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April 6, 2021

Re: Submissions on the Government of Canada's Consultation on Copyright Term Extension

Dear Ministers,

These submissions to the consultation on copyright term extension come a few days after your deadline, due to the unnecessarily tight timeframe provided in the midst of a global pandemic impacting my and everyone else's work, family, and entire lives. I trust that my submissions will be nonetheless considered, because they are relevant and compelling.

The Parliamentary Committee consulting on copyright reform in 2019 specifically cited and shared my "pragmatic perspective on term extension."[1] Your Departments have commissioned from me several research studies relevant to this consultation, one of which is cited in the consultation paper. Here, I further submit to you that:

- Deficiencies in the consultation process would undermine the legitimacy of ensuing reforms.
- Registration is a legally viable option, which cannot be dismissed without serious discussion.
- Collective or other licensing via the Copyright Board would exacerbate not solve problems.
- Robust limitations and exceptions must accompany any extension of copyright term.

[1] House of Commons Canada, *Statutory Review of the Copyright Act: Report of the Standing Committee on Industry, Science and Technology*, June 2019, 42nd Parliament, 1st Session, p 38; Jeremy de Beer, "Intellectual property chapter of USMCA proves Canada's pragmatism," *Toronto Star* (4 October 2018).

Deficiencies in the consultation process must be remedied.

Deficiencies in this consultation process, if not remedied, threaten to undermine the legitimacy of any ensuing copyright reforms or, worse, our democratic institutions.

First, the 30-day deadline for responses to this consultation, extended at the last minute to roughly six weeks, was arbitrary and unreasonable. In the midst of a global pandemic, the deadline increased the likelihood that the best-resourced and most-organized stakeholders would disproportionately participate in and influence the process. There is indeed a legal deadline at the end of 2022 for Canada to implement its obligation under the Canada United States Mexico Agreement (CUSMA) to extend the term of copyright protection. But that deadline does not justify this rushed consultation. The explanation from Government officials to stakeholders that this consultation must be rushed in order to complete other consultations on issues in respect of which there are no deadlines is unpersuasive.

Second, the consultation paper fails to acknowledge the overwhelming empirical and theoretical research proving the problems with copyright term extension. It skews the policy debate with oversimplified rhetoric and suggestions there are commensurate arguments on either side of this particular issue: "Stakeholders have raised arguments in favour of and against extending the copyright term of protection."[2] That is true, but it is like saying stakeholders have raised arguments refuting and supporting the reality of climate change. Stakeholders with vested interests would of course argue in favour of term extension and can muster some apparent support for that argument. But that does not obviate the Government's duty to accurately review and portray the broad, global consensus of copyright researchers on the net harms of term extension as part of an evidence-based policymaking process.

Third, the nature and content of this consultation process disrespects and undermines the work of our democratically elected Parliamentarians. More than fifty Members of Parliament are named as having sat on the committee or participated in the months-long process of reviewing Canada's *Copyright Act* in 2019. Their report "is the culmination of hundreds of oral

[2] Government of Canada, *A Consultation on How to Implement an Extended General Term of Copyright Protection in Canada*, February 2021, p 5.

and written testimonies".[3] After its extensive, robust, and inclusive consultation process, the Parliamentary Committee put in charge of this issue recommended that the Government of Canada consider amending the *Copyright Act* "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."[4]

In response, the consultation paper suggests there are unspecified "serious questions" about international obligations, costs to copyright owners, and administrative duplication. In one short, weakly reasoned paragraph the consultation paper seems to summarily dismiss the recommendation of our elected representatives.

My first submission is to suggest that the Government fix these procedural deficiencies. It is not too late.

The Government should continue to accept and fully consider submissions to this consultation on a rolling basis at least through the summer of 2021. Other consultations on non-urgent copyright issues should be pre-empted to deal properly with this one.

At the same time the Government reviews, synthesizes, and presents stakeholder comments on this issue, it should complete (or commission) objective, methodologically rigorous reviews of all existing literature and evidence on term extension and on copyright registration. In doing so, the Government should implement best practices for evidence-based policymaking.[5] I would be pleased to refer your staff to relevant research if given sufficient time to meaningfully support this important policymaking process.

The Government should respect the recommendation of Parliamentarians by specifically disclosing and then exploring the "serious questions" it seems to have. There are many different options to implement incentives or requirements for registration, none of which have even presented for discussion. Serious questions deserve serious answers.

