Restoring Balance
A Submission with respect to *A Consultation on How to Implement an Extended General Term of Copyright Protection in Canada*

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Summary

E1. We would like to join the chorus of voices expressing the disapproval of Canada's extension of copyright term from life of the author plus 50 years to 70 years. On its face, the extension is absurd: no dead creator will benefit tangibly from the extension (because the creator is dead) and will also not be incentivized to create new works (because the creator is dead). The incentive provided for living authors is marginal. The implementation of the Canada-United States-Mexico Agreement (CUSMA) leaves no room for democratic discussion or debate of the issue, but we encourage Government of Canada to enact changes to the *Copyright Act* that:

- Express the value and importance of a thriving intellectual Commons of openly-licensed and public domain works;
- Echo the move made by the United States Congress in 1895 and remove copyright (Crown Copyright, s.12 of the *Copyright Act*) from materials published by the Canadian Government;
- Remove the supremacy of technological protection measures over acceptable exceptions to copyright and specifically for fair dealing uses for copyrighted works; and
- Provide clarity on the copyright status of "unpublished" works that are fixed in tangible form but have not been made available to the public.

E.2 The balance between author and user rights, which the Supreme Court of Canada has repeatedly established as central to Canadian copyright, must err on the side of the user in cases where copyright owners cannot be identified or where works are not available for purchase. Creativity and the exchange of ideas are hindered in situations where a copyright holder's active participation in the mobilization of works is absent, and the *Copyright Act* should address these scenarios clearly. We advocate strongly for an approach that minimizes barriers for new creators and promotes the evolution of cultural expression by making works more available to members of the public. Specifically:

- The Act should recognize and clarify the copyright status of *unpublished* orphan works and out-of-commerce works
- The term of copyright protection of orphan and out-of-commerce works should not be automatically extended from 50 to 70 years without a prior registration of the work

E3. The current consultation is biased towards preserving a rights-holder's monopoly over the use of creative works and does not adequately take the rights of all potential users into account. Accordingly, access to orphaned and out-of-commerce works should not be limited to the scope of libraries, archives, and museums (LAMs), and should not be unnecessarily hindered by collective licensing or other regimes. Access to orphaned and out-of-commerce works should be easily afforded to members of the public who reuse, distribute, or adapt these works in good faith.

Introduction

1. We recognize that implementation of signed trade agreements is a necessity of modern states; however, we suggest that extending the general term of copyright protection from life of the author plus 50 years to 70 years is an exceedingly poor policy choice. While all Canadians may be both creators and users of copyright protected works, the term extension benefits a

much smaller group of rights-holders who in many cases are large, foreign owned intellectual property intensive corporations (e.g. Disney) and who may or may not be actual creators. Term extension is not in the best interest of large swaths of the Canadian population or Canada's domestic cultural memory organizations, including (but not limited to) libraries, archives and museums (LAMs). This term extension will negatively impact future Canadians, who will suffer from diminished access to works as their entry into the public domain is delayed. It will even have an effect on some dead Canadians, whose works may not benefit from the increasing attention brought about through their entrance into the public domain. The extension is a considerable concession to foreign interests, and our proposal identifies several means for ameliorating the problems caused by term extension. In other words, and echoing the words for the Supreme Court of Canada,[1] the focus herein is on restoring "balance."

2. We also want to underscore the substantive democratic deficit revealed through this consultation and the term extension itself. While Global Affairs Canada did conduct a consultation in advance of the trade negotiations for the Canada-United States-Mexico Agreement (CUSMA) in 2017,[2] this process lacked transparency and accountability. The submissions to the consultation appear to be unavailable for review, and the government failed to release a summary document documenting the views expressed in the consultation or how they might influence the negotiations.

