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Hon. F-P Champagne, P.C., M.P., Minister of Innovation, Science and Industry
Francois-Philippe.Champagne@parl.gc.ca
Hon. S. Guilbeault, P.C., M.P., Minister of Canadian Heritage
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Dear Ministers:

Re: Consultation on How to Implement an Extended Term of Copyright Protection in Canada

The following comments are in my personal capacity and do not necessarily reflect the views of any clients of my firm or my firm itself. I offer them *pro bono publico* based upon several decades of experience in the private sector and in Government, which included serving as Canadian Head of Delegation at several WIPO meetings that involved Berne Convention issues. I have also enjoyed long and collegial relationships with several senior US government officials, academic and private sector experts on these matters.

I am writing to Ministers directly and copying the Honourable Minister of Justice, David Lametti, who has great substantive expertise on these issues, since the consultation by your officials has proven to be very unsatisfactory and I believe that this entire situation merits Ministers direct attention.

Preliminary Remarks

1. The consultation process itself is fundamentally flawed. Your officials have provided only one month (which was extended at the very last minute by less than three weeks) to respond to a consultation document that is, frankly, very problematic in terms of the quality of its analysis and the presentation of options. In my four decades of experience, I cannot recall any consultation on anything this important regarding copyright being so questionably handled – except for the non-consultation stealth amendment by Stephen Harper on the eve of the 2015 election hidden in a budget bill as a gift to the American recording industry,

which oddly enough also dealt with gratuitous copyright term extension.[1] The current situation is far more serious and could potentially cause hundreds of millions of dollars annually in unnecessary damage to the Canadian economy and billions on a present value basis going forward.[2] This current consultation is frankly unacceptable.

2. In the Government's press release and at a recent online consultation event held on February 25, 2021, your officials offered a frankly disingenuous rationale for the short one-month deadline. In response to several questions about the short timeline to respond, the repeated answer was that there were other consultations also coming up soon on the "internet of things" and "online intermediaries." I asked what these were even about and why these issues were so urgent, when we are facing a deadline of the end of 2022 to implement a CUSMA obligation that could potentially cost Canadians billions of dollars and negatively affect access to knowledge, innovation, etc. There was no specific answer. The other consultations mentioned were clearly in the nature of "vapor ware" and are thoroughly unnecessary at this time. One might even suspect that, if they happen, they will be a diversionary tactic from more pressing issues.

3. Accordingly, my substantive comments on the consultation document will be short and perfunctory – since I expect you to follow up with a consultation document of suitable quality with a sufficient time period for meaningful consultation with stakeholders

4. Last, but not least, regarding the process, the officials indicated that any legislation might not be a standalone bill. This suggests the possibility of another stealth measure in an omnibus bill with no possibility of meaningful hearings or debate. That would be totally unacceptable and contrary to an explicit campaign promise of this Government.

Comments On The Consultation Document

5. The consultation document is, at the very least, overly simplistic and, at most, very likely wrong in its all but decisive dismissal of the obvious option or requiring registration for the last 20 years of a life + 70 regime. There is no basis whatsoever to support the suggestion by your officials that:

[1] See Michael Geist Blog, May 8, 2015, *Sound of Silence: Why the Government's Copyright Extension for Sound Recordings Will Reduce Access to Canada's Musical Heritage*
[2] Howard Knopf blog, *The Cost of Canadian Copyright Term Extension Capitulation in the TPP - Estimates Based Upon New Zealand Study*, November 17, 2015 https://excesscopyright.blogspot.com/2015/11/the-cost-of-canadian-copyright-term.html

> *The approach recommended by INDU raises serious questions in the context of Canada's international obligations, as well as the costs that would be borne by copyright owners and the duplication of administrative efforts that might result,*[3]

6. You need not take my word for the wisdom of this option, or even that of the other experts who testified to the INDU Committee on this point. You should, however, give utmost consideration to the recommendation of Maria Pallante, former US Register of Copyrights.

7. **Maria Pallante** is the former Register of Copyrights in the US Government. When the Register speaks, the world listens. She is now the **President and CEO of the Association of American Publishers,** an organization not known to embrace the public domain. Nobody would ever suggest that Ms. Pallante is or ever has been a "copyleft" or "user friendly" person. Nor would anyone question her distinguished qualifications and expertise.

8. Here is what Ms. Pallante had to say in 2013 about the final 20 years of the life + 70 concept in a very important paper she published in 2013 while still Register of Copyrights:

> *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]
>
> > *107. If U.S. history with respect to renewal registration of copyright is any indication, very few copyright owners—in this context, heirs and successors in interest rather than the author herself—will actually do so. See U.S. COPYRIGHT OFFICE, STUDY NO. 31, supra note 9, at 220 (stating that, of works registered in 1931–1932, one third of musical compositions, 7% of books and 11% of periodicals had been renewed). In contrast, a 2007 study by Stanford University found that an average of 30.8% of books published between 1923 and 1963 had their copyright registration renewed. See STANFORD UNIV. LIBRARIES & ACADEMIC INFO. RES., '23–'64 IMPRINT COPYRIGHT DETERMINATOR: FINAL REPORT 4 (2007), available at http://collections.stanford.edu/copyrightrenewals/files/FinalNarrative_18Sept07.pdf.*
> > *108.* ***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***

[3] Consultation Document, p. 9

> ***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.* [4] (emphasis added)

9. The consultation document inexplicably does not even refer to Ms. Pallante's important paper. It defies logic that Canadian officials – or any unidentified outside expert retained by them – would disregard such a reliable and preeminent authority whose recommendation can only benefit Canada. Were they unaware of this paper – or did it not suit the Government's agenda? Either way, a solution that is acceptable to the top US copyright official at the time just a few years ago in 2013 should not be dismissed out of hand by Canadian officials with no apparent analysis.

