To: Hon. François-Philippe Champagne, MP—Minister of Innovation, Science, and Industry
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cc: copyright-consultation-droitdauteur@canada.ca

Re: Public consultation regarding increasing the term of copyright

March 31, 2021

Dear Ministers:

I am writing in response to your public call for consultation on the increased duration of copyright from life of the author plus fifty years to life of the author plus seventy years as agreed to during the negotiations of the CUSMA. My response is my own opinion. While the committee has extended the incredibly short consultation period, I am still struggling to submit a detailed response due to my increased workload under Covid-19. Therefore, this response will attempt to respond to a few key areas that may not be addressed fully by some of the other learned experts who I know are also submitting responses.

Firstly, I have some concerns with the consultation process by the Ministers in general in regards to the way in which this consultation and the others announced for the summer seem to be taking a divide and conquer approach to how Canadians receive and control their own content. I am concerned that this consultation will take an extremely narrow view of extending duration without committing to any balancing measures, ostensibly leaving those to a "future" Bill that will potentially enact the other recommendations of the Standing Committee's Statutory Review.

My background is in Entertainment and Media law. I have a Canadian JD from the University of Western Ontario with a specialization in Intellectual Property and Information Technology, an American LLM in Entertainment and Media law from Southwestern Law School in Los Angeles, and an MA in Media Studies from Western. I am currently pursuing a PhD at Western in the Faculty of Law that examines the entertainment industry and digital content delivery. Therefore, I have a very good sense of how copyright issues and ownership are

inextricably linked to Internet intermediaries and the *Broadcasting* and *Telecommunications Acts*. The media industries and Canada's cultural heritage need to be nurtured through a holistic approach that both protects and nurtures creators while ensuring that Canadians have access to their own cultural heritage. At the very least, any extension of duration should be accompanied by generous exceptions, termination rights, and reversion rights. In addition, the Standing Committee's Recommendation 18, "That the Government of Canada introduce legislation amending section 29 of the *Copyright Act* to make the list of purposes allowable under the fair dealing exception an illustrative list rather than an exhaustive one,"[1] should accompany this amendment as a sign of good faith.

I am not encouraged that the government is doing its utmost to protect individual Canadian creators and users, but are in fact, simply helping to further American corporate interests. It is important to understand the underpinnings of both Canadian and American copyright. Both systems trace their roots back to the Statute of Anne from 1710. It is worth noting the full title of the Act: *An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times Therein Mentioned*. The Act was designed to foster education and to particularly benefit creators and users. The term granted was 14 years with the option to renew for a further 14. The term of protection was limited.

In the nineteenth century, the United States was a net importer of Intellectual Property and the most prolific pirate of copyrighted works in the world at that time. The Entertainment industry, including the motion picture, television, and music industries, is built on the model of content ownership and exploitation. The longer and more widely content can be exploited the more valuable it generally is to corporate interests. Mickey Mouse became one of the first such properties as the United States moved from a history of piracy with their Penny Presses exploiting British works in the late nineteenth century in order to launch their own publishing dynasties to being leaders in protectionism. Virtually every change to copyright in the United States will find Mickey Mouse in danger of falling into the public domain.[2] Exhaustive

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[1] Report of the Standing Committee on Industry, Science, and Technology. "Statutory Review of the Copyright Act." June 2019 at 29.
https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf
[2] Steve Schlackman, "How Mickey Mouse Keeps Changing Copyright Law." *Art Law Journal* (15 February 2014)
https://alj.orangenius.com/mickey-mouse-keeps-changing-copyright-law/

exploitation of a work may result in bringing content to a wider audience or it may work to restrict access, especially when a particular cultural artifact fails to prove financially viable. That content may be locked away in a vault, unavailable for anyone to access until it moves into the public domain. I'm providing this information because it is illustrative of exactly who will benefit from this copyright extension, and it is NOT Canadian authors and creators. It is American corporate interests. Let's be realistic, how much does anyone benefit from a right 70 years after their death? How does that enable them to create and innovate? Corporate owners, like Disney, will still be going strong, of course.

