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To: copyrightconsultation/ consultationdroitdauteur (PCH) <copyright-consultation-droitdauteur@canada.ca>

Subject: Consultation on how to implement an extended general term of copyright protection in Canada

Hello,

I would like submit a response to the government's consultation on how to extend copyright terms to 70 years after the death of the creator, as required by CUSMA.

I am a documentary filmmaker based in Vancouver. I both create and make use of copyrighted works as part of my profession. I care deeply about Canadian culture, which copyright is ostensibly intended to protect and nurture.

Before I respond to the question of what limitations should be placed on the extension of the general copyright term to life + 70 years, I would like to make some pointed observations:

1. I am currently nearing 40 years old. If I'm lucky, I expect to work for another 25-30 years, and live for another 40. Assuming I do, the proposed copyright extension for works I create in my lifetime will not take effect until sometime around the year 2110.
2. Extending the general copyright term is immaterial to my ability to make money off of my work. An additional 20 years of copyright protection that takes effect 50 years after my death does not benefit me in any way. I'll be dead long before I can take advantage of it.
3. In the same vein, an additional 20 years of copyright protection is immaterial to the commercial negotiations I make with the distributors and broadcasters that exploit my work. The expected commercial life of the documentaries I create is 10 years at best. It's a bonus if my work has a commercial life beyond that time frame, but no distributor I'm aware of makes a business plan for a documentary that counts on receiving revenue in the year 2110. An additional 20 years of copyright protection that takes effect 50 years after my death does not benefit them in any way. They'll be dead long before they can take advantage of it.
4. With the above points in mind, I hope it is clear that the proposed extension does not benefit *current* creators like me in any way. It is unlikely that the currently proposed extension will be in force unchanged by the year 2110. Perhaps it will be, but more likely a different regime will be in place, as legislation, including copyright, is typically revisited every few decades. It is quite implausible that any current stakeholders are making business decisions based on a potential benefit that is 90 years in the future — no one is planning that far into the future, and trying to do so would be foolish.
5. Thus, the primary benefits of the extension accrue not to current creators, but to the owners of works that were created at least 50 years ago (1970), but given that most works are created mid-life, the average is more likely in the ballpark of 90 years ago (1930).
6. The percentage of copyrighted works that have a commercial life lasting 90 years is exceedingly small — 1% is likely an overestimate based on percentages of books that remain in print at the time their copyright expires.

7. Because copyright is automatic on creation, the percentage of copyrighted works that are created for commercial purposes is also very small. The vast majority of copyrighted works are private, unpublished works.
8. For the sake of argument, let's say the percentage of commercial works is 10%. Based on the previous two points, that means the percentage of total copyrighted works that are likely to benefit from the proposed extension is in the ballpark of 0.1%, or one in a thousand.
9. Put another way, this means that 999 out of 1,000 works covered by the proposed extension would likely qualify as "orphan" or "out-of-commerce" works. Obviously, this is a ballpark estimate.
10. The proposed copyright extension has the effect of creating a commercial benefit that is useful for approximately 0.1% of copyrighted works. This benefit comes at the expense of making it harder to access and make use of the remaining 99.9% works.
11. Part of my work as a documentary filmmaker involves researching Canadian history, and re-using the copyrighted works that make up our history and culture in a way that makes them interesting and relevant to present-day audiences. I am a creator of Canadian culture, and that necessarily means that I build on our cultural heritage, much of which is under copyright.
12. The vast majority of the works I re-use in my work are "orphan", "out-of-commerce", or "noncommercial" in nature. The most common type of "commercial" works I use are old newscasts that are primarily factual in nature, but are nonetheless copyrighted and licensed by commercial entities.
13. The costs of clearing copyright — finding out who owns a work, when it was created, whether it is under copyright, and whether I can license it — form a significant portion of the time and money I spend creating. This is particularly true of the time involved in tracking down and clearing non-commercial works that are not owned by professional copyright holders.
14. Due to the fact that Canada's cultural industries were nascent and small until the rise of CanCon in the 1960s, the vast majority of commercially significant copyrighted works that stand to benefit from the proposed extension (i.e. those created in the first half of the twentieth century) are not Canadian in origin. Most are likely American, British, or French.
15. This means that the primary benefits of the proposed extension are likely to accrue to non-Canadian entities — there are simply far more foreign works dating from the first half of the twentieth century that are commercially viable than there are Canadian ones.

