Comments on the document, 'A consultation on how to implement an extended general term of copyright protection in Canada'

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Relevant experience

National Library of Canada/Library and Archives Canada – 1992-2014

- Head, Recorded Sound Collection – 1996-2002
- Manager, Music Section – 2002-2012

International Association of Sound and Audiovisual Archives (IASA) – 1990 – present

- Board Member – 2002-2011
- President – 2005-2008

Association for Recorded Sound Collections (ARSC) – 1990 – present

- Member, Copyright Committee – ongoing

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Treble Clef, Ottawa – 1976-1980

Introduction

In this paper I will discuss the issue of orphan works (2.1) and out-of-print works (2.2) and argue that Option 4, regarding the exception for works in their final 20 years, is a reasonable approach that, with some adjustments, would protect both the interests of rights holders and the invaluable work of libraries, archives and museums (LAMs). Canada, by adopting this approach, would recognize and acknowledge the significant role that LAMs play in preserving cultural heritage. If it does not, then the process will place an unnecessary burden on the work of these institutions. The work of LAMs is inextricably linked to the cultural heritage of all Canadians. Copyright modifications can be made in a way that facilitates that important work while respecting the needs of rights holders or the profits generated by their intellectual property.

Simply put, extension of the copyright protection term from 50 years to 70 years after the life of the author must be balanced by an exemption for orphan and out of commerce works,

particularly in the last 20 years of protection. The case for this modification is detailed below, and it must be empathized again that the modification proposed herein will result in a win for both Intellectual Property (IP) holders and LAMs.

Background

My expertise and experience is in the music field, with almost 50 years including time in record retail and as a librarian. My comments should only be taken in that context, though I expect that the same pattern will appear in other print and documentary materials impacted by the *Copyright Act*. I will also confine my comments to the Canadian English language market. Though I expect they will apply equally to the Canadian French language market. The French language market has some unique characteristics in that it is more focused and has a stronger interest in protecting the culture it produces.

I have considerable experience, through my work with the National Library of Canada (NLC) and Library and Archives Canada (LAC), in trying to navigate Canadian copyright procedures and to make sound recordings held at the NLC/LAC accessible to all Canadians. In 1998, the NLC began work on a web project called the Virtual Gramophone.[1] The aim of the project was to document Canada`s recorded sound history and to make accessible as many recordings from the 78-rpm era in Canada (1900-1958) as possible, while still adhering to copyright laws. As the recordings themselves were already in the public domain (PD) this meant only researching the individual songs to ascertain if they were still under copyright.

The aim of the Virtual Gramophone project was to be as comprehensive as possible in documenting the songs available in the 78-rpm era, starting with the first recordings released in Canada in 1900. All the information regarding the most popular titles and composers and lyricists was easily available and accessible. These titles generated, and continue to generate, most of the revenue for the music industry. As I will show, permitting LAMs to use orphan works, as proposed in some of the options, would not have a financial effect on the music industry and would assist the work of LAMs in preserving and making accessible Canada`s cultural heritage.

While we searched in the most relevant sources, published and on-line, it was not possible to determine the birth and death dates for many songwriters. These orphan works, as the consultation paper notes, can be cleared through the Copyright Board of Canada. This proved to be very impractical. The Board was not equipped to process these requests in a timely manner, nor to handle the number of titles we requested; and the Board required a level of research, almost genealogical, which simply was not practical (many song credits consist of last names

[1] https://www.bac-lac.gc.ca/eng/discover/films-videos-sound-recordings/virtual-gramophone/Pages/virtual-gramophone.aspx

only) or feasible from a budget point of view. We also approached one of the rights organizations to help clear these titles but the costs and procedures they would have imposed were also impractical and unrealistic.

In the end, NLC opted to follow a 90-year rule. If, after searching without success through a set list of authoritative reference sources to determine birth and death dates, it could be established that the work in question had been published for more than 90 years, then the NLC would consider the song to be out of copyright in all likelihood. The song could then be digitized and added to the web site. Hundreds of songs fell into this category and, in the years that I was involved with the VG (1998-2014), we never received any complaints or challenges. (We would have removed any songs upon request.)

