

Cory Doctorow
3727 W Magnolia Blvd #715
Burbank CA
91505 USA
+14157265209
doctorow@craphound.com

In re: "**A consultation on how to implement an extended general term of copyright protection in Canada**"

By email to copyright-consultation-droitdauteur@canada.ca

01 Mar 2021

To whom it may concern,

Please find below my comments on the 2021 IMED consultation on copyright term extension under the CUSMA.

Context

I am Cory Doctorow, a bestselling, award-winning Canadian author of picture books, middle-grade books, young adult novels, novels for adults, book-length nonfiction for adults, and short stories for all ages. My work is widely incorporated into elementary, secondary and post-secondary curriculum and assessments, and has been recognized in Canada, for example, through the Ontario Library Association's White Pine Award. My book *Radicalized* was a 2020 finalist for the CBC Canada Reads prize. In 2020, the Canadian Science Fiction and Fantasy Association inducted me into the Canadian Science Fiction Hall of Fame.

I hold an honorary doctorate in Computer Science from the Open University (UK), where I am a visiting professor; I am also a visiting professor of practice in the University of North Carolina Department of Library Science and a research affiliate at the MIT Media Lab. I was the inaugural Canada-US Fulbright Chair in Public Diplomacy at the University of Southern California.

I am a special advisor to the San Francisco-based Electronic Frontier Foundation and formerly served as their European Director; in that capacity, I was an observer delegate to the UN's World Intellectual Property Organisation, where I was involved in negotiations over several global copyright and neighbouring rights treaties, and where I was co-drafter of the Access to Knowledge Treaty, which later became the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.

I am also a naturalised British citizen, and I co-founded the UK Open Rights Group, a digital human rights nonprofit campaigning organisation.

Background: Term Extension was a Harmful Mistake

The 1998 US experiment in retrospective copyright term extension – the Sonny Bono Act – provides an evidentiary basis for evaluating the impact of these extensions. In the 23 years since Act was signed into law, all areas of media production have undergone radical concentration, from film to music to print publishing to news to digital publishing. Much of that concentration is driven by the economics of exploiting the rare elements of back-catalogue that are still commercially viable, for example, by allowing recording giants to dictate who may produce sample-based music, which led to smaller labels subjecting themselves to mergers on unfavourable terms in order to gain access to "heritage act" samples prized in hip-hop production.

The result is a positive feedback loop: companies like UMG accumulate more catalogue, which corrals more artists into agreeing to UMG's terms in order to clear samples, and then **these new works end up part of UMG's leverage over both new artists and new market entrants who might offer artists a better deal.**

Variants on this dynamic have played out in other media as well, as has consolidation – and yet, the dominant firms in each entertainment vertical have not used that market power to extract better deals for artists from new digital intermediaries such as Spotify, Youtube and Netflix. **To the extent that content monopolists have flexed their market power in respect of these digital intermediaries, it has been to their own benefit** – for example, by striking deals for minimum payouts to UMG from Spotify while simultaneously conceding on per-stream royalties, with the result that much of that minimum Spotify payout is "unattributed" (not attributable as a royalty for any given stream), and can therefore be paid directly to UMG's shareholders, rather than its artists.

The combination of lax antitrust enforcement (under the creaking, long-discredited "consumer welfare" theory of monopolies of the Chicago School) and increased terms of copyright have created a durable hybrid species of monopolist: a monopolist who combines a market-power monopoly (the power to set prices) that also wields a massive portfolio of "authors' monopolies" (copyrights). Even under the prevailing climate of forbearance for monopolistic conduct, such a firm risks competition regulators' wrath when they use their market power to maintain their monopolies. **But if they use their copyrights to maintain that monopoly – to exclude new market entrants, to entice major competitors into "synergistic" mergers, and to squeeze suppliers, notably artists – the state will not punish them, it will defend them.**

Creators of all description suffer from a buyer's market for their work. The monopolization and vertical integration of entertainment investment, catalog management, distribution, performance and ticketing sectors, leading to a *monoposony*, an economic state of *excessive buyer power*. **States cannot address monoposony by granting alienable exclusive rights to sellers, because the monoposonist will non-negotiably acquire those exclusive rights as a condition of accessing the market.**

In practical terms, that means **giving a creator more copyright to help them get a better deal from their label or publisher is like giving a bullied schoolkid extra lunch money** in the hopes that the bullies will leave them with the excess so they won't go hungry. That's not how bullies operate. Bullies take whatever they can get, and when the bullies are vertically integrated monopolists, they understand that any excess rents they can extract from these rents can be mobilised in lobbying efforts to secure more regulatory favours. And happily for those bullies, highly concentrated industries don't just have

monopoly rents to spend on their legislative agendas – they also have concentrated leadership circles, cozy groups of wealthy, powerful managers who know one another intimately from tenures at one another's firms during their career ascents, who can agree on how to spend the money they've extracted from their workforce and their customers.

Term extension is harmful in many dimensions: not only is it an accelerant of excessive buyer-power; it is also a drag on the production of new works. **The public domain isn't just used by audiences, it's also used by creators.** We remix its characters, ideas, storylines and other elements to make new works. When a working artist licenses work from a long-dead artist's estate, it's a transfer from the living to the dead, a process that Victor Hugo railed against even as he drafted the Berne Convention (now incorporated as the baseline for the WTO TRIPPS and other global treaties), describing the true heirs of an author as the authors that build on their work, whose claims are more important than those of the familial descendants of these authors.

