

**SUBMISSION TO THE GOVERNMENT OF CANADA
CONSULTATION ON HOW TO IMPLEMENT AN EXTENDED
GENERAL TERM OF COPYRIGHT PROTECTION IN CANADA**

Submitted by Simon Fraser University
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About Simon Fraser University

Simon Fraser University (SFU) is located in Burnaby, BC, with additional campuses in Vancouver and Surrey. SFU enrolls over 37,000 students across its eight faculties, and the University employs 6500 academic and support staff, including 1100 instructors.¹ SFU is a comprehensive university (no medical or legal schools) and is consistently ranked as the top comprehensive university in Canada.²

SFU appreciates this opportunity to share its views on how the options and issues identified in *A Consultation on How to Implement an Extended General Term of Copyright Protection in Canada*, released in February by Innovation, Science and Economic Development Canada, will impact our teaching and research mission.

Impact of Term Extension

The extension of Canada's general term of copyright to life of the creator plus 70 years will seriously disrupt access to older works for scholars, researchers, students and instructors as the entrance of works into the public domain will be delayed by 20 years. The Supreme Court of Canada made clear that the purpose of the Copyright Act is to maintain a balance between creator rights and user rights.³ A strong and vibrant public domain is part of this balance as digitized public domain works support teaching, learning and research. For example, during the switch to remote learning in 2020 due to the COVID-19 pandemic, a SFU class needed the 1950 English translation of Gottlob Frege's classic 19th century treatise "The Foundations of Arithmetic". The translator died in 1960 and the translation was therefore in the public domain in Canada and could be digitized for use by the students. This is just one example of many instances where works currently in the public domain were able to be used and copied to facilitate student learning, which would not have otherwise been possible under a life plus 70 term of copyright protection.

The extension of the general term of copyright protection will negatively impact the public domain and the balance between creator and user rights. Therefore, term extension must be accompanied by measures that will mitigate some of the harms to the public domain inherent in extending the general term of copyright protection.

¹ About SFU, available at <https://www.sfu.ca/about.html>

² 2021 Maclean's Rankings, available at <https://www.macleans.ca/education/university-rankings/canadas-top-comprehensive-university-2021-simon-fraser/>

³ *Théberge v. Galerie d'Art du Petit Champlain Inc.*, 34 Supreme Court of Canada. (2002). <https://sccpsc.lexum.com/scc-csc/scc-csc/en/item/1973/index.do>. Paras 30 and 31.

Possible Measures to Accompany Term Extension

Options from the Consultation Paper

Option 1 and Option 2 envision a scheme for the copying of orphan and out-of-commerce works which require mandatory licences from the Copyright Board of Canada and/or collective societies; the creation of new collective societies to administer licences; and the implementation of new collective licences. These new licence systems and collective societies are intended to facilitate the copying of, and remuneration to rights holders for, the use of orphan and out-of-commerce works. Option 1 and Option 2 are impractical without significant new resources for the Copyright Board, and are labour intensive and time consuming to licencees. These options would also require paying royalties for the use of orphan works: works which by their very nature do not have a rights holder who can receive remuneration. It is improper for either the Copyright Board or collective societies to benefit from collecting remuneration that is unable to be delivered to the rightful recipient⁴ and would be a highly questionable use of public funds.

Option 4 would provide limited relief to the problem of term extension, but incorporates record keeping provisions not present in the US legislation it uses as a reference point.⁵ Option 5 would allow for the use by Libraries, Archives and Museums (LAMs) of works 100 years after creation, provided they undertake reasonable searches regarding commercial exploitation of the work and related record keeping. While likely of some help to university archives, in general such a provision is of marginal help to educational institutions. Even with a life plus 70 regime, many published works could well be in the public domain 100 years after creation. Options 4 and 5 are poor substitutes for the system proposed in Option 3.

