



March 30, 2021

Attn: Innovation, Science and Economic Development Canada

RE: Implementation of Canada's copyright term extension

The Council of Post-Secondary Library Directors, British Columbia (CPSLD) and the BC Open Education Librarians group (BCOEL) are writing in response to Canada's public consultation regarding implementation of the copyright term extension required by CUSMA.

CPSLD is an association representing the library directors of not-for-profit post-secondary education institutions in British Columbia. BCOEL is a community of practice for librarians who support open education initiatives in higher education. We are writing in partnership to:

1. express our intersectional perspective as administrators and practitioners regarding the impact of the term extension on universities, colleges, and institutes, and;
2. provide recommendations for mitigating the negative effects of the term extension on the communities we serve.

The Supreme Court of Canada asserts that the purpose of Canada's copyright regime is to maintain a balance between user and creator rights.¹ A robust public domain is part of this balance, as it supports users and creators alike.

The public domain supports teaching, learning, and research by facilitating digital access to works – the need for which has never been more apparent than during the COVID-19 public health crisis. To this point, we offer an illustrative and representative example from one B.C. college. When the institution quickly transitioned to fully online instruction in March 2020, an Anthropology instructor and their students were unable to access the library's print copy of Canadian ethnographer and folklorist Marius Barbeau's *Tsimshian Narratives*, which was required for a major course assignment. Under the current term of copyright protection, Barbeau's works entered the public domain on January 1, 2020, allowing the library to scan a substantial excerpt on behalf of the instructor. This use would have not been possible under the extended term of copyright protection, instead requiring the instructor or institution to reach out to the rights holder for permission. In such instances, rights holders are often unlocatable, unresponsive, or slow to reply, leaving students and instructors in limbo. A fulsome public domain supports good pedagogy by allowing instructors to respond to changes in the educational landscape in an agile manner.

¹ *Théberge v. Galerie d'Art du Petit Champlain Inc.*, 34 Supreme Court of Canada. (2002). <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1973/index.do>. See paragraphs 30 and 31.

The public domain also spurs creation, both within and beyond the walls of the academy. We have seen students as creators use copyright-expired works in brilliant and sometimes unexpected ways: to make documentary films from historical footage, write *centos*,² and even co-author an anthology of early American literature that is now freely available online for all to use.³ These benefits extend to the commercial sector as well. During the statutory review of the Copyright Act, Canadian-owned independent publisher Broadview Press spoke against the copyright term extension, arguing that a strong public domain encourages creation of competing editions of literary classics “that can often be of immense cultural and pedagogical value.”⁴ At the time of the review, more than half of Broadview’s publications were Canadian authored. These creative activities will stall under CUSMA, as citizens wait an additional twenty years for new works to enter the public domain.

CPSLD and BCOEL believe that the best way to preserve a balanced copyright regime in the context of term extension is by way of the registration system proposed by the prior Standing Committee on Industry, Science and Technology [INDU Committee] in its report for the statutory review of the Copyright Act; it writes:

The Committee believes that requiring rights-holders to register their copyright to enjoy its benefits after a period equal to the life of the author plus 50 years would mitigate some of the disadvantages of term extension, promote copyright registration, and thus increase the overall transparency of the copyright system.⁵

ISED’s Consultation Paper⁶ raises a number of concerns about the approach suggested by the INDU Committee, including “the costs that would be borne by copyright owners and the duplication of administrative efforts that might result.” Since the Sonny Bono Act (1998) extended the term of copyright protection in the United States, economists have had twenty-three years to study the economic impact of these measures. Synthesizing research by leading economists, Jennifer Jenkins, Director of Duke University’s Center for the Study of the Public Domain, explains that less than 1% of works are commercially valuable after the life +50 term of copyright protection.⁷ As such, it is likely that only a small set of rights holders would be motivated to register for an additional twenty

² Poems composed entirely of passages taken from other authors in a new form or order.

³ Robbins, T. (Ed.). (n.d.). *Open anthology of earlier American literature*.

<https://press.rebus.community/openamlit/>

⁴ Broadview Press. (2018, April 9). *Brief to the 2018 Copyright Act Review*.

<https://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR9762443/br-external/BroadviewPress-e.pdf>

⁵ Canada, Parliament, Senate. Standing Committee on Industry, Science and Technology. (2019, June).

Statutory review of the Copyright Act: Report of the Standing Committee on Industry, Science and Technology. 42nd Parl., 1st sess.

<https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf>

⁶ Innovation, Science and Economic Development Canada. (2021, February 11). *Consultation paper on how to implement an extended general term of copyright protection in Canada*.

www.ic.gc.ca/eic/site/693.nsf/eng/00188.html

⁷ Geist, M. (Host). (2021, March 1). Jennifer Jenkins on what the copyright term extension could mean for Canada [Audio podcast episode]. In *Law Bytes*. <https://www.michaelgeist.ca/2021/03/law-bytes-podcast-episode-78/>

years of copyright protection –namely, corporate entities with large repertoires of commercially successful works.⁸ These corporations are well-equipped to manage administrative processes and cover registration costs which, to date, have been nominal for rights holders.⁹