Other LAMs, businesses, and individuals which were dealing with the same problem adopted similar policies of their own, such as a 70-year rule or a 50-year rule, often accompanied by a clear take-down policy. The process adopted depended on their own risk assessment. NLC/LAC as a national institution decided that the 90-year rule, with the take down policy, was a sufficiently balanced and practical approach.

Since the LAC`s 90-year rule assumes a 50-year copyright, I wondered if a 70-year copyright term would mean changing the 90-year to a 110-year rule. If that was the case, and if the revisions came into force in 2022, then orphan works in the years from 1932 to 1952 could not be considered for use. By looking at some samples from those years, would the industry have much to lose by a 20-year exemption for LAMs like LAC. Would there be substantial revenues lost if there was flexibility as proposed?

Using the Directory of Popular Music 1900-1965 (Leslie Lowe, Peterson Publishing 1975) (selected because it was the only one of several possible reference sources I had at home), I selected the years 1932-33 and 1950-51 for study.

Of the 244 songs listed as being popular in 1932-33, I selected 66 titles at random and looked to see if they were available on Spotify, on the theory that, if the song was on Spotify, there must be some interest. (I realize that there are other streaming services available but time limitations and the easy availability of Spotify made it a good place to start.) I broke the results of the search into four categories: (1) the song was not available, (2) the song was available only in its original recorded versions (Because of time limitations, I did not note whether the recordings had been placed on Spotify by the original issuing company or by one of the several contemporary companies that specialize in reissues of PD recordings.), (3) the song was available with the original recordings plus a few more modern interpretations, or (4) the song was available with the original recordings plus a lot of modern versions. I reasoned that a song with many versions

would be a good revenue source. (Note that songs in this era were the attraction, not necessarily the artist. A popular song could be simultaneously recorded by several well-known performers.)

Of the 66 titles from 1932-33, 18 (27%) were not available, 14 (21%) had just their original recordings, 22 (33%) had the originals plus a few newer recordings, and 12 (18%) had many versions. Of the 12 frequently recorded songs, three are currently in PD and will remain so. If the 50-year rule was to remain in place the remainder would have come into PD between 2029 and 2041. Now they will not come into PD until 2049-2061.

An interesting footnote to this is that Irving Berlin, a prominent songwriter from this era, lived from 1888 to 1989. Thus one of his early works, *Alexander`s Rag Time Band* from 1911 will now be in copyright in Canada until 2060 – a total copyright term of 149 years. Because the US fixed copyright terms by publication date until 1978, works published prior to 1925 are in the public domain in the United States.

For 1950-51, of the 177 titles listed as being popular, I chose 53 at random to research. Seven (13%) were not on Spotify, 22 (42%) were available on the original recording only, 15 (28%) had the original recording plus a couple of newer versions, and nine (17%) had many versions available. Of the nine frequently recorded titles, three were PD and six were still copyright protected. Under the 50-year rule, they would have come into PD between 2027-2038, which translates to 2047-2058, respectively, under the new rule. This includes the most popular composing team of the era, Richard Rodgers and Oscar Hammerstein II.

As I think this brief study illustrates, a significant part of the industry`s revenue comes from a handful of titles. The copyright situation for these very popular titles is easily ascertained. Creating exemptions for orphan works, as proposed, would therefore have little financial impact on the industry.

In the mid-1950s there was a considerable change in the music world. As noted above, prior to that time songwriters and performers tended to be considered independent of each other. While there continued to be popular songwriters, in the mid 1950s performers began to write and perform their own material. Examples from the 50s era include Paul Anka, Buddy Holly and Chuck Berry. In the 1960s artists like the Beatles, Rolling Stones, Bob Dylan and many others expanded that trend and turned popular music into an even greater cultural force.

The music industry has come to depend on these steady, usually self-promoting, revenue producers. Being a rock musician became a lifelong career. Concerts by Paul McCartney, the Rolling Stones, Neil Young, and others, are now multi-generational events, with baby boomers, their children, and their grandchildren in attendance. These audiences will continue to consume product for years to come. In an era where it is said that content is king, it has become clear that

controlling the intellectual property is extremely important, thus the 70-year term of copyright. Bob Dylan has recently sold his song catalogue rights for $300 million, part of an industry wide trend. Indeed, the whole music industry, as reported in the article 'Musical Shares' in *The Economist*,[2] has experienced a financial rebound with digital revenues now rapidly increasing and overall income approaching a 20-year high. Ongoing access to these revenues is essential for the music business.

