



**Submission of Music Canada with respect to the
Consultation on how to implement Canada's CUSMA
commitment to extend the general
term of copyright protection
(the "Consultation")**

March 31, 2021

Music Canada represents Canada's major record labels: Sony Music Entertainment Canada, Universal Music Canada and Warner Music Canada. We advocate for a healthy and vibrant Canadian music ecosystem, which includes labels, performing artists, publishers, songwriters, managers and others. A key element of a healthy music ecosystem is one that provides robust protections for copyright, which is why we welcome the opportunity to provide these comments in response to the February 11, 2021, Consultation and accompanying paper (the "Consultation Paper").

Term extension should be implemented independently and without delay

Today, it has never been more clear that Canada's creators require a robust copyright framework to ensure that they are fairly compensated when their music is commercialized by others. For decades, certain academics and ideologues working outside of the creative industries perpetuated a myth that artists, songwriters, and the businesses who support them don't need strong copyright laws, because they can rely on live touring and merchandise sales to sustain a career in music. The music community has long known this to be false -- perhaps no one more so than artists who have had to leave live touring to raise a family, support a dependant, or for other reasons. Now the COVID-19 global pandemic has conclusively debunked the myth of live touring as a panacea. The ripple effects of the loss of live touring have disrupted numerous livelihoods across the music industry -- including songwriters, who are a key component of the Canadian music we all love.

Given the digital and global nature of music in 2021, it is also critically important that Canada's copyright framework meet the standards of our international trading partners. And in order for Canada's musical works to receive full protection in other jurisdictions, Canadian law must extend similar protection at home.

To this end, Music Canada and our colleagues applaud the Government for committing to extend the general term of copyright protection in works to the life of the author plus 70 years, as required by Article 20.62 of the Canada/United States/Mexico Agreement (“CUSMA”).¹ As correctly noted in the Consultation Paper, this helps to ensure that Canada’s protections for copyright are consistent with the norms of our key trading partners, including the United States and Mexico. This reform will not only create economic benefits for Canada’s creators at home and abroad, but those benefits will then be reinvested in creative industries both in Canada and internationally.

We encourage the Government to implement Canada’s CUSMA term extension obligations ‘cleanly’ and without delay. Consideration of other measures, particularly those as complex as potential regimes discussed in the Consultation Paper (such as for orphan or out-of-commerce works) will only further delay implementation. For Canadian songwriters and music publishers, this delay is not purely academic, but one with real consequences. If copyrights expire before term extension is implemented, the benefits are permanently lost to those rights holders -- and the effect can be particularly significant as the reciprocal right would also be lost in key territories that recognize a term of life of the author plus 70 years.

Formalities on term extension would violate Canada’s treaty obligations

We support the Government’s conclusion in the Consultation Paper that formalities such as registration requirements should not be considered as a condition of full exercise of rights extended by term extension, because they raise serious questions regarding compliance with Canada’s international treaty obligations and with international norms, and they would result in significant added administrative costs on copyright owners and collectives. As the Government properly notes, “Numerous international treaties to which Canada is a party (e.g., *Berne*) prohibit the imposition of any ‘formalities’ that would need to be satisfied for foreign works to benefit from copyright protection in Canada.” Similarly, limitations or exceptions which fundamentally undermine the effect or value of term extension to rights holders, thereby effectively undercutting Canada’s CUSMA obligation, would abrogate Canada’s Vienna Convention obligation to interpret the treaty in good faith.

Orphan works and out-of-commerce works regimes warrant greater study

While we appreciate the Government’s interest in canvassing the challenges and potential solutions surrounding orphan or out-of-commerce works, we respectfully submit that these issues are sufficiently complex to warrant their own study, apart from this brief consultation period. In any event, Canada’s obligations for term extension under CUSMA should be implemented forthwith and not delayed by other considerations.

¹ 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>

Issues surrounding orphan and out-of-commerce works may impact different sectors differently. However, most of the scenarios highlighted in the Consultation Paper relate to literary works such as books, but not to musical works or sound recordings. Ultimately, orphan works and out-of-commerce works constitute a very small fraction of the tens of millions of commercially available musical works -- and their consideration should not undermine or delay robust implementation of term extension for all works as negotiated and agreed to in CUSMA.

It is also important that consideration of new legislative schemes to address orphan or out-of-commerce works be based on thorough research of the efficiency, challenges and effectiveness of these regimes (for both rights holders and prospective users). The Consultation Paper correctly notes many complexities and nuances of potential regimes, and we encourage the Government to undertake a full study of these issues for different sectors, beyond that permitted by the present Consultation period.

Rushed legislation on orphan/out-of-commerce works may result in unintended consequences for both rights holders and users. Historically, unintended ambiguities or consequences in legislation have engendered years of litigation -- often at considerable expense to both rights holders and users.

We also note, as suggested by the Consultation, all legislative options relating to orphan/out-of-commerce works must be fully studied with a view to ensuring that they comply with Canada's international treaty obligations. Canada joined international treaties on copyright (such as the *Berne Convention*² and the *WIPO Internet Treaties*³) in order to help protect copyright creators and give certainty to creators and businesses dealing in copyright both domestically and abroad. This is particularly important in our global, digital world. In its study of new regimes, such as those for orphan or out-of-commerce works, these aims should be maintained.

A full survey of the issues raised by and potential legislative schemes to address orphan/out-of-commerce works would also be consistent with how these complex issues have been considered in other key markets. For example, both the European Union and in the United States have undertaken lengthy consultations on these regimes.

Conclusion

We urge the Government to implement term extension swiftly and independently, without tying it to any conditions. In addition to our comments above, we encourage the Government to consider the submission of Music Publishers Canada, which Music Canada supports.

² *Berne Convention for the Protection of Literary and Artistic Works*.

³ *The World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty*.

We appreciate the opportunity to provide our comments on implementation of Canada's term extension obligations under CUSMA. We are happy to answer any questions or provide the Government any further information that would assist in its Consultation.