3. This consultation suffers from the same shortcomings. The issue of the term extension itself is not actually up for debate, and Canadians are left discussing issues at the margins. Furthermore, far from having a substantive consultation of the issue of term extension and its impact on the balance of rights in copyright, the month long consultation (only briefly extended) specifically excludes broader issues such as Crown Copyright.[3] More importantly, the document only addresses rights in relation to "rights holders" - a term mentioned eight times in the document - and is silent on the issue of "users' rights."

4. Further to the Supreme Court of Canada's description of the balance of rights in copyright, first espoused in the *Théberge* decision[4] and reaffirmed in five subsequent Supreme Court decisions,[5] balance must be considered in light of the extension. Given that the extension

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[1] See para. 4

[2] Canada. "North American free trade agreement (NAFTA) - Information on Consultations." 2017. https://www.international.gc.ca/trade-commerce/consultations/nafta-alena/info.aspx?lang=eng

[3] Canada. *A Consultation on How to Implement an Extended General Term of Copyright Protection in Canada*." 2021. https://www.ic.gc.ca/eic/site/693.nsf/vwapj/consultation-implement-extended-term-copyright-protection-Canada-en.pdf/$file/consultation-implement-extended-term-copyright-protection-Canada-en.pdf p. 12 [herein *A Consultation*].

[4] *Théberge v. Galerie d'Art du Petit Champlain Inc*., [2002] 2 SCR 336, para. 30-32 [herein *Théberge*].

[5] *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339, paras. 10, 23, 48 and 70; *Society of Composers, Authors and Music Publishers of Canada [SOCAN] v. Bell Canada*, [2012] 2 SCR 326, paras 8, 10, 11; *Entertainment Software Association [ESA] v. Society of Composers, Authors and Music Publishers of Canada [SOCAN]*, [2012] SCR 231, paras. 7, 47, and 123; Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada [SOCAN], [2012] 2 SCR 283, para. 40; and, Canaidan Broadcasting Corp v. SODRAC 2003 Inc., [2015], 3 SCR 615, paras. 45, 47, 66 and 74.

enhances the rights of rights-holders, a corresponding increase in users' rights must also be made to maintain balance. Failure to ensure balance, particularly when the benefits appear to flow primarily to large, foreign interests, is a failure of Canadian copyright policy.

The Magical and Malefic Extension

5. As noted by Supreme Court in *Théberge*:

> The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them. Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it.[6]

"Inefficient" is insufficient for describing the impact of the term extension.

6. There are a great many notable creators who will *not* benefit from the current shift in copyright term. Artist M.C Escher died in 1972, author J. R. R. Tolkien died in 1973, musician Duke Ellignton died in 1974, composer Dimitri Shostakovich died in 1975, and painter L.S. Lowry died in 1976. Unfortunately, since they are dead, they will not get to see the benefit of longer terms of copyright protection. Their works would have entered the public domain in Canada in the years 2023, 2024, 2025, 2026 and 2027 respectively. While their works will benefit from the longer terms of protection, these individual creators will not. An additional 20 years of copyright protection for these creators would be a terrific incentive for the creation of new works… but none of them are alive and still able to create.

7. The total new works to be made by all creators who died between 1972 and today will be 0, because they are dead. Unless the extension includes some sort of necromantic magic, it only benefits the rights holders of these copyright protected works. For these rights holders, an extended copyright term merely enables rent-seeking and does not incentivize any expression of new creativity. For further clarity: dead people don't benefit from longer copyright terms because dead people don't create new works.

8. More tangibly, the incentive effect of longer copyright terms is best evinced by the *amici curiae* brief from 17 economists, including five Nobel Prize winners, that was submitted as part of the *Eldred v. Ashcroft* case contesting term extensions in the United States.[7] Based on their

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[6] *Théberge*, para. 31.

