably increase the costs for museums, already struggling with their limited operating budgets. The present risk-based approach utilized by most institutions is far preferable to this option.

Option 3 (p 11 of the Consultation document) – Permitted use

Permitting museums by law to use orphan works and/or out-of-commerce works in pursuance of their public interest mission is preferable to Options 1 and 2. Unlike those options, it does not involve the unnecessary complexity, time and costs associated with obtaining a license through the Copyright Board or through a collective society. It thus more adequately meets the needs of museums in offering a solution that is clear, uniform and easy to use.

CMA understands that, in order for this framework to achieve a balance with the rights of copyright owners, it will inevitably have to contain certain limits. These could likely be as follows:

- The exception would only apply to non-profit LAMs;
- The exception would only apply to works legally held within the collection;
- The permitted use will have to be within the public interest mission of the institution (i.e. sharing the collection with the public);
- The use will include no motive of gain;
- The institution will first undertake a reasonable search in good faith for the copyright owner (for orphan works) or evidence of past commercial exploitation (for out-of-commerce works);
- Records of reasonable searches will be maintained within the institution's database;
- Information regarding the work, including the details of reasonable searches, would be kept on the institution's website as long as the work is made available;
- A robust takedown policy would be applied if the copyright owner surfaces and requests removal; and
- Such copyright owners will have the right to opt-out going forward.

The CMA recommends that, in order to facilitate reasonable searches, as listed above, guidance or a checklist should be made available to the sector.

If a copyright owner surfaces, any claim to equitable remuneration should be restricted to a reasonable use cost equivalent for the period beginning when the owner appears and ending when the work is taken down. Extending it further back might involve unwarranted and unpredictable costs for museums. Any remuneration would also have to take into account that the museum's use is necessarily conducted without motive of gain.

The CMA believes that this version of Option 3 would provide the simplest, clearest and most uniform solution to the problem of orphan works and out-of-commerce works in museum

collections. It can also be limited in the ways outlined above so as not to unduly prejudice the rights of copyright owners. However, the preference for the CMA would nevertheless be its own recommendation below.

Option 4 (p 11 of the Consultation document) – Exception for final 20 years

While an exception for use in the last 20 years of the new copyright term is acceptable in principle, it would likely add an unnecessary layer of confusion to the process of managing copyright in museums. Nevertheless, insofar as LAMs are concerned, this option is preferable to the INDU Committee Recommendation above because this option would avoid the complexities involved in registering (and checking/rechecking) a possibly great number of works of visual art.

Option 5 (p 12 of the Consultation document) – Exception for 100 years from creation

An exception for use 100 years after creation would be of little use to museums because it would only add an unnecessary layer of complexity to the already-complicated process of rights management in museums. In relation to the usual term calculation for authorial works, a 100-year cut-off appears arbitrary and may even be inconsistent with Canada's obligations under the Berne Convention.

4) CMA recommendation

The culture and heritage sector has been impacted significantly by the pandemic. While libraries, archives and museums share certain similarities, there are also unique differences that the Government should take into account in order to ensure the interests of each are reflected in any modern copyright law. Given our role, the CMA focuses its recommendations on the needs of museums.

In light of the public interest mission of museums, and the particular struggles faced recently during the pandemic, the CMA believes it is necessary for museums to be protected by a new copyright exception that clearly allows for the digital reproduction of works from their collections for the benefit of the Canadian public, without the exorbitant fees charged by collective societies. After one year of shutdowns and financial turmoil, now is the time to assist museums in their mandate to support the public's access to Canada's one-of-a-kind collections. Museums need to be able to meet the challenges of 2021 and beyond by having greater abilities to make their collections available to the public online.

This recommendation can be seen as an extension of Option 3 above. It is also in keeping with the current abilities museums have to make reproductions of works on behalf of any person for fair

dealing purposes (for research, private study, criticism or review)¹ and the spirit of Supreme Court of Canada jurisprudence, which has expanded the concept of “user rights” in Canada.² The CMA made a similar recommendation to the INDU Committee in 2018, though in very different times when the urgency was not quite so acute as it is today.

This recommendation for a museum digitization exception is presented with the following use restrictions, in order to ensure the exception is finely tuned with the interests of copyright owners and satisfies the requirements of the Berne Convention’s three-step test. These restrictions would be:

- The exception would apply only to non-profit museums;
- The exception would apply only to works legally held within the collection;
- The exception would apply only to literary and artistic works, with the possible exception of commercial photographs;
- The permitted use will have to be within the public interest mission of the institution (i.e. sharing the collection with the public);
- The use will include no motive of gain;
- Only low or medium resolution reproductions would be permissible (i.e. nothing that would compete with the ability of copyright owners to licence high resolution images for commercial gain);
- All reproduced works will include an appropriate copyright notice with all rights reserved to the copyright owner (if work still in copyright and if copyright owner discoverable after reasonable search);
- No reproduction would be allowed if such action had been specifically prohibited by the copyright owner;
- A robust takedown policy would be applied if the copyright owner specifically requests removal.

We urge the government to consider that now is the time to provide adequate assistance for our museums through a museum digitization exception. Otherwise, the public – all of us – will lose out, for years to come.

In addition to the above and the recommendation to produce guidance for reasonable searches, the CMA recommends the Government consider producing guidance for copyright issues when dealing with Indigenous collections that abides by the spirit of the United Nations Declaration on the Rights of Indigenous Peoples.