But taxing living artists to pay the dead is the best-case scenario for term-extension. A far more likely outcome is that **living artists are taxed to pay intermediaries**: lawyers who evaluate muddy titles to works, negotiate clearances, or fail to negotiate them (and get paid anyway).

When this happens, either a new work is made after a non-value-producing intermediary has been given some rent in exchange for formalising paperwork, or the work isn't made at all. **When that happens, everyone loses**: the public (who don't get to enjoy the work), the new creator (who doesn't get to make the work) and the creator whose work was under negotiation (whose posterity is denied).

I spent my teens working in Toronto libraries and used/new bookstores. Anyone who's ever worked in those honourable trades knows that the destiny of the vast majority of works and creators – even the most successful examples of both – is **utter obscurity**. To work in a used bookstore is to discover authors who published a *New York Times* bestseller every single year for decades, and who are so unread, unregarded and unremembered today that you've run out of shelf-space for them and have to turn away people flogging their dead parents' treasured collections in hopes of finding a good home for them.

It is a disgrace that Canada extended its copyright terms. It is a double disgrace that it did so retrospectively. It is an *unforgivable* disgrace that it did so after decades of evidence from the disastrous American experiment. **We watched our southern neighbours fling themselves off the Empire State Building and were inspired to throw ourselves off the CN Tower.**

Recommendations: Making the Best of a Disgraceful Situation

Having allowed itself to be arm-twisted into a disastrous copyright concession at the behest of the malignant narcissist who holds the US record for impeachments, Canada now must decide how to soften the harms of this foolish mistake.

1. Require registration as a condition of retrospective term-extension

This is a no-brainer. The problem of clearing rights to elderly works is a heroically complex, wasteful activity that diverts licensing budgets away from rightsholders and creators to sleuthing lawyers. The

relationship of the age of a work to the obscurity of its title is exponential. The US experience tells us that extending copyright will create works of sufficiently murky title that they will slip from our memories before they slip out of copyright.

Copyright term extension is meant to incentivise new, energetic action by rightsholders to market their works. If an author's estate can't be bothered to fill in forms of the sort that rightsholders *already complete every single year* for public lending rights and other collectively administered rights, then they are unlikely to be engaged in that energetic renewal of the Canadian works of the first half of the previous century.

Term extension isn't meant to give creators' descendants a winning forgotten lotto ticket recovered from behind the sofa cushions ("Great-grampa's one-act play got discovered by Netflix! We're goin' to Disney World!") - it's a bid to reinvigorate the market for these older works. If a prospective seller can't even be bothered to identify themselves as the vendor for their product, then they're not in business at all.

2. Collectively administer retrospective rights

Collecting societies are unholy messes, **but they don't have to be**. There's no reason we can't have a collecting society that: a) cannot lobby; b) cannot pay excessive executive salaries; c) must publish and share registries with foreign counterparts; d) must publish, without restriction, all of its accounts in realtime; and e) must use unattributed revenues *solely* to improve its attribution systems. A statutorily created collecting society that administered retrospectively extended copyrights could solve some of the attribution/orphan works problems the Americans are suffering through.

3. Whatever you do, make registration free

There is no rational basis for INDU to charge Canadian creators \$50 to fill in a web-form and click submit. I know this is a formal submission to the Canadian government and I should use formal language here, **but seriously, give me a break**. The actual charge for submitting a web-form should be \$0.00. If you think copyrights should be treated as property so that efficient markets for them emerge, then you need an easy means for buyers and sellers to discover one another. I've heard Canadian arts ministers and bureaucrats from all parties extol the importance of creativity to Canada's economic and cultural health. Allocate a one-time budget grant to build this system and then use the existing maintenance budget to maintain it.

4. Registration is compatible with Berne

The consultation paper notes that "While limitations on enforcement of copyright linked to registration are not unprecedented, they do not appear to be the norm internationally." This is technically true, but it elides some pretty salient particulars: the US – that is to say, the trading partner that instigated this change to Canadian copyright, and that is also the world's most successful copyright exporter – has a enforcement-linked registration requirement. **This is literally the only good thing about the US copyright system**, and if Canada is going to slavishly plagiarise all of the US system's worst aspects, we should at a minimum adopt its sole mitigating practice. Registration lets copyright buyers locate copyright sellers. Not having a registration system is of sole benefit to intermediaries who unravel snarled titles to free-floating works whose ownership cannot be established. If you want a copyright system that generates payments from the users of works to the creators of works, you should do everything in your power to create registries and provide access to them.

Conclusion

Canada should not have granted any term-extension (retrospective or prospective) in the CUSMA negotiation. The fact that we did so is one of the most compelling pieces of evidence in favour of Donald Trump's otherwise laughable boasts to be a "great negotiator" who gets "the best deals."

We were the suckers at that poker table.

But now it's time to deal with our losses. This government sold Canadians out to US industrial monopolists. It can't undo that now (though it should try). What it *can* do is mitigate the harms from its foolish mistake:

1. Require registration (but reform the registration system so that it's free).
2. Collectively administer rights (but reform collecting societies so they serve artists)
3. Drop the pretense that linking extended copyright to registration is aberrant behaviour (if it's sauce for the American gander, it can be sauce for the Canada goose).

Sincerely,

A handwritten signature in black ink, appearing to read 'Cory Doctorow', written in a cursive, slightly slanted style.

Dr Cory Doctorow (h.c.)