

Submission

to the

Consultation on how to implement Canada's CUSMA commitment to extend the general term of copyright protection

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Table of Contents

1.Introduction.....	2
2.Wrong Direction.....	2
3.No Retroactive Changes.....	3
4.Impossible Licensing.....	4
5.Proposed compromise:.....	5
6.Proposed mitigation:.....	5
7.Sexual Discrimination and Arbitrary Protection.....	6
8.Orphan works.....	7
9.Thank you.....	8

1. Introduction

My livelihood depends on copyright. I professionally write, take pictures, and, at times videos. At the same time, my livelihood depends on easy access to pre-existing works.

Virtually all of my works are sold abroad. That helps reduce Canada's trade balance deficit.

I would like Canada and Canadians to lead in creative output.

To achieve that, **copyright protection terms must be shortened.**¹

2. Wrong Direction

Death +50 years does not support any creator, and extending that by another 20 years is an insult to any creative Canadian. Also, the proposed extension ignores the wonderful fact that life expectancy has risen by more than ten years over the last 50 years.

Copyright protection periods should be shorter than they are now, and generally not extend beyond the death of the author.² Copyright is a splendid incentive to make creative citizens publish their creative works. Once a person is, the incentive is useless. They will not be creative any more. At the same time, continued copyright protection prevents citizens to build upon a dead creator's work.

In any case, the **cost of licensing (and associated penalties for copyright violations) should diminish with age of the protected work.** After all, the damage inflicted by violating a copyright 10 years before it's expiry is generally less grave than violating it 110 years before it's expiry, when the work is only a decade or two old.

¹ For new works.

² Works published posthumously should enjoy limited protection to make it possible to earn back associated expenses.

3. No Retroactive Changes

If copyright terms were to be extended, they must apply to newly created works only.

Currently existing works should follow the rules under which they were created and under which related contracts, agreements, or arrangements have been made. The government should not interfere in these business and artistic relationships by changing the goal posts of public domain after the fact.

No works currently in the public domain must be taken from the public domain.

Long copyright terms make using works in education not only more expensive but much more difficult.

4. Impossible Licensing

Often the problem is not paying for a license, but obtaining a license in the first place.

As a fun project, I recently wrote new lyrics to an old blues song, "Corinne, Corinna", first recorded in 1928. The creator, Bo Carter, died in 1964.

I want to record his blues chords with my new lyrics and upload that to the internet, for all the world to hear. The song's music is out of copyright in Canada, but, for example, not in the US – because there, copyright extends 70 years beyond the author's death.

I would have to wait until 2035 to publish my song worldwide. As my song is COVID-related, it will be of no interest in 2035. The rights to the original song are administered by Sony/ATV. They even claim that the melody (!) is under copyright until the end of 2043 (or 2063 under a Death +70 years rule). As it happens, Bo Carter's publishers registered themselves as co-authors of the lyrics, and the last person in that group passed away in 1993.

The idea that the lifespan of a co-author of the lyrics would result in longer copyright for the music is misguided. But I have neither the financial means nor the interest to fight Sony/ATV over this in court. I just want to share my work with the public. So I simply asked Sony/ATV for permission. **How hard could it be to get a license?**

Very hard, as it turns out. First, I was ignored. Only with the help of a contact in the music industry, I was able to get Sony/ATV's attention. They asked me to submit my lyrics for review. Fair enough. However, they have been reviewing my lyrics for **more than ten months now**. **No license has been granted** for a simple, non-commercial project.

In 2063, I will no longer need Sony/ATV's permission. By that time, however, I will likely be dead myself. So the result of these overly long copyright terms is that my **song will never be recorded and never be published. It is a loss-loss-loss game.**

And: The **lengthy copyright terms have killed all incentive for me to produce** more lyrics to pre-existing works, although I have a knack for that. The hurdles are just too big.