[7] George A. Akerlof, Kenneth J. Arrow, Timothy F. Bresnahan, James M. Buchanan, Ronald H. Coase, Linda R. Cohen, Milton Friedman, Jerry R. Green, Robert W. Hahn, Thomas W. Hazlett, C. Scott Hemphill, Robert E. Litan, Roger G. Noll, Richard Schmalensee, Steven Shavell, Hal R. Varian and Richard J. Zeckhauser. "Brief as Amici Curiae in Support of the Petitioners." *Eldred v. Ashcroft*. 2002. https://cyber.harvard.edu/openlaw/eldredvashcroft/supct/amici/economists.pdf [herein Akerlof et al.]

economic analysis the present value of additional compensation to creators amounts to 0.33%.[8] This factor does not account for depreciation. Thus the net incentive benefit of the extension doesn't even round to a whole single percent.

9. This 'significant' benefit is not without cost. In their comments on the American CTEA [Copyright Term Extension Act], the Nobel laureates and their peers note:

> In short, a lengthened copyright term under the CTEA keeps additional materials out of new creators' hands. Would-be new creators face increased transaction costs: the necessity to engage in costly locating (especially for very old works, the very ones that would be in the public domain but for the CTEA) and bargaining with multiple parties. These higher costs givenew creators less incentive to produce. As a result, the CTEA imposes two kinds of burden on society, fewer new works produced and higher transaction costs in the creation of someworks.
>
> Comparing the main economic benefits and costs of the CTEA, it is difficult to understand term extension for both existing and new works as an efficiency-enhancing measure. Term extension in existing works provides no additional incentive to create new works and imposes several kinds of additional costs. Term extension for new works induces new costs and benefits that are too small in present-value terms to have much economic effect. As a policy to promote consumer welfare, the CTEA fares even worse, given the large transfer of resources from consumers to copyright holders.[9]

"Difficult to understand" phrases the value of the extension mildly. As suggested by the economists briefs, the social costs of term extension clearly outweigh the incentive effect.

10. While the American extension was upheld by the United States Supreme Court, Justice Ginsberg, in writing for the majority, noted, "we are not at liberty to second-guess congressional determinations and policy judgements of this order, *however debatable or arguably unwise they may be*."[10]

11. Subsequent empirical studies on term extension have revealed that indeed, Justice Ginsberg's passing critique of the extension holds true. As summarized in McNally[11]:

> Landes and Posner's examination of five statutory changes to copyright law in the U.S. revealed that only two changes, the 1976 *Copyright Act* and the 1988 *Berne Convention Implementation Act*, had a significant impact on the number of

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[8] Akerlof et al. p. 6.
[9] Akerlof et al., pg. 14-15.
[10] *Eldred et al. v. Ashcroft, Attorney General*, (2003), 537 U.S. 186, p. 208. Emphasis added.
[11] Michael B. McNally. Intellectual Property and Its Alternatives: Incentives, Innovation and Ideology. PhD Dissertation, (2012): https://ir.lib.uwo.ca/etd/458/ p. 146-147.

copyright registrations with the former actually producing a decrease in registrations[i]. An analysis of the CTEA determined that it did not provide any incentives for the creation of new movies in the U.S.[ii] However, a larger study of movie production in 26 OECD countries covering 1991-2002, a time when 19 of the 26 countries extended copyright terms, found that term extensions were associated with a statistically significant increase in movie production.[iii]. A study of changes to U.S. and Canadian copyright laws found that copyright registrations were significantly affected by the cost of registration, but found no compelling evidence that statutory changes had such an effect[iv]. The authors conclude by positing that a low cost registration is the best mechanism to encourage creative innovation[v]. The most significant empirical examination of copyright is the 2009 study by Ku, Sun and Fan which examined the influence of 56 significant changes in copyright law (both statutory and case law) on copyright registrations[vi]. They conclude that the primary driver behind the increased number of copyright registrations was population growth and suggest that the evidence does not support the argument that stronger copyright law incents greater creativity[vii]. Ku et al. find that laws that weakened copyright protection were more likely to result in a greater number of works than those that increased protection[viii].