The Consultation Paper also states that the approach recommended by the INDU Committee raises serious questions in terms of Canada's obligations under international treaties, such as the Berne Convention. However, various legal scholars assert that these concerns are unfounded, provided that Canada meets baseline copyright standards set out within these agreements (i.e. life +50 years as the minimum term of copyright protection) without the imposition of formalities such as registration.¹⁰ In fact, Maria Pallante, then Register of Copyrights of the United States and Director of the U.S. Copyright Office, proposed a similar model in 2013:

Perhaps the next great copyright act could take a new approach to term, not for the purpose of amending it downward, but for the purpose of injecting some balance into the equation. More specifically, perhaps the law could shift the burden of the last twenty years from the user to the copyright owner, so that at least in some instances, copyright owners would have to assert their continued interest in exploiting the work by registering with the Copyright Office in a timely manner (107). And if they did not, the works would enter the public domain (108).^{11 12}

Limitations on enforcement of copyright linked to registration may not currently be the norm internationally, but this does not preclude the INDU Committee's recommendation. Canada is no stranger to forging its own way forward with copyright. We see this in Option 5 of the Consultation Paper, which proposes a "made-in-Canada" exception that permits libraries, archives, and museums (LAMs) to use a work 100 years after its creation. Dr. Michael Geist explains that "Canada led by example" with the 2012 Copyright Modernization Act, "providing models for other countries on issues such as the notice-and-notice system, protection for non-commercial user generated content, caps on statutory damages for non-commercial infringement, and the enabler provision to support

⁸ Nair, M. (2021, February 15). Term extension -- redux. *Fair Duty*.

<https://fairduty.wordpress.com/2021/02/15/term-extension-redux/>

⁹ As the Consultation Paper notes, rights holders currently pay a \$50 fee to register a work or other subject matter online with the Canadian Intellectual Property Office (CIPO).

¹⁰ Knopf, H. (2021, February 25). February 25 2021 online discussion about CDN Government Consultation paper on how to implement an extended general term of copyright protection in Canada. *Excess Copyright*. excesscopyright.blogspot.com/2021/02/february-25-20201-online-discussion.html

¹¹ Pallante, M. (2013). The next great copyright act. *The Columbia Journal of Law & the Arts*, 36(3), 315-344. https://www.copyright.gov/docs/next_great_copyright_act.pdf

¹² *Ibid.* Regarding treaty obligations, Pallante explains: "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. See Berne Convention for the Protection of Literary and Artistic Works, *supra* note 2, art. 7. 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."

enforcement.”¹³ Term extension provides another opportunity for Canada to design a copyright regime that, to use Geist’s turn of phrase, better reflects Canadian copyright values.

In addition to the registration system recommended by the INDU Committee, CPSLD and BCOEL endorse Option 3 from the Consultation Paper, which permits non-profit LAMs to use orphan and/or out-of-commerce works by default, without being required to first obtain a licence from the Copyright Board. However, we suggest broadening the scope of Option 3 to encompass a wider range of users with public interest missions, including educational institutions. This aligns with the EU directive on orphan works, which the Consultation Paper cites. The EU directive applies to publicly accessible libraries, educational establishments and museums, as well as archives, film or audio heritage institutions, and public-service broadcasting organisations.¹⁴ From CPSLD and BCOEL’s perspective, expanding Option 3 ensures that users who conduct essential work outside of libraries on post-secondary campuses (e.g. curriculum developers, instructors, teaching assistants, and research assistants) can also make nimble use of orphan and out-of-commerce works to serve the public good.

The Consultation Paper notes that implementing term extension without any accompanying measures “would not close the door to the possibility of future reforms to address the concerns raised by some stakeholders in relation to access to orphan works and out-of-commerce works.” However, to extend the term of copyright protection without accompanying measures, as advocated by groups representing rights holders during hearings in the lead up to the ratification of CUSMA, tips the scales and puts users in the unfavourable position of having to lobby for future legislative reform. As such, it is imperative that Canada strikes the right balance now.

CPSLD and BCOEL believe that the INDU Committee’s recommendation presents the best path forward for users and creators alike. A uniquely Canadian registration system will allow rights holders to benefit from an additional twenty years of copyright protection, while enabling works that have run their commercial course to commence a second lifecycle in the public domain. It respects Supreme Court jurisprudence on users’ rights,¹⁵ honours creators’ intellectual and cultural contributions, and, in turn, preserves the balance that has come to characterize the Canadian copyright regime.

Sincerely,

The Council of Post-Secondary Library Directors, British Columbia (CPSLD) – <https://cpsld.ca/>
The BC Open Education Librarians Group (BCOEL) – <https://bcoel.ca/>

¹³ Geist, M. (2021, February 12). Afraid to lead: Canadian government launches timid consultation on implementing copyright term extension. <https://www.michaelgeist.ca/2021/02/afraid-to-lead/>

¹⁴ Directive 2012/28/EU. *Certain permitted uses of orphan works*. European Parliament, Council of the European Union. <http://data.europa.eu/eli/dir/2012/28/oj>

¹⁵ See *Théberge v. Galerie d’Art du Petit Champlain Inc.* (2002), *CCH Canadian Ltd. v. Law Society of Upper Canada* (2004), *Alberta (Education) v. Canadian Copyright Licensing Agency* (2012), *Society of Composers, Authors and Music Publishers of Canada (SOCAN) v. Bell Canada* (2012), *NS Keatley Surveying v. Teranet* (2019).