I don't think my songs would have made millions for anyone. But they would probably have made a few people smile and sing along – and humanity needs every bit of happiness we can get. Alas, copyright. The **long terms do more harm than good.**

5. Proposed compromise:

Change the bill from Death +70 years to Death +7 years, applicable to all newly created works. Leave copyright terms for pre-existing works as is.

6. Proposed mitigation:

Where works have more than one author/creator, Canada should calculate the expiry from the first death in the group, not from the last death. That would mitigate the negative effects of overly long copyright protection terms.

In any case, remuneration (and related penalties for copyright violation) should be reduced accordingly. For example, if there are three authors, and one has died 75 years ago but the other two only 45 years ago, only 2/3 of the remuneration should be due to the creators (penalties for copyright violations should be reduced accordingly).

7. Sexual Discrimination and Arbitrary Protection

Using the death of an author as the starting point to calculate the copyright expiry is arbitrary and results in sexual discrimination.

The Death+-rule is arbitrary by providing vastly different protection without valid reason. A brilliant work gets a bit over 50 years (or 70 years) of protection if the creator is hit by the proverbial bus the day after creating her work. However, if she lives for another 70 years, the same work would get over 120 years (or 140 years) of protection – double the length! Yet there is no reason for this discrepancy. It should not be a random bus driver who determines the length of copyright protection of a work of art.

Women have considerably higher life expectancy than men. As a result, men's works generally enter the public domain earlier than women's works. That leads to a higher use of men's works in education, LAMs (libraries, archives, and museums), and as basis for new works. As a result, women will find themselves underrepresented in popular art and culture.

At the same time, grandchildren of creative men will reap fewer royalties than grandchildren of creative women, simply because the payouts stop earlier for men's works.

Both these effects result in **discrimination based on the sex of the creator**.

Likewise, if a creator has a disability connected with lower life expectancy, for example cystic fibrosis, that family will be substantially short changed. Works by creators with disabilities are, on average, no better or worse than other creators' works. Why add shorter copyright protection to the already harsh genetic sentence of a shorter life expectancy?

Canada should actively work towards changing all international treaties who use the death of the creator as the starting point for calculating copyright expiry. It is unfair, discriminatory, and violates s. 15 of the Canadian Charter of Rights and Freedoms. Starting point should be the creation of the work.

8. Orphan works

It should be much easier (and faster!) to obtain licenses for exploiting Orphan Works. It should be free or at least **cheaper, if the use is transformative in a wider sense (such as new lyrics written to an orphaned tune, or a new arrangement created for an orphaned song, a new play based on an orphaned short story, etc.).**

Canada's Orphan Works regime should indeed **include unpublished works and published out-of-commerce works**. If copyright holders withhold their works from the public by no longer publishing them, they should not benefit from copyright protection. Copyright exists as an incentive for publishing creative works, not for holding them under lock and key for prolonged periods of time.

And, yes, the limitation period to claim remuneration should be reduced to three years to align with the general limitation period in the Act.

Also, non-profit LAM's should be allowed to use orphaned and/or out-of-commerce works by default, without being required to first obtain a licence from the Copyright Board of Canada.

Likewise, non-profit **LAM's should be allowed to use works during the last 40 years of protection** after death of the author. (Limiting that to 20 years would not nearly offset the negative consequences of extending copyright protection by another 20 years.) In addition, non-profit LAMs should be **allowed to use a work 100 years after its creation**. In effect, it would be either 100 years after creation or during the last 40 years of protection, whatever comes earlier.

Commercial use licenses should also be available through the Copyright Board of Canada for orphan works and commercial out-of-commerce works. However, the Copyright Board should consider if the intended use may contravene the absent creator's political or religious beliefs. For example, if the intended use is connected to furthering a political cause the creator would have taken offence with, no license should be granted.

9. Thank you

Thank you for the opportunity to contribute to this consultation.

Any copyright term extension must apply to newly created works only.

In any case, no works currently in the public domain must be removed from the public domain.

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Whitehorse, Yukon, March 10, 2021

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