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[3] House of Commons Canada, *Statutory Review of the Copyright Act: Report of the Standing Committee on Industry, Science and Technology*, June 2019, 42nd Parliament, 1st Session, p xiii.
[4] House of Commons Canada, *Statutory Review of the Copyright Act: Report of the Standing Committee on Industry, Science and Technology*, June 2019, 42nd Parliament, 1st Session, p 38.
[5] Jeremy de Beer, "Evidence-based Intellectual Property Policymaking: An Integrated Review of Methods and Conclusions" (2016) 19:5-6 *Journal of World Intellectual Property* 150-177.

Registration is a legally viable option that must not be dismissed.

The Parliamentary Committee's recommendation to limit the enforceability of copyright without registration after the current life-plus-fifty term can be implemented in various ways. Notably, the Committee did not recommend altogether denying copyright without registration, either before or after the Berne Convention term expires, which would admittedly create legal problems.

If there are indeed "serious questions" about this recommendation in the context of Canada's international obligations, then the Government should ask them seriously. At an absolute minimum, that means disclosing what exactly the questions are. The consultation paper makes vague mention of the international legal prohibition on "formalities". The paper does not say, let alone assess, what formalities-related problems might conceivably arise from various forms of post-Berne-term registration requirements. The paper does not acknowledge, let alone analyze, any of the relevant legal research, writing, or authorities on this topic.

One presumes that such a bold rejection of Parliamentarians' clear recommendation must be based on a legal opinion from the Department of Justice or external counsel. If such an opinion does not exist, it should be sought. If an opinion does exist, it should be disclosed.

While there are valid reasons to protect the legal privilege that enables effective lawmaking, in these circumstances such reasons do not outweigh Canadians' right to the know exactly why our elected officials' advice has been rejected. At least, this situation calls for disclosure of a redaction or summary of the legal questions and conclusions on which this extraordinary dismissal is based.

Just one example of numerous suggestions worthy of proper consideration is a model based on certificates of a supplementary term of protection. There is already precedent for such certificates as a means to comply with treaty requirements to extend or restore the term of patent protection. A system of certificates of supplementary term of copyright protection could be carefully crafted to fulfill the requirements of CUSMA while working delicately within or around Berne. The biggest problem with the current consultation is that it does not even attempt to consider or solicit comments on this or the wide range of other possibilities.

If, after serious scrutiny, the Parliamentary Committee's recommendation ultimately proves infeasible to implement literally, then every possible option must be explored to abide by the spirit of that recommendation. So, even if a complete prohibition on post-Berne-term enforcement of unregistered copyright is not legally permitted, then meaningful enforcement limitations must be adopted. The consultation paper itself cites but then ignores one such limitation—the inability in the United States to claim statutory damages for infringement of unregistered copyright.[6] That ought to be the obvious minimum limitation in Canada.

The fact that registration requirements or incentives would increase costs of enforcement for copyright owners is exactly the point; a feature not a bug of registration. It means that protection is provided only where necessary. It avoids the incredibly inefficient side-effect of impeding access to the overwhelming majority of automatically protected works, such as our emails, doodles, and all the other things copyright was never meant to and does not need to protect. And if costs are a concern at all, then the policy choice—between imposing registration and/or enforcement costs on owners when protection is worthwhile, and imposing financial, educational, cultural, social, and other costs on Canadians when protection is unnecessary—is a no-brainer. Copyright owners *should* incur costs to enforce copyright many decades or maybe more than a century after works have been created.

The final argument in the consultation paper against registration—that it may duplicate records maintained by collective societies—would, frankly, be laughable were this not such an important issue. Private collecting societies' legal obligation to disclose their repertoires to the public on request, which has generally not been satisfactory anyways, has nothing to do with the need for an official, public database of copyright records. Establishing an official system that at least starts to better track copyright status is, again, what makes registration a good idea not a bad one. Public registries of ownership-related information are among the essential ingredients to make copyright markets function.[7]

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[6] Government of Canada, *A Consultation on How to Implement an Extended General Term of Copyright Protection in Canada*, February 2021, pp 7, 9.

[7] Jeremy de Beer, "Making copyright markets work for creators, consumers and the public interest" in Rebecca Giblin and Kimberlee Weatherall, *What If We Could Reimagine Copyright?* (Canberra: Australian National University Press, 2017) p 163, citing Dev S Ganjee, "Copyright formalities: A return to registration?" in Rebecca

If the Canadian Intellectual Property Office currently lacks capacity to administer a robust registration system, as the consultation paper implies, then public investments must be made. When the costs of building CIPO's capacity are compared to the costs of expanding the responsibilities of an already-overburdened Copyright Board (several other policy options presented assume an expanded role for the Board), it should become clear that CIPO is the appropriate agency for the task of mitigating harms from term extension.

