



EFF response to the consultation on how to implement an extended general term of copyright protection in Canada

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The Electronic Frontier Foundation is among the leading non-profit organizations defending civil liberties in the digital world. Founded in 1990, EFF champions user privacy, free expression, and innovation through impact litigation, policy analysis, grassroots activism, and technology development. Our unique team of leading technologists, activists, and attorneys work to ensure that new technologies enhance and protect rights and freedoms around the world.

We welcome the initiative of the Canadian government to seek the views of stakeholders and the public on how to implement Canada's CUSMA commitment to extend the general term of copyright protection. The consultation paper states that Canada's term of copyright protection could be extended without accompanying measures, with one or a combination of the measures presented in this document, or possibly with alternative measures raised by stakeholders.

Based on our deep experience with copyright policy and law in the U.S. and abroad, we know that an extension of the general term of copyright protection without accompanying measures would create harms for creativity, culture, education and innovation and increase the number of orphan works. In the U.S., term extension without registration has inhibited the sharing and re-use of untold numbers of cultural works, with little if any corresponding benefit to rightsholders. In an era when users – intentionally or not, for-profit or not – are creating millions of copyrightable works every day, increasing the monopoly term by 20 years – in effect, based on average life expectancy for Canadians, granting monopoly protection for 150 years – is not necessary to fulfill copyright's basic purpose and will actually undermine it. Having nonetheless bound itself to doing so, the government should indeed take steps to mitigate the harm of term extension by, at a minimum, adopting a registration requirement as suggested by the INDU committee.

1. Copyright Expansions: Not Needed and Negative Implications

The international standard for copyright protection of life of the author plus 50 years, as set out in the Berne Convention,¹ is supposed to provide an “incentive” for people to generate material that can be enjoyed by the public. But economists and law scholars who have studied this rationale

¹ <https://www.wipo.int/treaties/en/ip/berne/index.html>.

have found that “the optimal length of copyright is at most seven years.”² Long copyright terms are a poor way to compensate creators, who generally receive low royalties from their works. With respect to music, for example, the Cambridge University Centre for Intellectual Property and Information Law has reported that the benefits of “any extended term would go to record companies rather than performers: either because the record company already owns the copyright or because the performer will, as a standard term of a recording agreement, have purported to assign any extended term that might be created to the copyright holder.”³

Long terms are also a poor way to serve copyright’s purpose. The public domain is our cultural commons, “the raw material from which we make new inventions and create new cultural works.”⁴ As such, it is an integral part of the copyright bargain, a vehicle through which copyright’s limited monopoly ultimately serves its purpose: to promote the progress of science and the useful arts. By shrinking that cultural commons and thereby making it expensive and risky for authors, filmmakers and other creative types to make new works from what came before, term extensions impede the public interest.

The Canada-United States-Mexico Agreement (CUSMA) goes into the wrong direction by unnecessarily adding another 20 years of protection to the current international standard. It will not “encourage investment in the creation, acquisition and commercialization of works” as suggested by the Government of Canada.⁵ Instead, an extension will be detrimental to creativity and innovation and costly to Canadians, who will have to pay for works that were foreseen to come into the public domain. As this consultation recognizes, it will also run afoul the objective of ensuring the public access to orphan works: The longer the general term of copyright protection, the higher the number of works that cannot be matched with their rightsholders.

The “harmonization” of Canada’s general term with that of certain trading partners will also fail to bring a notable competitive advantage. The Hollander-study commissioned by Industry Canada demonstrates that the economic value of a term extension to the recording industry was not significant and comes with the negative effect of an outflow of royalties from Canada to other countries.⁶ An extension also disregards other economic and legal studies, which focus on the importance of a rich commons for innovation and creativity.⁷ Research conducted to stress-test the hypothesis that exclusive rights are necessary to encourage publishers to invest in making older works available demonstrates that “works are actually less available where they are under copyright than where they are in the public domain. Also “exclusive rights do not appear to trigger

² Gowers Review of Intellectual Property, p. 50 (Dec. 2006) citing Growth and Intellectual Property, Boldrin M. and Levine D., 2005.

³ *Review of the Economic Evidence Relating to an Extension of Copyright in Sound Recordings*, Centre for Intellectual Property and Information Law (2006).

⁴ James Boyle, *The Public Domain: Enclosing the Commons of the Mind* 39 (2008).

⁵ <http://www.ic.gc.ca/eic/site/693.nsf/eng/00189.html> (last accessed 7 March 2021).

⁶ Report by A. Hollander (Department of Economics, Université de Montréal), prepared for Industry Canada.