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[i] William M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property Law*, (Cambridge, MA: Belknap Press, 2003), p. 247. [ii] Kai-Lung Hui and I. P. L. Png, "On the Supply of Creative Work: Evidence from the Movies," *American Economic Review*, 92(2), (2002), p. 219. [iii] I. P. L. Png and Qiu-hon Wang, *Copyright Duration and the Supply of Creative Work*, (2006), 15: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=932161 [iv] Matthew J. Baker and Brendan M. Cunningham, "Law and Innovation in Copyright Industries," *Review of Economic Research on Copyright Issues*, 6(1), (2009), p. 76, and 81. [v] Baker and Cunningham, "Law and Innovation in Copyright Industries," p. 81. [vi] Raymond Shih Ray Ku, Jiayang Sun and Yiying Fan, "Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty," *Vanderbilt Law Review*, 62 (2009), p. 1689-91, and 1742-44. [vii] Ku et al., "Does Copyright Law Promote Creativity?" p. 1672. [viii] Ku et al., "Does Copyright Law Promote Creativity?" p. 1673.

12. While the *Creative Canada Policy Framework*[12] does aim to increase Canadian film production, the empirical record outlined in the previous paragraph suggests that a 20 year copyright term extension appears a rather blunt approach.

13. Given the centrality of balance to Canadian copyright and the clear evidence that the benefits of term extension are marginal at best, with significant costs, the logical choice of action would be not to extend copyright terms. Given that this course of action is not an option, alternatives must be considered to restore balance.

Restoring Balance

[12] Canadian Heritage. *Creative Canada Policy Framework*. 2017. https://www.canada.ca/content/dam/pch/documents/campaigns/creative-canada/CCCadreFramework-EN.pdf

14. The consultation paper identifies five options for dealing with some potential complications arising from term extensions.[13] Simply put, all five options are too limited and fail to restore balance to Canadian copyright. A 20 year period where no works enter the public domain cannot be addressed, for example, through a collective licencing regime for libraries, archives and museums to make use of orphan works (i.e. Option 3).[14] To quantify the imbalance occurring because of term extension, in 2023, 37 million Canadians will not benefit from expansion of public domain through the access to the works of the roughly 422 million people who died globally in 1972.[15]

15. While the Consultation document notes that Crown Copyright is not directly implicated by the term extension[16] (because the term of protection for Crown Copyright is distinct from the general term of protection), we feel the Government of Canada should attempt to restore balance by making changes to Crown Copyright by emulating the approach of the U.S. government in the late 19th century. A two part implementation should occur.

16. In the first part, the Government of Canada should immediately waive copyright on all publicly available and previously publicly available[17] Crown materials. This can be achieved by declaration that all these materials are now covered under a Creative Commons 0 Public Domain Mark.[18] Such action should be accompanied by an explicit statement from the Government of Canada recognizing the importance of a thriving intellectual commons and importance of public domain and openly licensed materials to Canadian society. In the second part, the Government of Canada should repeal section 12 of the *Copyright Act*, ending Crown Copyright.[19]

17. Although the elimination of Crown copyright will partially restore the balance in Canadian copyright, further measures are necessary to ensure a proper balance. As noted in *Théberge*, "The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in *giving due weight to their limited nature*"[20] and:

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[13] *A Consultation*, p. 9-12.

[14] *A Consultation*, p. 10-11.

[15] 1972 deaths based on data from Oxford University and Global Data Change Lab. "Our World in Data - Number of Deaths per Year." N.d. https://ourworldindata.org/grapher/number-of-deaths-per-year?country=~OWID_WRL

[16] *A Consultation,* p. 12

[17] We specifically suggest "publicly available and previously publicly available" as "published" has narrower contexts for government materials. Furthermore the inclusion of "previously publicly available" is designed to include all documents that were ever made publicly available recognizing that over time materials one made available to the Canaidan public may now no longer be so. This approach is designed not to impinge on the Crown's ability to ensure some materials remain confidential, protected and secret.

