SUBMISSION OF INTERNET ARCHIVE CANADA IN RESPONSE TO THE CONSULTATION ON HOW TO IMPLEMENT AN EXTENDED GENERAL TERM OF COPYRIGHT PROTECTION IN CANADA

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Internet Archive Canada is a not-for-profit digital library whose mission is to provide universal access to all knowledge. To date, Internet Archive Canada has digitized more than 650,000 books, micro-reproductions, archival fonds, and maps.[1] More than 300 libraries and memory institutions from across Canada have supported Internet Archive Canada, including: McGill University, University of Alberta, Royal Ontario Museum, Canadian Museum of Human Rights, and University of Victoria. Foundational partners included University of Toronto, University of Ottawa, Canadian Research Knowledge Network, and Library and Archives Canada/ Bibliothèque et Archives Canada. Internet Archive Canada has a substantial collection of materials focused on Canadian cultural heritage and historical government publications. These efforts represent a significant investment in and contribution to the accessibility of Canadian digital heritage.

Internet Archive Canada works with the Internet Archive, a California-based public charity, to make these materials accessible to the general public in Canada and throughout the world. Internet Archive is building a digital library of Internet sites and other cultural artifacts in digital form.[2] Like a paper library, Internet Archive provides free access to researchers, historians, scholars, the print disabled, and the general public. In addition, Internet Archive Canada continues to seek opportunities and partnerships to expand access to knowledge, including digitization services for people with perceptual disabilities.[3] Internet Archive Canada is also a founding member of the National Heritage Digitization Strategy (NHDS).[4]

Much of Internet Archive Canada's work involves materials in the public domain; Internet Archive Canada and its partners are therefore very likely to be impacted by an extended general term of copyright protection in Canada. In these circumstances, Internet Archive Canada very much appreciates this opportunity to contribute to the discussion of which measures could best mitigate the implications of a longer general copyright term in Canada.

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[1] https://archive.org/details/toronto
[2] https://archive.org/
[3] https://ocul.on.ca/accessible-content-eportal-reaches-15000-titles
[4] https://nhds.ca/

Introduction

While Internet Archive Canada understands that the realities of the international trade environment lead to agreements like the CUSMA, it would be unfortunate if the accompanying legal changes led to an environment in Canada that is unusually restrictive of user's rights. As Chief Justice McLachlin stated in the landmark *CCH Canadian v. Law Society of Upper Canada* case, user's rights are an "integral part of the Copyright Act" in Canada. Indeed that decision, and others like it, have positioned Canada as a worldwide leader in user's rights.[5] It would be a great misfortune if the implementation of the CUSMA resulted in an environment for librarians and other users in Canada that is even more restrictive than in other countries—including potentially the United States itself.

In the circumstances, we urge the Government to implement mitigating measures that preserve a user-friendly environment for libraries and other users. Our view is that some form of Options 3-5 would be preferred, provided that they do not include claims for equitable remuneration or onerous search requirements. At a minimum, we see no reason why term extension should result in a situation that is more restrictive for libraries and users than that in the United States. In practice, we believe that means (1) a provision for library use of older or out-of-commerce works, and (2) a registration requirement.

1. Library Use of Older Works

We believe that, in order to mitigate the impact of extending the general copyright term, libraries and other users should be permitted to make use of older works subject only to a rightholder opt-out. Thus, we favor a broad version of Options 3-5 in the Consultation Paper. And again, we believe that this version should meet or preferably surpass the provisions provided for by US law.

The corresponding provision in US law is Section 108(h) of the US Copyright Act. As was noted in the consultation paper, the United States' Copyright Term Extension Act of 1998, which implemented the same 20-year extension under consideration here, added Section 108(h) to ensure that older works would nevertheless remain available to the public. It allows libraries to reproduce, distribute, display or publicly perform a work, in facsimile or digital form, in the last twenty years of its copyright term. However, the library must first complete a reasonable investigation to determine that:

1. The work is not subject to normal commercial exploitation, or
2. The work is not available at a reasonable price, or
3. The copyright owner provides notice that neither of the two conditions above apply.[6]

[5] *See, e.g.,* https://www.michaelgeist.ca/2014/03/cch-anniversary/.
[6] See U.S.C. 108(h). Note that to date, no such notice has ever been filed.

We believe that Canada should follow the US example by identifying a clear date for works subject to mitigation measures (in the case of Section 108(h), that was works in the last twenty years of term). That is because, for librarians and others to be able to implement mitigating measures, there must be bright lines around which works are subject to exception and which are not. Thus, we believe that something along the lines of Option 4—i.e., an exception for works in their final decades of copyright term—would be salutary in this regard.