Option 3 would allow for the use of orphan works and out-of-commerce works by LAMs subject to claims for equitable remuneration. Orphan works and out-of-commerce works have cultural and educational value yet frequently remain inaccessible to the wider public due to the inability to copy them under existing provisions in the Copyright Act. Option 3 is a reasonable way to mitigate some of the harms resulting from term extension while also allowing libraries and other organizations to fulfill their public interest mission without negatively impacting rights holders.

Therefore, of the five options outlined in the Consultation Paper, **SFU favours Option 3 provided that certain additional enhancements outlined below are also adopted with Option 3.**

⁴ Vaver, D., *Intellectual Property Law*, 2nd ed. Toronto: Irwin Law, 2011, p. 263.

⁵ 17 U.S. Code § 108 - Limitations on exclusive rights: Reproduction by libraries and archives.
<https://www.law.cornell.edu/uscode/text/17/108>

Additional Enhancements for Consideration

Extend Mitigating Measures Accompanying Term Extension to Educational Institutions

The options outlined in the Consultation Paper are specifically aimed at LAMs. Although SFU has an excellent library and could therefore avail itself of the options, we believe that any measure to mitigate the effects of copyright term extension should be explicitly extended to educational institutions and not only LAMs. Including educational institutions in such measures ensures that users outside of libraries on post-secondary campuses, such as curriculum developers, instructors, teaching assistants, and research assistants, can nimbly make use of orphan and out-of-commerce works to serve the public good.

Definition of Out-of-Commerce / In-Commerce

Out-of-commerce must be defined to mean that the work is no longer made available by the rights holder through regular commercial channels such as bookstores. The ability to obtain a licence from a collective society to reproduce the work cannot be part of what qualifies a work as still being in-commerce. A provision should only require that users conduct a good faith search to determine if a work (not a licence from a collective society) is commercially available on the Canadian market and can be obtained for a reasonable price, within a reasonable time frame, and using a reasonable amount of effort.

Search and Record Keeping Requirements

Option 3 proposes that institutional users carry out good faith, reasonable searches for a work to determine if the copyright owner can be located (orphan works) or to determine if the work is still being exploited commercially by the rights holder (out-of-commerce works). For libraries and educational institutions to benefit from this approach the parameters and record keeping obligations should be determined by best practices in the education and LAM sectors.

Limited Liability for an Orphan Works and Out-of-Commerce Provision

To properly function, a provision for the use of orphan and out-of-commerce works needs a zero liability system. Otherwise, fear of litigation involving orphan or out-of-commerce works for which copyright owners are unlocatable or unresponsive will inhibit institutions from making use of those works. A zero liability system could be modelled after the Australian proposals⁶ recommended in the Consultation Paper where a rights holder cannot claim any damages for infringement for the copying of a work prior to their coming forward and identifying themselves. Of course, once a rights holder has legitimately identified themselves to the user the two parties can negotiate for a fair remuneration for continued use of the work going forward.

⁶ See: <https://www.industry.gov.au/data-and-publications/government-response-productivity-commission-inquiry-into-intellectual-property-arrangements>

Recommendation

Option 3 should be adopted, along with the additional provisions discussed above, in order to mitigate the harmful effects of implementing a life plus 70 term extension. Specifically, an orphan works and out-of-commerce works provision similar to Option 3 should be adopted along with specific measures to ensure its smooth operation. These measures are: a definition of out-of-commerce which ensures that the availability of a licence from a collective society is irrelevant to the determination of out-of-commerce status; good faith search and record keeping requirements be based upon best practices in the LAM and educational sectors; extend Option 3 to educational institutions; a zero-liability system for an orphan works and out-of-commerce works provision.

Submitted for Simon Fraser University by:
Donald Taylor and Prubjot Gill, SFU Copyright Office.

For more information, contact:
Donald Taylor
Copyright Officer
SFU Copyright Office
W.A.C. Bennett Library
Simon Fraser University
8888 University Drive
Burnaby, BC V5A 1S6
sfu.ca