10. Other notable authorities overlooked by your officials include:
    a. Book chapter by Prof. David Lametti, as he then was, (now Hon. David Lametti, P.C., M.P., Minister of Justice) in a 2005 book where he advocates for registration for an extended copyright term (pp. 482, 510, 511, 516)[5]; and,
    b. Posner and Landes (2002)[6]. Judge Posner was one of the most esteemed senior judges in the USA and Prof. Landes a high regarded economist from the "Chicago School". See attached.

11. The elegance, efficiency and simplicity of a registration requirement for the last 20 years of a life + 70 term is this:
    - Works that are not worth protecting will not likely be registered by corporate owners, much less estates of deceased authors, if the estate is still functioning – which will be very rare 50 years after death;

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[4] Maria Pallante, *The Next Great Copyright Act*, The Columbia Journal of Law & the Arts, Volume 36, No. 3 (2013) **https://www.copyright.gov/docs/next_great_copyright_act.pdf** p. 337

[5] David Lametti, Coming to Terms with Copyright, *IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW, pp. 480-516, M. Geist, ed., Toronto, Irwin Law, 2005* *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1758903*

[6] Richard A. Posner & William M. Landes, "Indefinitely Renewable Copyright" (John M. Olin Program in Law and Economics Working Paper No. 154, 2002)

- A government registration system run by CIPO will be simple to search and be authoritative - unlike the private databases, some of which are referred to in the consultation document. For example, Access Copyright has long offered to sell licenses to use apparently public domain editions of the work of Charles Dickens, who died in 1870.[7] That kind of database and record keeping merits condemnation – not consideration;
- The registration system should require payment of a fee, which could be adjusted from time to time by regulation. I would suggest the sum of $100 for each work to start. There should be no bulk registrations and registration would be required before the 50 year initial term expires;
- The adaptation of the Canadian Intellectual Property Office ("CIPO") to accommodate registration for the final twenty years would require virtually no new resources. The current system is virtually instant and automatic and requires no human intervention if done online – unlike the trademark registration system with which is there is no equivalence; and,
- The new regime could and should enable the adjustment of fees and other details to be done from time to time by regulation – not statutory amendment.

12. Fear of international retaliation should be contextualized and minimalized. The dispute mechanism for Berne can only be invoked by another country – not by a private corporation.. Anything other than a flagrant failing by Canada maybe be unlikely to result in any dispute with serious consequences. The consequences and remedies for even an adjudicated dispute can be trivial. Canada can learn from the USA's experience and perspective on adherence to international law in the field of copyright. The USA has been flouting international copyright law, the WTO and the Berne Convention for the last two decades, paying less than a nominal penalty and still refusing to comply the requirement for "small" establishments, including retailers and restaurants, to pay for performance of music.[8] The USA has been an adjudicated scofflaw in international copyright and shows no intention of complying with its treaty obligations when the penalties imposed were less than trivial.

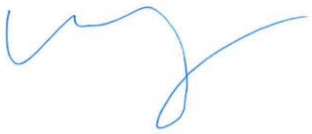
13. I will not comment on any of the suggested options in detail because they all will create more problems than they will solve. Any option that involves collectives and/or any involvement of the Copyright Board will be a costly make work project for the Board and a windfall to the

[7] Howard Knopf, *Is Access Copyright Selling the Brooklyn Bridge*? Blogpost September 21, 2016: https://excesscopyright.blogspot.com/2016/09/is-access-copyright-selling-brooklyn.html
[8] WTO DS160: United States — *Section 110(5) of US Copyright Act* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm

management and legal counsel for collectives, most likely Access Copyright. As in many of the matters handled by collectives and the Copyright Board, the dollar value return for all but a very few actual individual creators and their estates is likely to be less than trivial. It may be otherwise for major multinational corporate owners and wealthy estates, who can well afford the minor cost and formality of registration for the benefit of copyright protection for the final 20 years of a life + 70 year term. The Copyright Board's poor handling in the past of its orphan works mandate, when very few requests per year were received, and at least one FTE staff member was involved, should dissuade Ministers from any future involvement of the Board on any issues arising from term extension.[9] The delays, inefficiency and other problems of the Board's operations only continue to worsen.

14. Accordingly, I would recommend that you:
    a. Adopt the suggestion by former US Register of Copyrights Maria Pallante for a registration regime for the final twenty years of a life + 70 term;
    b. Establish a full and proper consultation over a period of at least six months following publication of the proposed details – and ideally the wording of any legislation and regulations – implementing such a regime;
    c. Insist on decoupling this consultation from the clearly vapor ware and diversionary announcement of parallel consultations involving the "internet of things" and "online intermediaries";
    d. Veto any option that would involve extended collective licensing, involvement of collectives and/or involvement of the Copyright Board in any manner; and,
    e. Recognize that there is no need for undue haste to comply with the apparent deadline of December 31, 2022 when the consequences of improvident compliance are so high and the risk of potential non-compliance may be manageable and perhaps even minimal.

Yours sincerely,



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[9] See Howard Knopf, Canada's blogpost May 5, 2014: *Unloadable Copyright Owner Regime – A Canadian "Solution" or a Canadian Problem or a Canadian Opportunity?* https://excesscopyright.blogspot.com/2014/05/canadas-unlocatable-copyright-owner.html