In the words of the Honourable David Lametti, "one has to be realistic" about what immediately is achievable on the matter of copyright term.[8] However, realizing what Minister Lametti describes as his "hope that Canada will become a leader in this necessary and I think, inevitable, discussion"[9] starts with far more serious answers to the registration questions than Canadians have been given.

The summer of 2021 should be spent conducting a proper consultation on all facets of the registration option already recommended by your colleagues in Parliament, our democratically elected representatives.

More collective or Board-administered remuneration models would exacerbate problems.

Expanding Canada's existing orphan works regime is a bad idea. My co-authored study of Canada's orphan works regime—commissioned by the Government of Canada, subsequently published as peer-reviewed journal article, and cited in the consultation paper—demonstrates the inherent flaws of this model.[10] Simply put, the system is inefficient. And there is no way it is scalable to suit the purposes envisioned. It is also unnecessary in light of better mitigation measures. To be clear, my work on orphan works licensing in Canada or elsewhere provides no support at all for what the consultation paper calls "Option 1".

Giblin and Kimberlee Weatherall, *What If We Could Reimagine Copyright?* (Canberra: Australian National University Press, 2017) p 213.

[8] David Lametti, "Coming to Terms with Copyright", in Michael Geist, ed. *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) pp 480-516 at 483.

[9] David Lametti, "Coming to Terms with Copyright", in Michael Geist, ed. *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) pp 480-516 at 483.

[10] Jeremy de Beer and Mario Bouchard, "Canada's 'Orphan Works" Regime: Unlocatable Copyright Owners and the Copyright Board" (2010) 10:2 *Oxford University Commonwealth Law Journal* 215-253.

New or expanded collective licensing regimes (Option 2), or possible claims for equitable remuneration (Option 3), are also bad ideas, especially insofar as they depend on an already over-burdened Copyright Board. My views are presented as former legal counsel and adviser to the Board, as an academic who has extensively researched and written on tariff-setting,[11] and as a sincere and somewhat rare defender of the excellent work the Board has done and continues to do. But the bottom line on these policy options is that the Board already has enough work to do. Before giving the Board additional powers or duties, we must wait to see the practical effects of very recent statutory and procedural reforms.[12]

Inefficiency is the common flaw of Options 1, 2, and 3. They would mask an economically unjustifiable (but politically and now legally necessary) decision to expand copyright term with measures that compound economic and administrative inefficiencies. At minimum, if such measures receive any further consideration, they ought to be accompanied by a full cost/benefit analysis including financial comparisons with the cost of options involving registration. Such analysis must itself be transparent and open to public scrutiny.

Limitations and exceptions must accompany term extension.

The idea of new limitations and exceptions is on the right track. But Options 4 and 5 in the consultation paper, as presented, do not begin to cover the range of necessary mitigation measures.

For starters, statutory damages should not be available for infringement of unregistered copyright or for any copyright, registered or not, during the 20-year period of supplemental protection. If Canada is to harmonize copyright term with the United States, this measure would also be needed to align the two countries' laws.

Another necessary amendment to Canada's limitations and exceptions, if the registration recommendation is rejected, would be to better align Canadian fair dealing law with American fair use law, by adopting the "such as" solution.

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[11] Jeremy de Beer, "Canada's Copyright Tariff-Setting Process: An Empirical Review" (2016) 63:3 *Journal of the Copyright Society of the USA* 471; Jeremy de Beer, "Twenty Years of Legal History (Making) at the Copyright Board of Canada" in Ysolde Gendeau, ed, *The Copyright Board of Canada: Bridging Law and Economics for Twenty Years* (Cowansville, QC: Éditions Yvon Blais, 2011).

[12] Bill C-86, *Budget Implementation Act*, SC 2018 c 27, Part 4, Division 7, Subdivision H.

One particular weakness of Options 4 and 5 are their unjustifiably narrow coverage. Mitigating the harms of term extension requires corresponding, robust limitations and exceptions for everyone, not just certain institutional users. There is no good reason to limit these limitations and exceptions to non-profit libraries, archives, and museums. Educational institutions, teachers, and students require the same protections. But frankly, so do all Canadians.

A better approach would be a user right for anyone who has conducted a reasonable but unsuccessful search to locate a copyright owner to use the work without fear of liability, or perpetual or even temporary obligations to reserve indeterminate or even limited remuneration in the unlikely event a work's owner eventually reappears. This exception for certain special cases (diligent but unsuccessful searches) would not unreasonably prejudice copyright owners or interfere with their normal exploitation, especially if limited to unregistered works during the post-Berne-term of supplemental protection.

Thank you for considering my submissions. I look forward to participating in the continuing consultations that I have submitted are necessary on this matter.

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