Aside from it being a requirement of CUSMA, the stated benefit of the proposed extension is:

"Canada's implementation of its commitment to extend its general term of protection to life-plus 70 years will provide certainty that Canadian rights holders will benefit from this extended term in each of these countries^{[Footnote 17](#)}, contributing to a more level global playing field and providing new export opportunities for Canadian creative industries and Canadian-made content."

Based on my observations above, I hope the following is clear:

- The number of Canadians, and Canadian works that can benefit from the proposed extension is miniscule. There simply are not many Canadian works produced in the first half of the twentieth century that have commercial value.
- I would reiterate that the expected benefit for *current* creators is in the ballpark of 90 years in the future, and is not a relevant factor in either creating or commercializing works created today. There simply are not very many "export opportunities for Canadian creative industries and Canadian-made content" that are enabled by the proposed extension, because the works that primarily benefit were created nearly a century ago, and most of those works are not Canadian.
- A "more level global playing field" in fact removes a competitive advantage that Canadians have benefited from up until now: Creators like me have more certainty about whether we can use works from creators who have been dead for 50-70 years, and we do not bear the time and labour costs of clearing them. Creators in countries that have adopted life+70 must bear these extra costs.

In short, although it is clear that Canada is required to adopt some form of extension to meet its obligations under CUSMA, compliance with CUSMA appears to be the main benefit that Canadians are getting; on its own merits, the extension is arguably detrimental to Canadians, and especially Canadian culture, on the basis of the additional costs it imposes on Canadians who want to access the vast majority of non-commercial copyrighted works that will become less accessible during the proposed extension. This is true whether Libraries, Archives, and Museums (LAMs) are bearing those costs, or individuals who simply lose access entirely because the LAMs cannot bear those costs.

I hope it is clear that I disagree with the premise that Canadians are getting anything real of value from a copyright extension. As a Canadian creator, I do not see how I benefit from the proposed extension, despite the fact that the policy is being promoted in the name of creators. I do, however, see cost to me, in that I will have to put more time and money into researching and clearing the old works that are in my work. For some projects, perhaps this cost would be negligible. But for others — particularly those that dig into Canadian history and culture — they could be significant enough to influence whether or not I am able to make a project.

As I see it, the proposed extension offers a benefit to the institutions that happen to own copyright in the most recognizable works of the early twentieth century — most of which are foreign — at the cost of present-day creators, in exchange for a lottery ticket that can't be redeemed until 50 years after I'm dead. The extension is a transfer of wealth from the present to the past, and it prioritizes access to the 0.1% of commercially viable works at the expense of the remaining 99.9% of our culture. This is the opposite of supporting Canadian culture.

With that in mind, I would like to offer my recommendation that Innovation, Science, and Economic Development Canada adopt the original INDU recommendation of a registration system for works to obtain copyright protection beyond 50 years after the death of the creator. Why? Because this option will cost creators, libraries, archives, museums, and Canadians the least when we want to access the 99.9% of works that are our cultural heritage.

This vast trove of cultural works are not economic to monetize. For out-of-commerce and non-commercial works, that is true by definition. For orphan works it is true due to market failure — any business that cannot be found by its customers is obviously not an economic business. Any licensing or clearance regime that is enacted to fulfill the fiction that such works are economically valuable (as opposed to culturally valuable) is almost certain to lose money — for the copyright owners as well as the licensees. The overhead and carrying costs of making such ancient works available is not worth the minuscule demand for those works. They are far more valuable to Canadians when there are as few barriers as possible to their use. They are worthless without the work that creators, libraries, archives, and museums do to re-use and re-contextualize them for modern Canadians.