Your consultation paper suggests several licensing and registration schemes as exceptions to balance the extended terms.[3] The top ten copyright applicants for 2018-2019, according to the Canadian Intellectual Property Office, included Apple Inc (number one - 380), Warner Bros., Entertainment Inc (number three – 80), Netflix Studios LLC (number five – 63), and Sony Pictures (number 10 – 41). There is only one Canadian media company on the list – Les Éditions Logitell inc. (number four – 74), an educational publisher based in Quebec.[4] The top ten applicants in 2019-2020 included Warner Bros (again number three – 80) and Netflix (number 5 – 50) with Canadian publisher Nelson coming in at number four (52). The number one applicant was again not a Canadian but Shaikh Muhammad (148).[5] It seems that Canadian creators are not particularly interested registration. For individual creators, registration is an additional financial burden. Corporate owners already have the deep pockets that allow for registration in multiple jurisdictions and litigation to protect those rights.

United States media industries have not been shy about intruding into other country's attempts to balance their Copyright legislation in order to make it serve the public interests of access to both education and culture. The most recent example of this is the United States Trade Representative's influence through the President of the Republic of South Africa to veto the recent Copyright Amendment Bill, sending it back to Parliament with an 11 page letter detailing

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[3] Innovation, Science and Economic Development Canada. *Consultation paper on how to implement an extended general term of copyright protection in Canada*. February 11, 2021. http://www.ic.gc.ca/eic/site/693.nsf/eng/00188.html#s422

[4] Canadian Intellectual Property Office. *Copyright Statistics: 2018-2019*. December 20, 2019. https://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr04724.html#country

[5] Canadian Intellectual Property Office. *Copyright Statistics: 2019-2020*. November 17, 2020. https://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr04856.html#applicants

concerns.[6] The USTR's concerns stemmed from a number of American media organizations: the Association of American Publishers (AAP), the Entertainment Software Association (ESA), the Independent Film & Television Alliance (IFTA), the Motion Picture Association of America (MPAA), and the Recording Industry Association of America (RIAA). Canada has long made it a priority to protect Canadian culture and cultural industries from our neighbors to the south. I would hope that Canada would continue to ensure that Canadian content remains Canadian. There are numerous ways that Canada can benefit from American expertise and dominance in media, such as through encouraging joint projects through tax credits for American productions that make use of Canadian talent both in front of and behind the cameras. The agreement that then Heritage Minister Melanie Joly came to with Netflix in 2017 to spend $500 million to make Canadian shows and movies is an example of out of the box thinking that benefitted Canadian culture's access and creation. It's also worth noting that Netflix completed the five year deal in three – without onerous regulations from the government and without imposing excessive ownership terms.

I have previously commented on the issue of duration during the Copyright Review process and am cited in that report on this issue as cautioning that an extension would "make it harder to access, build on, disseminate, and preserve works for commercial and non-commercial purposes."[7] Copyright owners maximize profits by locking up rights. Even Landes and Posner recommend that the optimal term would be 20 to 25 years.[8] In 2013, Maria A Pallante, then Register for the US Copyright Office suggested that 70 years was too long and proposed that after 50 years the burden of copyright should shift from the user to the owner, with the owner being required to license the work "to assert their continued interest in exploiting their work."[9] Michael Geist concurs, suggesting that "Canada could conceivably treat the term beyond [50

[6] See for example, Jonathan Klaaren. "What Role Can Regulations Play? A South African Public Law Perspectiv erspective on the P e on the Potential Response thr otential Response through Regulations t ough Regulations to Constitutional Reservations about the Copyright Amendment Bill, B-13B of 2017." *Digital Commons @ American University Washington College of Law*. June 2020. https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1056&context=research; Thiru, "2020: USTR takes aim at South Africa over copyright limitations and exceptions." *Knowledge Ecology International*, April 22, 2020. https://www.keionline.org/32804

[7] Supra note 1.

[8] *Supra* note 5 at 70.

