



Intellectual Property Institute of Canada  
Institut de la propriété intellectuelle du Canada

# Intellectual Property Institute of Canada (IPIC) Submission on How to Implement an Extended General Term of Copyright Protection in Canada

Submission to Innovation, Science  
and Economic Development Canada

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**March 23, 2021**

## INTRODUCTION

The Intellectual Property Institute of Canada (IPIC) is the professional association of patent agents, trademark agents and lawyers practicing in all areas of intellectual property law. Our membership totals over 1,850 individuals, consisting of practitioners in law firms and agencies of all sizes, sole practitioners, in-house corporate intellectual property professionals, government personnel, and academics. Our members' clients include virtually all Canadian businesses, universities and other institutions that have an interest in intellectual property (e.g. patents, trademarks, copyright and industrial designs) in Canada or elsewhere, as well as foreign companies who hold intellectual property rights in Canada.

IPIC is pleased to provide these comments in response to the Consultation initiated on February 11, 2021, and the accompanying consultation paper issued by the Government (the “**Consultation Paper**”). IPIC's response is set forth in four topic areas:

### (1) CUSMA-REQUIRED TERM EXTENSION SHOULD BE IMPLEMENTED SWIFTLY AND ‘CLEANLY’

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Canada has committed to extending the general term of copyright protection in works to the life of the author plus 70 years (hereinafter life+70), as required by Article 20.62 of the Canada/United States/Mexico Agreement (“CUSMA”).<sup>1</sup> As noted in the Consultation Paper, this reform is generally consistent with international norms and standards of Canada's key trading partners, including both other parties to CUSMA.<sup>2</sup>

Canada's decision to implement term extension as required by CUSMA has already been made. It requires no further study. IPIC respectfully submits that term extension should be implemented independently and expeditiously and should not be delayed by reason of a perceived need to consider any other measures.

When Canada entered CUSMA it did so without any reservations. Though CUSMA does allow for certain flexibilities in implementation of Canada's treaty obligations, reservations to a treaty are a customary way in which a party to a treaty is given a right to derogate from its obligations. Examples in other treaties are rights to equitable remuneration for sound recordings and retransmissions for

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<sup>1</sup> Available at <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/20.aspx?lang=eng#fn2-rf>

<sup>2</sup> E.g., Australia, Belgium, Brazil, France, Israel, Italy, Mexico, the Netherlands, Norway, Russia, Spain, the United Kingdom and the United States.

broadcasting. IPIC therefore encourages the government to proceed to implement term extension without delay and consider mitigating terms separately and generally to honour the commitments made under CUSMA. It notes that, under the Vienna Convention, there is a duty to interpret treaties in good faith. In considering such mitigating terms, the Committee encourages the government to ensure that such terms are consistent with the duty of good faith interpretation of treaties under the Vienna Convention.

## **(2) DELAY IN IMPLEMENTING CANADA'S TREATY OBLIGATIONS WILL BE COSTLY**

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As the Consultation Paper notes, term extension can create economic benefits which are then reinvested by creators (both in Canada and for their export abroad). A swift implementation of term extension will also create economic benefits for Canadian rights holders outside Canada due to reciprocity with other jurisdictions. Consideration of other measures, particularly those as complex as potential regimes for orphan or out-of-commerce works, will likely delay implementation of term extension. Any delay will potentially deny benefits to Canadian rights holders permanently, as copyrights expire and consequently cannot be enforced by Canadian rights holders either domestically, or, due to reciprocity, in key territories where life+70 protection is recognized. Finally, the sooner term extension is implemented, the sooner Canadians will benefit from reciprocity abroad, and the sooner we avoid a consequent loss of rights. If term extension is not implemented until 2022, copyright holders whose works are set to expire as of December 31, 2021 under the current regime will have their works fall to the public domain, rather than benefit from term extension.

## **(3) ORPHAN WORKS AND OUT-OF-COMMERCE WORKS REGIMES WARRANT GREATER STUDY**

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The Consultation Paper proposes five different options for addressing orphan works and out-of-commerce works and acknowledges that these are by no means exhaustive. Each of these issues is complex and deserves comprehensive study simply to determine whether a problem exists, and to identify solutions to potential problems. Such study should not delay implementation of Canada's term extension CUSMA obligations, and in any event is well beyond proper consideration during the current thirty-day consultation period, even if it were extended by a few weeks.