⁷ <https://www.eff.org/deeplinks/2012/08/all-nations-lose-tpps-expansion-copyright-terms>.

investment in works that have low commercial demand.”⁸

2. Registration Requirement: Needed to Mitigate the Harm of a Copyright Extension

With the above in mind, EFF supports the INDU committee recommendation to ensure that copyright in a work cannot be enforced beyond the current term unless the alleged infringement occurred after the registration of the work. We agree with the committee that such a requirement would “mitigate some of the disadvantages of term extension, promote copyright registration, and thus increase the overall transparency of the copyright system.”

In general terms, a registration requirement would help ensure a fair and pragmatic⁹ balance between the interests of copyright holders in exploiting the work and the interest of the general public, which would like to see works entering into the public domain. Many copyright owners will have no interest in, or need for, the additional twenty years; limiting the additional restriction to those works in which someone has a vested interest, and releasing the rest into the cultural commons just makes sense as a matter of good copyright policy.

A registration requirement would also help enhance access to works which would otherwise become orphans. Orphan works exclude access by the general public because of existing copyright protections while also failing to bring any economic benefits to the unknown copyright holders. In the U.S., the persistent problem of orphan works is due mostly to three dangerous aspects of U.S. law: extremely long terms, high statutory damages, and a lack of formalities for copyright protection.¹⁰ By requiring registration for the new additional term, Canada can partially avoid at least one of these problems.

In terms of commitments under international law, EFF does not believe that the introduction of a registration requirement would undermine the objectives sought by the Berne Convention. A registration requirement give rightsholders a term extension, while ensuring that many other works enter the public domain at the international standard of life plus 50 years as foreseen under the Convention.¹¹ Also, the Convention does not preempt national governments from subjecting the *enforcement* of copyright to certain conditions fulfilled by rightsholders.

Last, a registration requirement is even more necessary in the digital age. As noted, the Internet presents ample opportunities for *all* users to create and to share content at scale, thus also scaling the number of potential orphan works. A system that provides a verifiable record of ownership would benefit creators who wish to exercise their copyright and benefit users, who will be given

⁸ J. Flynn, R. Giblin, F. Petitjean, *What happens when books enter the public domain? Testing copyright's underuse hypothesis across Australia, New Zealand, the United States and Canada* 42 U.N.S.W.L.J. 1215 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3401684 (last accessed 7 March 2021).

⁹ M. A. Pallante, *The Next Great Copyright Act*, The Columbia Journal of Law & the Arts, Volume 36, No. 3 (2013).

¹⁰ <https://www.eff.org/deeplinks/2013/02/orphan-works-problem-time-fix-it>.

¹¹ <https://www.michaelgeist.ca/2019/12/making-the-best-of-a-bad-provision-why-canada-should-work-toward-a-copyright-term-extension-registration-requirement/>.

the option to consult the registry to learn whether a work has fallen into the public domain. A searchable and accessible records of registration is thus a solution that provides legal certainty and ease of use.

3. Other Mitigating Measures

Under 4.1. and 4.2 of the consultation paper, the Canadian government presents several additional options to enable the use of works not currently being commercialized in exchange for remuneration. These options comprise the expansion of Canada's current orphan works licensing regime, the development of a collective license regime, and privileged options for non-profit libraries, archives and museums (LAMs) to use orphan works under certain circumstances.

As an initial matter, we note that while some of these options may facilitate public access to works, none of them are a substitute for a registration requirement. In particular, with the focus on additional licensing options and narrowly defined exceptions, the consultation paper fails to address the issue of how to facilitate the individual use of works and how to ensure the objective of delivering works into the public domain.

That said, EFF supports the introduction of exceptions for LAMs, which should be permitted to use works during the additional 20 years of protection in order to achieve aims related to their public interest missions. In addition, collective licensing may be useful in some cases, such as musical works. EFF agrees with Cory Doctorow, who submitted comments in his personal capacity as an author, that 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 administers retrospectively extended copyrights could solve some of the attribution/orphan works problems the Americans are suffering through.

However, collective licensing is not a universal solution. In the U.S., for example, many uses of orphan works are already lawful under our fair use doctrine. We are not experts in Canadian copyright law, so we simply urge the any licensing scheme must take careful account of other limitations and exceptions.

4. Transposition: Fundamental Rights Impact Assessment

The consultation paper suggests that many Canadian stakeholders have expressed concern that term extension may have negative consequences. We suggest introducing a review clause in the law implementing the CUSMA obligations to evaluate the impact of the extension on fundamental rights, including the impact on freedom of expression and the freedom of the arts. An ex-post impact assessment should be carried out within five years and be accompanied by an obligation to take action to mitigate negative consequences the assessment identifies.