[9] Maria A Pallante. "The Next Great Copyright Act" 37 Colum JL & Arts (Spring 2013) at 23.

years]… as a supplementary regime that falls outside of the Berne Standard."[10] These suggestions would apply to all copyrighted works, not just orphan or out of commerce works as the Consultation Paper so narrowly focuses on.

In fact, the Consultation Paper seems to ignore many of the other suggestions from the Standing Committee's Report, specifically the section "Term Extension, Reversion Right and Termination Right."[11] Rather than re-create the entire section of the report with its evidence and reasoning, I will simply draw the Minister's attention to the final recommendations of the Standing Committee, which I whole-heartedly support:

"**Recommendation 6**

That, in the event that the term of copyright is extended, 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….

Recommendation 7

That the Government of Canada introduce legislation amending the *Copyright Act* to provide that a reversion of copyright under section 14(1) of the Act cannot take effect earlier than 10 years following the registration of a notification to exercise the reversion….

Recommendation 8

That the Government of Canada introduce legislation amending the *Copyright Act* to provide creators a non-assignable right to terminate any transfer of an exclusive right no earlier than 25 years after the execution of the transfer, and that this termination right extinguish itself five years after it becomes available, take effect only five years after the creator notifies their intent to exercise the right, and that the notice be subject to registration."[12]

I would particularly urge the Ministers to consider Recommendation 8 to allow creators to fully benefit from their own creation during their lifetime when it can do them the most benefit. It also benefits society and the public interest if this allows the creator to keep creating and innovating. Naturally, if the creator is fully satisfied with how their work is being exploited, they are equally free to simply do nothing. I would further recommend that the current

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[10] Michael Geist. "The Trouble with the TPP's Copyright Rules." In What's the Big Deal? Understanding the Trans-Pacific Partnership. Ottawa: Canadian Centre for Policy Alternatives, (July 2016). <https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2016/07/Trouble_with_TPPs_Copyright_Rules.pdf> at 9.

[11] Supra note 1 at 54.

[12] Ibid., at 60-61.

termination right at 25 years after the death of the author remain as well, to ensure that those benefits still accrue to the creator's heirs.

I would also urge the Ministers not to follow the American example. Several recent instances in the United States should give pause to adopting their measures, which are highly influenced by the strong lobbies of the MPAA and RIAA. Corporations with deep pockets and especially industries with organizations with deep pockets and common goals can afford to pay for the best lobbyists to influence the policy that feeds into both trade negotiations and legislation. This phenomenon was first identified in the Hargreaves Report from 2011: "Much of the data needed to develop empirical evidence on copyright and designs is privately held. It enters the public domain chiefly in the form of "evidence" supporting the arguments of lobbyists ("lobbynomics") rather than as independently verified research conclusions."[13] The phenomenon of lobbynomics has far-reaching implications. David Vaver posits that "[i]nternational corporate power has effectively curbed national sovereignty in the field of [Intellectual Property] policy," and he attributes this trend to globalization.[14] Furthermore, Peter Drahos states that "[b]ilateral intellectual property and investment agreements are part of a ratcheting process that is seeing intellectual property norms globalize at a remarkable rate."[15] Lobbyists are skilled at presenting evidence in easily consumable portions. Lobbyists are also able to provide those glossy, pithy nuggets in a timely manner. Jeremy de Beer points out that

> governments have short time frames that are not always amenable to rigorous scholarly standards. Commissioning research favours professional consultancies over academic investigators; therefore, there are likely to be biases in the data and evidence presented to policy makers. Organized and well-financed industry lobbyists are advantaged over small business or consumers.[16]

Benjamin Mitra-Kahn, in responding to the Hargreaves Report's negative comments on the evidence used for policy-making defends the government economists who are instructed to "[p]rovide the *best* advice you can, given what you know at this point. That does not mean