Lost in the shuffle are many hundreds of songs and recordings that have fallen out of commerce and that are locked in the vaults of different record companies. This includes many songs and recordings by Canadian artists who did not achieve the celebrity of the artists noted above but whose music and contributions are important documentation of Canadian culture and life.

To illustrate this I used as an example the Capitol-EMI Records 6000 series of LPs. I selected this series because there was an extensive discography available[3] and the University of Calgary is now the home of the Capitol-EMI archives. (Most labels in Canada had a similar series for their Canadian records. I expect the results of this survey would be similar for all labels.) Capitol used for this series for many of the Canadian records released by the label particularly after CanCon regulations arrived. Between 1960 and 1978, 110 Canadian titles were issued including 9 by Anne Murray. With one exception all the Murray titles are on Spotify. Of the 101 other titles only 10 are on Spotify. Some have been reissued on CD by companies in Japan, Holland, France and the USA, though I do not know if these are legitimate. Four titles can be found on the original artists` web sites and four have been licensed to various Canadian labels for CDs and Spotify. Only four seem to have ever been issued on CD by Capitol itself.

Thus, there are roughly 90 titles, representing around 1080 songs, that have disappeared. Aside from Anne Murray, an artist with national and international appeal, why shouldn`t these works be accessible by the Canadian public? Many represent local bands of historical and regional interest. Some of these bands have family members who would like to have access to the music. The options as presented in the consultation document could begin to address this problem. One would think that if a company has decided not exploit their archives for 40-60 years then there would be little financial loss in LAMs making them available.

It could be argued that rights holders should be the ones to decide if and when a work is made available. Sometimes I think this is not a conscious decision particularly if you look at it over the longer term. The music industry has always focused on current product. Many of the people promoting this product are younger, with little interest in out of commerce works. Not so long ago there were seven major labels in Canada; now there are three. With mergers and takeovers, corporate memory of earlier labels and artists is easily lost. Several times when LAC asked to

[2] February 20-26, 2021 p. 54

[3] http://www.capitol6000.com/6000.html

use material that was still copyright protected, the reply was, “You say it is ours, we think maybe it is ours, but for us to definitely claim it as ours would take a lot of work which we don`t want undertake. Use it at your own risk.” Companies have, on occasion, done reissues. Frequently they turned to the collection at LAC to supply recordings they no longer held. LAMs are an important part of the music industry`s corporate memory.

Canadian governments, and therefore the Canadian public, have consistently provided support for the music industry and the efforts of creators by funding the Canadian Music Fund and the Canada Council for the Arts, amongst others. Should not LAMs and individual Canadians interested in Canadian music therefore assert their interest in these out of commerce works? Protecting the rights of creators is not the sole purpose of the Copyright Act. The Supreme Court has consistently reinforced the essential balance between the public interest and the need for a just reward for creators.[4] The public interest is an integral part of copyright and should be recognized in the current process.

Though not part of this current review, one approach might include a reconsideration of the idea put forward by Bryan Adams in 2018 when the recording rights were extended. He called for a provision that would allow creators to terminate their copyright assignments after 25 years. As shown in my look at the Capitol 6000 series several reissues were the work of artists themselves. The US has a recapture (aka termination) provision, part of their 1976 revision, which allows creators to gain back the copyrights they had assigned after 35 years. Some prominent artists, such as Paul McCartney, have started to use this claim in the US. Something similar would be supported by Canadian artists and it might help to make these recordings accessible once more. While it might sometimes be hard for recording artists to establish their role as "creators," songwriters and authors are definitely the "creators," and can therefore recapture their rights from publishers.

Recommendation

I believe it is in the best interests of LAMs and the Canadian public that the proposed revisions to the Act include, in addition to the term extension, accompanying measures that facilitate access to Canada`s heritage. The document presents a number of accompanying measures for consideration. Current practices in the US and the EU are also outlined.

The US (3.1) measures, while attractive, need to be examined in conjunction with how US LAMs have employed fair use in the US. This is outside the time limitations for this consultation and my area of expertise. The EU (3.2) measures fit within the general European frame that is accustomed to bureaucracy, and where smaller European countries believe making their heritage publically available in digital format is a cultural necessity. In my experience working with

[4] *Théberge v. Galerie d’Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336.