In truth, it is the 0.1% of commercially valuable works that are the exception, and a registration requirement would codify that exception into law. A \$50 registration fee and a few minutes filling out a registration form are a small cost to bear for a work that is expected to produce a commercial return, and in aggregate, \$50 for each of the 0.1% of commercially significant works is a far, far smaller economic cost than the time and labour costs imposed by needing to clear the 99.9% of uneconomic works.

A registration system buys clarity: There is a definitive way of knowing which works must be cleared, and who they need to be cleared with. Because of that clarity, the orphan work problem goes away, and no difficult definitions are needed to determine which works are out-of-commerce. Copyright holders can determine that for themselves, and if a work is commercially viable, a \$50 fee is no hardship. Such a system will simultaneously satisfy our international obligations, ensure that what economic opportunities there are can be made use of, and most importantly, it does not burden the 99.9% of non-economic works with the cost of allowing the 0.1% to be sold.

I understand that there is concern that requiring registration for the 20 year extension may fall afoul of the prohibition of 'formalities' within the Berne Convention and TRIPS. I urge the committee to examine this concern closely and consult more widely. I have had discussions with numerous lawyers and academics who cast doubt on this position. I am told that such formalities can only apply to the terms mandated in those agreements, i.e. life + 50 years.

The consultation document notes that "*limitations on enforcement of copyright linked to registration are not unprecedented, [Footnote 61](#) they do not appear to be the norm internationally*". However, it is also noted that "*Approximately 80 countries have moved to a term of life-plus 70 years or longer*", which means that life + 70 is **not** an international norm. The Berne Convention has been adopted by at least 179 countries, which means the 80 countries that use life + 70 are in the minority, and cannot be considered an international norm.

The life + 70 standard is being adopted to comply with a US-driven agreement (CUSMA), and as the consultation document notes, the US imposes formalities on the final 20 years of the copyright term. So, the primary proponent of the minority "norm" that we are adopting already includes formalities in their domestic law. I do not see why Canada should adopt a minority policy such as life + 70, and then decline to consider a registration system because it's "against

the norm", especially when other users of the minority policy do in fact impose formalities on the final 20 years of the copyright term.

While I'm not a lawyer, there are clearly differences in legal opinions here, so I urge you to base your policy on the basis of what is best for Canadians and Canadian culture, not on the most conservative legal opinion. A registration system is the best way to mitigate the costs that life + 70 will impose Canadian creators like me, and LAM organizations that largely operate in the public interest. Avoiding such a system to comply with a "norm" that is legally uncertain is not a good public policy for Canadians. The decision to adopt a registration system should be made on the basis of what is good for Canadians and Canadian culture, and avoiding a registration system will impose costs on creators in the form of time and money spent on clearances, and on Canadians due to lack of access imposed by the limited resources available to LAMs to bear those clearance costs.

Of the "official" options, "Option 3 — Permit the use of orphan works and/or out-of-commerce works, subject to claims for equitable remuneration" comes closest to mitigating the problems of copyright extension. Permitting use by default mostly mitigates the overhead of trying to clear uneconomic works, while still permitting owners of commercial works to negotiate licenses. However, it would need to be modified to allow creators — and ordinary Canadians — access to our cultural heritage, and the non-profit restriction seems unnecessary. Additionally, it allows the value created by creators, libraries, archive and museums to be appropriated by copyright owners. In situations where very old works regain popularity and commercial viability, it is likely that the efforts to re-use and re-contextualize are responsible for the new value that is created, not any value inherent in the work itself.

In sum, Option 3 has its merits, but is still inferior to a registration system that would provide more certainty about what does and doesn't need to be licensed, impose fewer costs on non-commercial works, and be cheaper to implement. If "following international norms" is the only benefit to avoiding a registration system, that benefit is not tangible enough to outweigh the benefits of creating one. If the Berne Convention is satisfied by a copyright term of Life+50, there is no reason to think that Berne's requirements should apply to any protection offered past that term.

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All the best,

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