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[13] Ian Hargreaves. *Digital Opportunity: A Review of Intellectual Property and Growth*. (May 2011) at 18.
[14] David Vaver. *Intellectual Property Law: Copyright, Patens, Trade-marks*. Toronto: Irwin Law, 2011 at 5.
[15] Peter Drahos. "BITS and BIPS: Bilateralism in Intellectual Property." The Journal of World Intellectual Property. 4.6 (November 2001)791-808 at 798.
[16] Jeremy de Beer. "Evidence-Based Intellectual Property Policymaking: An Integrated Review of Methods and Conclusions." *The Journal of World Intellectual Property*. 19.5-6 (2016) 150-177 at 153.

providing the *right* advice after 12 months of research."[17] This also touches on my initial concern over the very limited time to respond to this consultation. The recent CASE Act (Copyright Alternative in Small-Claims Enforcement Act of 2019) is a good example of legislation that was lobbied by the big media concerns. The Bill had previously failed to pass but was slipped into an omnibus bill on Covid-19 spending. This creates a Small Claims Board within the Copyright Office that can decide on any copyright claim and award damages up to $30,000. Numerous organizations have criticized the initiative for being outside the judicial system and therefore unconstitutional. There is no evidence that such a system will adhere to current precedence or protect small copyright owners as is its stated purpose.[18]

However, to return to my point about recent developments in the United States, I would point to recent cases that touched on termination rights. Large media corporations have the deep pockets for both litigation and lobbying. It is clear from recent litigation that termination rights need to be clearly defined. In *Johansen v. Sony Music Entertainment*[19] the courts agreed with the plaintiffs that their applications for termination rights should stand, but Sony put up a vigorous defence, including trying to categorize the works as works for hire. This points to an area where creators, especially those just starting their career, could be pressured into signing rights away. In *Waite v. UMG Recordings, Inc.*[20] a number of musicians (including John Waite and Joe Ely) were in danger of losing their termination rights due to a "gap" created by changes in the dates to calculate those rights. This is a cautionary tale both on the gap created by the lengthening of duration, and the addition of new termination rights. The court in this instance did allow the artists to make amendments to the recording agreements, Waite and Ely ultimately lost because they'd assigned their rights to a third party loan out company and were therefore found not to be

[17] Benjamin H Mitra-Kahn. "Copyright, Evidence and Lobbynomics: The World After the UK's Hargreaves Review." *Review of Economic Research on Copyright Issues* 8.2 (2011) 65-100 at 83.
[18] See for example Jason Kelley, "The CASE Act Is Just the Beginning of the Next Copyright Battle," *Electronic Frontier Foundation*. (22 December 2020) https://www.eff.org/deeplinks/2020/12/case-act-hidden-coronavirus-relief-bill-just-beginning-next-copyright-battle; Katherine Trendacosta, "This Disastrous Copyright Proposal Goes Straight to Our Naughty List," *Electronic Frontier Foundation.* (22 December 2020) https://www.eff.org/deeplinks/2020/12/disastrous-copyright-proposal-goes-straight-our-naughty-list; Shiva Stella, "Public Knowledge Condemns Passage of CASE Act in Funding Bill," *Public Knowledge*. (21 December 2020) https://www.publicknowledge.org/press-release/public-knowledge-condemns-passage-of-case-act-in-funding-bill/

[19] Case No. 19-cv-01094 (ER), United States District Court, S.D. New York. January 12, 2021.
[20] No. 19-cv-1091 (LAK), United States District Court, S.D. New York. August 10, 2020

the owners of their own work. These are just two very recent cases, and my point in providing these cases is to highlight the need for careful wording with regard to termination rights that will allow the maximum public interest benefit for creators of Canadian content.

While I understand that the Ministers are constrained to implement the provision of CUSMA to extend copyright to the life of the author plus seventy years, I hope that the Ministers will see the need to mitigate that provision in order to keep Canadian content in the hands of Canadians who can nurture it and make it accessible to all Canadians. I have tried to utilize the time available to me in order to focus attention on a few concerns, but I would stress that I am equally concerned about the issues pertaining to the public domain, educational access, and orphan works that others will have addressed.

Sincerely,

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