That said, this provision of US law was ultimately undermined by its reasonable search and other onerous requirements. The Internet Archive's own attempt to use Section 108(h) may be instructive here. As outlined in further detail below, despite spending substantial time and resources attempting to utilize Section 108(h), Internet Archive has only been able to identify a handful of books as clearly eligible.[7] A substantial obstacle has been the reasonable search requirements of that law. We therefore propose that such requirements be excluded from the mitigation provisions ultimately adopted here.

1.1 — **Reasonable search requirements**

We believe that, in order to mitigate the expansion of copyright term in a meaningful way, libraries must be capable of implementing the exception at scale. That is because a huge volume of works will be kept from the public domain as a result of this term extension. That loss cannot be mitigated by measures that will only apply to a handful of works. And so long as any measure requires detailed searching, on a work-by-work basis, before use can be made, it will fail this test.

Again, the US example is instructive. Over twenty years have passed since the US enacted Section 108(h) as a supposed mitigation measure, and it has barely been utilized.[8] Only after a team of legal interns had researched the status of various works—over the course of more than a year—was Internet Archive able to launch a collection of such works; only *sixty titles* were included at launch.[9]

Proposals which include reasonable search requirements are well-meaning, but they do not adequately redress the harms done to the public interest by overly long copyright terms. Given the vast numbers of works that will be kept from the public domain as a result of copyright term extension, librarians can not be expected to conduct a reasonable search as to even a fraction of them. Put another way, such a mitigation measure would not be proportional to the loss.

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[7] https://archive.org/details/last20

[8] *See, e.g.,* Townsend Gard, Elizabeth, Creating a Last Twenty (L20) Collection: Implementing Section 108(h) in Libraries, Archives and Museums (October 2, 2017). 22 UCLA Journal of Law & Technology 3. Available at http://dx.doi.org/10.2139/ssrn.3049158

[9] *See* Alexis Rossi, Making Out-of-Print Pre-194 books available with "Last 20" provision (February 12, 2019). Available at http://blog.archive.org/2019/02/12/making-books-available-with-last-20-provision/.

We believe that opt-out provisions strike a better balance. They permit widespread mitigation of the loss to the public domain while respecting legitimate rightsholder interest. And as outlined in further detail below, they do so fairly and adequately even without a right to equitable remuneration.

1.2 — Equitable remuneration

As with reasonable search requirements, we believe that rights of equitable remuneration are well intentioned, but have been shown to have limited mitigating effects. That is because rights of remuneration can theoretically expose users to financial liabilities of unknown and unknowable scope. In general, organizations are uncomfortable taking on unknown and unknowable risks, and libraries are no exception; they are ordinarily quite risk averse. As a result, in Europe, "this lack of clarity has strongly disincentivised cultural heritage professionals from relying on" such provisions.[10]

This is an unfortunate and unnecessary outcome. Whether addressing orphan, out-of-commerce, or simply older works, the vast majority of works are not likely to be subject to ongoing commercial exploitation beyond 50 years after the death of the author. Thus, a claim for equitable remuneration is only likely to arise in unusual circumstances; presumably, in the event that something breathes new life into a work such that it is reinvigorated with economic value after long dormancy and at the end of their copyright term. If this were to occur, the value in the work would be largely forward-looking. As a result, the copyright owner would likely be able to capture virtually all of the new economic value of the work—i.e., its forward-looking value—by opting out at the time of its reinvigoration.

Unfortunately, the inclusion of a right to equitable remuneration is likely to prevent most uses of these older works. Organizations like libraries are simply not likely to take on even theoretical risks of this sort. Thus, we believe that the adopted mitigation measures should not include rights of equitable remuneration, and should instead center around robust opt-out provisions for rightsholders.

2. Registration

Finally, we believe it is worth revisiting an increased role for registration in the mitigation process. While not a substantial part of copyright practice in Canada today, registration is a simple and inexpensive process that is already fully implemented by the Canadian Intellectual Property Office. It would be a natural fit for the opt-out process envisioned here; rightsholders would need only submit their registration to a library or other user in order to effectuate an opt out. And it would have the additional beneficial effects of increasing transparency over the class of works where it is most lacking.

[10] *See* https://pro.europeana.eu/post/evaluating-the-orphan-works-directive

3. Conclusion

Internet Archive Canada very much appreciates the efforts of the Government to mitigate the effects of copyright term extension. We would be pleased to continue to participate in this process and look forward to further engagement with other stakeholders and the Government of Canada.