Before devising a legislative solution to orphan works or out-of-commerce works, it is necessary to identify whether an unaddressed problem actually exists. A proper study would necessarily include data on the use, efficiency, and effectiveness of the current regime relating to orphan works, and the nature of the challenges faced by rights holders and prospective users in the licensing of out-of-commerce works. If problems are identified, then informed proposed solutions should be discussed and considered with stakeholders. As other jurisdictions have recognized, the impact of technological,

developments over recent years is also relevant. Potential regimes or reforms are likely to raise different issues for different sectors, which also warrant careful study and possibly diverging legislative approaches.

The Consultation Paper cites approaches to orphan and out-of-commerce works taken by other jurisdictions, but it is worth noting that: 1) these approaches differ significantly from one another; 2) Canada has taken its own approach, which has, in fact, been cited by at least some observers as embodying some international best practices,<sup>3</sup> and 3) each of the regimes cited only adopted reforms in conjunction with considerable study, well beyond the time frame of the current inquiry.

EU Directives pertaining to orphan works and out-of-commerce works each followed considerable deliberation and stakeholder consultation. The EU [Directive](#) on orphan works adopted in 2012, and not fully implemented by EU member states until October 29, 2014, following consultations dating back at least to 2006, when a High Level Group on Digital Libraries brought together stakeholders concerned with digitization and online accessibility of orphan works and other cultural material. The European Commission's 2008 Green Paper further sought the views of stakeholders on orphan works. An impact assessment and public hearings followed.

The EU [Directive on Copyright in the Digital Single Market \(CDSM\)](#), which includes a framework for the digitization and dissemination of out-of-commerce works, followed eight years of extensive consideration and debate after the publication of a European Commission [Memorandum of Understanding](#) in 2011, which itself followed an eight-month long stakeholder dialogue.

Decades after the adoption of the Sonny Bono Term Extension Act (1998), the United States continues to study the topics of orphan and out-of-commerce works. The United States Copyright Office examined the topics of orphan works and mass digitization in 2006 and 2011. Following the 2006 report, US House and Senate Judiciary Committees proceeded to hold multiple hearings and introduce multiple competing bills in the 2006 and 2008 sessions of Congress. A further [report](#) by the US Copyright Office was published in 2015, after examining potential approaches for legislation in this area, but no legislation has yet been adopted.

We caution against rushed implementation of legislation, as it may result in unintended consequences for both users and rights holders. In any case, as is evident from the consultations the Government has conducted on this issue to date, there is consensus among both proponents and

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<sup>3</sup> See, e.g., Stef van Gompel & P. Bernt Hugenholtz, Institute for Information Law (IViR) University of Amsterdam, "The Orphan Works Problem: The Copyright Conundrum of Digitizing Large-Scale Audiovisual Archives, and How to Solve It," [Popular Communication](#), Volume 8, 2010 - Issue 1 (concluding that "the Canadian model provides maximum legal certainty.") preprint available at: [https://www.ivir.nl/publicaties/download/the\\_orphan\\_works\\_problem.pdf](https://www.ivir.nl/publicaties/download/the_orphan_works_problem.pdf)

opponents of such reforms that the approximately forty-five-day period provided by this consultation is inadequate to properly consider the issue.

IPIC believes that any measures being considered to accompany implementation of the copyright term extension in Canada should be carefully studied to ensure their compliance with Canada's treaty obligations. IPIC is also of the view that it is imperative that the potential for Canadian copyright holders to suffer because of other jurisdictions applying the rule of the shorter term be studied, with all economic consequences being carefully weighed before any accompanying measures are implemented.

#### **(4) OTHER REFORMS MAY BE IMPLEMENTED AT ANY TIME**

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As the Consultation Paper properly notes, 'clean' implementation of term extension "would not close the door to the possibility of future reforms . . . in relation to access to orphan works and out-of-commerce works." Term extension as required by CUSMA may be implemented immediately, while the Government fully studies and considers whether reforms to address orphan and out-of-commerce works are appropriate or even necessary. 'Clean' term extension would provide concrete, empirical evidence on whether such reforms are necessary, rather than proceeding on conjecture.

#### **CONCLUSION**

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IPIC thanks the Government for this opportunity to provide its comments on implementation of Canada's term extension obligations under CUSMA. We urge the Government to implement such term extension promptly and 'cleanly,' without additional conditions or accompanying measures and without delaying implementation for consideration of any other issue. We would be pleased to assist the Government in any way that may assist in realizing this.