IASA, European LAMs, creators, and commercial enterprises all support the initiative and through the EU have given large sums to support projects like *Europeana*.[5] Canada, except perhaps in the Province of Quebec, does not always seem to display the same acceptance of the need for cultural access.

The document (4. Consultation) then presents the possibility of extending the term without any accompanying measures. This, as is noted in the document, is usually advocated by rights holders because it gives very broad protection to their interests. In my opinion this does not recognize the rights of users and the need for balance in the application of copyright protection. As I have shown above permitting a form of exemption would not, when done correctly, affect the rights of copyright owners to remuneration for works they deem commercially viable.

The second possibility discussed in that section puts forward the idea of expanding copyright registration in Canada. While there is a certain appeal in having a centralized place documenting those works in copyright, to me, this has the possibility of being very inefficient. I have dealt with many creators who register their works with the US Copyright Office, where there is a long accepted and acknowledged procedure for deposit, documentation, access and retention of materials submitted for registration. Registration is not required in the US, though it is a prerequisite to bringing copyright infringement actions. The Canadian Intellectual Property Office (CIPO) does provide copyright registration but, unlike its US counterpart, it does not receive or retain any of the works being registered. As in the US, registration in Canada is not required.

CIPOs current database only contains works since 1991 and does not appear to be particularly robust. For example, they discourage loading of large numbers of works. Thousands of entries would have to be created as part of a comprehensive registration process particularly for works where the copyright protection might lapse. CIPO also cites "limitations of equipment and bandwidth" in describing problems with the system.[6] If the CIPO database was to be used as the base to document works falling out of copyright, considerable effort would have to be undertaken to make the database functional and comprehensive.

Section 4.1 looks at frameworks where works not being commercialized could be made accessible through a registration process using either the Copyright Board (Option 1) or a collective licensing regime (Option 2). As I have noted above the Virtual Gramophone experience shows that the Copyright Board and rights organizations are not equipped to handle the volume and nature of possible requests. The bureaucracy required sounds like a recipe for empire building, not efficient processing of reasonable requests from LAMs.

[5] https://www.europeana.eu/en

[6] http://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr02314.html

Option 3 is promising in that it is flexible. This places the onus on the rights holder to make a claim while putting the burden on LAMs to undertake due diligence, which is not a problem in my experience. However, it is imprecise in saying when a work should be declared out of commerce or orphan.

It would be my hope the due diligence process would be modeled after the procedures established by LAC for its 90-year rule. While it made some assumptions regarding copyright expiration, it did respect the need to do due diligence. Recognizing that need and posting the process a LAM followed would make it simpler to respect the law and the rights of both users and creators.

The section 4.2 exception seems to me to start to move in the right direction. Option 4 in particular still places the onus on LAMs to undertake due diligence and record keeping, but it does give guidance as to when a work can be considered out of commerce. It is much less bureaucratic and is more cost effective for LAMs. It does not deprive rights holders of revenues, as out-of-commerce works are, by definition, not generating any revenue. Due diligence could follow the model in the previous paragraph. If this option has a failing it is in determining the final 20 years of protection for work where the birth and/or death dates of the creator are unknown. The NLC/LAC used a 90-year rule for such orphan works. Option 5 uses a 100-year rule for similar effect.

These options do not have to be mutually exclusive. The options could be combined by making the LAM exception available after the earlier of 50 years after the death of the creator or 100 years after publication.

I should also add that in my decades of experience, nationally and internationally, LAMs are respectful of the needs of the rights holders. I know of no LAM that wants to commercially exploit, without proper permissions, works in their holdings. What most want is a simple, straightforward, way to respect and obey the law while preserving and making accessible documents and collections, published and unpublished, that have been entrusted to their care.

The result of the copyright consultation process should recognize and acknowledge the role that LAMs have in documenting and making accessible Canada`s heritage. It can do this, without impinging on the needs of rights holders, by recommending that, along with the extension of the term to 70 years, provisions should be made for orphan and out of commerce works particularly in the last 20 years of protection along the lines discussed above. I believe that these exceptions should apply to all works, published and unpublished and in all formats.

I look forward to seeing the results of the consultation and hope my contribution has been useful. If you have any questions or require further information, I would be very pleased to help.

Richard W. Green,

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