[18] Creative Commons. "CC0 'No Rights Reserved'." N.d. https://creativecommons.org/share-your-work/public-domain/cc0/

[19] *Copyright Act*, RSC 1985, c. C-42. s. 12.

[20] *Théberge*, para. 31.

> Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization. This is reflected in the exceptions to copyright infringement enumerated in ss. 29 to 32.2...[21]

Given the high court's emphasis on the limited nature of creator's rights and the identification of fair dealing as a key mechanism for achieving balance, any extension of term should explore considerations of expanding or improving fair dealing.

18. One aspect of fair dealing that was studied (and criticized) at length during the statutory review of the *Copyright Act* was the ability of technological protection measures (TPMs) to prevent otherwise non-infringing uses of works. The House of Commons Standing Committee on Industry, Science and Technology was explicit on the issue and the needed remedy:

> The Committee recognizes that the effective use of TPMs remains important in at least some creative industries and that Canada has international obligations in the matter. However, it agrees that the circumvention of TPMs should be allowed for non-infringing purposes, especially given the fact that the Nintendo case provided such a broad interpretation of TPMs. In other words, while anti-circumvention rules should support the use of TPMs to enable the remuneration of rights-holders and prevent copyright infringement, they should generally not prevent someone from committing an act otherwise authorized under the Act.[22]

19. We suggest that balance can be restored, in part, by removing the supremacy of technological protection measures over acceptable exceptions to copyright and specifically for fair dealing uses for copyrighted work.

20. Finally, as part of restoring the balance, the government should remove uncertainty around unpublished works. Specifically, the Act should be revised to provide clarity on the copyright status of "unpublished" works that are fixed in tangible form but have not been made available to the public.

Orphaned and Unavailable Works

21. As noted in the Consultation document, an important aspect of the term extension is the impact on works that have no known or locatable copyright holder (also known as orphan works). It is important to note that human orphans are children with no parents or guardians that all of society has a responsibility to foster into independence and adulthood. If the "orphan" metaphor is to hold, the same should be said of orphan works.

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[21] *Théberge*, para. 32.

[22] Canada - House of Commons Standing Committee on Industry, Science and Technology (INDU). *Statutory Review of the Copyright Act*. 2019. https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf p. 72.

22. The second type of work addressed in the consultation paper are works that are no longer available to the public through commercial means ("out-of-commerce" works). These works may *also* be orphaned, but their defining characteristic is that their copyright is held by entities that no longer have the interest or the means to make the works available for licence or purchase. We know of no reason why the *Copyright Act* should protect the monopoly over creative works in cases where a copyright holder is not engaged in the pursuit of benefitting from their creativity.

23. To preserve fair balance, Canadian copyright must err on the side of the user in cases where copyright owners cannot be identified or where works are not available for purchase. In these cases, the user's desire to exploit a work is *prima facie* a greater demonstration of interest and engagement with the work than the neglect of the copyright holder.

24. Creativity and the exchange of ideas are hindered in situations where a copyright holder's active participation in the mobilization of works is absent, and the *Copyright Act* should address these scenarios clearly. We advocate strongly for an approach that minimizes barriers for new creators and promotes the evolution of cultural expression by making works more available to members of the public.

25. The accompanying measures presented in the consultation document are almost universally suggested as benefits for non-profit libraries, archives and museums.[23] This framing exposes the underlying assumption that the rationale for copyright term extension is centred on protecting and preserving the monopoly over existing works, and has not taken the generation of new creative and cultural works into account. All of the options for accompanying measures provided in the consultation document limit the ability of Canadians to exchange ideas and contribute to cultural growth. Accordingly, any accompanying measures adopted for orphan and out-of-commerce works should apply to *all* potential users who can demonstrate the failure of a good faith search to locate a copyright holder or find a commercially-available copy of a work.

26. We thank Innovation, Science, and Economic Development for the opportunity to comment on its proposal, and call on the Ministry to pause and rethink its view on the purpose and benefit of copyright in Canada.

[23] *A Consultation*, p. 9-11.